ARNOLD SCHWARZENEGGER, GOVERNOR

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PROPOSED ACTION ON REGULATIONS

GENERAL PUBLIC INTEREST

(Continued on next page)

Time-Dated Material

(Editorial Note: The following Petition Decision was published in the October 20, 2006 edition of the California Regulatory Notice Register but was inadvertently placed under another heading. For clarification, we are republishing this Petition Decision under the proper heading here and within this Register.)

PETITION DECISION

ACCEPTANCE OF PETITION TO REVIEW ALLEGED UNDERGROUND REGULATIONS

SUMMARY OF REGULATORY ACTIONS

The *California Regulatory Notice Register* is an official state publication of the Office of Administrative Law containing notices of proposed regulatory actions by state regulatory agencies to adopt, amend or repeal regulations contained in the California Code of Regulations. The effective period of a notice of proposed regulatory action by a state agency in the *California Regulatory Notice Register* shall not exceed one year [Government Code § 11346.4(b)]. It is suggested, therefore, that issues of the *California Regulatory Notice Register* be retained for a minimum of 18 months.

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PROPOSED ACTION ON REGULATIONS

Information contained in this document is published as received from agencies and is not edited by Thomson West.

TITLE 2. COMMISSION ON STATE MANDATES

TITLE 2. ADMINISTRATION
DIVISION 2. FINANCIAL OPERATIONS
CHAPTER 2.5. COMMISSION ON STATE MANDATES

NOTICE OF PROPOSED RULEMAKING

The Commission on State Mandates (Commission) proposes to adopt the regulation described below after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARING

The Commission has not scheduled a public hearing on this proposed action. However, the Commission will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Commission. The written comment period closes at **5:00 p.m. on January 5, 2007**. The Commission will consider only comments received at the Commission offices by that time. Submit comments to:

Cathy Cruz Jefferson, Senior Program Analyst
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

AUTHORITY AND REFERENCE

Government Code section 17527, subdivision (g), authorizes the Commission to adopt the proposed regulations. The purpose of this rulemaking is to implement AB 2652 (Stats. 2006, ch. 168), which reforms the Commission's incorrect reduction claims process.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Commission is a seven–member quasi–judicial body authorized to resolve disputes regarding the existence of state–mandated local programs (Gov. Code, § 17500 et seq.) and to hear matters involving applications for a finding of significant financial distress (Welf. & Inst. Code, § 17000.6). The proposed rulemaking implements AB 2652 (Stats. 2006, ch. 168), which reforms the Commission's incorrect reduction claims process. It adds Government Code sections 17558.7 and 17558.8, which establish processes for either claimant–initiated or Commission–directed consolidation of incorrect reduction claims, if all of the following apply:

- The method, act, or practice that the claimant alleges led to the reduction has led to similar reductions of other parties' claims, and all of the claims involve common questions of law or fact.
- The common questions of law or fact among the claims predominate over any matter affecting only an individual claim.
- The consolidation of similar claims by individual claimants would result in consistent decisionmaking by the commission.
- The claimant filing the consolidated claim would fairly and adequately protect the interests of the other claimants.

Under Article 5, the Commission proposes to amend and renumber sections 1185, 1185.01, 1185.02, 1185.03, and 1185.1; and to add sections 1185.2, 1185.3, and 1185.4 of the California Code of Regulations, title 2, chapter 2.5, division 2.

Section 1185 will shorten the statute of limitations for filing an incorrect reduction claim from three years to one year following the date of the Controller's final state audit report, letter, remittance advice, or other written notice of adjustment notifying the claimant of a reduction, if the notice is dated on or after July 1, 2007. It will also eliminate the requirement, when filing an incorrect reduction claim with the Commission, to submit a copy of a letter sent by the claimant or the claimant's representative to the Controller explaining why the reduced area(s) of cost in dispute should be restored.

Section 1185.2 adds a process for the consolidation of claims initiated by an individual claimant as described in Government Code section 17558.7.

Section 1185.3 adds a process for opting out of a consolidated incorrect reduction claim.

Section 1185.4 adds a process for the executive director to consolidate incorrect reduction claims as described in Government Code section 17558.8.

Sections 1185.01, 1185.02, 1185.03, and 1185.1 were renumbered and will make only minor, non–substantive, and technical amendments.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Commission has made the following initial determinations:

Mandate on local agencies and school district:	None
Cost or savings to any state agency:	Minor
Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630:	None
Other non–discretionary cost or savings imposed on local agencies:	Minor
Cost or savings in federal funding to the state:	None
Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states:	None
Significant effect on housing costs:	None

Cost impacts on a representative private person or business: The Commission is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Adoption of these regulations will not:

(1) create or eliminate jobs within California;

(2) create new businesses or eliminate existing businesses within California; or

(3) affect the expansion of businesses currently doing business within California.

Small Business Determination: Because the Commission has no jurisdiction over small businesses, the proposed regulatory action will have no impact on small businesses.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Commission must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The Commission invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Cathy Cruz Jefferson, Senior Program Analyst
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Telephone: (916) 323–3562

The backup contact person for these inquiries is:

Nancy Patton, Assistant Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Telephone: (916) 323–3562

Please direct requests for copies of the proposed text (the "express terms") of the regulations, the initial statement of reasons, the modified text of the regulations, if any, or other information upon which the rulemaking is based to Ms. Cathy Cruz Jefferson at the above address.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Commission will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, the initial statement of reasons, and the Commission order to initiate rulemaking proceedings. Copies may be obtained by contacting Ms. Cathy Cruz Jefferson at the address or phone number listed above. All persons on the Commission's interested persons mailing list will automatically be sent a copy of the rulemaking file.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After considering all timely and relevant comments received, and holding a public hearing, if necessary, the Commission may adopt the proposed regulations substantially as described in this notice. If the Commission makes modifications which are sufficiently related to the originally proposed text, it will make the modified

text (with the changes clearly indicated) available to the public for at least 15 days before the Commission adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Ms. Cathy Cruz Jefferson at the address indicated above. The Commission will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Ms. Cathy Cruz Jefferson at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout can be accessed through our website at www.csm.ca.gov.

TITLE 5. BOARD OF EDUCATION

NOTICE OF PROPOSED RULEMAKING AMENDMENT TO CALIFORNIA CODE OF REGULATIONS, TITLE 5 REGARDING CHARTER SCHOOL CLOSURES

[Notice published November 17, 2006]

NOTICE IS HEREBY GIVEN that the State Board of Education (SBE) proposes to adopt the regulations described below after considering all comments, objections, or recommendations regarding the proposed action.

PUBLIC HEARING

The California Department of Education staff, on behalf of the SBE, will hold a public hearing beginning at **9:00 a.m. on January 4, 2007**, at 1430 N Street, Room 1801, Sacramento. The room is wheelchair accessible. At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action described in the Informative Digest. The SBE requests that any person desiring to present statements or arguments orally notify the Regulations Coordinator of such intent. The SBE requests, but does not require, that persons who make oral comments at the hearing also submit a written summary of their statements. No oral statements will be accepted subsequent to this public hearing.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to:

Debra Strain, Regulations Coordinator
LEGAL DIVISION
California Department of Education
1430 N Street, Room 5319
Sacramento, California 95814

Comments may also be submitted by facsimile (FAX) at (916) 319–0155 or by e–mail to regcomments@cde.ca.gov. Comments must be received by the Regulations Coordinator prior to **5:00 p.m. on January 4, 2007**.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

Following the public hearing and considering all timely and relevant comments received, the SBE may adopt the proposed regulations substantially as described in this Notice or may modify the proposed regulations if the modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified regulation will be available for 15 days prior to its adoption from the Regulations Coordinator and will be mailed to those persons who submit written comments related to this regulation, or who provide oral testimony if a public hearing is held, or who have requested notification of any changes to the proposal.

AUTHORITY AND REFERENCE

Authority: Section 33031, Education Code.
Reference: Sections 47604.32 and 47607, Education Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Education Code section 47605 authorizes the establishment of a charter school upon approval of a charter petition that meets specified requirements of law, which includes the provision of a reasonably comprehensive description of 16 required elements. Among the required elements of a charter petition is a requirement for a reasonably comprehensive description of the procedures to be used if the charter school closes (Education Code sections 47605(b)(5)(P) and 47605.6(b)(5)(Q)).

Other than a general requirement that these procedures ensure a final audit of the school to determine the disposition of school assets and liabilities, and the maintenance and transfer of pupil records, guidance is lacking with respect to what should appropriately be included in a "reasonably comprehensive" description of closure procedures. The proposed regulations would provide clarity to charter school petitioners and chartering authorities as they work to develop a reasonably comprehensive description of closure procedures to be implemented in the event of the charter school's closure.

DISCLOSURES REGARDING THE PROPOSED REGULATION

The SBE has made the following initial determinations:

Mandate on local agencies or school districts: None

Cost or savings to state agencies: None

Costs to any local agencies or school districts for which reimbursement would be required pursuant to Part 7 (commencing with section 17500) of division 4 of the Government Code: None

Other non–discretionary cost or savings imposed on local educational agencies: None

Cost or savings in federal funding to the state: None

Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: None

Cost impacts on a representative private person or businesses: The SBE is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Adoption of these regulations will not 1) create or eliminate jobs within California; 2) create new businesses or eliminate existing businesses within California; or 3) affect the expansion of businesses currently doing business within California.

Effect on housing costs: None

Effect on small businesses: The proposed regulations would not affect small businesses because the regulations only apply to charter schools and their granting agencies (school district governing boards, county boards of education, and the SBE).

CONSIDERATION OF ALTERNATIVES

The SBE must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the SBE, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action.

The SBE invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

CONTACT PERSONS

Inquiries concerning the content of this regulation may be directed to:

Deborah Probst, Education Programs Consultant
Charter Schools Division
California Department of Education
1430 N Street, Room 5401
Sacramento, CA 95814
Telephone: (916) 445–1014
E–mail: dprobst@cde.ca.gov

Inquiries concerning the regulatory process may be directed to the Regulations Coordinator or Connie Diaz, Regulations Analyst, at (916) 319–0860.

INITIAL STATEMENT OF REASONS AND INFORMATION

The SBE has prepared an initial statement of reasons for the proposed regulation and has available all the information upon which the proposal is based.

TEXT OF PROPOSED REGULATION AND CORRESPONDING DOCUMENTS

Copies of the exact language of the proposed regulation and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained upon request from the Regulations Coordinator. These documents may also be viewed and downloaded from the California Department of Education's Web site at http://www.cde.ca.gov/re/lr/rr.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the Regulations Coordinator.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the Regulations Coordinator.

REASONABLE ACCOMMODATION FOR ANY INDIVIDUAL WITH A DISABILITY

Pursuant to the *Rehabilitation Act of 1973*, the *Americans with Disabilities Act of 1990*, and the *Unruh Civil Rights Act*, any individual with a disability who requires reasonable accommodation to attend or participate in a public hearing on proposed regulations, may request assistance by contacting Deborah Probst, Charter Schools Division, 1430 N Street, Sacramento, CA, 95814; telephone, (916) 445–1014. It is recommended that assistance be requested at least two weeks prior to the hearing.

TITLE 5. BOARD OF EDUCATION

NOTICE OF PROPOSED RULEMAKING AMENDMENT TO TITLE 5, CALIFORNIA CODE OF REGULATIONS REGARDING EDUCATIONAL INTERPRETERS

[Notice published November 17, 2006]

NOTICE IS HEREBY GIVEN that the State Board of Education (SBE) proposes to adopt the regulations described below after considering all comments, objections, or recommendations regarding the proposed action.

PUBLIC HEARING

The California Department of Education (CDE) staff, on behalf of the SBE, will hold a public hearing beginning at **10:00 a.m. on January 3, 2007**, at 1430 N Street, Room 1101, Sacramento. The room is wheelchair accessible. At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action described in the Informative Digest. The SBE requests that any person desiring to present statements or arguments orally notify the Regulations Coordinator of such intent. The SBE requests, but does not require, that persons who make oral comments at the hearing also submit a written summary of their statements. No oral statements will be accepted subsequent to this public hearing.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to:

Debra Strain, Regulations Coordinator
LEGAL DIVISION
California Department of Education
1430 N Street, Room 5319
Sacramento, California 95814

Comments may also be submitted by facsimile (FAX) at 916–319–0155 or by e–mail to regcomments@cde.ca.gov. Comments must be received by the Regulations Coordinator prior to **5:00 p.m. on January 3, 2007**.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

Following the public hearing and considering all timely and relevant comments received, the SBE may adopt the proposed regulations substantially as described in this Notice or may modify the proposed regulations if the modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified regulation will be available for 15 days prior to its adoption from the Regulations Coordinator and will be mailed to those persons who submit written comments related to this regulation, or who provide oral testimony if a public hearing is held, or who have requested notification of any changes to the proposal.

AUTHORITY AND REFERENCE

Authority: Sections 33031, 56100, 56100(a) and (i), and 56366(e), Education Code.

Reference: Sections 56363 and 56366.1, Education Code; and Sections 300.34 and 300.156(b)(1), Title 34, Code of Federal Regulations.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Consistent with the Individuals with Disabilities Education Improvement Act (IDEA 2004) requirement that interpreters for pupils who are deaf or hard of hearing meet state–approved or –recognized certification, licensing, registration, or other comparable requirements, as defined in the Code of Federal Regulations, section 300.156(b)(1), the SBE proposes to amend *California Code of Regulations (CCR), title 5*, sections 3051.16 and 3065, to clarify existing regulations, and to ensure that all deaf and hard of hearing pupils receive comparable and acceptable levels of access to classroom instruction.

The proposed regulatory amendments will clarify the definition of "qualified personnel" to provide educational interpreter services for deaf and hard of hearing

pupils in California public schools and in nonpublic schools and agencies. The proposed amendments will delay the implementation of qualification standards for educational interpreters to July, 2007.

INCORPORATION BY REFERENCE

CDE staff relied upon the following information in proposing the adoption of these regulations:

- Recommendations from the 1988 report of the Commission on Education of the Deaf to the United States Congress
- Recommendations of the 1989 National Task Force on Educational Interpreting
- Recommendations from the 1994 Deaf and Hard of Hearing Students Educational Service Guidelines from the National Association of State Directors of Special Education
- CDE Educational Interpreter Workgroup (August 2, 2006) [Requirements for interpreters in other states (page 20) and information and test results data provided by the testing agencies (page 22)

These documents are available for review from the Regulations Coordinator.

DISCLOSURES REGARDING THE PROPOSED REGULATION

The SBE has made the following initial determinations:

Mandate on focal agencies or school districts: None

Cost or savings to state agencies: None

Costs to any local agencies or school districts for which reimbursement would be required pursuant to Part 7 (commencing with section 17500) of division 4 of the Government Code: None

Other non–discretionary cost or savings imposed on local educational agencies: None

Cost or savings in federal funding to the state: None

Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: None

Cost impacts on a representative private person or businesses: The SBE is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Adoption of these regulations will not 1) create or eliminate jobs within California; 2) create new businesses or eliminate existing businesses within California; or 3) affect the expansion of businesses currently doing business within California.

Effect on housing costs: None

Effect on small businesses: While some local educational agencies contract with small businesses (agencies) to provide educational interpreting services, those small businesses must ensure that pupils who are deaf or hard of hearing receive quality services. There is no evidence that local educational agencies will change this practice as a result of these regulations.

CONSIDERATION OF ALTERNATIVES

The SBE must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the SBE, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action.

The SBE invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

CONTACT PERSONS

Inquiries concerning the content of this regulation may be directed to:

Nancy Sager, Special Education Consultant
State Special Schools and Services Division
California Department of Education
1430 N Street, Room 2305
Sacramento, CA 95814
Telephone: (916) 327–3868

INITIAL STATEMENT OF REASONS AND INFORMATION

The SBE has prepared an initial statement of reasons for the proposed regulation and has available all the information upon which the proposal is based.

TEXT OF PROPOSED REGULATION AND CORRESPONDING DOCUMENTS

Copies of the exact language of the proposed regulation and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained upon request from the Regulations Coordinator. These documents may also be viewed and downloaded from the CDE's Web site at http://www.cde.ca.gov/re/lr/rr.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the Regulations Coordinator.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the Regulations Coordinator.

REASONABLE ACCOMMODATION FOR ANY INDIVIDUAL WITH A DISABILITY

Pursuant to the *Rehabilitation Act of 1973*, the *Americans with Disabilities Act of 1990*, and the *Unruh Civil Rights Act*, any individual with a disability who requires reasonable accommodation to attend or participate in a public hearing on proposed regulations, may request assistance by contacting Nancy Sager, State Special Schools and Services Division, 1430 N Street, Sacramento, CA, 95814; telephone, (916) 327–3868; fax, (916) 327–3516. It is recommended that assistance be requested at least two weeks prior to the hearing.

TITLE 14. BOARD OF FORESTRY AND FIRE PROTECTION

[Notice Published November 17, 2006]

NOTICE OF PROPOSED RULEMAKING

Utility Clearing Exemption, 2006

The Board of Forestry and Fire Protection (Board) proposes to adopt the regulations of Title 14 of the California Code of Regulations (14 CCR) Division 1.5, Chapter 7 Fire Protection, and Article 4, described below after considering all comments, objections, and recommendations regarding the proposed action.

Amend:

§ 1257 Exempt Minimum Clearance Provisions—PRC4293

PUBLIC HEARING

The Board will hold a public hearing on Wednesday, January 10, 2007, starting at 8:00 a.m., at the Resources Building Auditorium, 1st Floor, and 1416 Ninth Street, Sacramento, California. At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action described in the *Informative Digest*. The Board requests, but does not require, that persons who make oral comments at the hearing also submit a summary of their statements. Additionally, pursuant to Government Code § 11125.1, any information presented to the Board during the open hearing in connection with a matter subject to discussion or consideration becomes part of the public record. Such information shall be retained by the Board and shall be made available upon request.

WRITTEN COMMENT PERIOD

Any person, or authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period ends at 5:00 P.M., on Tuesday, January 2, 2007. The Board will consider only written comments received at the Board office by that time (in addition to those written comments received at the public hearing). The Board requests, but does not require, that persons who submit written comments to the Board reference the title of the rulemaking proposal in their comments to facilitate review.

Written comments shall be submitted to the following address:

Board of Forestry and Fire Protection
Attn: Christopher Zimny
Regulations Coordinator
P.O. Box 944246
Sacramento, CA 94244–2460

Written comments can also be hand delivered to the contact person listed in this notice at the following address:

Board of Forestry and Fire Protection
Room 1506–14
1416 9th Street
Sacramento, CA

Written comments may also be sent to the Board via facsimile at the following phone number:

(916) 653–0989

Written comments may also be delivered via e–mail at the following address:

board.public.comments@fire.ca.gov

AUTHORITY AND REFERENCE

Under the authority of PRC 4292 and 4293, CDF is amending Article 4, Chapter 7, to Title 14 California Code of Regulations. References include Sections 4111, 4292–4296, and 4125 to 4128 of the Public Resources Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The proposed regulation amends the fire prevention standards for electrical utilities. The proposed regulation adds § 1257(a)(3), a new exemption to existing utility vegetation clearing requirements. The proposed exemption allows for healthy, mature trees (trunks and limbs), that are sufficiently rigid so they do not present a risk to public safety, to be closer to powerlines than the minimum clearing distance under existing regulations. These trees/limbs are commonly referred to as major woody stems, or MWS.

The new exemption would reduce the allowable minimum clearance between the MWS and energized lines to six inches, compared to the existing clearing requirement of four feet (for lines less than 75,000 volts). The proposed exemption would be permitted for a limited period, expiring December, 31 2008. The exemption would apply to utilities lines in the State Responsibility Area (SRA).

SPECIFIC PURPOSE OF THE REGULATION

The purpose of the regulation is to add a MWS exception to 14 CCR § 1257(a)(3) as provided for by PRC 4293. The regulation:

- avoids trimming or removing trees that are technically within the prescribed clearance requirement but pose no risk of ignition. Because the MWS eligible for exemption have been determined through inspection to be of sufficient size and/or having the necessary characteristics such as rigidity and bark thickness, they do not present a risk of ignition through contact;
- reconciles 14 CCR 1257 with the California Public Utilities Commission General Order 95, Rule 35;
- provides a measure of fire protection more consistent with the actual risk involved;
- protects mature and stately trees from needless trimming or removal;
- preserves vital habitat to the greatest practical extent consistent with public safety and electric system reliability;
- clarifies enforcement standards for CDF;
- reduces enforcement related costs incurred by CDF related to PRC 4293;
- clarifies compliance standards for the regulated public with regard to PRC 4293; and
- allows for both tree trunks and limbs, when the specific above characteristics are met, to apply to the exemption.

Amendments to subsection 1257(a)(3) provide for inclusion of a MWS as an exemption to PRC 4293 clearing requirements and defines the characteristics of the MWS along with the new minimum clearance requirements. Characteristics necessary for inclusion of a MWS as an exemption to the existing rules include

- established in their current location for a minimum of ten years;
- are vigorous and healthy;
- the trunks and major limbs are at least six inches from the line; and
- trunks and limbs are of sufficient strength and rigidity to prevent the trunk or limb from encroaching within six inches of the line.

This section also establishes a limited time frame for implementation of the regulation (sunset date). The purpose of the time limitation is to provide an experimental period for implementation, and follow with an evaluation of the results, and amend the rule as necessary.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Board has determined the proposed action will have the following effects:

- Mandate on local agencies and school districts: None
- Costs or savings to any State agency: None
- Cost to any local agency or school district which must be reimbursed in accordance with the applicable Government Code (GC) sections commencing with GC § 17500: None
- Other non–discretionary cost or savings imposed upon local agencies: None
- Cost or savings in federal funding to the State: None
- The Board has made an initial determination that there will be no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.
- Cost impacts on representative private persons or businesses: The board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
- Significant effect on housing costs: None
- Adoption of these regulations will not: (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing businesses within California; or (3) affect the expansion of businesses currently doing business within California.

- Effect on small business: None. The Board has determined that the proposed amendments will not affect small business. The amendment adds an exemption to existing clearing standards, reducing the clearing requirement for MWS to a minimum of six inches. This reduction in the clearing requirements is estimated to have a significant positive financial effect for utilities, and potentially utility rate payers, due to the lesser amount of vegetation removal or installation of insulation around line for compliance with existing rules.
- The proposed rules do not conflict with, or duplicate Federal regulations.

BUSINESS REPORTING REQUIREMENT

The regulation does not require a report, which shall apply to businesses.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code § 11346.5(a)(13), the Board must determine that no reasonable alternative it considers or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

CONTACT PERSON

Requests for copies of the proposed text of the regulations, the *Initial Statement of Reasons*, modified text of the regulations and any questions regarding the substance of the proposed action may be directed to:

Board of Forestry and Fire Protection
Attn: Christopher Zimny
Regulations Coordinator
P.O. Box 944246
Sacramento, CA 94244–2460
Telephone: (916) 653–9418

The designated backup person in the event Mr. Zimny is not available is Doug Wickizer, California Department of Forestry and Fire Protection, at the above address and phone.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board has prepared an *Initial Statement of Reasons* providing an explanation of the purpose, background, and justification for the proposed regulations. The statement is available from the contact person on request. When the *Final Statement of Reasons* has been prepared, the statement will be available from the contact person on request.

A copy of the express terms of the proposed action using UNDERLINE to indicate an addition to the California Code of Regulations and ~~STRIKETHROUGH~~ to indicate a deletion, is also available from the contact person named in this notice.

The Board will have the entire rulemaking file, including all information considered as a basis for this proposed regulation, available for public inspection and copying throughout the rulemaking process at its office at the above address. All of the above referenced information is also available on the Board web site at: http://www.fire.ca.gov/BOF/board/board_proposed_rule_packages.html

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearing and considering all timely and relevant comments received, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text—with the changes clearly indicated—available to the public for at least 15 days before the Board adopts the regulations as revised. Notice of the comment period on changed regulations, and the full text as modified, will be sent to any person who:

a) testified at the hearings,
b) submitted comments during the public comment period, including written and oral comments received at the public hearing, or
c) requested notification of the availability of such changes from the Board of Forestry and Fire Protection.

Requests for copies of the modified text of the regulations may be directed to the contact person listed in this notice. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

TITLE 15. DEPARTMENT OF CORRECTIONS AND REHABILITATION

NOTICE IS HEREBY GIVEN that the Secretary of the Department of Corrections and Rehabilitation

(CDCR), pursuant to the authority granted by Government Code Section 12838.5 and Penal Code (PC) Section 5058, and the rulemaking authority granted by PC Sections 5058.3, in order to implement, interpret and make specific PC Sections 5054, proposes to amend Sections 3084.1 and 3391 in the California Code of Regulations (CCR), Title 15 concerning Citizens Complaints.

PUBLIC HEARING

Date and Time: January 9, 2007, 10:00 a.m. to 11:00 a.m.

Place: 660 Bercut Dr
Large Conference Room
Sacramento, CA 95814

Purpose: To receive comments about this action.

PUBLIC COMMENT PERIOD

The public comment period will close 5:00 PM. Any person may submit public comments in writing (by mail, by fax or by e–mail) regarding the proposed changes. To be considered by the Department, comments must be submitted to the Department of Corrections and Rehabilitation, Regulation and Policy Management Branch, P.O. Box 942883, Sacramento, CA 94283–0001; by fax at (916) 341–7366; or by e–mail at *RPMB@cdcr.ca.gov* before the close of the comment period.

CONTACT PERSON

Please direct any inquiries regarding this action to:

Timothy M. Lockwood, Chief
Regulation and Policy Management Branch
Department of Corrections and Rehabilitation
P.O. Box 942883, Sacramento, CA 94283–0001
Telephone (916) 341–7332

In the event the contact person is unavailable, inquires should be directed to the following back–up person:

Stephanie Winn
Regulation and Policy Management Branch
Telephone (916) 341–6156

Questions regarding the substance of the proposed regulatory action should be directed to:

Don Price, CCII
Division of Adult Institutions
Telephone (916) 322–1843

LOCAL MANDATES

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement pursuant to Government Code Section 17561.

FISCAL IMPACT STATEMENT

- Cost or savings to any state agency: *None*
- Other nondiscretionary cost or savings imposed on local agencies: *None*
- Cost or savings in federal funding to the state: *None*

EFFECT ON HOUSING COSTS

The Department has made an initial determination that the proposed action will have no significant effect on housing costs.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS

The Department has initially determined that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

EFFECT ON SMALL BUSINESSES

The Department has determined that the proposed regulations may not affect small businesses. It is determined that this action has no significant adverse economic impact on small business because they are not affected by the internal management of state prisons.

ASSESSMENTS OF EFFECTS ON JOB AND/OR BUSINESS CREATION, ELIMINATION OR EXPANSION

The Department has determined that the proposed regulation will have no affect on the creation of new, or the elimination of existing jobs or businesses within

California, or affect the expansion of businesses currently doing business in California.

CONSIDERATION OF ALTERNATIVES

The Department must determine that no reasonable alternative considered by the Department, or that has otherwise been identified and brought to the attention of the Department, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons, than the proposed regulatory action.

AVAILABILITY OF PROPOSED TEXT AND INITIAL STATEMENT OF REASONS

The Department has prepared and will make available the text and the Initial Statement of Reasons (ISOR) of the proposed regulations. The rulemaking file for this regulatory action, which contains those items and all information on which the proposal is based (i.e., rulemaking file) is available to the public upon request directed to the Department's contact person. The proposed text, ISOR, and Notice of Proposed Action will also be made available on the Department's website http://www.cdcr.ca.gov.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons may be obtained from the Department's contact person.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this Notice. If the Department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. Requests for copies of any modified regulation text should be directed to the contact person indicated in this Notice. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Penal Code (PC) Section 5000 provides that commencing July 1, 2005, any reference to the Department of Corrections in this or any code, refers to the CDCR, Division of Adult Operations.

PC Section 5050 provides that commencing July 1, 2005, any reference to the Director of Corrections, in this or any other code, refers to the Secretary of the CDCR. As of that date, the office of the Director of Corrections is abolished.

PC Section 5054 provides that commencing July 1, 2005, the supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein are vested in the Secretary of the CDCR.

PC Section 5058.3 authorizes the Director to adopt, amend, or repeal emergency regulations conducted pursuant to Government Code Section 11340. This regulatory action:

- Will bring CDCR into immediate compliance with the Ninth Circuit Court of Appeals opinion in *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, which held that PC 148.6, which criminalizes knowingly false speech critical of peace officer conduct, violates the First Amendment.
- The Department must modify Sections 3084.1 and 3391 in order to remove language that is now deemed unconstitutional. Existing language in both sections states that it is against the law to knowingly make a false complaint against a peace officer. According to *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, this statement is unconstitutional in that it violates the First Amendment.

TITLE 16. BOARD OF BARBERING AND COSMETOLOGY

NOTICE IS HEREBY GIVEN that the Board of Barbering and Cosmetology is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at 2420 Del Paso Road, Suite # 100, Sacramento, California, 95834, from 11:00 a.m. to 12:00 p.m., on January 4, 2007. Written comments, including those sent by mail, facsimile, or e–mail to the addresses listed under Contact Person in this Notice, must be received by the board at its office not later than 5:00 p.m. on January 4, 2007 or must be received by board staff at the hearing. The board, upon its own motion or at the instance of any interested party, may thereafter adopt

the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Section 7312, of the Business and Professions Code, and to implement, interpret or make specific Section 7367 of said Code, the board is considering changes to Division 9 of Title 16 of the California Code of Regulations as follows:

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Section 7367 of the Business and Professions Code specifies requirements for the transferring of credits from one program of instruction to another.

The board is proposing to amend section 950.10, Credit for Special License and Transfer of Training, in order to allow credit for training earned in the apprentice program to be transferred to a school program. The amendment also includes a repeal date of January 1, 2009 at which time section 950.10(a)(2)(c) shall state that training received as an apprentice shall not be credited toward a course of training in a school.

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

Nondiscretionary Costs/Savings to Local Agencies:

None.

Local Mandate:

None.

Cost to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement:

None.

Business Impact:

The board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Impact on Jobs/New Businesses:

The board has determined that this regulatory proposal will not have a significant impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

Cost Impact on Representative Private Person or Business:

This agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Effect on Housing Costs:

None

EFFECT ON SMALL BUSINESS

The board has determined that the proposed regulations would not affect small businesses since the regulations are only providing options for apprentices who have already been displaced or will be displaced by a business.

CONSIDERATION OF ALTERNATIVES

The board must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would either be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposal described in this Notice.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above–mentioned hearing.

INITIAL STATEMENT OF REASONS AND INFORMATION

The Board of Barbering and Cosmetology has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Board of Barbering and Cosmetology at 2420 Del Paso Road, Suite # 100, Sacramento, California, 95834.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

CONTACT PERSON

Any inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name:	Paul Cobb
Address:	2420 Del Paso Road, Suite # 100 Sacramento, California 95834
Telephone No.:	(916) 575–7104
Fax No.:	(916) 575–7282
E–Mail Address:	paul_cobb@dca.ca.gov

The backup contact person is:

Name:	Heather Berg
Address:	Same as Above
Telephone No.:	(916) 575–7154
Fax No.:	(916) 575–7282
E–Mail Address:	heather_berg@dca.ca.gov

Website Access:

Materials regarding this proposal can be found at: www.barbercosmo.ca.gov

TITLE 16. BOARD OF BARBERING AND COSMETOLOGY

NOTICE IS HEREBY GIVEN that the Board of Barbering and Cosmetology is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at 2420 Del Paso Road, Suite # 100, Sacramento, California, 95834, from 10:00 a.m. to 11:00 a.m., on January 4, 2007. Written comments, including those sent by mail, facsimile, or e–mail to the addresses listed under Contact Person in this Notice, must be received by the board at its office not later than 5:00 p.m. on January 4, 2007 or must be received by board staff at the hearing. The board, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Section 7312 of the Business and Professions Code, and to implement, interpret or make specific Section 7316 of said Code, the board is considering changes to Division 9 of Title 16 of the California Code of Regulations as follows:

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Section 7316(d)(3) of the Business and Professions Code provides the definition of threading and exempts the practice of and a licensing requirement from the Board of Barbering and Cosmetology. Recent legislation AB 1793 (Bermudez, Chapter 149, Statutes of 2006) amended Business and Professions Code Section 7316(d)(3) to include the incidental trimming of eyebrow hair.

The board is proposing to adopt section 997, Definition of Incidental Trimming Related to Threading, in order to define incidental trimming and specify the implement allowed for said procedure.

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None

Nondiscretionary Costs/Savings to Local Agencies:

None.

Local Mandate:

None.

Cost to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement:

None.

Business Impact:

The board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Impact on Jobs/New Businesses:

The board has determined that this regulatory proposal will not have a significant impact on the creation of

jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

Cost Impact on Representative Private Person or Business:

This agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Effect on Housing Costs:

None

EFFECT ON SMALL BUSINESS

The board has determined that the proposed regulations would not affect small businesses because the implement specified in this proposal is already being used for these services.

CONSIDERATION OF ALTERNATIVES

The board must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would either be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposal described in this Notice.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above–mentioned hearing.

INITIAL STATEMENT OF REASONS AND INFORMATION

The Board of Barbering and Cosmetology has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Board of Barbering and Cosmetology at 2420 Del Paso Road, Suite # 100, Sacramento, California, 95834.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

CONTACT PERSON

Any inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name: Paul Cobb
Address: 2420 Del Paso Road, Suite # 100
Sacramento, California 95834

Telephone No.: (916) 575–7104
Fax No.: (916) 575–7282
E–Mail Address: paul_cobb@dca.ca.gov

The backup contact person is:

Name: Heather Berg
Address: Same as Above

Telephone No.: (916) 575–7154
Fax No.: (916) 575–7282
E–mail Address: heather_berg@dca.ca.gov

Website Access:

Materials regarding this proposal can be found at: www.barbercosmo.ca.gov

TITLE 16. BOARD OF BARBERING AND COSMETOLOGY

NOTICE IS HEREBY GIVEN that the Board of Barbering and Cosmetology is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at 2420 Del Paso Road, Suite # 100, Sacramento, California, 95834, from 9:00 a.m. to 10:00 a.m., on January 4, 2006. Written comments, including those sent by mail, facsimile, or e–mail to the addresses listed under Contact Person in this Notice, must be received by the board at its office not later than 5:00 p.m. on January 4, 2006 or must be received by board staff at the hearing. The board, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such

proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Sections 7312, 7337.5, and 7421 of the Business and Professions Code, and to implement, interpret or make specific Sections 7331, 7415, 7417, 7418, 7419, 7420, 7423, 7423.5, 7424, and 7425 of said Code, the board is considering changes to Division 9 of Title 16 of the California Code of Regulations as follows:

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Section 7331 of the Business and Professions Code specifies requirements for an out–of–state applicant licensed in another state and interested in becoming licensed in California. Section 7331 provides that the board may grant a license to practice to an applicant if the applicant submits prescribed information to the board. Recent legislation SB 1474 (Figueroa, Chapter 253, Statute of 2006) amended Business and Professions Code 7331 which directs the board to grant a license to practice to an out–of–state applicant if the applicant submits a completed application form, all fees required by the board and submits proof of a current license issued by another state to practice that meets specified requirements.

The board is proposing to adopt section 911, Reciprocity for Out–of–State Licensees, which will establish, clarify and make specific the reciprocity process for an out–of–state applicant holding a license in another state and wishing to become licensed in California.

Additionally, the board proposes to amend section 998, Schedule of Fees, in order to establish and incorporate the reciprocity application and initial license fee to the existing schedule of fees.

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

Nondiscretionary Costs/Savings to Local Agencies:

None.

Local Mandate:

None.

Cost to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement:

None.

Business Impact:

The board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Impact on Jobs/New Businesses:

The board has determined that this regulatory proposal will not have a significant impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

Cost Impact on Representative Private Person or Business:

The cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action and that are known to the board are: a one–time reciprocity application and initial license fee of $50.

Effect on Housing Costs:

None.

EFFECT ON SMALL BUSINESS

The board has determined that the proposed regulations would not affect small businesses. This regulation will increase the workforce in California and would actually increase the employment pool of perspective employees.

CONSIDERATION OF ALTERNATIVES

The board must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would either be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposal described in this Notice.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above–mentioned hearing.

