

**STATE OF CALIFORNIA
CALIFORNIA STATE AUDITOR'S OFFICE
621 CAPITOL MALL, SUITE 1200
SACRAMENTO, CA 95814**

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

FINAL STATEMENT OF REASONS

**UPDATE OF THE INITIAL STATEMENT OF REASONS AND SUMMARY AND
RESPONSE TO COMMENTS RECEIVED DURING RULEMAKING – GOVERNMENT
CODE SECTION 11346.9**

SUMMARY

The California State Auditor's Office (State Auditor's Office) received three sets of comments from four commenters. The State Auditor's Office carefully considered each comment. Ultimately, the State Auditor's Office decided not to make any changes to the proposed regulations. The following summarizes the purpose of each proposed regulation, any comments received, and our reasons for not making any changes.

PROPOSED SECTION¹ 61300

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61300 sets forth a general statement regarding the purpose of Government Code section 8547.5, subdivisions (c) and (d) and clarifies that all the proposed regulations in California Code of Regulations, title 2, division 10, chapter 5 pertain to the alternative whistleblower system. This proposed regulation is necessary to inform the Legislature, the Department of Justice (DOJ), any independent investigators, employees of the State Auditor's Office, and the general public of the purpose of the proposed regulations and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The California State Auditor (State Auditor) did not receive any comments regarding this proposed regulation during the 45-day public comment period.

¹ Unless otherwise indicated, (such as by an express reference to the California Government Code) any use of the term "section" in this statement is a reference to a section of the California Code of Regulations.

PROPOSED SECTION 61301

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61301 defines the term “Act” to mean the California Whistleblower Protection Act 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. This section helps to ensure that the Act is not interpreted as only Government Code section 8547.5, subdivisions (c) and (d), and that the Act is not confused with other statutes applicable to the State Auditor or other statutes that refer to investigations. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61302

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61302 defines the term “alternative whistleblower system” and interprets and makes specific the use of this term as set forth in Government Code section 8547.5, subdivision (c). This term is defined to mean a process to receive, keep confidential, and investigate only those allegations of improper governmental activities made against the State Auditor’s Office or its employees under the Act and shall be limited to this purpose. The way this term is defined ensures that the term is used in reference to the alternative whistleblower system developed pursuant to Government Code section 8547.5, subdivisions (c) and (d), and is not confused with the whistleblower program operated by the State Auditor that pertains to allegations of improper governmental activities against other state entities or their employees. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61303

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61303 defines the term “appropriate to share” and interprets and makes specific the use of this term as set forth in Government Code section 8547.5, subdivision (c). This term is defined to mean that the independent investigator may report to entities or individuals outside the State Auditor’s Office when (1) the State Auditor’s Office does not provide an objectively reasonable explanation for not taking adverse action and

implementing the independent investigator's recommendation or (2) criminal or other activity poses an ongoing threat to the integrity of the State Auditor's Office. This section helps to clarify when it is appropriate for the independent investigator to report to entities outside the State Auditor's Office. This section is necessary to ensure that when the independent investigator determines it is appropriate to share an investigation report, such a determination is consistent with when the State Auditor makes determinations about when it is appropriate to similarly share reports outside the agency involved pursuant to Government Code section 8547.7, subdivision (a). By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

Three commenters stated that section 61303 limits the discretion of the independent investigator to report to outside entities in ways that go beyond the language of Assembly Bill No. 31 (2017-2018 Reg. Sess.) (AB 31), which is codified in Government Code section 8547.5. Two commenters stated that AB 31 empowers the independent investigator with the sole authority and discretion to determine which entities will receive a report. They also commented that section 61303 does not plainly reflect provisions in AB 31 that authorize the independent investigator to share the report with the appropriate committees of the Senate and Assembly. One commenter recommended revising section 61303 to conform to Government Code section 8547.5, subdivision (c)(2)(B), and to allow the independent investigator to exercise greater discretion in determining when investigative information is appropriate to share.

Response

Section 61303 is necessary to comply with the plain language of AB 31's own mandate that the independent investigator's implementation of the alternative whistleblower system be consistent with the State Auditor's implementation of the Act. Government Code section 8547.5, subdivision (c) – which was added by AB 31 – requires independent investigators to conduct their investigations in a manner that is consistent with the provisions of the Act for other state civil service employees. Under the Act, if the State Auditor determines it is appropriate to share a report with the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject matter, or any other authority that the State Auditor determines appropriate, the State Auditor may do so (Gov. Code § 8547.7, subd. (a)). With the exception of replacing the term "State Auditor" with the term "independent investigator," this statutory language is identical to the corresponding authority of the independent investigator to report to these same outside entities (Gov. Code §8547.5, subd. (c)(2)(B)).

Importantly, the State Auditor only deems it appropriate to report to these outside entities when a potential crime is involved, the integrity of the agency is threatened (e.g., an agency head is implicated or there is no oversight authority), or the matter is substantiated and the agency fails to act appropriately. Thus, in order to ensure that the independent investigator's implementation of the alternative whistleblower system is consistent with the State Auditor's implementation of the Act, it is necessary to define the term "appropriate to share" so that the independent investigator will, in fact, conduct

investigations in a manner consistent with the State Auditor's implementation of the Act. In other words, section 61303 is necessary to ensure that employees of the State Auditor's Office are treated consistently under the alternative whistleblower system as are other state civil service employees under the Act.

Further, section 61303 implements the express legislative intent of AB 31. The Senate amended AB 31 on September 8, 2017, to add subparagraph (B) to section 8547.5, subdivision (c), paragraph (2). The amended text states:

"If the independent investigator determines it to be appropriate, the independent investigator shall report this information to the Attorney General, to the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and to any other authority that the independent investigator determines appropriate."

The Senate Floor Analysis of this amendment explains that this authority of independent investigators to report to other government authorities "**closely resembles** the authority, under existing law, that the SAO [State Auditor's Office] has when it is investigating whistleblower complaints made against other agencies" (emphasis added). Clearly, the legislative intent was for the independent investigator to have the same level of authority as the State Auditor with respect to reporting to these outside entities. Accordingly, we drafted Section 61303 to mirror the occasions when the State Auditor exercises his or her authority to report to outside entities and to ensure that employees of the State Auditor's Office are treated similarly to other civil servants.

As noted above, the State Auditor only reports to these outside entities under the Act when a potential crime is involved, the integrity of the agency is threatened (e.g., an agency head is implicated or there is no oversight authority), or the matter is substantiated and the agency fails to act appropriately. The purpose of reporting to these outside entities is to hold the applicable agency accountable and remediate the problem. Notably, throughout the history of the Act, the State Auditor has deemed it necessary only twice to share a report with these outside entities under Government Code section 8547.7, subdivision (a). In both instances, the criteria of section 61303 were clearly met. Therefore, empirical evidence demonstrates that the need for independent investigators to share reports outside the State Auditor's Office will be rare and, when it occurs, section 61303 will allow the independent investigator to hold the State Auditor's Office accountable.

The reasons the State Auditor has limited when it is appropriate to share with these outside entities pursuant to the Act are many. First, there is no public benefit in disclosing allegations that are not substantiated. In reality, most whistleblower complaints are not substantiated. Reports to outside entities of unsubstantiated allegations, whether related to the State Auditor's Office or another state agency, could encourage future frivolous allegations to be made simply for their ability to garner public attention. Further, no state agency, including the State Auditor's Office, should have to answer publicly for allegations of improper governmental activity that likely did not occur, particularly since AB 31

mandates that the employee being investigated be treated like all other civil servants who possess privacy rights. Responding to such allegations and, therefore, being compelled to prove a negative, would cause the State Auditor's Office to treat its employees inconsistently with how other civil service employees are treated under the Act and expend substantial resources to no avail.

Second, there is little or no value in publicizing administrative matters for which a state agency or the State Auditor's Office has taken appropriate adverse action, because adverse actions must be filed with the State Personnel Board and are already publically disclosable under the California Public Records Act. Further, to the extent an outside report's purpose would be to prompt disciplinary action through the power of publicity, this purpose is negated if the state agency or the State Auditor's Office has already taken appropriate adverse action.

