SB 591 (Gaines) – Administrative Regulations: Reductions

Introduced February 17, 2011, Amended March 29, 2011

This bill would require state agencies to determine how many regulations it imposes and reduce the total number of regulations it has identified by 33% according to specified priorities and requires review of regulations to determine burden on regulated persons.

Existing law requires the Office of Administrative Law (OAL) to review a proposed regulation for necessity, authority, clarity, consistency, reference, and non-duplication, as defined. (Govt. Code § 11349.1)

Specifically, this bill:

1) Requires OAL, in reviewing a proposed regulation, to additionally determine if it would impose a "burden" on the persons subject to the regulation.

2) Defines "burden" in the context of OAL review to mean that the record of the rulemaking proceeding demonstrates by substantial evidence, taking into account the totality of that record, that no alternative regulation proposed to the agency would be less costly to persons subject to the regulation, and would be equally effective in achieving the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific.

3) Enacts the California Smart Regulation Act, which, in addition to directing each agency to determine by July 1, 2012 how many regulations it imposes, also specifies that:

   a) Upon review, every agency is required to reduce the total number of regulations it has identified by 33 percent before 12/31/13, giving priority to eliminating regulations that increase the regulatory burden on businesses and the business climate.

   b) An agency shall submit a report of the regulations eliminated or identified for elimination to the State Auditor, which shall evaluate the regulations to determine if removal of the regulations would have a positive impact on the regulatory burden on businesses and the business climate.

   c) Directs the Legislature to appropriate funds to the State Auditor sufficient to fulfill the duties imposed on the State Auditor pursuant to this mandate.

   d) Until December 31, 2021, any new regulation proposed by an agency shall also eliminate another regulation.

   e) These provisions of the Smart Regulation Act remain in effect only until January 1, 2022.

The author states that California is considered one of the least business-friendly states in the nation, partly because of a regulatory burden that frustrates existing and would-be business owners and that a reformed regulatory environment could help California become more attractive to businesses, encouraging them to open, expand, and hire more workers in the state.

Additionally, the bill analysis states that the actions required by agencies could be deemed arbitrary and capricious. Actions taken by administrative agencies to adopt regulations are considered to be a quasi-legislative action that has been legitimately delegated to the executive branch agency by the Legislature. A reviewing court has limited authority to invalidate a regulatory action, and cannot invalidate a regulatory decision of the agency unless its decision was "arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair." The limited scope of review of quasi-legislative administrative action is based on the doctrine of separation of powers, which (1) allows legislative delegation of authority to an appropriate administrative agency and (2) acknowledges the presumed expertise of the agency. In applying this deferential test, a court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute."

The analysis concludes that provisions in this bill that require agencies to (1) reduce the number of regulations by 33 percent, and (2) eliminate a regulation whenever it adopts a new regulation could reasonably be regarded as arbitrary and capricious decisions, and therefore declared invalid if challenged in court. In light of this, the analysis states that the committee may wish to consider amendments deleting SECTION 4 of the bill, which enacts the California Smart Regulation Act.

AMENDED IN SENATE MARCH 29, 2011

SENATE BILL No. 591

Introduced by Senator Gaines

February 17, 2011

An act to amend ~~Section 8544.5~~ *Sections 8544.5, 11349, and 11349.1* of, and to add and repeal Article 9.5 (commencing with Section 11362) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of, the Government Code, relating to administrative regulations.

LEGISLATIVE COUNSEL'S DIGEST

SB 591, as amended, Gaines. Administrative regulations: reductions.

(1) The Administrative Procedure Act generally sets forth the requirements for the adoption, publication, review, and implementation of regulations by state agencies, *and for review of those regulatory actions by the Office of Administrative Law. Existing law requires the office to review a proposed regulation for necessity, authority, clarity, consistency, reference, and nonduplication, as defined.*

This bill would also require the office to review a proposed regulation for burden, as defined.