INITIAL STATEMENT OF REASONS AND INFORMATION

The Board of Barbering and Cosmetology has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Board of Barbering and Cosmetology at 2420 Del Paso Road, Suite # 100, Sacramento, California, 95834.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

CONTACT PERSON

Any inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name:	Paul Cobb
Address:	2420 Del Paso Road, Suite # 100 Sacramento, California 95834
Telephone No.:	(916) 575–7104
Fax No.:	(916) 575–7282
E–mail Address:	paul_cobb@dca.ca.gov

The backup contact person is:

Name:	Heather Berg
Address:	Same as Above
Telephone No.:	(916) 575–7154
Fax No.:	(916) 575–7282
E–Mail Address:	heather_berg@dca.ca.gov

Website Access:

Materials regarding this proposal can be found at: www.barbercosmo.ca.gov

TITLE 21. DEPARTMENT OF TRANSPORTATION

NOTICE OF INTENTION TO AMEND THE CONFLICT OF INTEREST CODE OF THE STATE OF CALIFORNIA, DEPARTMENT OF TRANSPORTATION

NOTICE IS HEREBY GIVEN that the State of California, Department of Transportation ("Caltrans"), pursuant to the authority vested in it by California Government Code section 87306, proposes an amendment to its Conflict of Interest Code, codified at Title 21, Division 2, Chapter 14, Section 1575. The purpose of this amendment is to implement the requirements of Government Code sections 87300 through 87302, and section 87306.

Caltrans proposes to amend its Conflict of Interest Code to include employee positions that involve the making or participation in the making of decisions that may foreseeably have a material effect on any financial interest, as set forth in subdivision (a) of section 87302 of the Government Code. Specifically, the proposed substantive amendment will add newly created positions, delete positions that are no longer used, require that consultants be designated positions and, clarify cumbersome language in the disclosure categories under the prior Conflict of Interest Code, which was adopted in 1982.

Additionally, the amendment will better reflect the current organizational structure of Caltrans and also better delineate duties of employees and supervisors with respect to the code. Copies of the amended code and reasons for the amendment are available and may be requested from the contact person set forth below.

A 45–day public comment period has been set, during which any interested person may submit written statements, arguments, or comments relating to the proposed amendment by submitting them in writing to the person and place stated below, no later than 5:00 p.m. on January 1, 2007. Comments received after this date will not be considered prior to adoption of the amendment. Any interested party or his/her representative may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to 2 CCR section 18750(c)(3)(I). Information about this public hearing can be obtained from Caltrans' contact person set forth below. Any interested party may submit written statements, arguments, or comments relating to the proposed amendment at such a hearing.

Caltrans has prepared a written explanation of the reasons for the proposed amendment, which can be reviewed by contacting the person named below. In addi-

tion, any interested party may obtain a copy of the proposed amendment and any submitted comments by contacting the individual named below.

Caltrans has determined that the proposed amendment:

1. Will not impose a mandate on local agencies or school districts.
2. Will not impose a cost or savings on any state agency.
3. Will not impose a cost or savings on any local agency or school district that is required to be reimbursed under part 7 (commencing with Section 17500) of Division 4 of the Government Code.
4. Will not result in any nondiscretionary cost or savings to local agencies.
5. Will not result in any cost or savings in federal funding to the state.
6. Will not have any potential cost impact on private persons or any business, including small businesses.

In proposing this amendment to its conflict of interest code, Caltrans must determine that no alternative considered by Caltrans would be more effective in carrying out the purpose for which the amendment is proposed or would be as effective and less burdensome to affected private persons than the proposed amendment.

Contact Person: All inquiries or comments concerning this proposed amendment and any communication required by this notice should be directed to:

Patti Oshita
Department of Transportation
1727 30th Street, MS 90
Sacramento, CA 95816
Department of Transportation
(916) 227–7414

GENERAL PUBLIC INTEREST

DEPARTMENT OF TOXIC SUBSTANCES CONTROL

NOTICE OF CONSENT ORDER WALKER PROPERTY SITE SANTA FE SPRINGS, CALIFORNIA

The Department of Toxic Substances Control ("DTSC"), pursuant to the authority vested in DTSC under California Health and Safety Code, Sections 25187, 25355.5, 25358.3, 25360, 58009 and 58010, proposes to enter into a Consent Order regarding the Walker Property Site located at Bloomfield Avenue and Lakeland Road in Santa Fe Springs, California ("Site") with United States of America — National Aeronautics and Space Administration for Jet Propulsion Laboratory and United States of America — Department of the Air Force for Norton Air Force Base ("Respondents"). This Consent Order is being executed in connection with the Remedial Action performed at the Site by Texaco, Inc. and BC Santa Fe Springs ("Settling Respondents").

Pursuant to the Consent Order, DTSC and the Settling Respondents intend to resolve the claims they may have against the Respondents for recovery of the sums that DTSC and the Settling Respondents have spent and will spend in the course of performing response actions at the site. The Consent Order is intended to obtain settlement with the Respondents for at least its fair share of response costs incurred and to be incurred at or in connection with the Site by DTSC and by private parties, including the Settling Respondents, in exchange for full and complete contribution protection for the Respondents.

DTSC will consider public comments on the Consent Order which are received by DTSC within thirty (30) days of the date of this notice. DTSC may withdraw or withhold consent to the proposed Consent Order, if such comments disclose facts or considerations that indicate the proposed Consent Order is inappropriate, improper and inadequate.

The proposed Consent Order and additional background information relating to the Consent Order are available for public inspection at the Department of Toxic Substances Control, 1011 N. Grandview Avenue, Glendale, California 91201. A copy of the proposed Consent Order may also be obtained by contacting the DTSC representative listed below. DTSC invites any interested persons to submit comments on the Consent Order. *Comments must be received by DTSC on or before December 18, 2006*. The comments should reference the Site name and be directed to:

Mr. Richard Gebert
Department of Toxic Substances Control
1011 North Grandview Avenue
Glendale, California 91201

DTSC's responses to any timely comments will be available for inspection at DTSC's office in Glendale, California.

Further information regarding this matter may be obtained by contacting any of the following persons: DTSC Project Manager Richard Gebert at (818) 551–2859 or DTSC Staff Counsel Robert Elliott at (916) 327–6105.

OFFICE OF ADMINISTRATIVE LAW

REQUEST FOR PUBLIC INPUT ANNUAL RULEMAKING CALENDAR GOVERNMENT CODE 11017.6

Each year all state government agencies with rulemaking authority are required to prepare a rulemaking calendar pursuant to section 11017.6 of the Government Code. The rulemaking calendar lists anticipated rulemaking activity by the agency for the coming year. The rulemaking calendar is non–binding. Section 11017.6 specifically allows agencies to adopt rules that were not listed in the rulemaking calendar if it is required by unanticipated circumstances.

The requirement to prepare a rulemaking calendar was established in 1982 and has not been amended since 1987. In 2000 the Legislature adopted section 11340.85 of the Government Code, which requires state agencies to post all their rulemaking activity on their web sites. The information that must be posted on the web pursuant to section 11340.85 is much more extensive than that included in the annual rulemaking calendar pursuant to section 11017.6. Use of the internet as a primary information source has, obviously, increased greatly since 1982.

The Office of Administrative Law is attempting to evaluate the public's current level of reliance upon the annual rulemaking calendar as a source of information about state agency rulemaking. If you have found that the annual rulemaking calendar continues to be a valuable source of information to you, please let us know through one of the following methods:

1. Send an e–mail message to staff@oal.ca.gov;
2. Send a note via fax to (916) 323–6826;
3. Leave a telephone voice message at (916) 323–6815; or
4. Send a letter to:

   Office of Administrative Law
   Rulemaking Calendar Survey
   300 Capitol Mall, Suite 1250
   Sacramento, CA 95814

Any information that you could provide on this subject would be greatly appreciated.

PETITION DECISION

DEPARTMENT OF INSURANCE

Legal Division, Rate Enforcement Bureau — Sacramento
300 Capitol Mall, l7th Floor
Sacramento, CA 95814

Lisbeth Landsman–Smith
Staff Counsel
TEL: 916–492–3561
FAX: 916–324–1883
E–Mail: landsmanl@insurance.ca.gov
www.insurance.ca.gov

October 4, 2006

VIA FACSIMILE AND US MAIL (310) 319–0156

Bryce Gee, Esq.
Strumwasser & Woocher LLP
100 Wilshire Boulevard, Suite 1900
Santa Monica, California 90401

SUBJECT: Decision on Petition for Emergency and Permanent Rulemaking

Dear Mr. Gee:

On September 7, 2006, the Insurance Commissioner of the State of California received a petition from you on behalf of the California Earthquake Authority ("Petitioner"). Petitioner, pursuant to Government Code sections 11340.6 and 11346.1, requested that the Commissioner undertake rulemaking proceedings to amend Title 10, Sections 2697.6 and 2697.61 of the California Code of Regulations.

The Commissioner hereby grants the Petition for Emergency and Permanent Rulemaking. The circumstances detailed in the Petition, the unforeseen time constraints, and existing case law support promulgating this regulation on an emergency basis. Pursuant to Government Code, section 11340.7, the Commissioner intends to schedule this matter for public hearing in accordance with the requirements of Article 5 of the Government Code (commencing with section 11346). Interested persons may obtain a copy of the petition from, or direct questions to, me.

Sincerely,

/s/
Lisbeth Landsman–Smith
Staff Counsel

cc: Daniel Marshall (CEA)

ACCEPTANCE OF PETITION TO REVIEW ALLEGED UNDERGROUND REGULATIONS

DEPARTMENT OF INSURANCE

OFFICE OF ADMINISTRATIVE LAW ACCEPTANCE OF PETITION TO REVIEW ALLEGED UNDERGROUND REGULATIONS (Pursuant to Title 1, Section 270, of the California Code of Regulations

Agency being challenged: Department of Insurance, CTU 06–0927–01

The Office of Administrative Law has accepted the following petition for consideration. Please send your comments to:

Kathleen Eddy, Senior Counsel
Office of Administrative Law
300 Capitol Mall, Ste 1250
Sacramento, CA 95814

A copy of our comment must also be sent to the petitioner and the agency contact person.

Petitioner:

Independent Brokers and Agents of the West
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PETITION TO THE OFFICE OF ADMINISTRATIVE LAW

Re: **Underground regulation in the form of a settlement agreement designated as a "precedential decision" under Government Code § 11425.60.** *See* Order Designating Decision as Precedential, issued June 30, 2006 in *In re American Reliable Insurance Co.*, California Insurance Commissioner, File No. DISP 06091926 [Exhibits C and D hereto].

From: Steven A. Hirsch, Keker & Van Nest LLP, and Gene Livingston, Greenberg Traurig, LLP, on behalf of the Independent Brokers and Agents of the West ("IBA West")[1]

Date: September 26, 2006

1. IDENTIFYING INFORMATION

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2. DEPARTMENT BEING CHALLENGED

California Insurance Commissioner; California Department of Insurance ("the Department")

3. DESCRIPTION OF THE UNDERGROUND REGULATION AND OF THE DEPARTMENTAL ACTION BY WHICH IT WAS ISSUED.

In a recent settlement with a regulated entity, the California Department of Insurance inaugurated a practice of (1) inserting extensive statutory interpretations and regulatory guidance into settlement documents, and then (2) designating the settlement as a "precedential decision" under Government Code § 11425.60.[2] The result is that the legal rules announced in the settlement purportedly bind the agency's ALJs and the agency itself in future cases—even though those rules have not been vetted by the notice–and–comment pro-

[1] IBA West is a voluntary trade association representing independent insurance agents and insurance brokers. Its membership is comprised of more than 900 agencies and brokerages and tens of thousands of individual broker–agents.

[2] Henceforth, all statutory references will be to the Government Code unless otherwise indicated.

cedures of a formal rulemaking or even by the somewhat less rigorous adversarial process of an agency adjudication.

