



Department of Corrections and Rehabilitation

NOTICE OF CHANGE TO REGULATIONS
Sections: 3490, 3491, 3495, 3496, 3497,
2449.1, 2449.30, 2449.31, 2449.32, 2449.33,

Number:
19-02

Publication Date:
April 19, 2019

Effective Date:
January 1, 2019

INSTITUTION POSTING AND CERTIFICATION REQUIRED

This Notice announces the proposed amendment of sections 3490 and 3491 and adoption of sections 3495, 3496 and 3497 of the California Code of Regulations (CCR), Title 15, Crime Prevention and Corrections, to incorporate into Division 3, Chapter 1, as well as amendments to section 2449.1 and adoption of sections 2449.30, 2449.31, 2449.32, 2449.33 and 2449.34 of Division 2, Chapter 3, Title 15, regarding Supplemental Reforms to Parole Consideration.

PUBLIC COMMENT PERIOD

The public comment period will close on **June 6, 2019 at 5:00 p.m.** Any person may submit written comments about the proposed regulations by mail to the California Department of Corrections and Rehabilitation (CDCR), Regulation and Policy Management Branch (RPMB), P.O. Box 942883, Sacramento, CA 94283-0001, or by e-mail to RPMB@cdcr.ca.gov. All written comments must be received or postmarked no later than **5:00 p.m. on June 6, 2019.**

PUBLIC HEARING INFORMATION

A public hearing regarding these proposed regulations will be held on **Thursday, June 6, 2019, from 10:30 a.m. to 11:30 a.m. in the Conference Room 100N, located at 1515 S Street, North Building, Sacramento, CA 95811.** The purpose of the hearing is to receive comments about this action. It is not a forum to debate the proposed regulations. No decision regarding the permanent adoption of these regulations will be rendered at this hearing. Written comments submitted during the prescribed comment period are given the same significance and weight as verbal comments presented at the hearing. This hearing site is accessible to the mobility impaired.

POSTING

This Notice shall be posted immediately upon receipt at locations accessible to inmates, parolees, and employees in each Department facility and field office not later than five calendar days after receipt. Also, institutions and facilities shall make this Notice available for review by inmates in segregated housing who do not have access to the posted copies, and shall distribute it to inmate law libraries and advisory councils. CDCR Form 621-A (Rev. 04/18), Certification of Posting, shall be returned to RPMB by mail or e-mail. See Department Operations Manual Sections 12010.12.1 and 12010.12.2 for posting and certification of posting procedures.

CONTACT PERSON

Inquiries regarding this Notice should be directed to L. Lomonaco, by mail to California Department of Corrections and Rehabilitation, RPMB, P.O. Box 942883, Sacramento, CA 94283-0001, by telephone at (916) 445-2217, or e-mail to RPMB@cdcr.ca.gov.

/Original signed by/

RALPH M. DIAZ
Secretary
California Department of Corrections and Rehabilitation

Attachments

CERTIFICATION OF PUBLIC SAFETY COMPLIANCE
[Per California Constitution, Article I, Section 32)

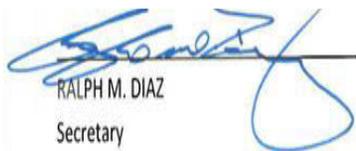
This rulemaking action amends existing regulations concerning the nonviolent parole consideration process which was promulgated after the passage of The Public Safety and Rehabilitation Act of 2016 (hereafter referred to as Proposition 57 or the Act). Proposition 57 provided that the "Department of Corrections and Rehabilitation adopt regulations in furtherance of [the Act], and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety." (Cal. Const., art. 1, § 32(b).)

Accordingly, in my role as the Secretary of the Department, I have been granted broad rulemaking authority under the California Constitution to adopt, amend, or repeal regulations in furtherance of the Act (notwithstanding other provisions of law) and I hereby invoke that constitutional grant of authority in support of this rulemaking action.

Regulations adopted by the Department in 2018 excluded inmates incarcerated for a term of life with the possibility of parole from the nonviolent parole consideration process. This exclusion was challenged in the Court of Appeal of the State of California, Second Appellate District, Division Five. On September 7, 2018, in the matter of *In re Edwards*, the court ordered the Department to amend its regulations to allow nonviolent inmates who are incarcerated for a term of life with the possibility of parole to be eligible for parole consideration by the Board of Parole Hearings.

The Department proposes amendments to the Supplemental Reforms to Parole Consideration regulations with the goal to comply with the court's order while protecting and enhancing public safety. To that end, nonviolent inmates who have been sentenced to a term of life with the possibility of parole are now eligible for parole consideration following an in-person hearing conducted by the Board of Parole Hearings.

I, Ralph M. Diaz, Secretary of the Department, do certify that these regulations protect and enhance public safety for all Californians in compliance with the courts order and Section 32 of Article I of the California Constitution.


