

NOTICE OF PROPOSED RULEMAKING

TITLE 2, DIVISION 10: CALIFORNIA CODE OF REGULATIONS ADOPT SECTIONS 61300 TO 61320, INCLUSIVE, REGARDING THE ALTERNATIVE WHISTLEBLOWER SYSTEM

Notice Published May 3, 2019

NATURE OF PROCEEDING

NOTICE IS HEREBY GIVEN that the California State Auditor (State Auditor or the State Auditor's Office, as appropriate) is proposing to adopt the following sections in title 2, division 10 of the California Code of Regulations: 61300 to 61320, inclusive.

PUBLIC HEARING

The State Auditor has not scheduled a public hearing on this proposed rulemaking. However, the State Auditor will hold a public hearing if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the State Auditor's Office no later than 15 days before the close of the written comment period. To request a hearing, send a letter or email to the contact person named below.

WRITTEN COMMENT PERIOD

Any interested person, or his or her duly authorized representative, may submit written comments relevant to the proposed regulations to:

Brianna Behnoud
California State Auditor's Office
Office of Legal Services
621 Capitol Mall, Suite 1200
Sacramento, CA 95814
Email: regulations@auditor.ca.gov

The written comment period closes on June 17, 2019. The State Auditor will only consider comments received by the State Auditor's Office by that time.

Following the written comment period, the State Auditor may adopt the proposed regulations substantially as described in this notice. If modifications are made that are sufficiently related to the originally proposed text, the full modified text with changes clearly indicated shall be made available to the public for at least 15 days prior to the date on which the State Auditor adopts the resulting regulations. A request for copies of any modified regulations should be made to the contact person named above. The State

Auditor will accept written comments on any modified regulations for 15 days after the date on which they are first made available to the public.

AUTHORITY AND REFERENCE

Pursuant to the authority vested in it by the Government Code section 8546, and to implement, interpret, and make more specific Government Code section 8547.5, subdivisions (c) and (d), the State Auditor's Office proposes to adopt the regulations identified under the heading Nature of Proceeding above.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Informative Digest

Government Code section 8547.5, subdivisions (c) and (d) as added by Assembly Bill No. 31, Statutes of 2017, Chapter 605, contain provisions that do the following:

- Require the State Auditor to create an alternative whistleblower system for submission to an independent investigator of allegations of improper governmental activities engaged or participated in by employees of the State Auditor's Office.
- Require the alternative whistleblower system to promptly and directly deliver all submissions to the Employment and Administrative Mandate Section of the Department of Justice without prior review by the State Auditor.
- Require the Employment and Administrative Mandate Section of the Department of Justice to review submissions, determine whether they constitute an allegation of improper governmental activity and, if so, transmit them to an independent investigator for further action.
- Require the independent investigator to conduct investigations in a manner consistent with the California Whistleblower Protection Act ("Act") [as set forth in Article 3 (commencing with Government Code section 8547) of Chapter 6.5 of Division 1 of Title 2 of the Government Code] as it pertains to other state civil service employees.
- Require the investigator to prepare a confidential report and send a copy of the report and all evidence to officials at the State Auditor's Office if the independent investigator concludes that an employee engaged in or participated in an improper governmental activity.
- Require the State Auditor to either serve a notice of adverse action upon the subject employee or provide written reasons for not doing so to the independent investigator within 60 days of receiving the independent investigator's report.

- Authorize the independent investigator to report to certain authorities outside the State Auditor’s Office if the independent investigator determines such action to be appropriate.

Government Code section 8546.1, subdivision (c), and section 8546.4, subdivision (a), require the State Auditor to conduct all financial and performance audits pursuant to the Government Auditing Standards published by the Comptroller General of the United States (“auditing standards”). These auditing standards require the State Auditor’s Office and the individual auditors to be independent in all matters relating to audit work. To ensure that the State Auditor’s Office maintains the independence necessary under audit standards, Government Code section 8543, subdivision (a), declares that the State Auditor’s Office shall be independent of the executive branch and legislative control in order to be free of organizational impairments to independence. Government Code section 8546 states that it is the Legislature’s intent that the State Auditor’s Office be free from influence of existing state control agencies that could be the subject of audits conducted by the State Auditor’s Office.

The Act requires that the State Auditor investigate and report on improper governmental activities by other state agencies or their employees.

Government Code sections 8545 and 8545.1 prohibit the State Auditor and her employees from disclosing to the public any record or substantive information about a pending audit. Government Code section 8545.1, subdivision (c) makes such a disclosure a misdemeanor.

Government Code section 8547.5, subdivision (b), prohibits disclosure of the identity of a person who provides information that initiates an investigation, or of any person who provides information in confidence to further an investigation, without the express permission of the person. Government Code section 8547.7, subdivision (c), requires the State Auditor to keep confidential every investigation, including, but not limited to, all investigative files and work product.

Policy Statement Overview and Benefits of the Proposed Rulemaking

This proposed rulemaking gives structure to the alternative whistleblower system required by Government Code section 8547.5, subdivisions (c) and (d). It also defines and clarifies a number of the terms set forth in Government Code section 8547.5, subdivisions (c) and (d) that pertain to the alternative whistleblower system. This proposed rulemaking harmonizes the alternative whistleblower system with the State Auditor’s statutory duties regarding independence, confidentiality, and the State Auditor’s duty to comply with auditing standards. This proposed rulemaking also ensures that investigations conducted under the alternative whistleblower system are consistent with investigations conducted by the State Auditor under the Act.

