

**BPH RN 19-01: READOPTION OF EMERGENCY REGULATIONS
NOTICE AND GOV. CODE § 11346.5(a)(2)-(6) INFORMATION**
(Original Emergency Rulemaking: OAL File No. 2018-1012-03E)

**BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 2.5. ADVANCING PAROLE CONSIDERATION HEARING DATES**

NOTICE IS HEREBY GIVEN that the Board of Parole Hearings (Board) seeks to readopt the emergency regulations to add “Chapter 2.5. Advancing Parole Consideration Hearing Dates” to the California Code of Regulations, Title 15, Division 2. The original emergency regulations were filed with the Office of Administrative Law (OAL) on October 12, 2018 (OAL File No. 2018-1012-03E). They became effective on October 22, 2018, and expire on April 23, 2019.

PUBLIC COMMENT

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency action to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

CONTACT PERSON

Please direct requests for copies of the Readoption of Emergency Regulations Filing or other information upon which the rulemaking is based to:

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AUTHORITY AND REFERENCE

Government Code section 12838.4 vests the Board with all the powers, duties, responsibilities, obligations, liabilities, and jurisdiction of the Board of Prison Terms and Narcotic Addict Evaluation Authority, which no longer exist.

Penal Code section 3052 vests with the Board the authority to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside of prison when eligible for parole.

Penal Code section 5076.2 requires the Board promulgate, maintain, publish, and make available to the general public a compendium of its rules and regulations.

Penal Code section 3041.5 establishes the requirements and conditions concerning parole denial. It also authorizes the Board to advance an inmate's parole consideration hearing on its own motion or based on an inmate's written petition to the Board for an earlier hearing.

Penal Code section 3043 requires the Board to provide proper notice to victims regarding an inmate's parole consideration hearing.

Penal Code section 3055 establishes the Board's Elderly Parole Program for reviewing the parole suitability of any inmate who is 60 years of age or older and has served a minimum of 25 years of continuous incarceration on his or her current sentence.

Penal Code section 4801 requires the Board to give great weight to certain factors when considering the parole suitability of an inmate who committed his or her controlling offense at the age of 25 years of age or younger.

The Ninth Circuit Court of Appeals in *Gilman v. Schwarzenegger* (9th Cir. 2011) 638 F.3d 1101 (*Gilman I*), held that increased parole denial lengths under the California Victim's Bill of Rights Act of 2008 (also known as "Marsy's Law") did not violate ex post facto laws on its face because it did not create a significant risk of prolonging an inmate's incarceration. The court specifically pointed to the Board's discretionary authority to advance parole hearings under Penal Code section 3041.5, subdivision (b)(4) and the inmate's right to submit a Petition to Advance (PTA) under subdivision (d)(1), and found that the availability of advanced hearings removed any possibility of harm to the inmate. (*Id.* at p. 1109.) The same court in February 2016 held that no ex post facto violation had occurred as applied to the plaintiff class because there was insufficient evidence "demonstrating that the PTA process failed to afford relief from the classwide risk of lengthened incarceration posed by [Marsy's Law]." (*Gilman v. Brown* (9th Cir. 2016) 814 F.3d 1007, 1021 (*Gilman II*).)

The California Supreme Court in *In re Vicks* (2013) 56 Cal.4th 274 held that increased parole denial lengths under Marsy's Law did not violate ex post facto laws because of the Board's discretionary authority to advance hearings under Penal Code section 3041.5 subdivision (b)(4), and an inmate's ability to submit a written request for an advanced hearing under subdivision (d)(1). (*Id.* at pp. 304-305, 317.)

INFORMATIVE DIGEST & POLICY STATEMENT OVERVIEW

The Board proposes to add California Code of Regulations, title 15, chapter 2.5 regarding the Board's processes of advancing parole consideration hearings under Penal Code section 3041.5, subdivisions (b)(4) and (d)(1). These emergency regulations memorialize the Board's longstanding PTA and administrative review processes to advance hearings in the appropriate circumstances. The regulations identify the timing of a valid PTA submission, information that must be included in a PTA, and criteria for the Board when reviewing a PTA. The regulations also identify when the Board will conduct an ad hoc administrative review or an administrative review of a three-year denial, and the criteria used by the Board when reviewing a case. Additionally, the regulations describe the notification requirements and the decision review process for PTAs and administrative reviews.

These emergency regulations are necessary to allow the Board to continue to comply with court decisions and to protect Marsy's Law. Section 3041.5 of the Penal Code previously required the Board to conduct annual parole consideration hearings, which could be deferred under certain circumstances for up to five years for murderers and up to two years for non-murderers. In 2008, the People of California passed Marsy's Law, which amended Penal Code section 3041.5 and increased denial periods to a minimum of three years and a maximum of 15 years. Therefore, the shortest denial length an inmate can receive after Marsy's Law has increased from one to three years.

Following these changes, inmates potentially faced longer periods of incarceration after a denial of parole by the Board, which raised the question of whether the amendments prolonged an inmate's incarceration in violation of ex post facto laws. However, section 3041.5, subdivisions (b)(4) and (d)(1), also gave the Board discretion to advance an inmate's parole consideration hearing to an earlier date under its own authority or based upon a written request by an inmate.