RALPH M. DIAZ
Secretary

Secretary


Date

Department of Corrections and Rehabilitation

NOTICE OF PROPOSED REGULATIONS

California Code of Regulations Title 15, Crime Prevention and Corrections Department of Corrections and Rehabilitation

NOTICE IS HEREBY GIVEN that the Secretary of the California Department of Corrections and Rehabilitation (CDCR or Department), proposes to amend sections 3490 and 3491 of Title 15, Division 3, Subchapter 5.5, Article 1, and adopt sections 3495, 3496 and 3497 into Title 15, Division 3, Subchapter 5.5, Article 2, as well as amend section 2449.1 of Title 15, Division 2, Chapter 3, Article 15 and adopt sections 2449.30, 2449.31, 2449.32, 2449.33, and 2449.34 into Title 15, Division 2, Chapter 3, Article 16 regarding Supplemental Reforms to Parole Consideration.

PUBLIC HEARING

Date and Time: **June 6, 2019 – 10:30 a.m. to 11:30 a.m.**
Place: Department of Corrections and Rehabilitation
Conference Room 100N
1515 S Street – North Building
Sacramento, CA 95811
Purpose: To receive comments about this action.

PUBLIC COMMENT PERIOD

The public comment period begins **April 19, 2019** and closes on **June 6, 2019 at 5:00 p.m.** Any person may submit written comments by mail addressed to the primary contact person listed below, or by e-mail to rpmb@cdcr.ca.gov, before the close of the comment period. For questions regarding the subject matter of the regulations, call the program contact person listed below.

CONTACT PERSONS

<u>Primary Contact</u>	<u>Back-Up</u>
L. Lomonaco	Y. Sun
Telephone: (916) 445-2217	Telephone: (916) 445-2269
Regulation and Policy Management Branch	Regulation and Policy Management Branch
P.O. Box 942883	P.O. Box 942883
Sacramento, CA 94283-0001	Sacramento, CA 94283-0001

AUTHORITY AND REFERENCE

In California, adopting, amending, or repealing a regulation requires an express grant of authority in law. As stated in subdivision (b) of section 11349 of the Government Code, “‘Authority’ means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.”

Ordinarily, the authority to adopt, amend, or repeal regulations in Division 3 of Title 15 is found in subdivision (a) of section 5058 of the Penal Code, which states: “The [Secretary] may prescribe and amend rules and regulations for the administration of the prisons” Authority to do the same in Division 2 of Title 15 is found in section 3052 of the Penal Code, which states: “The Board of Parole Hearings shall have the power to establish and enforce rules and regulations under which inmates committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole.” Furthermore, pursuant to section 5058.3 of the Penal Code, the Department is authorized to promulgate emergency regulations, as it proposes to do here, “to expedite the exercise of its power to implement regulations as its unique organizational circumstances require.”

Additional authority: Penal Code sections, 2700 and 2701.

Reference: Cal. Const., art. 1, sec. 32(a); Penal Code sections 667, 667.5, 1170.1(c), 1170.2, 2900.1, 2900.5, 2930, 2932, 2933, 2933.05, 2933.1, 2933.3, 2933.6, 2935, 3041, 4019, 5054 and 5068; *In re Edwards* (Sept. 7, 2018, B288086) Cal.App.4th_ [237 Cal.Rptr.3d 673]; *In re Reeves* (2005) 35 Cal.4th 765; *In re Tate* (2006) 135 Cal.App.4th 756; *In re Monigold* (1988) 205 Cal.App.3d 1224; *In re Thompson* (1985) 172 Cal.App.3d 256.

Government Code Section 12838.5 provides that commencing July 1, 2005, CDCR succeeds to, and is vested with, all the powers, functions, duties, responsibilities, obligations, liabilities, and jurisdiction of abolished predecessor entities, such as: Department of Corrections, Department of the Youth Authority, and Board of Corrections.

Penal Code (PC) Section 5000 provides that commencing July 1, 2005, any reference to Department of Corrections in this or any code, refers to the CDCR, Division of Adult Operations. **PC Section 5050** provides that commencing July 1, 2005, any reference to the Director of Corrections in this or any other code, refers to the Secretary of the CDCR. As of that date, the office of the Director of Corrections is abolished. **PC Section 5054** provides that commencing July 1, 2005, the supervision, management, and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein are vested in the Secretary of the CDCR. **PC Section 5055** provides that commencing July 1, 2005, all powers and duties previously granted to and imposed upon the Department of Corrections shall be exercised by the Secretary of the CDCR. **PC Section 5058** authorizes the Director to prescribe and amend rules and regulations for the administration of prisons and for the administration of the parole of persons.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

This proposed rulemaking action amends existing regulations concerning parole consideration which were promulgated after the passage of The Public Safety and Rehabilitation Act of 2016 (Proposition 57). Existing regulations exclude inmates incarcerated for a term of life with the possibility of parole from the nonviolent parole consideration process. This exclusion was challenged in the Court of Appeal of the State of California, Second Appellate District, Division Five. On September 7, 2018, in the matter of *In re Edwards*, the court ordered the Department to amend its regulations to allow nonviolent inmates who are incarcerated for a term of life with the possibility of parole to be eligible for parole consideration by the Board of Parole Hearings.

