

OFFICE OF ADMINISTRATIVE LAW

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Director

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

Overview

With few exceptions, state agencies are required to adopt regulations to enforce or implement the laws which they administer. These regulations must be adopted through procedures established by the [Administrative Procedure Act \(APA\)](#), which begins at section 11340 of the California Government Code. On occasion, an agency may attempt to enforce a rule that it is required to adopt formally pursuant to the APA, but which it did not adopt formally. Such a rule is called an “underground regulation”. [Section 11340.5](#) of the Government Code makes it illegal for a state agency to use an underground regulation.

If you feel that a state agency is enforcing an underground regulation, you may submit a petition to the Office of Administrative Law (OAL) asking us to determine whether or not the agency is complying with [section 11340.5](#).

Once OAL receives your petition, we will evaluate it and contact the agency involved. We may contact you for additional information, if necessary. If OAL accepts your petition, we will issue our written opinion as to whether the rule is or is not an underground regulation. We may also try to resolve the matter without issuing a formal opinion, perhaps by obtaining the agency’s agreement to change its practices or to adopt the disputed rule through formal rulemaking.

OAL may also decide not to accept your petition. If so, this has no legal significance. A decision not to accept a petition does not imply that the petition lacks merit. It may mean nothing more than that OAL does not have adequate staff to respond to the petition within the time limits set by our regulations.

Petition Content Requirements

In order to maximize our ability to evaluate petitions, we require each petition to contain a significant amount of specific information. There are no precise form requirements for providing this information, but you should try to be as clear and easily understandable as possible.

Briefly, OAL [regulations](#) require that your petition contain:

- (1) Your name and contact information.
- (2) The name of the agency that has allegedly enforced the underground regulation.

- (3) A complete description of the particular underground regulation and a written copy of the purported underground regulation.
- (4) A description of the actions of the agency showing that it has employed the underground regulation.
- (5) The legal basis for concluding that the rule is a regulation as defined in [Section 11342.600](#) of the Government Code and that no express statutory exemption to the requirements of the APA is applicable.
- (6) Information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.
- (7) Your certification that you have submitted a copy of the petition and all attachments to the agency, including the name, address, and telephone number of the person to whom the copy was submitted.

Items 1, 2, 3 and 7 are procedural elements of the process. They tell us the basic components of your petition and show that you have provided a copy to the agency. They also tell us who we need to contact at the agency when we consider whether or not to accept the petition.

Item #4 provides an essential factual element of the petition. In order for an agency to violate [section 11340.5](#), it must “issue, utilize, enforce, or attempt to enforce” the underground regulation. In item #4, you should provide facts demonstrating that the agency has, in fact, done this.

For Item #5 you should provide a basic legal argument. This does not need to be exhaustive. A complete legal analysis is OAL’s job, not yours, but the better you can make the case that the agency’s enactment meets the legal definition of underground regulation, the stronger your petition will be.

In Item #5 you should, to the degree that you can, demonstrate that the agency’s enactment is legally a [regulation](#) and that it is not subject to an exemption from the APA rulemaking requirements. A key element of this is showing that it is a “rule of general application”. An agency action in a single case, even if the action is illegal, does not mean that the action is an underground regulation. Agencies routinely make case-by-case applications of the laws they administer, but only if this situation results in a rule of general application could the agency be using an underground regulation.

Item #6 requires petitioners to make the best possible public policy argument in favor of OAL accepting the petition. The importance of different issues may be based upon very different factors. One petition may, for example, deal with a rule affecting a large number of people, another may deal with something imposing a significant cost to the economy, and a third may allege a serious abuse of an agency’s authority. Requirement #6 is intentionally written to allow many different types of cases to be made in petitions. Use your best judgment on how to make the strongest case you can on this point.

We have prepared an [optional form](#) for you to use when preparing and submitting a petition.