The facts, in brief are these. On May 9, 2006, the Department served a "Notice of Noncompliance and Order to Show Cause" on the American Reliable Insurance Company.[3]

On June 30, 2006, the Department and American Reliable entered into a "Special Notice of Defense"[4]—in effect, a settlement and release—resolving all issues raised by the Order to Show Cause. The Special Notice of Defense stated that "[t]he attached Decision and Order will be issued by the Commissioner without the taking of proof and without a hearing or further adjudication of any question of fact or law."[5] As part of the settlement, American Reliable "waiv[ed] its right to attempt to set aside or vacate any provision of [the] Special Notice of Defense or the Decision and Order to be issued pursuant thereto, including by petition for any form of judicial or administrative review on any grounds whatsoever."[6]

The Decision and Order, also dated June 30, 2006,[7] required American Reliable to pay fines and to disgorge some payments that it had "constructively" received from customers of Superior Access Insurances Services. The Department's finding of "constructive receipt" was predicated on a legal conclusion that Superior Access had served as American Reliable's "agent" under the Insurance Code sections defining that term. The Decision and Order contained extensive interpretations of the Insurance Code provisions that define an "insurance agent"[8] and an "insurance broker,"[9] and included a list of factors that the Department will apply in an attempt to reclassify "brokers"—*i.e.*, producers who fall squarely within the statutory definitions of "insurance broker"—as insurance "agents," even though those producers do not meet the statutory definitions of "insurance agent." Thus, the Decision and Order states that "[a] producer represents or acts on behalf of an insurer, *inter alia*, whenever":

- "the insurer has given the producer discretion to issue insurance binders",
- "the insurer has obtained the producer's express or tacit agreement to apply specific underwriting or rating factors before submitting applications to the insurer";
- "the insurer has directed or controlled the producer in any respect or reserved the right to do so";
- "the insurer has permitted the producer to display the insurer's name or logo on the producer's signage, stationery or business cards in a manner that implies ostensible agency";
- "the insurer refers potential or existing insureds to the producer";
- "the insurer refers the producer to potential or existing insureds";
- "the insurer attempts to control the licensee's conduct by disciplining the licensee (other than by terminating), or maintaining the right to discipline him, for failing to follow the insurer's rules or for failing to meet production standards";
- "the insurer provides the same or substantially similar training to supposed brokers as to any appointed agents";
- "the relationship between the producer and the insurer is functionally indistinguishable from the relationship between the insurer and its appointed agents";
- "the producer has placed the insurer's interests above that of the insured and the insurer has accepted the benefits thereof'; or
- "the insurer has incentivized the producer to act on the insurer's behalf by promising to provide compensation contingent upon the producer meeting a premium volume threshold, loss ratio, or level of profitability."[10]

The new interpretive rules set forth in the Decision and Order were taken, *verbatim*, from the Notice of Noncompliance and Order to Show Cause—the pleading by which the Department had initiated the proceeding. Thus, the Special Notice of Defense and accompanying Decision and Order represented a regulated entity's total and unqualified acquiescence in the Commissioner's legal interpretations of the statutes defining insurance agents and brokers.

Finally, also on June 30, 2006, the Department issued a one–sentence "Order Designating Decision as Precedential" [hereinafter, "the *American Reliable* order" or "the order"], stating that the *American Reliable* Decision and Order "is hereby designated as a precedential

[3] A copy of the May 9, 2006 Notice and Order is attached as Exhibit A.

[4] A copy of the June 30, 2006 Special Notice of Defense is attached as Exhibit B.

[5] Special Notice of Defense ¶ 2.

[6] Special Notice of Defense ¶ 4.

[7] A copy of the June 30, 2006 Decision and Order is attached as Exhibit C.

[8] *See* CAL. INS. CODE §§ 31 & 1623. Insurance Code § 31 defines "insurance agent" as "a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life insurance." Insurance Code § 1623 contains essentially identical language.

[9] *See* CAL. INS. CODE §§ 33 & 1623. Insurance Code § 33 defines "insurance broker" as "a person who, for compensation and on behalf of another person, transacts insurance other than life with, but not on behalf of, an insurer." Insurance Code § 1623 contains essentially identical language.

[10] *See* Decision and Order (Exhibit C) at p. 4.

decision pursuant to California Government Code Section 11425.60(b), effective immediately."[11]

This petition seeks a determination, under California Government Code § 11340.5 and California Administrative Code title 1, § 260(a), that the Department may not "issue, utilize, enforce, or attempt to enforce" the *American Reliable* order or any other order purporting to confer precedential status on a "decision" reached by way of a settlement agreement, a "Special Notice of Defense," or any equivalent document or procedure.

4. LEGAL BASIS FOR CONCLUDING THAT THE CHALLENGED ORDER IS A REGULATION UNDER GOVERNMENT CODE § 11342.600 AND NOT WITHIN ANY EXPRESS APA EXEMPTION.

A. The *American Reliable* order is a "regulation" under Government Code § 11342.600, and therefore improper unless within some express APA exemption.

The California Administrative Procedure Act, CAL GOV'T CODE § 11400 *et seq*., defines "regulation" to mean "every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it . . . ." § 11342.600. "A regulation subject to the APA thus has two principal identifying characteristics. . . . **First**, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. . . . **Second**, the rule must 'implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure.' " *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996) (emphases added) (citations omitted) (court's brackets and ellipses omitted).

The *American Reliable* order is a "regulation" within the meaning of § 11342.600, as it purports to grant precedential status to a Decision and Order announcing a "standard of general application" that "implement[s], interpret[s], or mak[es] specific" the California Insurance Code provisions that define and distinguish between "insurance agents" and "insurance brokers." It likewise meets the definition of a regulation couched as an adjudicative decision, as it "contains a significant legal or policy determination of general application that is likely to recur." § 11425.60(b); *see also* § 11425.10(a)(7). The Insurance Commissioner adopted this general standard in the course of implementing and enforcing Insurance Code provisions administered by his agency—specifically, Insurance Code § 1861.01(c), which requires that property and casualty insurance rates be approved by the Department, and Insurance Code § 1861.05(a), which prohibits those rates from being unfairly discriminatory.[12]

But the impact of the new agent/broker definitions and tests goes far beyond §§ 1861.01(c) and 1861.05(a). The Insurance Commissioner's adoption of the new interpretive rules will have a broad impact on his implementation and enforcement of numerous Insurance Code provisions governing the conduct and licensing of insurance producers. Thus, the statutory interpretations set forth in the *American Reliable* Decision and Order are classic examples of "interpretative regulations" that—but for § 11425.60—would have to be issued through formal rulemaking under the APA. *See Tidewater,* 14 Cal. 4th at 574; *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 335 (2006).

B. The *American Reliable* order is not within any express APA exemption; more specifically, it cannot be designated as a "precedent decision" under § 11425.60.

No existing statute or duly adopted regulation contains the interpretive rules set forth in the *American Reliable* settlement documents. Those rules, in short, are new (insofar as they purport to bind future decisionmakers). Because the new rules constitute a "regulation" under § 11342.600, the Department bears the burden of demonstrating that they fall within the scope of some express APA exemption.

Recognizing this obligation, the Department has invoked the APA exemption for "precedent decisions" set forth in § 11425.60(b). That section provides that "[d]esignation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340)." The Department has not invoked any other APA exemption, nor has IBA West been able to identify any that might be applicable.[13]

[11] A copy of the June 30, 2006 Order Designating Decision as Precedential is attached as Exhibit D.

[12] Insurance Code §§ 1861.01(c) and 1861.05(a) do not purport to define or distinguish between an "insurance broker" and an "insurance agent" and are not the focus of the new agent/broker definitions and tests laid down in the *American Reliable* Decision and Order.

[13] The *American Reliable* order does not concern internal agency management (§ 11340.9(d)), is not a form (§ 11340.9(c)), is not an audit guideline (§ 11340.9(e)), is not a rate, price, or tariff (§ 11340.9(g)), and is not a legal ruling of tax counsel (§ 11340.9(b)). *See* Office of Administrative Law, "What Must Be Adopted Pursuant to the APA?" at pp. 5–6, *available at* http://www.oal.ca.gov/What%20Is%20A%20Regulation.pdf.

(Footnote 13 continued on next page)

This petition therefore poses the question:

Does § 11425.60 authorize the Department to grant precedential effect to *settlements* between itself and a regulated entity; or is the statute limited to decisions reached through a process of adversarial adjudication?

For reasons set forth below, we conclude that § 11425.60 does not authorize agencies to designate "precedential settlements." Indeed, American law has long rejected the very concept of a precedential settlement. Section 11425.60 thus applies only to *adjudicative* decisions—ones that emerge from an adversarial hearing in which the decision–maker is exposed to differing viewpoints about the facts and the applicable laws and then renders a decision based on his factual and legal findings. There is, accordingly, no APA exemption that prevents the *American Reliable* order from being treated as a "regulation" within the meaning of § 11342.600.

1. Even when it involves a true adjudication and not a mere settlement, agency adjudication is not the preferred method for making new administrative law in California.

Under California's APA, agencies make law in two principal ways: by regulation and by adjudication. As previously discussed, a regulation is intended to apply "generally, rather than in a specific case." *Tidewater Marine*, 14 Cal. 4th at 571 (citations omitted) (court's brackets and ellipses omitted). In contrast, adjudicative decisions are of "specific applicability because they are addressed to particular or named persons." LAW REVISION COMMENTS to § 11405.50.[14]

Regulation through formal rulemaking has long been the preferred method of agency lawmaking. "[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action . . . , any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." *Grier v. Kizer*, 219 Cal. App. 3d 422, 438 (1990), *disapproved on other grounds by Tidewater*, 14 Cal. 4th at 577. Indeed, even when recommending enactment of § 1142.5.60—the statute that exempts so–called "precedent decisions" from APA requirements—the Law Revision Commission cautioned that agencies are "encouraged to express precedent decisions in the form of regulations, to the extent practicable." LAW REVISION COMMISSION COMMENTS to § 11425.60 [hereinafter "LRC COMMENTS"].

Good reasons support this preference that agencies make new law through regulations instead of through case–by–case adjudications. Under the APA, regulations must be adopted through formal rulemaking procedures that further the values of transparency, due process, public participation, and informed decision–making. "One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation . . . as well as notice of the law's requirements so that they can conform their conduct accordingly . . . ." *Tidewater Marine*, 14 Cal. 4th at 568–69 (citations omitted). In enacting the APA, "[t]he Legislature wisely perceived that the party subject to

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Nor, under § 11340.9(f), is the order "[a] regulation that embodies the only legally tenable interpretation of" the statutes that define "insurance agent" and "insurance broker." The Department does not invoke the § 11340.9(f) exemption—nor could it. Indeed, IBA West believes that the rules that the *American Reliable* order designates as "precedential" are inconsistent with current law, unsupported by material fact, and bad public policy because they presuppose that, if a broker–agent engages in *any* activity that could be said to benefit an insurer, he must be characterized as that insurer's "agent" for all purposes.

The new interpretive rules rest on the fallacious assumption that brokers and agents are easily distinguished and should be regulated in materially different ways. The rules thus ignore the practical reality of the marketplace today, in which brokers and independent agents (and arguably even some captive agents) are, to a large degree, functionally indistinguishable—not only to consumers, but even within the industry itself. Brokers and agents cannot be characterized accurately as strictly one or the other based on the duties they undertake apart from policy placement. Rather, insurance producers typically assume duties on behalf of both the consumer and the insurer, prior to, during, and after the binding of coverage. Even if one focuses—as the Department does—solely on policy placement to determine "agent" or "broker" status, it is common in commercial and even personal lines for a producer to be a broker in the placement of one coverage, and an agent in the placement of another coverage, all in the same set of transactions for a given consumer.

This functional similarity has long been recognized not only by consumers, but also by the insurance industry itself, where the terms "broker" and "agent" and "producer" are widely used interchangeably, where brokers are commonly paid commissions (and sometimes even contingent commissions), where insurers give brokers binding authority (or something functionally analogous to it), where brokers are expected to "pre–underwrite," where agents charge fees (at least in cases in which they provide additional services), and where agents assume all manner of duties on behalf of consumers (such as shopping the marketplace and making coverage recommendations) prior to placement.

Finally, the lengthy list of factors set forth in the *American Reliable* Decision and Order—purporting to specify instances in which an insurance producer acts as an insurer's "agent"—is found nowhere in the California Insurance Code and constitutes a Departmental "wish list" of criteria that can be used to misclassify almost all brokers as "agents." If the Commissioner had sought to promulgate those criteria as regulations, the regulations probably would have been held illegal under the APA for want of authority, clarity, and consistency with other law.

[14] The Law Revision Commission Comments to an APA section may be found immediately after the text of that section in West's Annotated California Codes. The California Supreme Court "has recognized that Law Revision Commission comments are usually a reliable guide to legislative intent." *In re Bryce C.*, 12 Cal. 4th 226, 241 (1995).

regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny." *Id*. at 569.