This action will:

Allow inmates who are incarcerated for a term of life with the possibility of parole for a nonviolent offense to be eligible for parole consideration by the Board of Parole Hearings, thus bringing the Department into compliance with the court order in the matter of *In re Edwards*.

SPECIFIC BENEFITS ANTICIPATED BY THE PROPOSED REGULATIONS

The establishment of the nonviolent offender parole consideration process will make prisons and communities safer by encouraging and motivating indeterminately-sentenced nonviolent offenders to participate in rehabilitative programs and service opportunities that create skills and employability. The proposed regulations establish rigorous screening criteria for inmates and notification procedures for registered victims and prosecuting agencies. Establishing screening criteria benefits public safety by excluding inmates who are more likely to pose a risk to the public and provides nonviolent offenders with substantial motivation to avoid prison misconduct and focus on their rehabilitation. Establishing notification processes benefits public safety by ensuring that registered victims and prosecuting agencies, as well as other interested parties, have the opportunity to submit additional information regarding the nonviolent offender for the Board's consideration. Under the proposed regulations, the Board will review all relevant and reliable evidence, including an inmate's full criminal history, institutional behavior, rehabilitative efforts, and statements from interested parties to determine whether the inmate poses a current unreasonable risk to public safety. This process will enhance public safety by motivating eligible inmates to take responsibility for their own rehabilitation and work to prepare them to be productive members of the community upon their release.

EVALUATION OF CONSISTENCY / COMPATIBILITY WITH EXISTING LAWS AND REGULATIONS

The Department must evaluate whether the proposed regulations are inconsistent or incompatible with existing State regulations. Pursuant to this evaluation and because the Act authorizes the Department to adopt regulations “notwithstanding anything in this article or any other provision of law” (Cal. Const., art. 1, § 32, subd. (a)), it has determined these proposed regulations are not inconsistent or incompatible with any existing laws or regulations within CCR, Title 15, Division 2 and Division 3.

LOCAL MANDATES

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code Sections 17500 - 17630.

FISCAL IMPACT STATEMENT

- Cost or savings to any state agency:
 - **Cost: Fiscal Year 2019-20 = \$8.2 Million**
 - **Cost: Fiscal Year 2020-21 = \$8.2 Million**
 - **Cost: Fiscal Year 2021-22 = \$2.9 Million**
- Cost to any local agency or school district that is required to be reimbursed: *None*
- Other nondiscretionary cost or savings imposed on local agencies: *None*
- Cost or savings in federal funding to the state: *None*

EFFECT ON HOUSING COSTS

The Department has made an initial determination that the proposed action will have no significant effect on housing costs.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

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

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS

The Department has made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states, because private businesses are not significantly affected by the management of correctional facilities or the Board of Parole Hearings.

EFFECT ON SMALL BUSINESSES

The Department has made an initial determination that the proposed regulations will not affect small businesses. It is determined that this action has no significant adverse economic impact on small business because the proposed regulations affect the internal management of the Department and the Board of Parole Hearings only, and place no requirements or restrictions on businesses.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

This proposed rulemaking action is designed to implement the will of California voters when they enacted the nonviolent parole consideration under The Public Safety and Rehabilitation Act of 2016, as interpreted by the Court of Appeals in *In re Edwards*. As for job creation, the nonviolent parole consideration process will necessarily create jobs at the Board due to the additional parole reviews required by the Act. These proposed regulations may also lead to the creation of new businesses and the expansion of existing businesses in California to fill the need for increased rehabilitative programming mandated by The Public Safety and Rehabilitation Act of 2016.

No jobs in California have been eliminated as a result of these changes. No businesses are expected to be eliminated.

These regulations may benefit the Health and Welfare of California residents, worker safety, and the State's environment by providing inmates with incentives to participate in rehabilitative and educational programming which will assist in preparing inmates to find employment upon release, which may eventually reduce recidivism and overcrowding in California prisons.

CONSIDERATION OF ALTERNATIVES

The Department must determine that no reasonable alternatives considered, or that have otherwise been identified and brought to the attention of the Department and the Board would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing and equally effective in implementing The Public Safety and Rehabilitation Act of 2016. Interested persons are invited to present statements or arguments with respect to any alternatives to the changes proposed at the scheduled hearing or during the written comment period.

AVAILABILITY OF PROPOSED TEXT AND INITIAL STATEMENT OF REASONS

The Department has prepared and will make available the text and the Initial Statement of Reasons (ISOR) of the proposed regulations. The rulemaking file for this regulatory action, which contains those items and all information on which the proposal is based (i.e., rulemaking file) is available to the public upon request directed to the Department's contact person. The proposed text, ISOR, and Notice of Proposed Action will also be made available on the Department's website: www.cdcr.ca.gov.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons may be obtained from the Department's contact person.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this Notice. If the Department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text, with the changes clearly indicated, available to the public for at least 15 days before the Department adopts, amends or repeals the regulations as revised. Requests for copies of any modified regulation text should be directed to the contact person indicated in this Notice. The Department will accept written comments on the modified regulations for at least 15 days after the date on which they are made available.