This bill would, until December 31, 2021, enact the California Smart Regulation Act. The bill would require, on or before July 1, 2012, that a state agency determine how many regulations it imposes and, on or before December 31, 2013, to reduce the total number of regulations it has identified by 33%. The bill would require an agency to give priority to eliminating regulations that increase the regulatory burden on businesses and the business climate. The bill would also require, until December 31, 2021, that any new regulation proposed by an agency also eliminate another regulation. *The bill would repeal these provisions on January 1, 2022, as specified.*

(2) Existing law establishes the Bureau of State Audits, which is headed by the State Auditor and has specified statutory duties.

This bill would require an agency to submit a report of the regulations eliminated or identified for elimination to the State Auditor. The bill would require the State Auditor to perform an evaluation of the identified regulations and determine, in a report submitted to the Legislature, whether the removal of the regulations will result in a positive impact on the regulatory burden on businesses and the business climate. This bill would require the Legislature to appropriate funds to the State Auditor sufficient to fulfill these duties. *The bill would repeal these provisions on January 1, 2022, as specified.*

~~(3) This bill would repeal its provisions on January 1, 2022, as specified.~~

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 8544.5 of the Government Code is
2 amended to read:
3 8544.5. (a) There is hereby established in the State Treasury
4 the State Audit Fund. Notwithstanding Section 13340, the State
5 Audit Fund is continuously appropriated for the expenses of the
6 State Auditor, except expenses incurred pursuant to Section 11363.
7 There shall be appropriated annually in the Budget Act to the State
8 Audit Fund, from the General Fund and the Central Service Cost
9 Recovery Fund, the amount necessary to reimburse the State Audit
10 Fund for the cost of audits to be performed that are not directly
11 reimbursed under subdivision (c). "Cost of audits" means all direct
12 and indirect costs of conducting the audits and any other expenses
13 incurred by the State Auditor in fulfilling his or her statutory
14 responsibilities.
15 (b) With regard to the funds appropriated pursuant to subdivision
16 (a), upon certification by the State Auditor of estimated costs on
17 a monthly basis, the Controller shall transfer the amount thus
18 certified from the General Fund or the Central Service Cost
19 Recovery Fund, as applicable, to the State Audit Fund. The
20 Controller shall thereafter issue warrants drawn against the State
21 Audit Fund upon receipt of claims certified by the State Auditor.

(c) To ensure appropriate reimbursement from federal and special funds for the costs of the duties performed pursuant to Section 8546.3, the State Auditor may directly bill state agencies for the costs incurred, subject to the approval of the Director of Finance.

(d) To ensure adequate oversight of the operations of the bureau, the Milton Marks "Little Hoover" Commission on California State Government Organization and Economy shall annually obtain the services of an independent public accountant to audit the State Audit Fund and the operation of the bureau to ensure compliance with state law, including Section 8546. The results of this audit shall be submitted to the commission and shall be a public record.

(e) To ensure that audits of the Milton Marks "Little Hoover" Commission on California State Government Organization and Economy are conducted in conformity with government auditing standards, any audit of the commission that is required or permitted by law shall be conducted by the independent public accountant selected pursuant to subdivision (d).

SEC. 2. Section 11349 of the Government Code is amended to read:

11349. The following definitions govern the interpretation of this chapter:

(a) "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

(b) "Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.

(c) "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.

(d) "Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.

(e) "Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.

(f) "Nonduplication" means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.

(g) "Burden" means that the record of the rulemaking proceeding demonstrates by substantial evidence, taking into account the totality of that record, that no alternative regulation proposed to the agency would be less costly to persons subject to the regulation and would be equally effective in achieving the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific.

SEC. 3. Section 11349.1 of the Government Code is amended to read:

11349.1. (a) The office shall review all regulations adopted, amended, or repealed pursuant to the procedure specified in Article 5 (commencing with Section 11346) and submitted to it for publication in the California Code of Regulations Supplement and for transmittal to the Secretary of State and make determinations using all of the following standards:

(1) Necessity.
(2) Authority.
(3) Clarity.
(4) Consistency.
(5) Reference.
(6) Nonduplication.
(7) Burden.

In reviewing regulations pursuant to this section, the office shall restrict its review to the regulation and the record of the rulemaking proceeding. The office shall approve the regulation or order of repeal if it complies with the standards set forth in this section and with this chapter.

(b) In reviewing proposed regulations for the criteria in subdivision (a), the office may consider the clarity of the proposed regulation in the context of related regulations already in existence.

(c) The office shall adopt regulations governing the procedures it uses in reviewing regulations submitted to it. The regulations shall provide for an orderly review and shall specify the methods, standards, presumptions, and principles the office uses, and the limitations it observes, in reviewing regulations to establish compliance with the standards specified in subdivision (a). The regulations adopted by the office shall ensure that it does not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations.

(d) The office shall return any regulation subject to this chapter to the adopting agency if any of the following occur:

(1) The adopting agency has not prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5 and has not included the data used and calculations made and the summary report of the estimate in the file of the rulemaking.

(2) The agency has not complied with Section 11346.3.

(3) The adopting agency has prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5, the estimate indicates that the regulation will result in a cost to local agencies or school districts that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, and the adopting agency fails to do any of the following:

(A) Cite an item in the Budget Act for the fiscal year in which the regulation will go into effect as the source from which the Controller may pay the claims of local agencies or school districts.

(B) Cite an accompanying bill appropriating funds as the source from which the Controller may pay the claims of local agencies or school districts.

(C) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has approved a request by the agency that funds be included in the Budget Bill for the next following fiscal year to reimburse local agencies or school districts for the costs mandated by the regulation.

(D) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has authorized the augmentation of the amount available for

expenditure under the agency's appropriation in the Budget Act which is for reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4 to local agencies or school districts from the unencumbered balances of other appropriations in the Budget Act and that this augmentation is sufficient to reimburse local agencies or school districts for their costs mandated by the regulation.

(e) The office shall notify the Department of Finance of all regulations returned pursuant to subdivision (d).

(f) The office shall return a rulemaking file to the submitting agency if the file does not comply with subdivisions (a) and (b) of Section 11347.3. Within three state working days of the receipt of a rulemaking file, the office shall notify the submitting agency of any deficiency identified. If no notice of deficiency is mailed to the adopting agency within that time, a rulemaking file shall be deemed submitted as of the date of its original receipt by the office. A rulemaking file shall not be deemed submitted until each deficiency identified under this subdivision has been corrected.

This subdivision shall not limit the review of regulations under this article, including, but not limited to, the conformity of rulemaking files to subdivisions (a) and (b) of Section 11347.3.

~~SEC. 2.~~

SEC. 4. Article 9.5 (commencing with Section 11362) is added to Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

Article 9.5. Reduction of Regulations

11362. This article shall be known as the California Smart Regulation Act.

11363. (a) On or before July 1, 2012, every agency shall determine how many regulations it imposes.

(b) On or before December 31, 2013, every agency shall reduce the total number of regulations it has identified pursuant to subdivision (a) by 33 percent. In determining which regulations to eliminate, an agency shall give priority to the elimination of regulations that increase the regulatory burden on businesses and the business climate. An agency shall submit a report of the regulations eliminated or identified for elimination pursuant to this subdivision to the State Auditor.

(c) (1) The State Auditor shall perform an evaluation of the regulations contained in the agency report for the purpose of determining whether the removal of the regulations will result in a positive impact on the regulatory burden on businesses and the business climate. The State Auditor shall report the results of the evaluation to the Legislature.

(2) The Legislature shall appropriate funds to the State Auditor sufficient to fulfill the duties imposed on the State Auditor pursuant to this section.

(d) Until December 31, 2021, any new regulation proposed by an agency shall also eliminate another regulation.

(e) This article shall remain in effect only until January 1, 2022, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2022, deletes or extends that date.

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