Accordingly, the APA requires an agency acting in its rulemaking capacity to

- give the public notice of its proposed regulatory action,[15]
- issue a complete text of the proposed regulation with a statement of the reasons for it,[16]
- give interested parties an opportunity to comment on the proposed regulation,[17]
- respond in writing to public comments, [18] and
- forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law,[19] which reviews the regulation for consistency with the law, clarity, and necessity.[20]

Id.; Morning Star, 38 Cal. 4th at 333. APA amendments enacted in 2001 strengthened these notice–and–comment procedures by giving agencies discretion to deliver and receive information about proposed regulations by electronic mail or facsimile[21] and by requiring every agency that maintains a website to post specified information about proposed regulations.[22]

The APA also forbids the use of so–called "underground" regulations. Under § 11340.5, "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline . . . or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this Chapter." Nor may a "penalty" be based on any such rule unless the rule "has been adopted as a regulation . . . ." § 11425.50(e).[23]

Although formal rulemaking is the preferred method of agency lawmaking, courts recognize that "any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise . . . ." *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 202 (1947). *Chenery* is regarded as the leading decision on the legitimacy of agency lawmaking through adjudication. In that case, the U.S. Supreme Court explained:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. . . . [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case–by–case basis if the administrative process is to be effective. There is thus a very definite place for the case–by–case evolution of statutory standards.

Id. at 202–03.[24]

But the case–by–case, adjudicatory method of agency lawmaking poses special concerns. While "[t]he rulemaking process subjects agency discretion to rigorous statutory standards and permits wide public participation[,] . . . [t]he adjudicatory lawmaking process, on the other hand, lacks the explicit statutory safeguards inherent in rulemaking and operates largely undetected outside the administrative tribunal." Douglas Jacobs, *Illuminating a Bureaucratic Shadow World: Precedent Decisions Under California's Revised Administrative Procedure Act*, 21 J. NAT'L ASS'N OF ADMIN. L. JUDGES 247, 285–86 (2001) [hereinafter "*Precedent Decisions*"].[25] In an article written before § 11425.60 was enacted, two staff lawyers for California's Office of Administrative Law cautioned that it is "preferable to adopt formally a rule addressing a certain problem after full discussion in the rulemaking process with all segments of the affected public, than to crystallize the policy in a precedent opinion following a proceeding involving only one public party. In some ad-

[15] §§ 11346.4, 11346.5.
[16] § 11346.2(a), (b).
[17] § 11346.8.
[18] §§ 11346.8(a), 11346.9.
[19] § 11347.3(b).
[20] §§ 11349.1, 11349.3.
[21] § 11340.85(a), (b).
[22] § 11340.85(c); *see generally* Douglas Jacobs, *Illuminating a Bureaucratic Shadow World: Precedent Decisions Under California's Revised Administrative Procedure Act*, 21 J. NAT'L ASS'N OF ADMIN. L. JUDGES 247, 285 n. 184 (2001) [Exhibit E hereto].
[23] But "[a] penalty based on a precedent decision does not violate subdivision (e)." LAW REVISION COMMISSION COMMENTS to § 11425.50(e).
[24] None of these rationales for adjudicative agency lawmaking were present in the *American Reliable* case. Rather, as previously explained, the statutory interpretations set forth in the *American Reliable* Decision and Order are classic examples of "interpretative regulations" that—but for § 11425.60—would have to be issued through formal rulemaking under the APA.
[25] A copy of *Precedent Decisions* is attached as Exhibit E.

ministrative proceedings, the public party may even lack legal representation, raising concerns that both sides of the legal question at issue have not been fully briefed." Herbert F. Bolz & Michael McNamer, *Agency Rules and Rulemaking*, *in* 1 CALIFORNIA PUBLIC AGENCY PRACTICE § 20.06[4], at 20–23 to 20–24 (Gregory L. Ogden, ed., 1996).[26]

The leading administrative–law treatise puts the problem in starker terms, warning that "[a]n agency whose powers are not limited either by meaningful statutory standards or by [quasi–]legislative rules poses a serious potential threat to liberty and to democracy. In the absence of other limits on its power, such an agency can engage in patterns of adjudicatory decision–making that are based on corruption, personal favoritism or animosity, or political favoritism or animosity, with little risk of detection." 2 RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE §11.5, at 815 (2d ed. 2002).

In 1995, as part of a general overhaul of California's APA, the Legislature enacted a provision—Government Code § 11425.60—that both authorizes and restricts the practice of lawmaking by agency adjudication. Previously, it had remained unsettled in California whether doctrines formulated in agency adjudications could have precedential effect. While some decisions expressed approval of the principle announced in the *Chenery* decision (quoted above), others accepted the view expressed by this Office that the APA prohibited agencies from relying on previous adjudicative decisions as precedents, absent express statutory authority. *See* LRC COMMENTS (referencing 1993 OAL Det. No. 1). Many agency adjudicators concluded that they could not cite previous decisions as authoritative; but they nevertheless drew upon those decisions to lessen the burden of continually redetermining settled legal issues. *See Precedent Decisions* at 252–53.

The Legislature needed to find a way to balance the agencies' need for flexible, interstitial lawmaking against the public's need for transparency and accountability. The solution lay in "moving adjudicatory lawmaking out of the shadows . . . ." *Precedent Decisions* at 287. Section 11425.60 accomplished this objective by prohibiting agencies from relying on a "decision" as a precedent unless it is designated as a "precedent decision"[27] and is maintained in a publicly available index of such decisions.[28] A "decision" may be designated "precedential" only if it "contains a significant legal or policy determination of general application that is likely to recur."[29] Once designated precedential, the decision's legal holdings will bind the agency's ALJs, and the agency itself, in future cases. Designation also permits the agency's ALJs, and the agency itself, to cite and rely upon the decision without running afoul of the APA's prohibition against "underground regulations."[30] A precedent decision therefore "is an exception to the rulemaking requirements of the APA . . . ." *Rea v. Workers' Comp. Appeals Bd.*, 127 Cal. App. 4th 625, 645 (2005); *see also* § 11425.60(b) (designation of precedent decision is "not rulemaking") [31]

Even after being designated "precedential," however, an agency decision occupies the lowest rung in the hierarchy of laws that constrain agency discretion—below the agency's organizing statutes *and* its own regulations. As the Law Revision Commission put it: "An agency may not by precedent decision revise or amend an existing regulation or adopt a rule that has no adequate legislative basis." LRC COMMENTS. And even after the enactment of § 11425.60, formal rulemaking remains the preferred mode of agency lawmaking. As one commentator has observed: "The California Law Revision Commission comments regarding Section 11425.60 envisage administrative case–made laws generally as impermanent measures, to be displaced where possible by formally–adopted regulations. '[A]gencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable. . . .' The Commission comment reveals a legislative policy favoring the use of both adjudication and rulemaking as interrelated and complementary powers. Accordingly, the revised APA preserves agency discretion to choose the method of evolving policy, but evinces the clear intent to prohibit administrators from using adjudication

[26] Relevant excerpts from this article are attached as Exhibit F.
[27] § 11425.60(a).
[28] § 11425.60(c); LRC COMMENTS ("Section 11425.60 limits the authority of an agency to rely on previous decisions unless the decisions have been publicly announced as precedential.").
[29] § 11425.60(b); *see also* § 11425.10(a)(7).
[30] *See* § 11425.60(b).
[31] The statute which accomplishes all this, § 11425.60, states in full:

> (a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.
> (b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.
> (c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.
> (d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997.

to evade formal notice and comment rulemaking procedures." *Precedent Decisions* at 285.

2. Section 11425.60 does not authorize agencies to designate mere settlements as "precedential"— indeed, there is no such thing as a "precedential settlement."

We have shown that § 11425.60 recognizes, but constrains, an agency's ability to make new law through "precedent decisions," and that formal regulation remains the preferred method of agency lawmaking. In view of these constraints—and the serious policy concerns that engendered them—the key legal question posed here is this: Can an agency's *settlement* with a regulated entity ever be deemed an adjudicative "decision" that is capable of being designated precedential under § 11425.60?

The correct answer is "no." While California law has, with some reservations, authorized the use "precedent decisions," it has not taken—and cannot take—the further step of according precedential status to a mere settlement. At least four considerations compel this conclusion.

First, the statute's legislative history indicates that its drafters intended § 11425.60 to apply only to *actual adjudications*—not to mere settlements. Thus, the Law Revision Commission wrote that "[t]he first sentence of subdivision (b)[32] recognizes the need of agencies to be able to make law and policy *through adjudication* as well as through rulemaking." LRC COMMENTS (emphasis added). But a settlement is not an "adjudication." Indeed, Government Code § 11405.20 defines "adjudicative proceeding" as "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." But a mere settlement requires no evidentiary hearing, no determination of facts, and no decision based on a determination of facts.[33] Indeed, a settlement normally terminates the entire adjudicative process—often before it has begun, and sometimes even before an accusatory pleading is filed.

The Law Revision Commission also noted that § 11425.60(b) "codifies the practice of a number of agencies to designate important decisions as precedential." LRC COMMENTS. The Law Revision Commission cited the practices of the Fair Employment and Housing Commission and of the Unemployment Insurance Appeals Board. *Id.* But neither of those adjudicative bodies ever had purported to confer precedential status on a mere settlement.

Moreover, as discussed above, the Law Revision Commission expressed a strong preference for formal rulemaking over the use of precedent decisions. LRC COMMENTS. It would be implausible to maintain that the same drafters who urged agencies to use regulations whenever possible nevertheless wanted the Legislature to grant agencies a free hand to write virtually any rule into law merely by inserting it into a negotiated settlement with a private party.

Second, the Government Code section specifying the required contents of a written agency "decision" makes it clear that such decisions must set forth factual and legal *findings* that are based *exclusively* on *evidence* and matters officially noticed in the course of a *proceeding* in which a *record* is developed. Thus, § 11425.50(a) states that "[t]he decision shall be in writing and shall include a statement of the factual and legal basis for the decision." Section 11425.50(c) further provides that "[t]he statement of the factual basis for the decision shall be based *exclusively* on the *evidence of record* in the proceeding and on matters officially noticed *in the proceeding*. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating *evidence*."[34] In contrast, a *settlement* may occur in advance of any proceeding and without the development of any factual record. And even if a settlement occurs after some hearings have been held, the evidence developed at those hearings does not form the "basis" for any decision based on factual or legal "findings." Rather, as discussed at length below, *the parties' agreement* forms the basis of the "decision."

Third, a settlement or consent decree is *inherently incapable* of establishing new legal principles. This is demonstrated by the many cases denying precedential or preclusive effect to settlements and consent decrees. Those decisions emphasize that a settlement or consent decree is not an adjudication of facts or law, but merely a contract between the immediate parties to terminate litigation on negotiated terms. Typically, the negotiated terms reflect the parties' relative skill, wealth, degree of risk–aversion, and bargaining power. A settlement or consent decree thus establishes no "principle" to which *stare decisis* might attach.

Unlike true adjudications, mere settlements and consent decrees never have been entitled to precedential status. Rather, they are "regarded as a contract between

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[32] The sentence referred to above states that "[a]n agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur."

[33] A background study drafted by the architect of the 1995 APA revisions, and relied upon by the Law Revision Commission, recommended that "[a]ll agencies should be required to designate their *adjudicatory decisions* that contain new law or policy as precedential and maintain an index of such decision." MICHAEL ASIMOW, THE ADJUDICATION PROCESS 447, 455 (Oct. 1991) (emphasis added). *See* 25 CAL. L. REVISION COMM'N REPORTS 59–60 (1995) (acknowledging Professor Asimow's contributions and attaching this article) [Exhibit G hereto].

[34] Emphases added.

the parties" that "must be construed as any other contract." *Roden v. Bergen Brunswig Corp*., 107 Cal. App. 4th 620, 624 (2003). For example, in *Bruno v. Superior Court*, 127 Cal. App. 3d 120 (1981), the court noted that the details of a settlement that occurred in a well–known class–action case were "interesting" for purposes of the court's analysis, "[a]lthough of no precedential value." *Id*. at 127 n.1.

Similarly, in indemnity actions, California courts refuse to grant precedential status to a damage allocation contained in a prior settlement agreement between a tortfeasor and an indemnified victim, even when the settlement has been adjudged to be in "good faith" under Code of Civil Procedure §§ 877 and 877.6.[35] In part, this lack of precedential status reflects the fact that neither the settlement itself nor the good–faith hearing can provide a satisfactorily adversarial adjudication of whether the damage allocation is reasonable. Both the tortfeasor and his victim have incentives to heap blame on any nonsettling party who has indemnified the victim (*see Heppler v. J.M. Peters Co*., 73 Cal. App. 4th 1265, 1282–1284 (1999)); and the procedures used at good–faith hearings, which rely on affidavits, are abbreviated and not suited to the "precise or accurate determination of fact." *Gouvis Eng'g v. Super. Ct.*, 37 Cal. App. 4th 642, 650–51 (1995).[36] Thus, courts hold that a good–faith hearing cannot adjudicate the rights of a nonsettling indemnitor *even if* that indemnitor participated in the hearing. *Id*. at 650. Of course, the settlement at issue here is, if anything, even further removed from a true adjudication entitled to precedential status, as no court ever has vetted the *American Reliable* settlement to the slightest degree.