TEXT OF PROPOSED REGULATIONS

In the following text, ~~strikethrough~~ indicates deleted text; underline, indicates added text.

California Code of Regulations, Title 15, Crime Prevention and Corrections Division 3, Adult Institutions, Programs and Parole

Chapter 1. Rules and Regulations of Adult Operations and Programs

SUBCHAPTER 5.5. PAROLE CONSIDERATION

Article 1. Parole Consideration for Determinately-Sentenced Nonviolent Offenders.

Section 3490. Definitions. Is amended to read:

For the purposes of this article, the following definitions shall apply:

(a) An inmate is a "determinately-sentenced nonviolent offender" if none of the following are true:

(1) The inmate is condemned to death;

(2) The inmate is currently incarcerated for a term of life without the possibility of parole;

(3) The inmate is currently ~~incarcerated for~~ serving a term of life with the possibility of parole for a "violent felony;"

(4) The inmate is currently serving a determinate term prior to beginning a term of life with the possibility of parole ~~for a "violent felony"~~ or prior to beginning a term for an in-prison offense that is a "violent felony;"

(5) The inmate is currently serving a term of incarceration for a "violent felony;" or

(6) The inmate is currently serving a term of incarceration for a nonviolent felony offense after completing a concurrent determinate term for a "violent felony."

(b) Notwithstanding subsection (a), a "determinately-sentenced nonviolent offender" includes an inmate who has completed a determinate or indeterminate term of incarceration and is currently serving a determinate term for an in-prison offense that is not a "violent felony."

(c) "Violent felony" is a crime or enhancement as defined in subdivision (c) of section 667.5 of the Penal Code.

(d) "Primary offense" means the single crime for which any sentencing court imposed the longest term of imprisonment, excluding all enhancements, alternative sentences, and consecutive sentences.

(e) "Full term" means the actual number of days, months, and years imposed by the sentencing court for the inmate's primary offense, not including any sentencing credits.

(f) A "nonviolent parole eligible date" is the date on which a nonviolent offender who is eligible for parole consideration under section 3491 has served the full term of his or her primary offense, less any actual days served prior to sentencing as ordered by the court

under section 2900.5 of the Penal Code and any actual days served in custody between sentencing and the date the inmate is received by the department.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); and Section 5058, Penal Code. Reference: Cal. Const., art. 1, sec. 32(a); Section 1170.1(c), Penal Code; *In re Tate* (2006) 135 Cal.App.4th 756; and *In re Thompson* (1985) 172 Cal.App.3d 256.

Section 3491. Eligibility Review. Is amended to read:

(a) A nonviolent offender, as defined in subsections 3490(a) and 3490(b), shall be eligible for parole consideration by the Board of Parole Hearings under article 15 of chapter 3 of division 2 of this title.

(b) Notwithstanding subsection (a), an inmate is not eligible for parole consideration by the Board of Parole Hearings under article 15 of chapter 3 of division 2 of this title if any of the following apply:

(1) ~~The inmate is currently incarcerated for a term of life with the possibility of parole for an offense that is not a violent felony or the inmate is currently serving a determinate term prior to beginning a term of life with the possibility of parole for an offense that is not a violent felony~~ an indeterminate-sentenced nonviolent offender as defined in section 3495, in which case he or she may be eligible for parole consideration under Article 2 of this subchapter;

(2) Within one year of the date of the eligibility review, the inmate will be eligible for a parole consideration hearing under section 3051 or 3055 of the Penal Code or the inmate has already been scheduled for an initial parole consideration hearing under section 3051 or 3055 of the Penal Code; or

(3) The inmate is convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in sections 290 through 290.024 of the Penal Code.

(c) The department shall complete an eligibility review within 60 calendar days of an inmate's admission to the department.

(d) The department shall conduct a new eligibility review whenever an official record, such as an amended abstract of judgment or minute order, is received that affects the inmate's eligibility under this article, when an inmate begins serving a determinate term for an in-prison offense that is not a violent felony, or when an inmate is within one year of being eligible for a parole consideration hearing under section 3051 or 3055 of the Penal Code.

(e) The department shall conduct an eligibility review by completing the following steps.

(1) The department shall determine if the inmate is eligible for parole consideration by the Board of Parole Hearings under subsections (a) and (b) of this section.

(2) If the inmate is eligible for parole consideration by the Board of Parole Hearings under subsections (a) and (b), the department shall identify the inmate's primary offense, as defined in subsection 3490(d) of this article.

(A) If at the time of the eligibility review the inmate is serving a term or terms for crimes committed prior to his or her arrival to prison, the terms for any in-prison crimes shall not be considered when identifying the inmate's primary offense.