The courts in *Gilman II* and *In re Vicks* found no ex post facto violations in the increased denial lengths specifically because of the Board's discretionary authority to advance hearings under section 3041.5, subdivisions (b)(4) and (d)(1). Additionally, the courts clarified their expectation for the Board to implement a meaningful mechanism to exercise this discretion to advance hearings. The Board subsequently exercised its discretion under section 3041.5, subdivision (b)(4) to conduct a structured administrative review process whereby deputy commissioners review cases to determine whether, in accordance with statutory requirements, new information or a change in circumstances established a reasonable likelihood that consideration of public safety does not require the additional period of incarceration.

Recent litigation challenged the Board's ability to advance hearings under the PTA and advanced review processes, based mainly on the lack of regulations formally memorializing these processes in the Board's regulations. (*Tony Rackauckas, et al. v. State of California, et al.*, Orange County Superior Court, Case No. 30-2018-00985610-CU-WM-CJC.) Thus, on September 17, 2018, a majority of the Board voted to approve the Board's parole hearing date advancement processes as reflected in the text of the original emergency regulations filed by the Board on October 12, 2018, and approved by the Office of Administrative Law on October 22, 2018.

Since then, the Board has met with various stakeholders regarding the emergency regulations, and, on March 18, 2019, a majority of the Board voted to approve amendments to the emergency regulation as reflected in this readoption filing. The Board has also made substantial progress and proceeded with due diligence to comply with Government Code section 11346.1, subdivision (e). While the Board anticipates filing notification of the regular rulemaking package for these regulations before the expiration of the current emergency regulations on April 23, 2019, the readoption of the emergency regulations is necessary to keep them in effect during the regular rulemaking process as outlined in Government Code section 11346.1, subdivision (e). Without immediate action, the Board may be increasingly subject to litigation challenging the Board's authority to advance hearings without regulations, which will have a substantial negative impact on both the constitutional rights of inmates and the rights of victims under Marsy's Law.

DOCUMENTS RELIED UPON:

In proposing the readoption of the existing emergency regulations, the Board relied on the following court decisions:

- *Gilman v. Schwarzenegger* (9th Cir. 2011) 638 F.3d 1101 (*Gilman I*)
- *Gilman v. Brown* (9th Cir. 2016) 814 F.3d 1007 (*Gilman II*)
- *In re Vicks* (2013) 56 Cal.4th 274

In proposing the readoption of the existing emergency regulations, the Board relied on the following document:

- Board's Petition to Advance Hearing Form

DETERMINATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING STATE REGULATIONS:

The Board has determined that the proposed regulations are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Board has concluded that these are the only regulations that concern the Board's role and requirements in advancing a parole consideration hearing under Penal Code section 3041.5, subdivisions (b)(4) and (d)(1).

SPECIFIC AGENCY STATUTORY REQUIREMENTS

There are no other statutory requirements specific to the Board or to any specific regulation or class of regulations promulgated by the Board.

MANDATE ON LOCAL AGENCIES OR SCHOOL DISCTRICTS

The Board has determined that the proposed action imposes no mandate upon local agencies or school districts.

FISCAL IMPACT ESTIMATE

Fiscal Impact Statement: The Board has made the following initial determinations:

- Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: **None**
- Cost or savings to any state agency: **None**: There are no specific costs or savings anticipated for the fiscal year 2018-2019. These regulations codify the Board's current processes, and the Board has already absorbed the costs with its existing budget. In fiscal year 2015-2016, the Board requested an increase in staffing. However, this was for position authority only and had no impact on funding. In fiscal years 2016-2017 and 2017-2018, the Board requested an increase in staffing, but the workload justifications were not specifically attributed to individualized workloads, such as PTAs and administrative reviews.
- Other non-discretionary cost or savings imposed on local agencies: **None**
- Cost or savings in federal funding to the state: **None**

Significant Statewide Adverse Economic Impact on Business: The Board has determined that there is no significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Cost Impacts on Representative Private Persons or Businesses: The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Assessment of Effects on Job and/or Business Creation, Elimination or Expansion: This rulemaking action will not have a significant adverse economic impact directly affecting the expansion of businesses in California or on existing businesses within the State of California, because it is highly unlikely that private businesses will be affected by the Board's continued implementation of parole hearing date advancement processes. These proposed regulations may lead to expansion of businesses in California to the extent more inmates may need legal assistance and representation and to the extent more victims may need support and assistance from entities during the parole hearing advancement process and any hearing held as a result of the advancement. These proposed regulations will have no additional effect on business expansion in California.

Effect on Housing Costs: The Board has made an initial determination that the proposed action will have no significant effect on housing costs because housing costs are not affected by the Board's processes in advancing hearings under Penal Code section 3041.5, subdivisions (b)(4) and (d)(1).

Small Business Determination: The Board has determined that the proposed regulation does not have a significant adverse economic impact on small business because small businesses are not affected by the Board's processes in advancing hearings under Penal Code section 3041.5, subdivisions (b)(4) and (d)(1).