Third and most importantly, the limitations on when it is appropriate to share are necessary to ensure that neither the State Auditor (under the Act) nor the independent investigator (under the alternative whistleblower system) disclose personal information unnecessarily. As noted above, the purpose of disclosure to these outside entities is to hold the applicable agency accountable. If the applicable agency is responding to an investigation appropriately, then there is no need to disclose private, personal information in a public forum. This is especially necessary to help ensure that whistleblowers come forward. Without section 61303, many potential whistleblowers might choose not to come forward knowing that their identity and private information may be publically disclosed. Whistleblowers are often frightened, concerned, and reluctant to come forward. The unnecessary airing of complaints, substantiated or not, increases fear of retaliation and can have a chilling effect on employees' willingness to submit complaints. Section 61303 gives employees with knowledge about an improper governmental activity assurance that their personal information and the personal information of their co-workers will not be publicized unless there is a compelling need. Without section 61303, reports to outside entities or persons when not appropriate could generate fear of the disclosure of personal information and subsequent retaliation. A single instance of inappropriate reporting could have an irreparably chilling effect on whistleblowers' willingness to come forward. In addition, unnecessary disclosure to these outside entities could harm the reputations of innocent employees of the State Auditor's Office. Moreover, since State Auditor's Office employees are required to be treated like all other civil servants, the independent investigator should be subject to the same restrictions that the State Auditor's Office imposes on its own operations. Even though these reports cannot contain names, it is not uncommon to be able to deduce that information. For that reason, the State Auditor's Office exercises extreme caution with publicly revealing the outcomes of its investigations.

Without section 61303, independent investigators could report to outside entities in ways that are inconsistent with how the State Auditor makes outside reports to these outside entities. Such outside reports would result in inconsistent systems that unfairly subject employees of the State Auditor's Office to reporting standards that deviate from the

standards applicable to other civil service employees. This would violate AB 31, which requires consistency of treatment.

PROPOSED SECTION 61304

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61304 defines the term “consistent with the provisions of this article relating to other state civil service employees” as used in Government Code section 8547.5, subdivision (c), to mean that the independent investigator shall comply with these proposed regulations and provide State Auditor’s Office employees with the same rights and obligations as civil servants being investigated or interviewed by the State Auditor’s Office under the Act. This section helps to ensure that the independent investigator treats the State Auditor’s Office and its employees fairly and equitably and in substantially the same manner as other civil servants being investigated or interviewed by the State Auditor’s Office pursuant to the Act. This section also helps to ensure that the State Auditor’s Office and its employees are not afforded any preferential treatment. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in interpreting the statute and these regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61305

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61305 defines the terms “Department of Justice” or “DOJ” to mean the Employment and Administrative Mandate Section of the California Department of Justice, unless otherwise indicated. This helps to ensure that these terms are not confused with the California Department of Justice as a whole or the California Attorney General who acts through the California Department of Justice. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61306

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61306 defines the terms “employee” or “employees” and makes specific the use of this term as set forth in Government Code section 8547.5, subdivision (c). This term is defined to mean an employee or employees of the State Auditor’s Office. This section clarifies that this term includes any employee of the State Auditor’s Office but does not include any person or business entity that has contracted with the State Auditor’s Office. Defining this term also defines who is subject to the alternative whistleblower system as opposed to the whistleblower program operated by the State Auditor. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61307

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61307 defines the term “final action” to mean the State Auditor’s written notification to the independent investigator regarding any recommendations the independent investigator has made or the State Auditor’s reasons for not taking adverse action pursuant to Government Code section 19570 in response to the independent investigator’s final written report. This clarifies that the term does not include oral statements, interim inquiries, or notifications that are not from the State Auditor or that are not regarding recommendations the independent investigator has made. This helps to ensure that the independent investigator does not conclude erroneously that the State Auditor has taken a final action. Defining this term also clarifies when the independent investigator can take subsequent steps in response to a final action issued by the State Auditor. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in interpreting the statute and these regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61308

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61308 defines the term “good faith” to mean that the individual providing the information or report of an improper governmental activity has a reasonable basis in fact for reporting or providing the information. This section helps to ensure that the DOJ

does not engage independent investigators for lengthy or costly investigations into frivolous or meritless allegations. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61309

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61309 defines the terms “improper governmental activity” or “IGA” to have the same meaning as set forth in Government Code section 8547.5, subdivision (c)(5). This section eliminates ambiguity in the proposed regulations since “improper governmental activity” has two separate meanings under the Act. This section clarifies which term is applicable to the proposed regulations. This section ensures that this term has the same meaning as intended by Government Code section 8547.5, subdivision (c). Further, by establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61310

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61310 defines the term “independent investigator” to mean an individual who meets all of the requirements contained in proposed section 61318. This section makes specific the term “independent investigator” as used in Government Code section 8547.5, subdivisions (c) and (d). It also helps to ensure that the independent investigator is independent from other state and local agencies and, therefore, does not pose a threat to the State Auditor’s independence, or create a conflict of interest or perception of bias, which could violate both state law and the State Auditor’s statutory duty to follow auditing standards. This section also helps to ensure that the independent investigator’s conclusions and recommendations are reliable. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61311

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61311 defines the term “pending matters liaison” to mean the State Auditor’s Office’s Chief Counsel unless the Chief Counsel is the subject of the submission, in which case it means the State Auditor’s Office’s Assistant Chief Counsel. If both are the subject of a submission, then it means the State Auditor’s Office’s Human Resources Manager. This section helps to ensure the availability of a pending matters liaison if the Chief Counsel or the Assistant Chief Counsel are effectively unavailable due to a conflict of interest. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

Two commenters stated that AB 31 does not establish or authorize the pending matters liaison and that the position is given authority that may supersede decisions and determinations made by the independent investigator.

Response

Section 61311 does not give the pending matters liaison any authority to supersede decisions and determinations made by the independent investigator. The pending matters liaison merely notifies the independent investigator that a related audit, assessment or investigation is pending. The notice is based on facts. The pending matters liaison cannot modify the facts and may not decree that an audit, assessment or investigation is pending when, in fact, it is not. Instead, the pending matters liaison must weigh in to prevent the State Auditor’s Office from violating the auditing standards we are required by law to follow in order to ensure that our work products are unbiased and free from outside influence. The pending matters liaison was created at the suggestion of the DOJ to protect the integrity of the work the State Auditor’s Office performs for the Legislature, taxpayers, and the federal government.

If a related audit, assessment or investigation is pending, then Section 61317 requires the independent investigator to temporarily cease work until the audit, assessment or investigation is completed. In nearly all cases this will be in as few as one to six months.

The pending matters liaison ensures that the independent investigator does not pressure or inadvertently cause staff of the State Auditor’s Office to commit the crime of unlawful disclosure of confidential information. Government Code section 8545.1, subdivision (c), makes the disclosure of confidential information by staff of the State Auditor’s Office a misdemeanor. Government Code sections 8545 and 8545.1 make all substantive information about a specific pending audit confidential. Government Code section 8547.7, subdivision (c), makes every investigation confidential unless the State Auditor issues a public report. Various other state and federal laws also require that the State Auditor’s Office keep certain records and information gathered for an assessment, audit or investigation confidential. Examples include the Internal Revenue Code; the Family Educational Rights and Privacy Act; and the Health Insurance Portability and

Accountability Act. Staff whom the independent investigator would seek to interview while an audit, assessment or investigation is pending would likely be prohibited by these laws from disclosing any substantive information to the independent investigator. This could impair the independent investigator's ability to learn the truth, which would render the independent investigator's work incomplete and unreliable.

The pending matters liaison also ensures that the independent investigator does not threaten the independence of the State Auditor's Office's and its staff. Government Code section 8546.1, subdivision (c), and section 8546.4, subdivision (a), require the State Auditor to conduct all financial and performance audits in compliance with auditing standards. These standards require the State Auditor's Office and its auditors to be independent *in fact and appearance* in all matters relating to audit work. In particular, they require auditors to avoid allowing external influences to threaten their ability to make independent and objective judgments. Allowing an independent investigator to investigate an auditor while an audit is pending could constitute an undue influence and thereby threaten independence. For example, if an auditor believed his or her employment was in jeopardy, then the independent investigator could potentially influence the auditor's selection or application of audit procedures as well as the auditor's conclusions and the report content, or at a minimum create the appearance that the auditor engaged in those activities. It could also cause an auditor to refrain from asking pressing questions, for fear that doing so will lead to another complaint. And even in the absence of actual threats to independence, auditing standards require the State Auditor's Office to avoid any situation that could lead to the *perception* of such threats. Thus, the mere possibility that a pending investigation could influence the outcome of an audit is a violation of auditing standards. Auditing standards require the State Auditor's Office to mitigate against the appearance of and actual threats to independence. Section 61311 does just that.

The pending matters liaison is the result of close collaboration with the DOJ. In fact, the DOJ specifically requested that our office identify a point of contact to ensure open communication, particularly for new investigations. Similarly, the State Auditor's Office frequently confers with the respective state agency's chief legal counsel when it conducts investigations of state employees. Conferring with high-ranking legal counsel, when appropriate, ensures that those communications remain confidential, assists in answering initial questions during predication, serves as a point of contact for confidentially obtaining pertinent records such as organizational charts and personnel information, and is essential if and when a complaint relates to executive management.