(B) If at the time of the eligibility review the inmate is serving a term or terms for crimes committed after his or her arrival to prison, only the terms for all in-prison crimes currently being served or yet to be served shall be considered when identifying the inmate's primary offense.

(3) If the inmate is eligible for parole consideration by the Board of Parole Hearings under subsections (a) and (b), the department shall establish his or her nonviolent parole eligible date, as defined in subsection 3490(f) of this article.

(f) Eligibility reviews under this section shall be served on the inmate and placed in the inmate's central file within 15 business days of being completed.

(g) Eligibility reviews under this section are subject to the department's inmate appeal process in accordance with article 8 of chapter 1 of this division.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); and Section 5058, Penal Code.
Reference: Cal. Const., art. 1, sec. 32(a).

New Article 2 is adopted to read:

Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders.

New Section 3495 is adopted to read:

3495. Definitions.

For the purposes of this article, the following definitions shall apply:

(a) An inmate is an "indeterminately-sentenced nonviolent offender" if the inmate was sentenced to an indeterminate term and none of the following is true:

(1) The inmate is condemned to death;

(2) The inmate is currently incarcerated for a term of life without the possibility of parole;

(3) The inmate is currently serving a term of life with the possibility of parole for a "violent felony;"

(4) The inmate is currently serving a determinate term prior to beginning a term of life with the possibility of parole for a "violent felony;"

(5) The inmate is currently serving an indeterminate term of incarceration for a nonviolent felony offense after completing a concurrent or consecutive determinate term for a "violent felony;"

(6) The inmate is currently sentenced to a "violent felony" for an in-prison offense; or

(7) The inmate has completed an indeterminate term of incarceration and is currently serving a determinate term for an in-prison offense.

(b) Notwithstanding subsection (a), an "indeterminately-sentenced nonviolent offender" includes an inmate who has completed a determinate term of incarceration and is currently serving an indeterminate term for an in-prison offense that is not a "violent felony."

(c) “Violent felony” is a crime or enhancement as defined in subdivision (c) of section 667.5 of the Penal Code.

(d) “Primary offense” means the single crime for which any sentencing court imposed the longest term of imprisonment, excluding all enhancements, alternative sentences, and consecutive sentences. For purposes of determining the primary offense under this section, the term of imprisonment for inmates sentenced to a life term under an alternative sentencing scheme for a nonviolent crime shall be the maximum term applicable by statute to the underlying nonviolent offense.

(e) “Full term” means the actual number of days, months, and years for the inmate’s primary offense, not including any sentencing credits.

(f) A “nonviolent parole eligible date” is the date on which an indeterminately-sentenced nonviolent offender who is eligible for a parole consideration hearing under section 3496 has served the full term of his or her primary offense, less any actual days served prior to sentencing as ordered by the court under section 2900.5 of the Penal Code and any actual days served in custody between sentencing and the date the inmate is received by the Department.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); and Section 5058, Penal Code. Reference: Cal. Const., art. 1, sec. 32(a); Section 1170.1(c), Penal Code; *In re Edwards* (Sept. 7, 2018, B288086) Cal.App.4th [237 Cal.Rptr.3d 673]; *In re Tate* (2006) 135 Cal.App.4th 756; and *In re Thompson* (1985) 172 Cal.App.3d 256.

New Section 3496 is adopted to read:

3496. Eligibility Review.

(a) An “indeterminately-sentenced nonviolent offender,” as defined in subsection 3495(a), shall be eligible for a parole consideration hearing by the Board of Parole Hearings under Article 16 of Chapter 3 of Division 2 of this title.

(b) Notwithstanding subsection (a), an inmate is not eligible for a parole consideration hearing by the Board of Parole Hearings under Article 16 of Chapter 3 of Division 2 of this title if the inmate is convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in sections 290 through 290.024 of the Penal Code.

(c) The Department shall complete an eligibility review within 60 calendar days of an inmate’s admission to the Department.

(d) The Department shall conduct a new eligibility review whenever an official record, such as an amended abstract of judgment or minute order, is received that affects the inmate’s eligibility under this article or when an inmate begins serving a term for one or more in-prison offenses of which at least one is an indeterminate term and none is for a “violent felony.”

(e) The Department shall conduct an eligibility review by completing the following steps:

(1) The Department shall determine if the inmate is eligible for a parole consideration hearing by the Board of Parole Hearings under subsections (a) and (b) of this section.

(2) If the inmate is eligible for a parole consideration hearing by the Board of Parole Hearings under subsections (a) and (b), the Department shall identify the inmate's primary offense, as defined in subsection 3495(d) of this article.

(A) If at the time of the eligibility review the inmate is serving a term or terms for crimes committed prior to his or her arrival to prison that are not a violent felony, the terms for any in-prison crimes that are not a violent felony shall be considered when identifying the inmate's primary offense.

