

WHAT MUST BE ADOPTED PURSUANT TO THE APA?



Not every statute requires the adoption of an implementing regulation. In this regard, it is useful to think about three types of statutory provisions:

self-executing--wholly-enabling--susceptible to interpretation.

A self-executing provision is so specific that no implementing or interpreting regulation is necessary to give it effect. An example is a statutory provision that provides: “The annual licensing fee is \$500.”

In contrast, a wholly-enabling statutory provision is one that has no legal effect without the enactment of a regulation. An example is a statute that provides: “The department may set an annual licensing fee up to \$500.” This type of statute cannot be legally enforced without a regulation setting the fee.

The third type, a statutory provision that is susceptible to interpretation, may be enforced without a regulation, but may need a regulation for its efficient enforcement. An example is a statute that provides: “There shall be adequate space between hospital beds.” Conceptually, this statute could be enforced on a case-by-case basis, but such enforcement would probably present significant difficulties. *(It does not violate the APA to enforce or administer a statute on a case-by-case basis so long as no rule or standard of general application is used that should have been adopted pursuant to the APA.)*

Every “regulation” is subject to the rulemaking procedures of the APA unless expressly exempted by statute.

Government Code Section 11346

IT IS MANDATORY: Compliance with the rulemaking requirements of the Administrative Procedure Act is mandatory. (*Armistead v. State Personnel Board.*) All regulations are subject to the APA, unless expressly exempted by statute. (*Engelmann v. State Board of Education.*) Any doubt as to the applicability of the APA should be resolved in favor of the APA. (*Grier v. Kizer.*) If a rule looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated by the courts as a regulation whether or not the issuing agency so labeled it. (*SWRCB v. OAL.*)

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Government Code section 11342.600

A GENERAL RULE: A standard or procedure of general application (general rule) is a standard or procedure that applies to an open class. (*Roth v. Department of Veterans Affairs.*) An open class is one whose membership could change. *This broad definition includes many classes of rules that are exempt from notice and comment under the federal Administrative Procedure Act.*

THE PROHIBITION: The APA specifically prohibits any state agency from making any use of a state agency rule which is a "regulation" as defined in Government Code section 11342.600, that should have, but has not been adopted pursuant to the APA (unless expressly exempted by statute).

No 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” under the APA unless it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA.

Government Code section 11340.5(a)

ARMISTEAD V. STATE PERSONNEL BOARD

In 1978, the California Supreme Court made it clear that compliance with the rulemaking requirements of the Administrative Procedure Act is mandatory. (*Armistead v. State Personnel Board.*) In doing so, the court quoted a 1955 legislative report finding that noncompliance with APA rulemaking requirements was common.

"The committee is compelled to report to the Legislature that it has found many agencies which avoid the mandatory requirements of the Administrative Procedure Act of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the Administrative Code.

"The committee has found that some agencies did not follow the act's requirements because they were not aware of them; some agencies do not follow the act's requirements because they believe they are exempt; at least one agency did not follow the act because it was too busy; some agencies feel the act's requirements prevent them from administering the laws required to be administered by them; and many agencies . . . believe the function being performed was not in the realm of quasi-legislative powers.

"The manner of avoidance takes many forms, depending on the size of the agency and the type of law being administered, but they can all be briefly described as 'house rules' of the agency.

"They consist of rules of the agency, denominated variedly as 'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins." [First Report of the Senate Interim Committee on Administrative Regulations (1955) as cited in *Armistead*, p. 205.]

HOW TO DETERMINE WHETHER AGENCY’S POLICY OR PROCEDURE SHOULD BE ADOPTED PURSUANT TO THE APA

Preliminarily determine whether the particular policy or procedure is already set out in an applicable statute or duly adopted regulation. (Generally, duly adopted regulations are printed in the California Code of Regulations.) The adoption of a policy or procedure as a “regulation” pursuant to the APA is not required if you find the specific policy or procedure in an applicable statute or duly adopted regulation.

If you determine that the policy or procedure (i.e., rule) is not set out in an applicable statute or duly adopted regulation, use the following three-step analysis to determine whether the policy or procedure must be adopted as a regulation pursuant to the requirements and procedures of the APA:

First, is the policy or procedure either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the policy or procedure been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency’s procedure?

Third, has the policy or procedure been expressly exempted by statute from the requirement that it be adopted as a “regulation” pursuant to the APA?