Federal cases concerning consent decrees are similarly instructive. Consent decrees are of interest because they are often the means by which agency enforcement actions are settled. A consent decree is more "judgment–like" than the settlement at issue here because courts must approve consent decrees, and usually must examine them for fairness before doing so. Yet, "[h]owever close [that] examination may be, the fact remains that it does not involve contest or decision on the merits. Any findings made as part of the approval process go to the reasonableness of the settlement, not the merits of the dispute. The judgment results not from adjudication but from a basically contractual agreement of the parties." 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4443, at 257 (2d ed. 2002) (footnote omitted) (emphasis added); *see also Ashley v. City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari).

Like other forms of settlement, a consent decree is *not* an adjudication of the parties' rights. Rather, it is "primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating." *Local Number 93, Int'l Ass'n of Firefighters, AFL–CIO v. City of Cleveland*, 478 U.S. 501, 528 (1986). "[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Id*. at 522. This essential truth has given rise to "a line of cases . . . [holding] that any command of a consent decree or order must be found 'within its four corners,' . . . and not by reference to any 'purposes' of the parties or of the underlying statutes." *United States v. ITT Continental Baking Co*., 420 U.S. 223, 233 (1975) (citation omitted).

Thus, in *United States v. Armour & Co*., 402 U.S. 673 (1971), the Supreme Court refused to give a consent decree an expansive reading that, according to the government, was dictated by the policies and purposes of the federal antitrust laws. The *Armour* court wrote:

> This argument would have great force if addressed to a court that had the responsibility for formulating original relief in this case, *after the factual and legal issues raised by the pleadings had been litigated*. It might be a persuasive argument for modifying the original decree, *after full litigation*, on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint. Here, however, where we deal with the construction of an existing consent decree, such an argument is out of place.
>
> *Id*. at 681 (emphases added).

The *Armour* court further explained why a consent decree must be construed according to its terms, rather

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[35] "An adjudication that a settlement was made in 'good faith' under Code of Civil Procedure sections 877 and 877.6 bars cross–complaints against . . . settling parties and provides an offset to nonsettling tortfeasors against their remaining liability. . . . Code of Civil Procedure section 877.6 allows a settling tortfeasor to insulate itself from contribution and equitable indemnity claims. . . . Thus, these statutes provide a 'defensive procedure by which a joint tortfeasor may extricate itself from a lawsuit and bar actions for equitable indemnity by the remaining joint tortfeasors . . . . The fundamental inquiry in a good faith hearing pursuant to Code of Civil Procedure sections 877 and 877.6 is whether the settling defendant is paying the plaintiff an amount that is so far below defendant's proportionate share of liability as to be completely 'out of the ball park.' " *Heppler v. J.M. Peters Co.*, 73 Cal. App. 4th 1265, 1283–1284 (1999) (emphasis and citations omitted).

[36] The *Gouvis* court also noted that "the burdens of proof in the hearings are different." *Gouvis*, 37 Cal. App. 4th at 650–51.

than according to the statutory purposes that originally motivated an enforcement action:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus *the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve*. . . . [Accordingly,] the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.
>
> *Id*. at 681–82 (emphasis added).

In the same vein, another court has observed that "the agreement of the parties is not equivalent to a judicial decision on the merits. It is not the result of a judicial determination after the annealment of the adversary process and a judge's reflection about the ultimate merits of conflicting claims. It does not determine right and wrong in the initial dispute. Forged by the parties as a compromise between their views, it embodies primarily the results of negotiation rather than adjudication." *U.S. v. City of Miami*, Fla. 664 F.2d 435, 440 (5th Cir. 1981) (Rubin, J., concurring in en banc per curiam opinion).

Because a consent decree is a contract, not an adjudication, it is "based upon a specific factual context, relates only to those parties [who signed it,] and does not purport to provide a basis for decision in any other proceeding." *United Van Lines, Inc. v. United States*, 545 F.2d 613, 618 n.4 (8th Cir. 1976) (citation omitted). "The way in which a consent judgment or consent decree resolves, between the parties, a dispute over a legal issue is not a ruling *on the merits* of the legal issue that either (1) becomes precedent applicable to any other proceedings under the law of *stare decisis* or (2) applies to others under the law of claim preclusion or issue preclusion." *Langton v. Hogan*, 71 F.3d 930, 935 (1st Cir. 1995) (emphases added); *see also Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 17 (1st Cir. 2004).

By the same token, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. . . . And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Firefighters*, 478 U.S. at 529. Moreover, there is "a well–settled line of authority" from the U.S. Supreme Court that "a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975); *see also Martin v. Wilks*, 490 U.S. 755, 768 (1989).

Fourth and finally, because settlements and consent decrees result from bare–knuckled negotiations and not from any principled adjudication of the merits of a case, an agency's reliance on "precedential settlements" provides no assurance to the public that the agency's lawmaking is adequately informed, fair, or constrained by law. Indeed, a "precedential settlement" lacks even those relatively modest indicia of rationality and due process that characterize a true agency adjudication.

While adjudications "lack[ ] the strict formative standards that govern rulemaking," *Precedent Decisions* at 287, they at least involve a hearing, open to the public, at which the parties have an opportunity to present and rebut evidence before a neutral decision–maker.[37] Moreover, a true adjudication is at least theoretically capable of supplying the decision–maker with "adequate tools for well–informed policymaking"—including exposure to the views of affected nonparties. *Id.* Nonparties whose rights may be "substantially affected by the proceeding" may seek leave to intervene under § 11440.5; and they also can have an impact on an ongoing adjudication, without assuming the substantial costs of becoming parties, by taking advantage of agency regulations that permit the "filing of amicus briefs, testifying as a witness, or contributing to the fees of a party." LAW REVISION COMMISSION COMMENTS to § 11440.50. Thus, an agency adversarial proceeding can bring an abundance of evidence, argument, and expertise to bear on a problem, helping the decision–maker reach a result that is sound from the standpoints of both law and public policy. As one commentator has explained:

> The adversarial hearing process contemplated by the APA facilitates a comprehensive hearing record, which the agency has significant powers to enhance. The APA permits employees or representatives of the litigant agency to assist the presiding officer in evaluating the evidence and to give advice to the presiding officer concerning settlement proposals. Except in prosecutorial cases, the APA permits agency employees or representatives to advise the presiding officer on technical issues in the proceeding, providing that the content of the advice is disclosed on the record

[37] *See* § 11425.10 (setting forth minimum due–process requirements for agency adjudications).

> and the parties are given an opportunity to address it. The APA authorizes the decisionmaker to take official notice of any generally accepted technical or scientific matter within the agency's special field and of any other fact subject to judicial notice by the courts. The Act empowers presiding officers to use their experience, technical competence, and specialized knowledge in evaluating the evidence. It permits persons whose interests will be substantially affected by the adjudication to intervene as parties and the agency may invite amicus curiae briefs to elicit the views of interested nonparties.
>
> *Precedent Decisions* at 286–87 (footnotes omitted).

Of the various assurances and protections listed above, only one—staff input on settlement proposals—could have any relevance to a settlement. Most troublingly, a settlement seldom offers nonparties any opportunities to make their voices heard. Thus, the process leading to an agency settlement offers few procedural assurances of an informed and principled outcome.[38]

Furthermore, "precedential settlements" are particularly prone to agency abuse. Settlement negotiations between a regulator and a licensed entity are often characterized by a gross disparity of power, with the licensed entity acutely aware that the agency can revoke its license and put it out of business or take other harmful actions. This power imbalance is especially likely in a case involving a small licensed entity like an independent insurance brokerage or agency.

But it is this very imbalance of power that could make "precedential settlements" the lawmaking method of choice for any agency considering a controversial action. Consider the situation in which an agency wishes to promulgate a rule that it deems likely to arouse an unusual amount of opposition from the public or from affected industries. Perhaps the contemplated rule pushes (or punctures) the envelope of the agency's statutory powers. If that agency were allowed to designate "precedential settlements," it could single out a particularly weak or vulnerable regulated entity in an enforcement action and then use its settlement with that entity as the vehicle for announcing the controversial rule. Thus, permitting agencies to designate "precedential settlements" would dramatically expand agency power in precisely those situations where administrative action warrants the closest scrutiny.

Finally, any "precedent" that emerges from a mere settlement will lack legitimacy because the regulated entity has little or no reason to care about or vigorously dispute the content of the legal doctrines that the agency wants to insert into the settlement documents. In a true adjudication, the regulated entity retains a vital interest in the content and development of the applicable legal doctrines, because those doctrines will determine who wins the case and what fines and penalties, if any, the regulated entity will incur. But a settlement severs the connection between the law and the outcome, depriving the regulated entity of its most important reason to care about the legal doctrines announced in the case.

Without any adversarial counterweight to hold it in check, the agency effectively "legislates" in a vacuum, potentially succumbing to whim, caprice, or its own ignorance of the "facts on the ground." To use an analogy: Because a settlement sunders the connection between a new legal doctrine and the result in the immediate case, purporting to announce a new legal rule in settlement documents resembles a "purely prospective" judicial decision—one in which a court announces a change in the law but declines to apply the new doctrine to the parties before it. But pure prospectivity is disfavored, as it "tends to relax the force of precedent, by minimizing the costs of overruling, and thereby allows the courts to act with a freedom comparable to that of legislatures." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536–37 (1991). The same could be said of "precedential settlements": because neither party incurs the cost of the new doctrine, neither party has much incentive to get it right; and the agency is given too free a hand to make ill–considered changes in the law.

In sum: the Department needs to explain how it could possibly be proper to grant "precedential" status to a "decision" that

- fails to reflect any considered judgment on the merits by a neutral decision–maker,
- results from inherently unequal negotiations between a licensed or regulated entity and a regulator that could put that entity out of business, and
- has never undergone any of the "reality testing" that typically occurs in an adversarial adjudicative setting.

3. Contrary arguments based on the statutory definition of "decision" must fail.

The Department may try to evade the troubling policy implications of its new administrative practice by offering up a textual argument based on the statutory definition of a "decision." But it needn't bother going down that road, because the argument cannot succeed.

[38] For similar reasons, it is well established that "[a]n administrative decision is not res judicata when the agency is not acting in a quasi–judicial capacity and the decision is not the result of an adjudicatory proceeding." 7 B.E. WITKIN, CALIFORNIA PROCEDURE: JUDGMENT § 303, at 852 (1997) (citing *Penn–Co v. Bd. of Supervisors*, 158 Cal. App. 3d 1072, 1077, 1080 (1984)); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. e (no issue preclusion if issue not "actually litigated" in prior proceeding).

The anticipated argument might go something like this: The APA defines "decision" as "an *agency action* of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." § 11405.50(a) (emphasis added).[39] The Department may argue that a settlement is an "agency action" that determines the rights of the settling parties and is therefore a "decision" under this definition. The Department also may try to garner additional support from § 11415.60(a) (entitled "Decision by settlement"), the first sentence of which states that "[a]n agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding." Thus, the Department may argue that the term "decision," as used in § 11425.60, encompasses a "decision by settlement" and that settlements therefore may be designated as precedential.

Aside from the fact that "agency action" is an oddly unilateral way of describing a negotiated result, this argument will fail for at least four reasons.

First, the Law Revision Comments to § 11405.50—the section defining "decision"—explain that "[t]he definition of 'decision' makes clear that it includes only *legal determinations made by an agency* that are of specific applicability because they are addressed to particular or named persons." Emphasis added. As discussed at length above, a settlement or consent decree embodies no "legal determinations," whether "made by an agency" or by anyone else. Indeed, a settlement embodies no adjudication of anyone's rights or obligations. Rather, it embodies the parties' *agreement*, which does not turn on any legal determination, but rather, on the parties' relative skill and bargaining power in achieving their conflicting goals through negotiation. *See Armour*, 402 U.S. at 681.[40]

Second, as previously discussed, the Government Code section specifying the required contents of a written agency "decision" makes it clear that such decisions must be premised upon findings of fact and law, and that the factual findings must be based exclusively on an evidentiary record developed at a hearing. *See* § 11425.50(b)–(c). Of course, it is no answer to say that a settlement document may be larded with administrative "findings" even if no hearing was held nor any evidence received. Under the administrative–mandamus statute, "[a]buse of discretion is established if . . . the order or decision is not supported by findings, or *the findings are not supported by the evidence*." CAL. CODE CIV. PROC. § 1094.5(h) (emphasis added). Thus, "findings" based on the mere acquiescence of a regulated party are not, in any true sense, "findings" capable of supporting a written decision within the meaning of the APA.