(B) If at the time of the eligibility review the inmate is serving a term or terms for crimes committed after his or her arrival to prison that are not a violent felony, only the terms for all in-prison crimes that are not a violent felony currently being served or yet to be served shall be considered when identifying the inmate's primary offense.

(3) If the inmate is eligible for a parole consideration hearing by the Board of Parole Hearings under subsections (a) and (b), the Department shall establish his or her nonviolent parole eligible date, as defined in subsection 3495(f) of this article.

(f) Eligibility reviews under this section shall be served on the inmate and placed in the inmate's central file within 15 business days of being completed.

(g) Eligibility reviews under this section are subject to the Department's inmate appeal process in accordance with Article 8 of Chapter 1 of this Division.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); and Section 5058, Penal Code.
Reference: Cal. Const., art. 1, sec. 32(a).

New Section 3497 is adopted to read:

3497. Public Safety Screening and Referral.

(a) If an inmate is determined to be eligible for a parole consideration hearing under section 3496, he or she shall be screened under this section for possible referral to the Board of Parole Hearings.

(b) Inmates shall be screened under this section at least 180 calendar days prior to their nonviolent parole eligible date.

(c) An inmate is eligible for referral to the Board of Parole Hearings if, on the date of the screening, all of the following are true:

(1) The inmate is not currently serving a Security Housing Unit term;

(2) The Institutional Classification Committee has not assessed the inmate a Security Housing Unit term within the past five years, unless the Department assessed the Security Housing Unit term solely for the inmate's safety;

(3) The inmate has not served a Security Housing Unit term in the past five years, unless the Department assessed the Security Housing Unit term solely for the inmate's safety;

(4) The inmate has not within the past five years been found guilty of any of the following:

(i) A serious rules violation for a Division A-1 or Division A-2 offense as specified in subsection 3323(b) or 3323(c);

(ii) A serious rules violation for battery on a peace officer not involving the use of a weapon as specified in subsection 3323(d)(1);

(iii) A serious rules violation for assault on a peace officer by any means likely to cause great bodily injury as specified in subsection 3323(d)(2);

(iv) A serious rules violation for battery on a non-prisoner as specified in subsection 3323(d)(3);

(v) A serious rules violation for threatening to kill or cause serious bodily injury to a public official, their immediate family, their staff, or their staff's immediate family as specified in subsection 3323(d)(4);

(5) The inmate has not been assigned to Work Group C as specified in subsection 3044(b)(4) in the past year;

(6) The inmate has not been found guilty of two or more serious Rules Violation Reports in the past year;

(7) The inmate has not been found guilty of a drug-related offense as specified in section 3016 or refused to provide a urine sample as specified in subsection 3290(d) in the past year; and

(8) The inmate has not been found guilty of any Rules Violation Reports in which a Security Threat Group nexus was found in the past year.

(d) Notwithstanding (c) an inmate is not eligible for referral to the Board of Parole Hearings if, on the date of the screening, the inmate has previously been scheduled for a parole consideration hearing under any other provision of law or will be eligible for a parole consideration hearing under any other provision of law within the next 12 months.

(e) Within five business days of being screened, inmates who are eligible for referral under this section shall be referred to the Board of Parole Hearings for a parole consideration hearing under Article 16 of Chapter 3 of Division 2 of this title.

(f) Inmates shall be screened again under this section one year from the date of their previous public safety screening until they are scheduled for a parole consideration hearing or are no longer eligible for a parole consideration hearing under section 3496, if any of the following apply:

(1) The inmate was determined to be ineligible for referral under this section;

(2) The inmate was referred to the Board of Parole Hearings and a hearing officer determined the Board of Parole Hearings did not have jurisdiction to conduct a parole consideration hearing under section 2449.31 of Division 2 of this title;

(g) Public safety screening and referral results shall be served on the inmate and placed in the inmate's central file within 15 business days of being completed and, if the inmate is deemed eligible for referral to the Board of Parole Hearings, he or she shall be provided information about the parole consideration hearing process.

(h) Public safety screenings and referrals under this section are subject to the Department's inmate appeal process in accordance with Article 8 of Chapter 1 of this Division.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); and Section 5058, Penal Code.
Reference: Cal. Const., art. 1, sec. 32(a).

In the following text, ~~strikethrough~~ indicates deleted text; underline, indicates added text.

California Code of Regulations, Title 15, Division 2, Board of Parole Hearings

Chapter 3. Parole Release.

Article 15. Parole Consideration for Determinately-Sentenced Nonviolent Offenders.

2449.1. Definitions. Is amended to read:

For the purposes of this article, the following definitions shall apply:

(a) An inmate is a "determinately-sentenced nonviolent offender" if none of the following are true:

(1) The inmate is condemned to death;

(2) The inmate is currently incarcerated for a term of life without the possibility of parole;

(3) The inmate is currently ~~incarcerated for~~ servng a term of life with the possibility of parole for a "~~violent felony~~;"

(4) The inmate is currently serving a determinate term prior to beginning a term of life with the possibility of parole ~~for a "violent felony"~~ or prior to beginning a term for an in-prison offense that is a "violent felony;"

(5) The inmate is currently serving a term of incarceration for a "violent felony;" or

(6) The inmate is currently serving a term of incarceration for a nonviolent felony offense after completing a concurrent determinate term for a "violent felony."