Finally, the DOJ did not criticize the pending matters liaison in its public comments. This suggests that section 61311 satisfies the concerns it recognized and expressed about independent investigators being placed in a position where they could interfere with an audit, investigation or assessment or be limited in their capacity to investigate because auditors fear a violation of law or standards.

PROPOSED SECTION 61312

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61312 defines the term “promptly and directly delivered” and interprets and makes specific the use of this term as set forth in Government Code section 8547.5, subdivision (c). This term is defined to mean submitted by the State Auditor’s Office to the DOJ by website, email, U.S. Mail, or telephone, within three business days of receipt and without prior review by or disclosure to the State Auditor. This section identifies and clarifies the acceptable means of transmitting a submission. This section also clarifies that the term means not only the absence of a review by the State Auditor but also the absence of a disclosure to the State Auditor before delivery to the independent investigator. This helps to ensure that the State Auditor will not improperly review a submission before the State Auditor’s Office transmits it to the DOJ. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

Two commenters stated that section 61312 does not prohibit the State Auditor’s staff from reviewing the particulars of each submission. They recommended clearly prohibiting such review.

Response

Section 61312 is necessary, prudent, and fully aligns with the plain language of AB 31. Importantly and in accordance with AB 31, section 61312 allows for the direct transmission of submissions to the DOJ by email, U.S. mail, and telephone (Section 61312, subd. (a) and (b)). These direct transmissions to the DOJ will not be reviewed by any employee of the State Auditor’s Office. The State Auditor anticipates that most submissions will be made directly to the DOJ, thereby bypassing the State Auditor’s Office altogether.

However, it is very possible that a person may erroneously make a submission to the State Auditor’s Office in lieu of transmitting a submission directly to the DOJ. For example, a State Auditor’s Office employee may alert a human resources manager as to a potential improper activity not aware that such disclosure would also qualify as a submission under the alternative whistleblower system – a submission that must be transmitted to the DOJ under AB 31. Thus, it is necessary to address how the State Auditor’s Office will handle the receipt of any such submissions. Further, because the State Auditor’s Office implements the Act for all other state departments, and it is a crime to make an improper disclosure of those complaints to anyone outside of the State Auditor’s Office, the State Auditor’s Office must make certain that, if it receives any complaints, it reviews them to determine whether they should be investigated and maintained confidentially by the State Auditor’s Office, or whether they should be forwarded to the DOJ.

Section 61312 prudently addresses these issues by limiting the number of State Auditor’s Office employees who will be reviewing such submissions to just three employees while also identifying those employees who have the most experience necessary to recognize

such disclosures as actual alternative whistleblower system submissions. Section 61312 then requires these employees to forward such submissions to the DOJ in a timely fashion (Section 61312, subd. (c) and (d)). Again, these employees would only see any such submission *if the submission was made directly to the State Auditor's Office instead of directly to the DOJ.*

AB 31 requires that submissions be transmitted to the DOJ without prior review by or disclosure of the particulars to the State Auditor. Section 61312 aligns with AB 31 because it expressly prohibits employees who receive any such submissions from disclosing to or granting prior review of any submissions to the State Auditor. For all of these reasons, section 61312 is necessary, prudent, and aligns with the plain language of AB 31.

PROPOSED SECTION 61313

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61313 defines the term "State Auditor" to mean the California State Auditor appointed by the governor pursuant to Government Code section 8543.2 or held over in that position, or the Chief Deputy State Auditor when the State Auditor position is vacant. This section helps to ensure that the term "State Auditor" is not confused with the term "State Auditor's Office" and it clarifies which individuals and when such individuals might be acting in the capacity as State Auditor. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61314

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61314 defines the term "State Auditor's Office" to mean the California State Auditor's Office. This section helps to ensure that the term "State Auditor's Office" is not confused with the term "State Auditor" or with State Auditor's Office employees. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61315

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61315 defines the term “submission” to mean an allegation that the State Auditor’s Office or an employee engaged or participated in an improper governmental activity. This section helps to ensure that complaints that do not constitute allegations of improper governmental activities are handled under the proper legal authority. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61316

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61316 defines the term “supports a conclusion” to mean that the “sufficient, reliable, and credible evidence” gathered by the independent investigator establishes that it is more likely than not that the State Auditor’s Office or an employee engaged or participated in a substantiated improper governmental activity. This section clarifies that the evidentiary standard is more likely than not rather than another standard, such as the clear and convincing standard or beyond a reasonable doubt standard. This is the same evidentiary standard that the State Auditor’s Office uses when it investigates allegations of improper governmental activities by other state civil service employees and that the State Personnel Board uses when it determines whether to impose discipline on civil servants. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed regulation during the 45-day public comment period.

PROPOSED SECTION 61317, SUBDIVISION (a)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61317, subdivision (a) requires the DOJ to review a submission and determine whether it constitutes a good faith allegation of an improper governmental activity. If the DOJ concludes that the submission contains sufficient factual information to warrant further investigation, then this section requires the DOJ to contract with an independent investigator. This proposed subdivision provides the DOJ with clear criteria for deciding whether to engage an independent investigator. Without this proposed

subdivision, the DOJ would lack guidance and not know whether to engage an independent investigator for frivolous or meritless allegations. This proposed subdivision would also help to ensure that allegations of improper governmental activities made against the State Auditor's Office or its employees are handled in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61317, SUBDIVISION (b)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61317, subdivision (b) establishes the procedures necessary to ensure that an independent investigator, when conducting an investigation, does not violate or cause any employee of the State Auditor's Office to violate state law with respect to any pending audit, assessment, or investigation. As noted in the Introduction, state law has strict mandates imposed on employees of the State Auditor's Office regarding the confidentiality of the State Auditor's audits and investigations. Government Code sections 8545 and 8545.1 prohibit the State Auditor and employees of the State Auditor's Office from disclosing to the public any record or substantive information about a pending audit, which includes audit assessments. Government Code section 8547.5, subdivision (b), prohibits the 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 unless the State Auditor issues a public report after determining that such issuance is in the best interest of the State. Government Code section 8545.1, subdivision (c) makes these disclosures a crime.

In addition, Government Code sections 8546.1, subdivision (c), and 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 to be independent in all matters relating to audit work and require that outside parties not interfere with the State Auditor's work.

Therefore, this proposed subdivision sets forth a procedure to enable an independent investigator to know whether a particular investigation would improperly relate to a pending audit, assessment, or investigation, and, if so, places a hold on such investigation until that pending audit, assessment, or investigation is completed. To protect the integrity of the independent investigator's investigation, this proposed subdivision requires that the pending matters liaison place a litigation hold on the applicable pending audit,

assessment, or investigation so that materials related to the independent investigator's investigation are preserved until the independent investigator completes his or her investigation. This proposed subdivision clarifies that "relating to a pending audit, assessment or investigation" includes the various phases, elements and staff pertaining or assigned to an audit, assessment or investigation.

This proposed subdivision is necessary to preserve the State Auditor's independence, avoid interference with on-going audits, assessments, and investigations, and avoid the disclosure of records and information that are confidential by law, the disclosure of which would constitute a crime. It also eliminates ambiguity about whether an audit, assessment or investigation is pending while ensuring that a complete investigatory record is preserved for the independent investigator if he or she must defer the investigation.

Finally, this proposed subdivision allows the independent investigator to refer an allegation to the appropriate criminal or administrative law enforcement agency in lieu of conducting an investigation of the matter when the independent investigator determines that there is reasonable cause to believe that an employee is engaging in ongoing criminal activity or fraud subject to certain limitations. This proposed subdivision clarifies when an independent investigator may make reports to law enforcement. Without this regulation, an independent investigator could be left wondering whether he or she could report to law enforcement and, if so, under what circumstances.

Comments Received During the 45-Day Public Comment Period

Two commenters stated that subdivision (b) stands in contrast to the intent of AB 31. They also commented that section 61317 imposes serious limitations on the independent investigator's independence, including allowing the State Auditor's Office's Chief Counsel to decide when an investigator must suspend an investigation. They recommended deleting section 61317, subdivision (b).

Another commenter requested that subdivision (b), paragraph (4), detail the types of actions that the DOJ is permitted to take prior to commencing an investigation. This commenter recommended that the DOJ be given an opportunity to attempt to corroborate the allegations provided before releasing any information to the Chief Counsel. This commenter also recommended that section 61317 be revised so it does not require release of the name of the subject to the Chief Counsel.