Determination of Inconsistency/Incompatibility with Existing Law

No state agency has issued any regulations relating to the alternative whistleblower system. As such, there are no inconsistencies or incompatibilities with existing state regulations. There is no applicable federal regulation or statute that pertains to the alternative whistleblower system.

LOCAL MANDATE

This proposed rulemaking does not impose a mandate on local agencies or school districts.

FISCAL IMPACT ESTIMATES

This proposed rulemaking does not impose costs on any local agency or school district for which reimbursement would be required pursuant to part 7 (commencing with § 17500) of division 4 of title 2 of the Government Code. This proposed rulemaking does not impose other nondiscretionary costs or savings on local agencies. This proposed rulemaking does not result in any costs or savings in federal funding to the State.

EFFECT ON HOUSING COSTS

This proposed rulemaking will not affect housing costs.

COST OR SAVINGS TO STATE AGENCIES

This proposed rulemaking will not produce additional costs or savings to state agencies. This proposed rulemaking modifies how allegations of improper governmental activities engaged in by employees of the State Auditor's Office are investigated, but does not shift the fiscal responsibilities associated with such investigations away from the State Auditor's Office. Thus, the State Auditor's Office currently incurs and will continue to incur the costs associated with the alternative whistleblower system within its existing budget. Pursuant to Government Code section 8547.5, subdivision (c)(4), the State Auditor's Office will reimburse the California Department of Justice for its costs as part of its limited role with respect to the alternative whistleblower system. No other state agencies are affected by this rulemaking.

ECONOMIC IMPACT AFFECTING BUSINESS

The State Auditor has made an initial determination that this proposed rulemaking would have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposed rulemaking does not affect small businesses as defined by Government Code section 11342.610.

ECONOMIC IMPACT ASSESSMENT

The State Auditor has made an initial determination that this proposed rulemaking will not have any impact on the creation of jobs or new businesses, the elimination of jobs or existing businesses, the expansion of businesses in the State of California, or the health and welfare of California residents, worker safety, or the state's environment.

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS

The State Auditor is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed rulemaking.

BUSINESS REPORT

This proposed rulemaking requires that an investigator hired to conduct an investigation of an alleged improper governmental activity prepare a confidential report and send a copy of the report to certain parties depending on the circumstances. It does not require investigators to prepare reports pertaining to their businesses. Thus, the report requirement does not apply to businesses.

IMPACT ON SMALL BUSINESS

Based on the limited scope of these regulations, the State Auditor determined that none of the proposed regulations has a significant adverse economic impact on business. The determination that this proposed rulemaking would not affect small business is based upon the fact that the proposed regulations implement provisions of Government Code section 8547.5, subdivisions (c) and (d), that addresses the issue of an alternative whistleblower system for submission of allegations of improper governmental activities by employees of the State Auditor's Office.

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

From March 2018 to April 2019, the State Auditor engaged in pre-rulemaking discussions via telephone and email with the California Department of Justice.

ALTERNATIVES CONSIDERED

The State Auditor has determined that no reasonable alternative considered by the State Auditor or that has otherwise been identified and brought to the attention of the State Auditor would be more effective in carrying out the purpose for which the rulemaking is proposed, would be as effective and less burdensome to affected private persons than the proposed rulemaking, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

The State Auditor invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period.

CONTACT PERSON

Inquiries relating to this proposed rulemaking and written comments may be directed to:

Brianna Behnoud
California State Auditor's Office
Office of Legal Services
621 Capitol Mall, Suite 1200
Sacramento, CA 95814
Telephone: (916) 445-0255
Fax: (916) 323-0913
Email: regulations@auditor.ca.gov

The backup contact person for these inquiries is:

Heather Kendrick
California State Auditor's Office
Office of Legal Services
621 Capitol Mall, Suite 1200
Sacramento, CA 95814
Telephone: (916) 445-0255
Fax: (916) 323-0913
Email: regulations@auditor.ca.gov

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND INFORMATION

The State Auditor has prepared an initial statement of reasons for the proposed rulemaking and has available all the information upon which the proposed rulemaking is based, including the express terms. The rulemaking file is available for public inspection by making a request to the contact person listed above.

TEXT OF PROPOSED RULEMAKING

Copies of exact language of the proposed regulations may be obtained by making a request to the contact person listed above. These proposed regulations may also be viewed and downloaded from the State Auditor's website at www.auditor.ca.gov.

If there are substantial changes to the originally proposed regulations, these change(s) will be available for public inspection 15 days prior to adoption by the State Auditor. You will be able to obtain a copy of the change(s) by making a written request to the contact person listed above.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

The express terms, the final statement of reasons, and all the information upon which the proposed regulations are based will be contained in the final rulemaking file located at 621 Capitol Mall, Suite 1200, Sacramento, California 95814. The final rulemaking file will be available for public inspection by making a request to the contact person listed above. You may obtain a copy of the final statement of reasons once it has been prepared by making a written request to the contact person listed above.

WEBSITE ACCESS

Materials regarding this proposed rulemaking can be found at www.auditor.ca.gov.