(b) Notwithstanding subsection (a), a "determinately-sentenced nonviolent offender" includes an inmate who has completed a determinate or indeterminate term of incarceration and is currently serving a determinate term for an in-prison offense that is not a "violent felony."

(c) "Violent felony" is a crime or enhancement as defined in subdivision (c) of section 667.5 of the Penal Code.

(d) "Primary offense" means the single crime for which any sentencing court imposed the longest term of imprisonment, excluding all enhancements, alternative sentences, and consecutive sentences.

(e) "Full term" means the actual number of days, months, and years imposed by the sentencing court for the inmate's primary offense, not including any sentencing credits.

(f) A "nonviolent parole eligible date" is the date on which a nonviolent offender who is eligible for parole consideration under section 3491 has served the full term of his or her primary offense, less any actual days served prior to sentencing as ordered by the court under section 2900.5 of the Penal Code and any actual days served in custody between sentencing and the date the inmate is received by the department.

Subsection 2249.1(g) is adopted to read:

(g) A “hearing officer” is a commissioner, deputy commissioner, associate chief deputy commissioner, or the Chief Hearing Officer.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a); *In re Tate* (2006) 135 Cal.App.4th 756; and *In re Thompson* (1985) 172 Cal.App.3d 256.

New Article 16. Is adopted to read:

Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders.

New Section 2449.30 is adopted to read:

2449.30. Definitions.

For the purposes of this article, the following definitions shall apply:

(a) An inmate is an “indeterminately-sentenced nonviolent offender” if the inmate was sentenced to an indeterminate term and none of the following are true:

(1) The inmate is condemned to death;

(2) The inmate is currently incarcerated for a term of life without the possibility of parole;

(3) The inmate is currently serving a term of life with the possibility of parole for a “violent felony;”

(4) The inmate is currently serving a determinate term prior to beginning a term of life with the possibility of parole for a “violent felony;”

(5) The inmate is currently serving a term of incarceration for a nonviolent felony offense after completing a concurrent determinate term for a “violent felony;”

(6) The inmate is currently sentenced to a “violent felony” for an in-prison offense; or

(7) The inmate has completed an indeterminate term of incarceration and is currently serving a determinate term for an in-prison offense.

(b) Notwithstanding subsection (a), an “indeterminately-sentenced nonviolent offender” includes an inmate who has completed a determinate term of incarceration for a “violent felony” and is currently serving an indeterminate term for an in-prison offense that is not a “violent felony.”

(c) “Violent felony” is a crime or enhancement as defined in subdivision (c) of section 667.5 of the Penal Code.

(d) “Primary offense” means the single crime for which any sentencing court imposed the longest term of imprisonment, excluding all enhancements, alternative sentences, and consecutive sentences. For purposes of determining the primary offense under this section, the term of imprisonment for inmates sentenced to a life term under an alternative sentencing scheme for a nonviolent crime shall be the maximum term applicable by statute to the underlying nonviolent offense.

(e) “Full term” means the actual number of days, months, and years for the inmate’s primary offense, not including any sentencing credits.

(f) A “nonviolent parole eligible date” is the date on which an indeterminately-sentenced nonviolent offender who is eligible for a parole consideration hearing under section 3496 of Division 3 of this title has served the full term of his or her primary offense, less any actual days served prior to sentencing as ordered by the court under section 2900.5 of the Penal Code and any actual days served in custody between sentencing and the date the inmate is received by the Department.

(g) A “hearing officer” is a commissioner, deputy commissioner, associate chief deputy commissioner, or the Chief Hearing Officer.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a); *In re Edwards* (Sept. 7, 2018, B288086) Cal.App.4th [237 Cal.Rptr.3d 673]; *In re Tate* (2006) 135 Cal.App.4th 756; and *In re Thompson* (1985) 172 Cal.App.3d 256.

New Section 2449.31 is adopted to read:

2449.31. Jurisdictional Review.

(a) Within 15 calendar days of a referral from the Department under section 3497 of Division 3 of this title, a hearing officer shall review the inmate’s case and determine whether the board has jurisdiction to schedule the inmate for an initial parole consideration hearing.

(b) The board has jurisdiction to schedule the inmate for a parole consideration hearing under section 2449.32 if all of the following are true:

(1) The inmate is eligible for a parole consideration hearing under section 3496 of Division 3 of this title;

(2) The inmate, as of the date of the jurisdictional review, meets the criteria for referral to the board under subsection 3497(c) of Division 3 of this title; and

(3) The inmate has not previously been scheduled for a parole consideration hearing under any other provision of law and is not eligible for a parole consideration hearing under any other provision of law during the 12 months following the date of the referral screening under subsection 3497 of Division 3 of this title.