Response

Subdivision (b) does not allow the Chief Counsel acting as the pending matters liaison to decide when an investigator must suspend an investigation. The pending matters liaison merely notifies the independent investigator that a related audit, assessment or investigation is pending. The notice is based on facts. The pending matters liaison cannot modify the facts and may not decree that an audit, assessment or investigation is pending when, in fact, it is not. Instead, the pending matters liaison must weigh in to prevent the State Auditor's Office from violating the audit standards the State Auditor's Office is required by law to follow in order to ensure that our work products are unbiased and free from outside influence. We created the pending matters liaison at the suggestion of the

DOJ and in an effort to protect the integrity of the work the State Auditor's Office performs for the Legislature, taxpayers, and the federal government.

If a related audit, assessment or investigation is pending, then Section 61317 requires the independent investigator to temporarily cease work until the audit, assessment or investigation is completed. In nearly all cases this will be in as few as one to six months.

The pending matters liaison and the temporary work stoppage are essential to prevent independent investigators from pressuring or inadvertently causing staff of the State Auditor's Office to commit the crime of unlawful disclosure of confidential information. Government Code section 8545.1, subdivision (c), makes the disclosure of confidential information by staff of the State Auditor's Office a misdemeanor. Government Code sections 8545 and 8545.1 make all substantive information about a specific pending audit confidential. Government Code section 8547.7, subdivision (c), makes every investigation confidential unless the State Auditor issues a public report. Various other state and federal laws also require the State Auditor's Office to keep certain records and information gathered for an assessment, audit or investigation confidential. Staff whom the independent investigator would seek to interview while an audit, assessment or investigation is pending would likely be prohibited by these laws from disclosing any substantive information to the independent investigator. Without the pending matters liaison and a temporary work stoppage, the independent investigator would likely initiate an investigation only to be stymied.

The pending matters liaison and the temporary work stoppage are also critical so that the independent investigator does not threaten the independence of the State Auditor's Office and its staff. Government Code section 8546.1, subdivision (c), and section 8546.4, subdivision (a), require the State Auditor to conduct all financial and performance audits in compliance with auditing standards. These standards require the State Auditor's Office and its auditors to be independent in fact and appearance in all matters relating to audit work. In particular, they require auditors to avoid allowing external influences to threaten their ability to make independent and objective judgments. Allowing an independent investigator to investigate an auditor while an audit is pending could constitute an undue influence and thereby threaten independence. For example, if an auditor believed his or her employment was in jeopardy, then the independent investigator could potentially influence the auditor's selection or application of audit procedures as well as his or her conclusions and the report content, or create the appearance of undue influence. It could also cause an auditor to refrain from asking pressing questions, for fear that doing so will lead to another complaint. And even in the absence of actual threats to independence, audit standards require the State Auditor's Office to avoid any situation that could lead to the perception of such threats. Thus, the mere possibility that a pending investigation could influence the outcome of an audit is a violation of auditing standards. Audit standards require the State Auditor's Office to mitigate against the appearance of and actual threats to independence. Section 61317, subdivision (c), in conjunction with section 61311, does just that.

The pending matters liaison and the temporary work stoppage are the result of close collaboration with the DOJ. In fact, the DOJ specifically requested that the State Auditor's Office identify a point of contact to ensure open communication, particularly for new investigations. The State Auditor's Office frequently confers with chief legal counsel when it conducts investigations. Conferring with high-ranking legal counsel, when appropriate, ensures that those communications remain confidential, assists in answering initial questions during predication, serves as a point of contact for confidentially obtaining pertinent records such as organizational charts and personnel information, and is essential if and when a complaint relates to executive management.

Notably, the DOJ did not criticize subdivision (b) in its public comments. This suggests that it satisfies the concerns they expressed to us about independent investigators being placed in a position where they could otherwise interfere with an audit, investigation or assessment.

The regulation also preserves the records and ensures that the independent investigator is able to perform the investigation. Specifically, subdivision (b), paragraph (4), requires the pending matters liaison to place a litigation hold on the pending audit, assessment or investigation. This means that the pending matters liaison would order employees of the State Auditor's Office to preserve all documents and other materials relevant to the investigation similar to what the State Auditor's Office would do if served with a complaint in a lawsuit. This will enable the independent investigator to initiate or resume the independent investigation as soon as the audit, assessment or investigation is completed.

AB 31 and these regulations permit the DOJ to corroborate an allegation before releasing any information to the pending matters liaison. However, the confidentiality protections that attach to information and records collected as part of an audit, assessment or investigation would render even these preliminary steps difficult, if not impossible. No significant actions by the independent investigator would be appropriate prior to contacting the pending matters liaison. The transmission of certain limited information but not the name of the subject could leave the pending matters liaison speculating or mistaken about whether an independent investigation related to a pending audit, assessment or investigation and create a scope limitation. The consequences of an error could be grave. For example, an error could impair auditor independence and thereby interfere with an audit and damage the integrity of the State Auditor's Office. Moreover, limited information could enable the pending matters liaison to identify the subject. Also, the State Auditor's Office routinely discloses the names of subjects when it must engage legal counsel to assist with investigative work. These issues far outweigh the remote or non-existent risk that the pending matters liaison would improperly disclose the identity of the subject of an independent investigation as the commenters implied might occur if we did not delete section 61317.

PROPOSED SECTION 61317, SUBDIVISION (c)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61317, subdivision (c) clarifies that the State Auditor's Office may conduct its own workplace investigation of allegations even if they are the same or similar to those that the independent investigator is investigating. This resolves any ambiguity over whether Government Code 8547.5, subdivision (c) preempts the State Auditor's Office from investigating the same or similar matters that the independent investigator is investigating.

Comments Received During the 45-Day Public Comment Period

Two commenters stated that subdivision (c) stands in contrast to the intent of AB 31. They recommended removing section 61317. Another commenter stated that it was problematic that the State Auditor's Office could launch its own investigation into alleged improper acts after receiving the name of the subject from the independent investigator.

Response

Although not expressly stated, the commenters appear to presume that the State Auditor's Office intends to conduct duplicate investigations. That is not the case. Repeating the investigator's work is neither necessary nor a prudent use of state resources. However, subdivision (c) is necessary to comply with other relevant law and best practices. In California, employers have a legal duty to promptly and thoroughly investigate any claim of harassment, discrimination, or retaliation. Failure to comply with this mandate is a separate basis for liability. Government Code section 12940 requires employers to "take reasonable steps to prevent and correct harassing, discriminatory and retaliatory behavior in the workplace." Courts have held that prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work environment. See *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (App. 2 Dist. 2002) 103 Cal.App.4th 1021, 1035. In fact, the California Department of Fair Employment and Housing Workplace Harassment Prevention Guide for California Employers, page 2, states that employers should give top priority to reports of harassment and other wrongful behavior and determine whether the report is serious enough that the employer needs to conduct a formal investigation. Failure to comply with the law could increase the office's liability. Additionally, the Act, which AB 31 amended, expressly provides that it does not curtail any agency or department's authority to investigate any matter (Gov. C. §8547.7, subd. (d)).

To minimize legal liability and effectively implement corrective actions, the State Auditor's Office must be able to investigate complaints it receives directly, even into matters that are related to independent investigations. In these cases, the State Auditor's Office might not even be aware of the pending independent investigation. A whistleblower could notify the DOJ about alleged malfeasance and another employee could submit the same or similar complaint to the State Auditor's Office. The second complaint would trigger the State Auditor's duty to investigate. For example, Occupational Safety and Health Administration law might require the State Auditor's Office to investigate a safety incident

involving an employee who is the subject of an independent investigation. In fact, it is quite common for state agencies to receive complaints and conduct their own investigations into matters that are related to a whistleblower investigation. The Legislature must have intended for AB 31 to allow the State Auditor's Office to conduct workplace investigations that the State Auditor reasonably believes are legally necessary because courts presume that, in enacting any law, the Legislature had knowledge of existing statutory law and judicial decisions. *Bailey v. Superior Court* (1977) 19 Cal.3d 970, fn.10, at 977-978.

The State Auditor's Office recognizes the importance of avoiding interference with audits, investigations and assessments, and would only conduct its own investigation when legally required to do so or when it was not aware that a related independent investigation was taking place. If lawful and appropriate, the State Auditor's Office would defer further work on its investigation, or a portion of its investigation, to avoid interfering with the independent investigation. The State Auditor's Office would conduct its investigation employing strict confidentiality protocols and any disclosures would be in accordance with law.

PROPOSED SECTION 61317, SUBDIVISION (d)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61317, subdivision (d) requires any final report written by the independent investigator to set forth the information that the State Auditor needs to evaluate the independent investigator's findings and recommendations and to decide whether to take adverse action. Without this subdivision, an independent investigator could submit a final written report that is inadequate for the State Auditor to act upon.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61317, SUBDIVISION (e)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61317, subdivision (e) helps to ensure that the State Auditor and her office's executive staff receive a copy of the independent investigator's report and supporting evidence securely and timely whenever the independent investigator reaches a conclusion. It also helps to ensure that all records relating to an investigation are returned to the State Auditor's Office and that all copies are destroyed. This proposed subdivision is necessary to help ensure that confidential records are not disclosed to the public inadvertently.