If the policy or procedure satisfies steps one and two, then it is a “regulation” as defined in the APA and must be adopted pursuant to the APA unless it falls within an express statutory exemption from the requirements of the APA. Generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Government Code section 11346.) If the policy or procedure does not fall within an express statutory exemption, then it is subject to the rulemaking requirements of the APA.

EXPRESS STATUTORY EXEMPTIONS ARE FOUND IN THE APA AND IN OTHER STATUTES. THE FOLLOWING ARE SOME OF THE EXPRESS EXEMPTIONS SET OUT IN THE APA.

- **INTERNAL MANAGEMENT:** “A regulation that relates only to the internal management of the state agency.” (Government Code Section 11340.9(d).)

The internal management exception to the APA is narrow. A regulation is exempt as internal management if:

- (1) it directly affects only the employees of the issuing agency, and
- (2) it does not address a matter of serious consequence involving an important public interest. (*Armistead, Stoneham, Poschman, and Grier.*)

- **FORMS:** “A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued.” (Government Code Section 11340.9(c).)

This legislative language creates a limited statutory exemption relating to forms. A regulation is *not* needed if the form's contents consist only of existing, specific legal requirements.

By contrast, if an agency *adds any language which satisfies the definition of “regulation” to the existing legal requirements*, then, under Government Code section 11340.9(c), a formal regulation is "needed to implement the law under which the form is issued." Section 11340.9(c) cannot be interpreted as permitting state agencies to avoid mandatory APA rulemaking requirements by simply typing regulatory language into a form because this interpretation would allow state agencies to ignore the APA at will.

- **AUDIT GUIDELINES:** “A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial arrangement, or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:

“(1) Enable a law violator to avoid detection.

“(2) Facilitate disregard of requirements imposed by law.

“(3) Give clearly improper advantage to a person who is in an adverse position to the state.” (Government Code Section 11340.9(e).)

- **ONLY LEGALLY TENABLE INTERPRETATION:** “A regulation that embodies the only legally tenable interpretation of a provision of law.” (Government Code Section 11340.9(f).)
- **RATE, PRICE, TARIFF:** “A regulation that establishes or fixes rates, prices, or tariffs.” (Government Code Section 11340.9(g).)
- **LEGAL RULING OF TAX COUNSEL:** “A legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization.” (Government Code Section 11340.9(b).)
- **PRECEDENT DECISION:** A quasi-judicial decision by a state agency that is designated pursuant to Government Code Section 11425.60 as a precedent decision is expressly exempt from being adopted as a "regulation" pursuant to the APA.



REGULATORY DETERMINATION CASE LAW

Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1 ("Personnel Transactions Manual" rule governing withdrawal of state employees' resignations not within "internal management" exemption; rules that interpret and implement other rules have no legal effect unless they have been adopted pursuant to the APA).

Engelmann v. State Board of Education (1991) 2 Cal.App. 4th 47, 3 Cal.Rptr. 2d 264 (agencies need not adopt as regulations those rules contained in a statutory scheme which the Legislature has already established; but to the extent that any of the agency rules depart from, or embellish upon, express statutory authorization and language, the agency will need to promulgate regulations).

Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317 (standard of general application applies to all members of any open class).

Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244 (statistical extrapolation rule used by Department of Health Services in Medi-Cal provider audits was subject to the APA and, therefore, invalid).

Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596 (rule governing tenure within any school system is a matter of serious consequence involving an important public interest, and therefore, does not fall within the APA's exemption for internal management).

Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (noncontractual rule requiring Cal-Vet borrowers to pay late charges was subject to APA because it was a standard of general application, i.e., applied to all members of a class, kind, or order).

State Water Resources Control Board v. OAL (1993) 12 Cal.App. 4th 697, (if an agency rule looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated by the courts as a regulation whether or not the issuing agency so labeled it).

Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130 (rules governing state prison inmate classification do not fall within "internal management" exemption of APA because the rules were of general application significantly affecting the male prison population).

Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 59 Cal.Rptr.2d 186 (Division of Labor Standards Enforcement's interpretation of Industrial Welfare Commission's wage order as applying to maritime employees operating off coast was a "regulation," and therefore, void for failure to comply with the APA).

Union of American Physicians and Dentists v. Kizer (1990) 223 Cal.App.3d 490, 272 Cal.Rptr. 886 (agency rules properly promulgated as regulations, i.e., California Code of Regulations provisions, cannot legally be embellished upon in administrative bulletins).

United Systems of Arkansas v. Stamhon (1998) 63 Cal.App.4th 1001, 74 Cal.Rptr.2d 407 ("When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language").

Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (unless "expressly" or specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities).