

M e m o r a n d u m

Date: February 22, 2023

To: California Privacy Protection Agency Board
(Meeting of March 3, 2023)

From: Philip Laird, General Counsel

Subject: Board and Agency Policies and Practices: Rulemaking

Description: This memo outlines the recommended steps for the California Privacy Protection Agency (“CPPA” or “Agency”) to:

- (1) Efficiently introduce and consider the addition, amendment, or repeal of Agency regulations
- (2) Determine and apply the appropriate strategy for preparation, oversight, and adoption of regulation packages in compliance with the Administrative Procedures Act (“APA”) and the Bagley-Keene Open Meeting Act
- (3) Provide regular updates to, and receive regular input from, the Board on rulemaking progress and prioritization

The process outlined below seeks to establish a consistent and equitable opportunity for Board members to suggest changes or additions to existing Agency regulations, while remaining compliant with the Bagley-Keene Open Meeting Act and providing the benefit of staff analysis of such proposals before submission to the full Board for consideration and possible action. Additionally, the process seeks to set a routine cadence for the Board’s consideration and direction on the Agency’s general rulemaking strategy.

Rulemaking Background

Every state agency that adopts, amends, or repeals regulations must follow the rulemaking procedures in the APA¹ unless expressly exempted by statute from some or all of its requirements. The core components of the APA rulemaking procedures include notice to the public of proposed regulations (issued with supporting documentation that describes the regulatory effect and estimated economic impact of the proposal), a minimum 45-day public comment period, and submission of a final rulemaking record to the Office of Administrative Law (“OAL”) for review and approval. The APA requirements are designed to provide the public with a meaningful opportunity to participate in the adoption of regulations or rules that have the force of law by California state agencies and to ensure the creation of an adequate record for the OAL and judicial review.

Government Code section 11017.6 requires that state agencies annually submit to OAL their projections of rulemaking activities for the upcoming year by January 30th. State agencies are not bound by these projections, however, and can commence rulemaking at any time in the year, even

1. Government Code section 11340 et seq.

if not previewed on the most recent projection. Once a rulemaking package is noticed for public comment, state agencies generally have one year to complete the rulemaking.

Due to the fact that the CPPA is governed by a five-member Board, the Agency is also required to comply with the Bagley-Keene Open Meeting Act (“Bagley-Keene”) when taking substantive actions in connection with rulemaking. This means that any decision to notice, modify, or adopt regulations pursuant to the APA must be made by the Board during a Bagley-Keene compliant public meeting. While staff can prepare rulemaking materials and execute direction given by the Board between meetings, the Board itself is unable to deliberate or reach consensus about rulemaking proposals, priorities, or strategies outside of an open meeting.

Proposed Agency Regulation Process

In order to facilitate a uniform mechanism by which all Board members may suggest regulatory changes, while remaining compliant with the Bagley-Keene Open Meeting Act, and while providing for the benefit of staff analysis and recommendations on such proposals, staff proposes the Agency generally observe the following process. The proposed process not only would establish a consistent and coordinated approach for the Agency’s rulemaking efforts, but seeks to also maximize efficiency under Bagley-Keene as the Board considers and acts upon rulemaking proposals.

Individual Board Member Proposals: At any time, Board members may individually send to the Executive Director and the General Counsel suggestions for changes or additions to existing regulations. Board members may share specific language for amendments, or state more generally the concept they are interested in pursuing. The Agency’s Legal Division will review all proposals as they are received to assess for lawfulness, potential economic impact, and relationship to other pending rulemaking actions (including proposals received from other Board members). If Agency staff determine that there is a potential issue with the proposal—for instance, if the proposal goes beyond the Agency’s rulemaking authority—they will communicate such issues back to the Board member to determine if the Board member wants to maintain, revise, or retract their proposal before the next biannual rulemaking meeting (described below).

The benefit of such an approach is that it establishes a uniform and ongoing opportunity for Board members to share their proposed regulatory changes with staff, while also allowing staff time to analyze the proposal, and coordinate similar or related proposals, in advance of a public presentation and discussion by the Board. For instance, if two Board members are proposing potentially conflicting regulatory changes, staff will be able to analyze the conflicts in advance of the full Board’s discussion and offer recommendations on how the conflicts may be resolved when the Board considers the proposals during a public meeting.

Biannual Board Meetings on Rulemaking Priorities: Twice a year (recommended at the Board’s March/April and October/November² meetings) staff will provide an update to the Board on all rulemaking efforts underway, and present new proposals for additional regulatory changes submitted by Board members (through the process described above) or by staff. Staff will make

2. Holding one of these biannual meetings late in the calendar year will allow staff to incorporate the most current direction from the Board in the projected rulemaking calendar that gets submitted to OAL annually on January 30th.

recommendations around the prioritization and combination of rulemaking proposals that the Board chooses to advance. The Board will then decide on which proposals it would like to advance to the regular rulemaking process and/or prioritize for further analysis, and also whether or not a subcommittee will be formed to conduct preliminary rulemaking activities or draft proposed regulation text.

Board Meetings to Advance and Finalize Individual Regulations: Beyond the biannual meetings described above, staff will bring regulation packages to the Board any time there is a substantive decision-point for the Board to consider when advancing a specific rulemaking package. In alignment with the APA, these decision-points will typically be: consideration of potential regulations that require more urgent attention; approval of draft regulations to be noticed for public comment; consideration of public comment and decision on whether or not to approve or modify the draft regulations; and approval of the final regulations for submission to OAL. Staff will also strive to provide general rulemaking updates at all scheduled Board meetings to keep the Board apprised of current activities.