Comments Received During the 45-Day Public Comment Period

One commenter stated that requiring the independent investigator to provide all records gathered during the investigation to the State Auditor's Office was not in keeping with the goal of having the alternative whistleblower system be substantially similar to the regular whistleblower system. This commenter recommended that the regulation require the independent investigator to provide only information that is necessary to support the independent investigator's recommendations.

Response

Subdivision (e) is necessary to resolve an ambiguity in AB 31 about whether the State Auditor's Office should receive all or some of the evidence gathered during the independent investigation. Government Code Section 8547.5, subdivision (c), paragraph (2), subparagraph (A), requires the independent investigator to send *all* evidence gathered during the investigation to the State Auditor. However, subparagraph (B) states that the independent investigator *may* provide to the State Auditor *any* evidence gathered during the investigation that, in the judgment of the independent investigator, is necessary to support any of the report's recommendations. Ultimately, the return of government records to the appropriate governmental entity should not be left to the discretion of a private vendor.

As a matter of law, the records that the State Auditor's Office obtains during its audit work are only disclosable when used in support of a published audit report. Even the fact that we have gathered particular records is confidential until we publish a public report. Additionally, all investigative records are confidential in perpetuity, unless the State Auditor determines that it is in the best interest of the state to release them. These records can be highly sensitive and often contain information relating to private individuals protected by state and federal law. We do not believe that the Legislature, which itself may not be legally authorized to see the State Auditor's Office's records, intended that a private vendor, which is not subject to any of the laws protecting government information, should permanently retain those records, which frequently contain personally identifiable information, federal tax information, student-level educational records, medical records, criminal records, law enforcement records, attorney-client privileged records, death records, prison records, court records, and records that discuss the state's technical vulnerabilities. We also do not believe that the DOJ or any of its contractors should permanently retain records the State Auditor's Office is prohibited by law from sharing with the committee legislators who determine what we audit. Moreover, we think that certain auditees, such as law enforcement, would resist providing those records to us knowing that some unknown contractor may eventually gain possession, custody and control over them. In fact, such an outcome would constitute an absurd result. Pursuant to the rules governing rulemaking and statutory construction, we are required to draft and implement these regulations in a manner that avoids absurd results.

Subdivision (e) is necessary because without it the State Auditor could not comply with the requirements of AB 31. AB 31 requires the State Auditor to serve a notice of adverse action within 60 days after receiving a copy of the independent investigator's report or submit the reasons why no action was taken. AB 31 also requires the State Auditor to

report on a monthly basis on any actions it has taken or that it intends to take to implement the independent investigator's recommendations. In order to comply with these requirements, the State Auditor must have all the evidence the independent investigator gathered.

The State Auditor must also have all the evidence in order to make a fully supported decision regarding what action to take because only with all the evidence can the State Auditor be aware of all mitigating factors necessary to consider before deciding what penalty is appropriate given all the facts. Furthermore, all the evidence is necessary to comply with the requirement that the employee be provided with all the documents relied on in taking the adverse action. *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 214. Without all the evidence, the California State Auditor cannot show that it had reasonable ground to take an adverse action against an employee and the employee would be deprived of due process and the opportunity to prepare a defense.

Courts presume that, in enacting any law, the Legislature had knowledge of existing statutory law and judicial decisions that are pertinent. *Bailey v. Superior Court* (1977) 19 Cal.3d 970, fn.10, at 977-978. This principle and the plain language of AB 31 make clear that the Legislature intended for the State Auditor's Office to receive all evidence gathered during an investigation. Otherwise, the Legislature would not have required the State Auditor to take adverse action within 60 days knowing that the State Auditor would not have all the evidence needed to take adverse action.

Subdivision (e) is also necessary because the State Auditor's Office has a duty to ensure that confidential records are protected in accordance with law, that breaches of confidential records and information do not occur, and that if they do occur, that the affected parties are notified in accordance with law. California Civil Code section 1798.29 requires state agencies to disclose breaches of the personal information of California residents. This law does not apply to a non-governmental investigator. If the independent investigator retained the records instead of providing them to the State Auditor's Office and a breach occurred, then the State Auditor's Office could be unable to respond appropriately to the breach. The independent investigator has no clear legal duty to protect the records or to remedy a breach by notifying affected parties.

The State Auditor's Office collects records involving private citizens and has a duty to protect those individuals. The State Auditor's Office's physical and technical safeguards make the safest place for those records within the secure building that houses the State Auditor's Office. This regulation is an administrative safeguard intended to protect both auditees and the private citizens whose records they are required to share with us.

PROPOSED SECTION 61317, SUBDIVISION (f)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61317, subdivision (f) requires the State Auditor's Office either to serve a notice of adverse action or notify the independent investigator in writing of the reasons

for not doing so within 60 days of receiving a final written report from the independent investigator supporting a conclusion that an employee engaged in an improper governmental activity. This helps to ensure that the State Auditor's Office considers the independent investigator's report and takes appropriate action based upon it or provides an explanation as to why the State Auditor's Office has declined to do so.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61317, SUBDIVISION (g)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61317, subdivision (g) clarifies that the 60-day timeframe specified in subdivision (f) does not commence until the State Auditor's Office receives the independent investigator's final written report and all evidence gathered by the independent investigator during the investigation. This proposed subdivision defines "receipt" of the final written report as when the State Auditor's Chief Counsel, Chief of Investigations, or Human Resources Manager takes possession of the report. This helps to avoid ambiguity about when the 60-day timeframe commences and ensures that the regulation is not interpreted as requiring the State Auditor to act prematurely.

Comments Received During the 45-Day Public Comment Period

The commenter noted above under Proposed Section 61317, subdivision (e), stated that his or her comments for subdivision (e) also applied to subdivision (g).

Response

Because the commenter noted above under Proposed Section 61317, subdivision (e), that his or her comments for subdivision (e) also applied to subdivision (g), our response in subdivision (e) above are incorporated herein.

PROPOSED SECTION 61317, SUBDIVISION (h)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61317, subdivision (h) requires that the identity of the person providing the information that initiated an investigation must not be disclosed by anyone without the express permission of the person. This helps to ensure that persons who make allegations of improper governmental activities do so confidentially and that fear of disclosure of one's identity does not dissuade a prospective whistleblower from making an allegation. This proposed subdivision would also help to ensure that allegations of improper governmental activities made against the State Auditor's Office and its employees are handled in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees. Accordingly, this regulation would help to ensure

consistency of care and diligence in handling investigations of allegations of improper governmental activities regardless of which state entity's employee is the subject of the allegation.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61317, SUBDIVISION (i)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61317, subdivision (i) clarifies that the independent investigator may disclose the name of the subject employee if the independent investigator refers a matter to law enforcement or files a request to file charges before the State Personnel Board. This eliminates any ambiguity about whether the independent investigator could disclose the identity of the subject employee in these two limited circumstances and helps to ensure that these processes are able to function. This proposed subdivision would also help to ensure that allegations of improper governmental activities made against the State Auditor's Office or its employees are handled in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61318, SUBDIVISION (a)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61318, subdivision (a) is necessary to ensure that independent investigators retained by the DOJ have the proficiency, experience, and knowledge necessary to conduct an investigation of an alleged improper governmental activity by an employee of the State Auditor's Office. Without this section, independent investigators retained by the DOJ could be unqualified to conduct an investigation. This subdivision also helps to ensure that investigations of alleged improper governmental activities by employees of the State Auditor's Office are performed by independent investigators who meet the same minimum qualifications that the State Auditor requires of independent investigators who perform investigations of alleged improper governmental activities by all other state employees. Accordingly, this regulation would help to ensure consistency of care and diligence in handling investigations of allegations of improper governmental activities regardless of which state entity's employee is the subject of the allegation.

Comments Received During the 45-Day Public Comment Period

Three commenters indicated that the qualifications for the independent investigator set forth in subdivisions (a) and (b) are too stringent and exceed the minimum qualifications that the Legislature approved in AB 31.

Response

The qualifications set forth in proposed section 61318, subdivision (a) conform to the dictates of Government Code section 8547.5, subdivisions (c) and (d)(2). Government Code section 8547.5, subdivision (c)(2)(A) requires the DOJ's independent investigator to conduct investigations in a manner consistent with the provisions of the Act for other state civil service employees. Government Code section 8547.5, subdivision (d)(2) requires the DOJ to retain an investigator who has experience conducting confidential investigations of alleged, improper governmental activities. These statutory mandates help ensure that the DOJ's independent investigators conduct investigations with the same skill and quality with which the State Auditor's Office performs its own investigations. To implement these mandates, proposed section 61318, subdivision (a) requires the DOJ's independent investigators to have knowledge of the Act, experience in investigating matters pertaining to state Civil Service Rules, State Personnel Board precedent and applicable state and federal employment laws, and proficiency in conducting confidential workplace investigations. These are the minimum attributes both the State Auditor and the DOJ's own investigators should meet. It would be contrary to legislative intent, and unreasonable, to permit the DOJ to hire independent investigators who lack similar qualifications and experience as the State Auditor's investigators to investigate the State Auditor's own staff given that AB 31 requires the independent investigator to conduct investigations in a manner consistent with the Act. In other words, it would be fundamentally unfair to subject employees of the State Auditor's Office to investigations by those who are substantially less qualified than the State Auditor's investigators, who investigate state civil service employees in other state departments and agencies. Moreover, it is important to note Government Code section 8547.5, subdivision (d)(2), by itself, does not clarify what it means to be "experienced in investigating allegations of improper governmental activity in a confidential manner." The guidance provided in proposed section 61318, subdivision (a) clarifies what such experience should mean.

PROPOSED SECTION 61318, SUBDIVISION (b)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61318, subdivision (b) requires the DOJ to retain independent investigators who are independent from the State Auditor's Office, the executive branch, and legislative control. This proposed subdivision clarifies that independent means never having been employed by or contracted with the State Auditor's Office, and not having been employed by or contracted with the executive, legislative, or judicial branches of government, except to conduct independent workplace investigations, or any entity the State Auditor's Office has or could audit, within the preceding ten years. Ten years is a reasonable timeframe that helps to ensure independent investigators are not financially

interested in or biased by their former employers or contractors but it allows for retaining independent investigators whose interests and relationships are so remote that they would not affect the investigation. It also helps to ensure that the independent investigator has no duties or incentives to attempt to exert influence over the California State Auditor's Office and thereby threaten its independence and objectivity. This proposed subdivision is necessary to preserve the State Auditor's independence while still ensuring that there remains a sufficiently large enough pool of potential investigators available who are not agents of, financially interested in, or biased by any entity that could be the subject of an audit by the State Auditor's Office.

Comments Received During the 45-Day Public Comment Period

As noted above under section 61318, subdivision (a), three commenters indicated that the qualifications for the independent investigator set forth in subdivisions (a) and (b) are too stringent and exceed the minimum qualifications that the Legislature approved in AB 31. One commenter suggested it would be difficult to find an investigator in Sacramento that has not contracted with a branch of state government but who is experienced with state employment law. A fourth commenter stated that subdivision (b) is too restrictive. This fourth commenter recommended a five-year timeframe.

Response

The comment suggesting the proposed text in subdivision (b)(1) would disqualify most qualified investigators fails to consider that the ten-year cooling off period in section 61318, subdivision (b) excludes contracts to perform independent workplace investigations for state government. In other words, the proposed text does not disqualify an experienced investigator who has contracted with a government entity to perform independent governmental workplace investigations during the preceding 10 years. The proposed text therefore does not unreasonably limit the pool of qualified investigators. Simultaneously, the proposed text serves the purpose of disqualifying individuals who may have a bias against the State Auditor's Office as a result of its past work. According to the plain language of AB 31, employees of the State Auditor's Office are legally entitled to an investigation that is as equally unbiased as an investigation the State Auditor's Office itself performs. Given the volume, breadth and depth of the State Auditor's work, there is a significant risk that anyone who has worked in government within the last 10 years will have preconceived notions about the State Auditor's Office. Therefore, an investigator who was employed or contracted by a state entity the State Auditor's Office has or could have audited is likely to lack objectivity or create the appearance of a lack of objectivity.

In addition, Government Code section 8547.5, subdivision (d)(3) requires investigators to be "outside of, and independent from" the State Auditor's Office and executive and legislative branch control. Given this mandate, ten years is a reasonable cooling off period to ensure that an investigator's independence will not be threatened by financial interests, familiarity bias, ethical duties such as loyalty and confidentiality to former governmental employers, and other conflicts of interest. For example, it is undisputed that prior income from a former government agency employer is a financial interest that can impact an investigator's objectivity and credibility. Moreover, an investigator who was previously

employed by a government agency could have an expectation of returning to that employer, thereby raising concerns with the independent investigator's financial interest in expected future income. Such interests could impair the independent investigator's independence or create the appearance of an impairment to independence. Former employment could also create a familiarity bias if the independent investigator has long-standing relationships with management or personnel of the employer or industry the employer regulates. As yet another example, investigators could have legal or ethical obligations to former employers that could threaten the independent investigator's ability to investigate impartially. An investigation of alleged improper governmental activities at the State Auditor's Office could look back several years. In order to ensure an unbiased investigation of State Auditor employees, the investigation must be free of any bias, or the appearance of bias, that would result from any connection between the independent investigator and the subject of his or her investigation. This is particularly true where the independent investigator's work is not governed by auditing standards. Investigations often come down to assessments of credibility, so an unbiased investigator, uncolored by prior relationships – positive or negative – with the State Auditor's Office, is essential to the success of the alternative whistleblower system.

Moreover, ten years is a reasonable cooling off period, and parallels other California law. For example, title 2, division 1, chapter 3.2 of the Government Code implements the formation of the Citizens Redistricting Commission (Commission), as required by article XXI of the California Constitution. Government Code section 8252, subdivision (a)(2)(A) sets forth the conflict of interest provisions governing who may serve on the Commission. These provisions prohibit individuals from serving on the Commission if the individual or a qualifying member of the individual's family, for example, was employed by a California congressional, legislative, or Board of Equalization office, or served as an employee or had been under contract with a political party or campaign committee of a candidate for federal or state office, at any time within the last ten years. Approved as Proposition 11 by the voters of California in 2008, these conflict of interest rules demonstrate that 10 years is a reasonable amount of time to ensure an individual's ability to be impartial. Likewise, Government Code section 87410 prohibits a member of the Board of Administration of the Public Employees' Retirement System, or a member of the Teachers' Retirement Board from accepting compensation for providing services as a placement agent in connection with investments or other business, for a period of ten years. Thus, on its face, a 10-year period to mitigate conflicts of interest is reasonable.

Also, Government Code section 8547.5, subdivision (d), defines the independent investigator as either an attorney licensed in California or a certified fraud examiner (CFE). Both of these positions are bound by professional ethics whose duration may extend beyond ten years. For example, the California Rules of Professional Conduct, Rule 1.6 prohibits a lawyer from revealing protected client information. California Rules of Professional Conduct, Rule 1.7 imposes a duty of loyalty upon a lawyer that prevents using information about a former client to the advantage of a current client. No time limit applies to these rules. Additionally, the State Auditor's Office has a practice of not assigning an auditor or investigator to perform work involving a public entity if the auditor or investigator was ever formerly employed by the entity. Applying the 10-year limitation

to an investigator retained by the DOJ gives assurance to the public and other stakeholders that an investigation of alleged improper governmental activities by employees of the State Auditor will be conducted with the same degree of independence and impartiality. It ensures that employees of the State Auditor's Office are investigated by similarly unbiased, independent investigators.

Finally, the prohibition on retaining investigators who were previously employed by, been an applicant for employment with, or a contractor or employee of a contractor for the State Auditor's Office, is a reasonable limitation to ensure an unbiased investigation of the State Auditor's Office. Independence and objectivity demand that an investigator not have any real or perceived interests pertaining to the State Auditor's Office for the same reasons they demand that an independent investigator not have prior state employment. Otherwise, the risk of bias, or the appearance of bias, would color the independent investigator's ability to perform his or her duties as required by Government Code section 8547.5 and undermine the credibility of his or her work.

PROPOSED SECTION 61318, SUBDIVISION (c)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61318, subdivision (c) specifies that an independent investigator is a "consultant" as defined under the Political Reform Act of 1974 (Commencing with section 81000 of Title 9 of the Government Code) and must file a statement of economic interests. This eliminates any ambiguity about whether the independent investigator is a consultant and helps to ensure that the independent investigator discloses any potential conflict of interest.

Comments Received During the 45-Day Public Comment Period

One commenter stated that subdivision (c), which requires the independent investigator to file a Statement of Economic Interests (Form 700), seems unnecessary and could discourage individuals from acting as an independent investigator. The commenter recommended substituting subdivisions (b) and (c) with a provision that would focus more narrowly on preventing individuals with a conflict of interest from serving as independent investigators.

Response

The requirement to complete a Statement of Economic Interests (Form 700) will not discourage qualified individuals from serving as an independent investigator. Government Code section 87300 requires every agency to adopt a conflict of interest code that specifies which persons must file a Form 700. The State Auditor's Office's conflict of interest code requires its own auditors, investigators and certain consulting contractors to periodically disclose all interests in real property in the State of California, as well as investments, business positions, and sources of income, including gifts, loans, and travel payments on the Form 700. The requirement for the independent investigator is the same as the requirement that applies to auditors, investigators, and certain consulting contractors of the State Auditor's Office. The requirement to complete a Form 700 has

not prevented the State Auditor's Office from attracting highly qualified staff and contractors.

Moreover, the commenter's suggestion to simply substitute proposed subdivision (c) and (d) with a provision that would focus on preventing those with a conflict of interest from serving as an independent investigator fails to clarify what is meant by "conflict of interest." Such ambiguity invites confusion and inconsistency. For example, if the State Auditor's Office were to revise the regulation to simply incorporate "conflict of interest," as defined under the Political Reform Act of 1974 (Government Code section 81000 et seq.) and its regulations (2 CCR 18110 et seq.) without further limitation, then the DOJ and prospective contractors might have to perform a complex multi-step analysis or obtain an opinion from the Fair Political Practices Commission to determine whether a prospective investigator has a conflict of interest or should file a statement of economic interests (Form 700). This ambiguity would lead to confusion and inconsistent results in the qualifications of a prospective investigator. In contrast, the current proposed text allows the DOJ and prospective contractors to readily determine whether a prospective contractor qualifies as an independent investigator. Moreover, unlike auditing standards for auditors, the industry standards for investigators do not ensure that the investigator is free of impairments to independence as the commenters may have inferred. For example, the Association of Certified Fraud Examiners Code of Professional Ethics, paragraph II, and Code of Professional Standards, section III, paragraph A.2, allow a CFE to have a conflict of interest without applying safeguards so long as the CFE discloses it. As drafted, section 61318 is intended to prevent a biased investigation and is critical to the success of the alternative whistleblower system by helping to ensure consistency among the investigations affecting all civil servants and ensuring the integrity of the investigative report.

PROPOSED SECTION 61318, SUBDIVISION (d)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61318, subdivision (d) requires an independent investigator to maintain errors and omissions insurance of at least \$1 million. This helps to ensure an independent investigator could cover the losses that could result from the negligent performance of an investigation. This requirement is consistent with requirements for legal services contracts for state agencies, as well as a requirement in Business and Professions Code section 7520.3, for private investigators organized as limited liability companies.

Comments Received During the 45-Day Public Comment Period

One commenter stated that subdivision (d), which requires the independent investigator to retain errors and omissions insurance, seems unnecessary and could discourage individuals from acting as an independent investigator. The commenter recommended substituting section 61318 with a provision that would focus more narrowly on preventing individuals with a conflict of interest from serving as independent investigators.

Response

The requirement to maintain errors and omissions insurance will not discourage qualified individuals from serving as an independent investigator because many of them already have insurance. Government Code section 8547.5, subdivision (d) defines an independent investigator as either an attorney or certified fraud examiner (CFE). Public Contract Code section 10353.5 and the State Contracting Manual, Volume 1, section 3.07, require all legal services contractors to maintain legal malpractice insurance. Business and Professions Code section 7520.3 requires private investigators who are organized as limited liability companies, which is a common form of organization, to maintain errors and omissions insurance as a condition of licensure. Further, Business and Professions Code section 7521 defines a private investigator in a way that includes many of the CFEs who are qualified to be independent investigators. Therefore, we would expect all attorneys and many CFEs to have some form of professional liability insurance.

Notably, subdivision (d) does not require a prospective contractor to have the insurance before bidding or making an offer on a contract with the DOJ for independent investigator services. Rather, the requirement applies when the independent investigator is retained. Therefore, a prospective independent investigator without insurance could still bid or make an offer on a contract with the DOJ, factor the cost of insurance into his or her bid or offer, and then purchase the insurance as a condition of being retained.

Finally, the requirement to maintain errors and omissions insurance is necessary to ensure the fiscal integrity of the DOJ and the State Auditor's Office. Parties injured by the negligence of the independent investigator could sue both the DOJ and the State Auditor's Office. Jury awards for some claims involving workplace investigations have been exceedingly high and neither the DOJ nor the State Auditor's Office can predict the likelihood of avoiding a judgment. Subdivision (d) provides assurance that the DOJ and the State Auditor's Office will not incur or impose upon the state runaway costs that easily could have been covered by insurance.

As above, the commenter's suggestion to simply substitute proposed subdivision (c) and (d) with a provision that would focus on preventing those with a conflict of interest from serving as an independent investigator fails to clarify what is meant by "conflict of interest." Such ambiguity invites confusion and inconsistency. For example, if the State Auditor's Office were to revise the regulation to simply incorporate "conflict of interest," as defined under the Political Reform Act of 1974 (Government Code section 81000 et seq.) and its regulations (2 CCR 18110 et seq.) without further limitation, then the department and prospective contractors might have to perform a complex multi-step analysis or obtain an opinion from the Fair Political Practices Commission to determine whether a prospective investigator has a conflict of interest or should file a statement of economic interests (Form 700). This ambiguity would lead to confusion and inconsistent results in the qualifications of a prospective investigator. In contrast, the current proposed text allows the DOJ and prospective contractors to readily determine whether a prospective contractor qualifies as an independent investigator. Moreover, unlike auditing standards for auditors, the industry standards for investigators do not ensure that the investigator is free of impairments to independence. For example, the Association of Certified Fraud

Examiners Code of Professional Ethics, paragraph II, and Code of Professional Standards, section III, paragraph A.2, allow a CFE to have a conflict of interest without applying safeguards so long as the CFE discloses it. As drafted, section 61318 is intended to prevent a biased investigation and is critical to the success of the alternative whistleblower system by helping to ensure consistency among the investigations affecting all civil servants and ensuring the integrity of the investigative report.

PROPOSED SECTION 61319, SUBDIVISION (a)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61319, subdivision (a) establishes reasonable limits with adjustments for inflation for the hourly rate and total cost per completed investigation. Based on the State Auditor's vast experience in performing investigations, the State Auditor has determined that these limits will allow for the performance of a full and fair investigation while guarding against runaway and surprise costs the payment of which could impede the ability of the State Auditor's Office to meet its statutory mandates or be deemed an impairment or external control on our audit function. In the exceptional instance in which a completed investigation might exceed these reasonable limits, this proposed subdivision allows the State Auditor to defer payments of any amount exceeding the limit to the next fiscal year. This proposed subdivision is necessary as an investigation could impose unbudgeted costs on the State Auditor's Office for which there is no contingency appropriation available and, therefore, that would compromise its ability to perform other statutorily mandated activities that are critical to the state. For example, Government Code sections 8543.1 and 8546.3 require the State Auditor's Office to perform performance audits, to examine and report annually upon the financial statements prepared by the executive branch, and to perform all procedures necessary for proper reporting in accordance with the federal Single Audit Act of 1984 (31 U.S.C. Sec. 7501 et seq.). Failure to perform these activities could enable fraud, waste, and abuse of state funds, and result in the loss of substantial federal funding. The proposed subdivision ensures that the State Auditor can fulfill her mandate, while providing a reasonable mechanism to ensure payment to an independent investigator.

Comments Received During the 45-Day Public Comment Period

Two commenters stated that placing a monetary limit on the costs and expenditures for an independent investigator poses an impediment to how the independent investigator conducts his or her investigation. Another commenter stated that subdivision (a) could unduly restrict the independence of the independent investigator to conduct a sufficiently thorough investigation. This commenter explained that imposing a reimbursement limit of \$20,000 on all investigations except in exceptional circumstances could unreasonably constrain the independent investigator from conducting a full investigation. This commenter stated that the DOJ should not be responsible for paying the independent investigator if the costs of the investigation exceed \$20,000 and that the regulation should not allow for a delay of payment to the next fiscal year. Four commenters expressed concern that if an independent investigator charged \$500 per hour, as section 61318 permits, then this would limit the independent investigator to 40 hours unless an

exceptional event is approved. All the commenters believed that a limit of 40 hours could prevent the independent investigator from conducting a full or fair investigation.

Response

This regulation does not impose an absolute limit on the amount of reimbursement available for an independent investigation. Rather, it is an appropriate control that limits the extent to which these costs impact the State Auditor's Office's budget and, therefore, its other work. The regulation does not prohibit the independent investigator from billing and the State Auditor's Office from reimbursing costs in excess of \$20,000 if the costs are reasonable and necessary. Rather, \$20,000 serves as a threshold – a point at which the independent investigator must notify the State Auditor's Office of the total anticipated cost and at which the State Auditor's Office may defer additional payment. Merely having to make a report of estimated costs and having to accept deferred payments will not restrict the ability of the independent investigator to conduct a thorough investigation.