OAL Acceptance or Rejection of a Petition

OAL will review each complete petition that we receive. We will contact the agency involved and seek their response. After this initial review, we will decide whether or not to accept the petition and issue an opinion. After OAL receives your petition, we have 60 days in which to decide whether to accept it or decline it. If we decline it, we will notify you by mail. A decision not to accept a petition has no legal significance and does not reflect, in any way, upon the validity of your claim. We may, for example, decline a petition simply because we do not have enough staff to handle it.

The standards the OAL will use in deciding whether to accept or reject a petition are defined by regulation. OAL will consider, at a minimum, the following factors:

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

What Happens If We Accept Your Petition

If we accept your petition we will notify you and the petition or a summary of the petition will be published in the [California Regulatory Notice Register](#) (CRNR). The state agency that is the subject of your petition has 45 days from the date of publication to provide a formal response, if it chooses to do so. You will have 15 days to file a rebuttal to the agency's response if you want to. Members of the public also may submit comments to OAL on the issue.

OAL will review and consider the material submitted with your petition, along with information provided by the agency and the public or other information discovered during our review of the issue. Our decision will be made within 120 days after publication of the petition in the CRNR. We will send a copy of our decision to you and the state agency and we will publish it in the CRNR.

Factors to Consider When Submitting a Petition

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

- (1) OAL has no power to order an agency to change its practices. An OAL determination is nothing more than our legal judgment regarding whether or not an agency is employing an underground regulation. We have no authority under the law to do anything more than express this opinion. We cannot force an agency to stop

enforcing a rule. Only a court can do that. An OAL determination may be persuasive, but it is not directly enforceable.

(2) OAL does not accept all petitions. We do not even accept all petitions that present clear underground regulations. We will be more likely to accept petitions that present an issue of considerable public importance and which must be resolved promptly. Even though a particular rule may be of grave importance for you, it might not be a statewide issue of public importance requiring immediate resolution.

However, our acceptance even of petitions that present an issue of statewide public importance is limited by the workload of OAL. We are committed to providing timely, well-reasoned decisions as required by our regulations. It may be that we must reject some petitions for no reason other than to ensure that already pending petitions are properly considered. If we do not have adequate staff to respond to your petition within the required time frame, we will not accept it.

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

(4) California law contains some specific exemptions to the general requirement that rules must be adopted as regulations. It is possible for an agency to be acting entirely legally even though it employs a rule that is a regulation and has not been adopted pursuant to APA rulemaking. If the rule is exempt from the APA, it cannot be an underground regulation. You should raise the issue with the state agency enforcing the rule and ask it to specify if an exemption applies. It would be a waste of your efforts and resources to prepare a petition for OAL review only to learn from OAL that the regulation is exempt from APA requirements.

(5) A decision by OAL is not required before you may challenge the rule in court. Whether or not you seek an opinion from OAL is entirely optional. In some situations you cannot go to court until you demonstrate “exhaustion of administrative remedies” — a legal term meaning you have tried all administrative ways to resolve the issue. An OAL opinion on an alleged underground regulation is not one of those situations. If you choose to you may ignore OAL and go directly to court. If you think that litigation is inevitable, the time and expense associated with filing a petition with OAL may not be useful.

(6) In certain circumstances, the [APA](#) prohibits courts from considering OAL determinations on underground regulations. If you are submitting a petition primarily to influence ongoing litigation, you could be wasting your time. If you know of ongoing litigation over the subject of your petition, it would probably be to your advantage to include that information in the petition. This is true even if you are not a party to the litigation. OAL will contact the agency involved in your petition. If the agency tells us

that the issue of the petition is being litigated and that the petitioner knows this, it could make the petition appear to be directed primarily at obtaining a litigation advantage, thus undercutting the argument that “the petition raises an issue of considerable public importance requiring prompt resolution”.

Delivering Your Petition

OAL will accept petitions and accompanying documentation in hard copy delivered either through the mail, or hand delivered in person or by a commercial delivery service (FedEx, UPS, etc), or by e-mail or fax.

Deliver your petition to:

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

E-mail: staff@oal.ca.gov

Fax: 916-323-6826

Additional Information

You may obtain additional information, including a copy of the optional petition submission form, from the OAL web site at www.oal.ca.gov.

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