Third, the APA section authorizing "[d]ecision by settlement" (§ 11415.60(a)) *is not definitional*. Three reasons compel this conclusion.

[1] On its face, § 11415.60(a) does not define any statutory term, much less any term used in the APA section authorizing the designation of precedent decisions (§ 11425.60). Rather, the section authorizing "[d]ecision by settlement" merely authorizes agencies to settle their cases, and to do so on any terms that the parties find appropriate. It also extends the settlement privilege of Evidence Code § 1152 to agency settlement negotiations. Thus, its overall purpose appears to be to authorize and encourage settlements and to provide guidelines for agencies that wish to settle cases.

[2] The APA section that actually *does* define the term "decision"—§ 11405.50—does *not* state (as it might have) that "a 'decision' includes a 'decision by settlement' as defined in Section 11415.60(a) of this Chapter."

[3] The APA section authorizing the designation of "precedent decisions"—11425.60—*does not* use the term "decision by settlement" anywhere; nor does it make any reference to the section discussing that topic (§ 11415.60(a)). If the drafters had intended to link these two sections in any way, they could have followed their usual practice of doing so through explicit cross–references, either in the statutory text or in the accompanying Law Revision Comments. *See, e.g.*, § 11425.60(b) (expressly referencing § 11340); LRC COMMENTS (expressly referencing §§ 11340.5, 12935(h) and 19582.5 and UNEMP. INS. CODE § 409).

Fourth, even if there were some merit to an argument based entirely on the statutory definition of "decision," that argument fails to grapple with the undesirable policy implications of "precedential settlements." We have catalogued those implications at length and need not do so again, except to say that any argument for "precedential settlements" must be rejected unless it adequately addresses the many public–policy objections raised here.

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[39] The same statute states that "[n]othing in this section limits . . . [t]he precedential effect of a decision under Section 11425.60." § 11405.50(b)(1).

[40] The Comments go on to state that "[m]ore than one identified person may be *the subject of* a decision." Emphasis added. Substituting "settlement" for "decision"—as the Department contends is proper—would result in linguistic awkwardness. It would be highly unnatural for legal drafters to refer to a "*party to*" a settlement as being "*the subject of*" that settlement. Normally, one would expect a person who is "the subject of" a settlement to be some nonparty *affected by* the settlement—*e.g.*, a child affected by a child–custody settlement. But this awkwardness is entirely avoided if one confines "decisions" to "legal determinations made by an agency" in an adjudicative capacity.

5. REASONS WHY THIS PETITION RAISES AN ISSUE OF CONSIDERABLE PUBLIC IMPORTANCE REQUIRING PROMPT RESOLUTION.

In this case, the legal and public–policy rationales for disapproving the concept of "precedential settlements" are inextricably intertwined. IBA West therefore refers the reader back to item (4), above, where arguments of both types are presented together. We add only that the issues raised here go far beyond the lawmaking activities of the California Department of Insurance. If this Office does not take decisive action, "precedential settlements" could become a dominant mode of agency lawmaking throughout California government, effectively gutting the APA's protections against unchecked or arbitrary administrative power. Accordingly, IBA West believes that it is of central importance to OAL's mission that it render an authoritative ruling disapproving "precedential settlements" now.

6. CERTIFICATIONS:

I certify that I have submitted a copy of this petition and all attachments to:

Darrel Woo, Custodian of Records
California Department of Insurance
Sacramento Legal Department
300 Capitol Mall, 17th Floor
Sacramento, CA 95814
Telephone: (916) 492–3556
Facsimile: (916) 324–1883

I certify that all of the above information is true and correct to the best of my knowledge.

/s/
STEVEN A. HIRSCH September 26, 2006

SUMMARY OF REGULATORY ACTIONS

REGULATIONS FILED WITH SECRETARY OF STATE

This Summary of Regulatory Actions lists regulations filed with the Secretary of State on the dates indicated. Copies of the regulations may be obtained by contacting the agency or from the Secretary of State, Archives, 1020 O Street, Sacramento, CA, 95814, (916) 653–7715. Please have the agency name and the date filed (see below) when making a request.

BOARD OF EDUCATION
Standardized Testing and Reporting (STAR)

This rulemaking amends several sections of Title 5, Articles 1 and 2 by adding tests to the STAR program, as well as incorporating the regulations for the Designated Primary Language Test ("DPLT"), currently found in Article 3, into Articles 1 and 2. The amendments initially proposed shortening the testing window for STAR tests from 21 "instructional" days to 11 "instructional" days and moving the testing window from after the completion of 85% of the school year to completion of 90% of the school year. However, multiple comments objecting to the changes in the testing window and timeframe resulted in the SBE retaining the current timeframe.

Title 5
California Code of Regulations
AMEND: 850, 851, 852, 853, 854, 855, 857, 858, 859, 861, 862, 863, 864, 864.5, 865, 866, 867, 866, 870 REPEAL: 850.5, 880, 881, 882, 883, 884, 886, 887, 888, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 901
Filed 11/08/06
Effective 12/08/06
Agency Contact: Linda A. Cabatic

BOARD OF OCCUPATIONAL THERAPY
Fees

This rulemaking reduces the fees charged to occupational therapy assistants for licensure and renewal and changes the renewal period from an annual, to a biannual renewal period. When the Board was established, the renewal fees were set at the maximum amount of $150 to create a fiscally sound fund condition in an amount necessary to support its regulatory activities. The fund condition now supports a reduction in fees. The regulation reduces renewal fees to $150 biannually (reduction of one half) and delinquent fees to one half the renewal fee. It also reduces the fee for a limited permit from $100 to $75, among other things.

Title 16
California Code of Regulations
AMEND: 4130
Filed 11/08/06
Effective 11/08/06
Agency Contact: April Freeman (916) 322–3278

DEPARTMENT OF FOOD AND AGRICULTURE
Oriental Fruit Fly Eradication Area

This emergency regulatory action adds the county of Riverside to the list of counties already proclaimed to be eradication areas with respect to the Oriental fruit fly, "Bactrocera dorsalis."

Title 3
California Code of Regulations
AMEND: 3591.2(a)
Filed 11/08/06
Effective 11/08/06
Agency Contact: Stephen Brown (916) 654–1017

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
Permit Exemption

This amendment to 25 CCR, section 16 clarifies that it is not necessary to obtain a construction permit if the work is exempt under the California Building Standards Code or other rules and regulations.

Title 25
California Code of Regulations
AMEND: 16
Filed 11/08/06
Effective 12/08/06
Agency Contact: Doug Hensel (916) 445–9471

DEPARTMENT OF INDUSTRIAL RELATIONS
Conflict of Interest Code Amendments

This is a Conflict of Interest Code amendment that has been approved by the Fair Political Practices Commission and is submitted to OAL for filing with the Secretary of State and printing in the California Code of Regulations only.

Title 8
California Code of Regulations
AMEND: 17000 Appendix
Filed 11/08/06
Effective 12/08/06
Agency Contact: John Cumming (415) 703–4265

DEPARTMENT OF INSURANCE
Modified Guaranteed Annuity

This regulatory action revises existing regulations governing modified guaranteed annuities primarily to conform to recent changes made to the National Association of Insurance Commissioners Modified Guaranteed Annuity Model Regulation #255 and also to conform to section 10506.3 of the Insurance Code.

Title 10
California Code of Regulations
AMEND: 2534.27, 2534.28
Filed 11/09/06
Effective 11/09/06
Agency Contact: Nancy Hom (415) 538–4144

CCR CHANGES FILED WITH THE SECRETARY OF STATE WITHIN JUNE 07, 2006 TO NOVEMBER 08, 2006

All regulatory actions filed by OAL during this period are listed below by California Code of Regulations titles, then by date filed with the Secretary of State, with the Manual of Policies and Procedures changes adopted by the Department of Social Services listed last. For further information on a particular file, contact the person listed in the Summary of Regulatory Actions section of the Notice Register published on the first Friday more than nine days after the date filed.

Title 2

11/06/06	AMEND: 18216, 18421.1
11/03/06	AMEND: 1859.73.2
10/31/06	AMEND: 559.500, 559.501, 559.503, 559.504, 559.505, 559.507, 559.508, 559.509, 559.510, 559.511, 559.512, 559.513, 559.515, 559.516, 559.517
10/12/06	AMEND: 714
09/27/06	AMEND: 18754
09/07/06	AMEND: 21904, 21905
09/05/06	AMEND: 1859.2, 1859.76, 1859.83, 1859.163.1
08/23/06	AMEND: 1181.4
08/21/06	AMEND: 1859.2, 1859.70.1, 1859.71.3, 1859.78.5
08/15/06	ADOPT: 20108, 20108.1, 20108.12, 20108.15, 20108.18, 20108.20, 20108.25, 20108.30, 20108.35, 20108.36, 20108.37, 20108.38, 20108.40, 20108.45, 20108.50, 20108.51, 20108.55, 20108.60, 20108.65, 20108.70, 20108.75, 20108.80
08/11/06	AMEND: 1859.2, 1859.40, 1859.51, 1859.70, 1859.93.1, 1859.95, 1859.147, 1859.202, 1866
07/24/06	AMEND: 18944
07/06/06	AMEND: 575.1, 575.2
06/20/06	AMEND: 18537
06/08/06	AMEND: 18526

Title 3

11/08/06	AMEND: 3591.2(a)
10/27/06	ADOPT: 765 AMEND: 760.4, Article 3.5
10/19/06	AMEND: 3591.6(a)
10/12/06	AMEND: 3433(b)
10/12/06	AMEND: 3433(b)
10/12/06	ADOPT: 3424
10/06/06	AMEND: 3700(c)
10/06/06	AMEND: 3591.13(a)

10/05/06 AMEND: 3433(b)
10/05/06 AMEND: 3589
10/02/06 AMEND: 3591.6(a)
09/19/06 AMEND: 3433(b)
09/12/06 AMEND: 3591.12(a)
09/12/06 AMEND: 3406(b)
09/08/06 AMEND: 3423(b)
09/07/06 AMEND: 3433(b)
09/05/06 AMEND: 3406(b)
08/29/06 AMEND: 3433(b)
08/24/06 AMEND: 3433(b)
08/23/06 AMEND: 3591.12(a)
08/17/06 AMEND: 3591.19(a)
08/16/06 AMEND: 3433(b)
08/15/06 AMEND: 3700(c)
08/15/06 AMEND: 3700(c)
08/10/06 AMEND: 3591.6(a)
08/01/06 AMEND: 3424(b)
08/01/06 AMEND: 3591.6(a)
07/28/06 AMEND: 3591.2(a)
07/26/06 AMEND: 3700(c)
07/21/06 REPEAL: 1366
07/19/06 ADOPT: 6310 AMEND: 6170
07/18/06 ADOPT: 6960 AMEND: 6000
07/17/06 AMEND: 3591.6(a)
07/05/06 AMEND: 3591.6
07/03/06 AMEND: 3589(a)
06/28/06 AMEND: 3433(b)
06/12/06 AMEND: 3433(b)

Title 4

11/03/06 AMEND: 10152, 10153, 10155, 10159, 10160, 10161, 10162
10/24/06 AMEND: 1486
10/16/06 AMEND: 1733
09/26/06 AMEND: 1976.8
07/19/06 AMEND: 12358, 12359
07/17/06 AMEND: 2240(e)
06/20/06 AMEND: 1472

Title 5

11/08/06 AMEND: 850, 851, 852, 853, 854, 855, 857, 858, 859, 861, 862, 863, 864, 864.5, 865, 866, 867, 866, 870 REPEAL: 850.5, 880, 881, 882, 883, 884, 886, 887, 888, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 901
10/26/06 AMEND: 30023(c)
10/23/06 ADOPT: 11991, 11991.1, 11991.2
10/16/06 ADOPT: 11987, 11987.1, 11987.2, 11987.3, 11987.4, 11987.5, 11987.6, 11987.7
09/29/06 ADOPT: 19833.5, 19833.6 AMEND: 19815, 19816, 19816.1, 19819, 19824, 19828.1, 19831
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