It is fair and not unduly burdensome for investigators to provide an estimate of total costs so the State Auditor's Office may plan accordingly. In fact, the Public Contract Code section 10371, subdivision (c), and the State Contracting Manual, Volume 1, section 3.02, require all consulting services contracts totaling \$5,000 or more to contain a detailed analysis of the costs of performance of the contract. Additionally, the State Contracting Manual, Volume 1, section 3.07, requires legal services contractors to adhere to litigation plans and legal cost and billing guidelines and to submit and adhere to a legal budget as designated by the state agency. Therefore, the regulation is less burdensome than existing law and policy. The regulation simply imposes appropriate controls necessary to protect the State Auditor's budget independence. Without this control, the existing statutory protections in place for the State Auditor's Office's budget and statutes necessitated by the need to maintain actual and perceived independence disappear.

Nothing in the regulation requires the DOJ to assume responsibility for reimbursing the independent investigator. In fact, the regulation does not prohibit the DOJ from including a provision in its contracts with investigators that disclaims liability for costs that are not reimbursed by the State Auditor's Office, which is a standard provision for appropriations in state contracts. Additionally, subdivision (b) obligates the State Auditor's Office to reimburse the DOJ for the independent investigator's reasonable and necessary costs. Therefore, the DOJ should not be liable for reimbursement unless it contracts to reimburse costs that are not reasonable and necessary. Further, it would not be within the State Auditor's regulatory authority to issue a regulation that neither implements the statute nor protects the independence of the State Auditor's Office and whose sole purpose is to insulate the DOJ from unwanted costs.

Regardless, the legislative history of AB 31 establishes that \$20,000 is more than sufficient for an investigation that does not involve exceptional circumstances. Several of AB 31's committee analyses state that the average cost of an investigation would likely be in the range of \$10,000 to \$15,000. Moreover, the DOJ stated that in its experience attorney investigators charge \$170 per hour for complicated investigations. At this rate,

the independent investigator would not reach the \$20,000 threshold until roughly 118 hours or almost three weeks of work as follows: $\$20,000 / \$170 = 118$ hours (rounded).

Even if the independent investigation exceeds \$20,000, the provision that allows the State Auditor's Office to defer payment is analogous to and less onerous than a provision commonly found in state contracts. The State Contracting Manual, Volume 1, section 7.31, requires state contracts to contain a provision that invalidates the contract if it spans more than one fiscal year and the Legislature does not appropriate sufficient funds in the annual budget act for the program under which the contract was awarded. This provision helps to ensure that state agencies do not incur obligations in excess of available funds.

The ability of the State Auditor to defer payment on a large contract is necessary for the State Auditor's Office to avoid exceeding its appropriation and to maintain its independence and continue to perform the state's audits. Courts presume that, in enacting any law, the Legislature had knowledge of existing statutory law and judicial decisions that are pertinent. *Bailey v. Superior Court* (1977) 19 Cal.3d 970, fn.10, at 977-978. Therefore, in enacting AB 31, the Legislature must have known that the State Auditor's Office would have to implement the legislation in a way that preserves the independence of the State Auditor's Office as required by the State Auditor's authorizing statutes. The State Auditor's Office does not have an unlimited line of credit from which it could draw funding to cover extraordinary investigation costs. Inability to defer payment of some of these costs until the next fiscal year could cause the State Auditor's Office to delay or curb audit procedures (such as the employment of an expert to assist in complex or technical areas of expertise) and this could violate the auditing standards that the State Auditor's Office is required by statute to follow. In fact, it could have grave consequences for the State's Comprehensive Annual Financial Report and ultimately the State's ability to garner bond and federal funds. Instead, subdivision (a) gives the State Auditor's Office the time necessary to request and receive an appropriation sufficient to cover both the State Auditor's costs for its audits and investigations as well as the independent investigator's costs, thereby helping to ensure that both the investigator and the State Auditor's Office remain independent.

Section 61319, subdivision (a), is necessary to ensure that the State Auditor's Office retains statutory independence over its budget. Government Code section 8543.4 directs the State Auditor's Office to provide the Department of Finance with a proposed budget annually and it requires the Department of Finance to include the proposed budget in the Governor's Budget without modification. This provision is consistent with auditing standards section A3.07, paragraph (e), which states that restrictions on funds that could adversely affect the ability of an audit organization to carry out its responsibilities are an undue influence threat. Eliminating section 61319, subdivision (a), would give unaccountable independent investigators more extraordinary authority to impact the State Auditor's budget than that possessed by the Department of Finance.

PROPOSED SECTION 61319, SUBDIVISION (b)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61319, subdivision (b) limits the obligation of the State Auditor to reimburse only for actual, reasonable and direct costs of the independent investigator's services that are supported by detailed itemized invoices. This helps to ensure that the State Auditor is not obligated to reimburse for costs that were not incurred, that are not reasonable, or that could be allocated to cost drivers other than the subject investigation.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61319, SUBDIVISION (c)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61319, subdivision (c) specifies that certain listed costs are not reimbursable by the State Auditor's Office. The listed costs are fairly excluded because they are unreasonable, duplicative, allocable to other cost drivers, and/or discretionary and unnecessary. This subdivision eliminates any ambiguity about whether these costs are reimbursable and allows the DOJ and the independent investigator to plan accordingly.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61320, SUBDIVISION (a)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61320, subdivision (a) clarifies that the independent investigator may make a disclosure to a law enforcement agency in the same way that Government Code section 8547.5, subdivision (b) allows the State Auditor to make a disclosure to a law enforcement agency to conduct a criminal investigation. This clarifies that such a disclosure is permissible regardless of whether the State Auditor or another state entity is the subject of the investigation. It also helps ensure that allegations of improper governmental activities made against the State Auditor's Office and its employees are handled fairly, competently and in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61320, SUBDIVISION (b)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61320, subdivision (b) requires that all investigative records released to entities other than the State Auditor's Office be redacted to protect the identity of the whistleblower, witnesses and employees. This protects these parties and helps ensure that fear of disclosure does not dissuade whistleblowers from reporting improper governmental activities. It also ensures that allegations of improper governmental activities made against the State Auditor's Office and its employees are handled fairly, competently and in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61320, SUBDIVISION (c)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61320, subdivision (c) makes all records and similar evidence gathered in the course of an investigation confidential in the same way that Government Code section 8547.7, subdivision (c) makes them confidential when the State Auditor conducts an investigation. This helps to ensure that the same standards of confidentiality apply regardless of whether the State Auditor or any other state entity is the subject of the investigation. It helps to ensure that fear of disclosure does not dissuade whistleblowers from reporting improper governmental activities.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61320, SUBDIVISION (d)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61320, subdivision (d) requires the independent investigator and the DOJ to keep every investigation confidential the same way that Government Code section 8547.7, subdivision (c) requires the State Auditor to keep every investigation confidential. This helps to ensure that the same standards of confidentiality apply regardless of whether the State Auditor or any other state entity is the subject of the investigation. It also helps to ensure that fear of disclosure does not dissuade whistleblowers from reporting improper governmental activities.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61320, SUBDIVISION (e)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61320, subdivision (e) clarifies that notices of adverse action become public records after their effective dates when filed with the State Personnel Board, or when appealed, consistent with the California Constitution; Article 1, Section 1, the California Public Records Act as set forth in Article 1 (commencing with section 6250) of Chapter 3.1 of Division 7 of Title 1 of the Government Code; and principles of due process. This clarifies that the presence of an investigation does not invoke greater protections from disclosure for these records than existing law affords.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

PROPOSED SECTION 61320, SUBDIVISION (f)

Specific Purpose as Stated in the Initial Statement of Reasons

Proposed section 61320, subdivision (f) clarifies that investigations remain confidential even if the independent investigator determines that a disclosure is appropriate under this regulation. This clarifies that a disclosure to law enforcement, the Attorney General, or a committee of the Legislature, if appropriate, is allowable while still ensuring the investigation remains confidential from third parties. This proposed subdivision ensures that allegations of improper governmental activities made against the State Auditor's Office and its employees are handled in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees. Accordingly, these regulations would help to ensure consistency in the handling of investigations of allegations of improper governmental activities regardless of which state entity is the subject of the allegation.

Comments Received During the 45-Day Public Comment Period

The State Auditor did not receive any comments regarding this proposed subdivision during the 45-day public comment period.

LOCAL MANDATE

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

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 action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.