

# ANALYSIS OF AMENDED BILL

Author: Horton Analyst: Darrine Distefano Bill Number: AB 1302  
 Related Bills: See Legislative History Telephone: 845-4142 Amended Date: February 15, 2006  
 Attorney: Patrick Kusiak Sponsor: \_\_\_\_\_

<b>SUBJECT:</b>	State Agency Regulations/Emergency Regulations
-----------------	--

### SUMMARY

This bill would establish new procedures for state agencies regarding the adoption of “emergency regulations.”

### SUMMARY OF AMENDMENTS

The February 15, 2006, amendments replace the previous bill language and would:

- Further define “emergency” for purposes of adopting an emergency regulation.
- Establish a new pre-adoption process for the adopting agency to notify the public of the proposed emergency regulation.
- Establish a process for the Office of Administrative Law (OAL) to implement these new provisions.

### PURPOSE OF THE BILL

According to the author’s office, the purpose of this bill is to provide clarification on the appropriate use of emergency regulations.

### EFFECTIVE/OPERATIVE DATE

This bill would be effective and operative on January 1, 2007.

### POSITION

Pending.

### ANALYSIS

#### STATE LAW

Current state law requires every department, division, office, officer, bureau, board, or commission in the executive branch of California state government to follow the rulemaking procedures in the Administrative Procedures Act (APA) and in the OAL regulations, unless expressly exempted by

Board Position: <input type="checkbox"/> S <input type="checkbox"/> NA <input type="checkbox"/> NP <input type="checkbox"/> SA <input type="checkbox"/> O <input type="checkbox"/> NAR <input type="checkbox"/> N <input type="checkbox"/> OUA <input checked="" type="checkbox"/> PENDING	Department Director                    Date S. Stanislaus                    5/1/06
---	--

statute from some or all of these requirements. The APA<sup>1</sup> sets forth procedures state agencies must follow when adopting, amending, or repealing regulations. Among other requirements, it requires state agencies to give public notice, receive and consider public comments, submit regulations and rulemaking files to OAL for review to ensure compliance with the requirements of the APA, and have the regulations published in the California Code of Regulations. APA requirements are designed to provide the public with a meaningful opportunity to participate in the adoption of regulations by state agencies and to ensure the creation of an adequate record for the public, OAL, and judicial review.

Compliance with the rulemaking requirements of the APA is mandatory. All regulations are subject to the APA unless expressly exempted by statute. "Regulation" is defined in the Government Code as every rule, regulation, order, or standard of general application, or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Emergency regulations can be adopted, amended, or repealed if it is necessary for the immediate preservation of the public peace, health and safety, or general welfare. Any finding of an emergency must include a written statement of specified information and a description of facts showing the need for immediate action. The statement and regulation are to be filed immediately with OAL. Emergency regulations are effective upon filing and remain in effect for 120 days.

The APA specifically prohibits any state agency from making any use of a state agency rule that is a "regulation" that should have, but has not been adopted pursuant to the APA, unless expressly exempted by statute.

Generally, if a policy or procedure issued by a state agency does not fall within an express statutory exemption, then it is subject to the rulemaking requirements of the APA. The following are some of the express exemptions under the APA:

- A regulation that relates only to the internal management of the state agency, that is, it:
  - directly affects only the employees of the issuing agency, and
  - does not address a matter of serious consequence involving an important public interest.
- A form prescribed by a state agency or any instructions relating to the use of the form, assuming the form's contents consist only of existing, specific legal requirements.
- Guidelines or criteria used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial arrangement, or defending, prosecuting, or settling a case, if disclosure of the criteria or guidelines would:
  - enable a law violator to avoid detection,
  - facilitate disregard of requirements imposed by law, and
  - give clearly improper advantage to a person who is in an adverse position to the state.
- A regulation that embodies the only legally tenable interpretation of a provision of law.
- A regulation that establishes or fixes rates, prices, or tariffs.

---

<sup>1</sup> Government Code Section 11340, et seq.

- A “legal ruling of counsel” issued by the Franchise Tax Board (FTB) or State Board of Equalization.
- A quasi-judicial decision by a state agency that is designated pursuant to the applicable section of the Government Code as a precedent decision.

FTB issues rulings, under the APA exception for reliance upon the “legal rulings of counsel,” that contain legal interpretations of the franchise and income tax statutes administered by FTB. FTB develops forms, related instructions, and other publications to facilitate and assist taxpayers in complying with tax laws. FTB also develops internal procedure manuals, which fall under the APA exception, to set guidelines and standards for employees in carrying out FTB’s administrative duties, such as the audit function, collections, return receiving and processing, data storage, personnel administration, taxpayer communications, and other day-to-day operations.

### THIS BILL

Under the Government Code, this bill would add a provision that defines “emergency regulation” to mean an unforeseen situation that calls for immediate action to avoid serious harm evidenced by a threat to the public peace, health, safety, or general welfare. “Emergency” does not mean expediency, convenience, best interest, or general public need and cannot be based on speculation.

This bill would require the adopting agency to mail a notice of the proposed action to every person who has filed a request for notice of regulatory action at least five days before submitting the emergency regulation to OAL.

This bill requires this notice to describe the following:

- The proposed regulatory action.
- The specific regulatory language proposed to be adopted.
- The factual and evidentiary basis for the emergency and the need for immediate action.
- The statutory authority for adopting the regulation.
- The law being implemented, interpreted, or made specific.
- The basis for proposing the specific regulation to address the emergency.

This bill would not require an agency to provide the five-day notice if the situation clearly poses an immediate and serious harm that delaying action for public comment would be inconsistent with the public interest.

This bill would require for any emergency finding a written statement that demonstrates, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted or made specific, and that addresses only the demonstrated emergency. The emergency finding would need to identify each technical, theoretical, and empirical study, report, or similar document that the agency relies on.

This bill would allow the emergency regulation to remain in effect for 180 days. OAL may approve only one re-adoption of the regulation for no more than 90 days if the agency has made significant progress and proceeded with diligence to comply with the provisions of the APA.

This bill would require the OAL to post the proposed emergency regulation on its website and allow interested persons five calendar days to submit comments prior to adoption of the emergency regulation, unless the situation clearly poses an immediate and serious harm that delaying action for public comment would be inconsistent with the public interest.

This bill also makes various other technical changes.

### IMPLEMENTATION CONSIDERATIONS

FTB seldom issues emergency regulations because FTB is responsible for administering both the Personal Income Tax and the Corporation Income Tax programs that normally do not affect the public peace, health, safety, or general welfare of California citizens. However, if it became necessary to implement an emergency regulation, FTB would need a statute that expressly makes a finding for an emergency due to the legal standards set within the bill.

### **LEGISLATIVE HISTORY**

AB 1351 (Vargas, 2005/06) would have defined the term "underground regulation." This bill would have also established a process to allow any person to petition a state agency that has issued such an underground regulation. The regulatory language was amended out of AB 1351 on September 2, 2005.

### **FISCAL IMPACT**

This bill would not significantly impact the department's costs.

### **ECONOMIC IMPACT**

This bill would not impact the state's income tax revenue.

### **LEGISLATIVE STAFF CONTACT**

Darrine Distefano  
Franchise Tax Board  
(916) 845-4142  
[Darrine.Distefano@ftb.ca.gov](mailto:Darrine.Distefano@ftb.ca.gov)

Brian Putler  
Franchise Tax Board  
(916) 845-6333  
[Brian.Putler@ftb.ca.gov](mailto:Brian.Putler@ftb.ca.gov)