(c) If the hearing officer determines the board does not have jurisdiction to schedule the inmate for a parole consideration hearing, he or she shall issue a written decision that includes a statement of reasons supporting the decision. A copy of the decision shall be served on the inmate and placed in the inmate’s central file within 15 business days of being issued. Inmates determined to be ineligible for referral to the board under this section shall be screened for possible referral to the board again as provided in subsection 3497(f) of Division 3 of this title.

(d) If the hearing officer determines the board has jurisdiction to schedule the inmate for an initial parole consideration hearing, the board shall schedule the inmate for a parole consideration hearing as provided in section 2449.32.

(e) Inmates may seek review of decisions issued under this section by writing the board in accordance with section 2449.34 within 30 calendar days of being served the decision. Decisions issued under this section are not subject to the Department’s inmate appeal process under Article 8 of Chapter 1 of Division 3 of this title.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a).

New Section 2449.32 is adopted to read:

2449.32. Parole Consideration Hearings.

(a) An indeterminately-sentenced nonviolent offender shall be scheduled for an initial parole consideration hearing as follows:

(1) If, as of the date of his or her referral to the board under section 3497 of Division 3 of this title, the inmate's nonviolent parole eligible date was at least 180 calendar days in the future, the inmate shall be scheduled for an initial parole consideration hearing within 60 calendar days following his or her nonviolent parole eligible date.

(2) If, as of the date of his or her referral to the board under section 3497 of Division 3 of this title, the inmate's nonviolent parole eligible date was less than 180 calendar days in the future or it was in the past, the inmate shall be scheduled for an initial parole consideration hearing within one year from the date of his or her referral to the board.

(b) Notwithstanding (a) the board shall, by no later than December 31, 2021, schedule all parole consideration hearings for indeterminately-sentenced nonviolent offenders who are eligible for an initial parole consideration hearing on or before December 31, 2021, as a result of this Article. Indeterminately-sentenced nonviolent offenders who, as of January 1, 2019, have been incarcerated for 20 years or more and who are within five years of their Minimum Eligible Parole Date shall be scheduled for an initial parole consideration hearing on or before December 31, 2020.

(c) Hearing panels shall conduct parole consideration hearings for indeterminately-sentenced nonviolent offenders in compliance with the requirements for initial and subsequent parole consideration hearings described in this Division, Penal Code sections 3040, et seq., and applicable case law.

(d) If a hearing panel finds an indeterminately-sentenced nonviolent offender suitable for parole, and the parole grant is not vacated or rescinded, the inmate shall be released subject to all applicable review periods required by sections 3041, 3041.1, and 3041.2 of the Penal Code, notwithstanding his or her minimum eligible parole date or any additional terms imposed for in-prison offenses.

(e) If a hearing panel finds an indeterminately-sentenced nonviolent offender unsuitable for parole, the panel shall impose a denial period in accordance with paragraph (3) of subdivision (b) of section 3041.5 of the Penal Code. The inmate's next hearing date may be advanced under paragraph (4) of subdivision (b) or paragraph (1) of subdivision (d) of section 3041.5 of the Penal Code.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a). Sections 3041, 3041.1, 3041.2 and 3041.5, Penal Code.

New Section 2449.33 is adopted to read:

2449.33. Vacating a Jurisdictional Review Decision.

(a) If at any time prior to release an inmate is subsequently determined to be ineligible for a parole consideration hearing under section 3496 of Division 3 of this title, the Chief Hearing Officer or an associate chief deputy commissioner shall:

(1) Issue a written decision vacating the previous jurisdictional decision issued under section 2449.31 that includes a statement of reasons supporting the new decision; and

(2) Vacate all parole decisions resulting from any initial or subsequent parole consideration hearings scheduled under section 2449.32, except as provided in (b). The provisions of paragraph (3) of subdivision (b) of section 3041 of the Penal Code shall not apply to parole decisions vacated pursuant to this subsection.

(b) A parole decision shall not be vacated under Paragraph (2) of subsection (a) if one of the following is true:

(1) The inmate is currently eligible for a parole consideration hearing under any other provision of law; or

(2) The inmate will within 18 months be eligible for a parole consideration hearing under any other provision of law.

(c) If at any time prior to an inmate's initial parole consideration hearing under section 2449.32, it is subsequently determined the inmate did not meet the criteria for referral to the board under subsection 3497(c) of Division 3 of this title at the time of the board's jurisdictional review under section 2449.31, the Chief Hearing Officer or an associate chief deputy commissioner shall issue a written decision vacating the previous jurisdictional decision issued under section 2449.31 that includes a statement of reasons supporting the new decision. Any initial parole consideration hearing scheduled for the inmate under section 2449.32 shall be cancelled unless, on the date of the scheduled hearing, the inmate will be eligible for a parole consideration hearing under any other provision of law.

(d) Within 15 business days of issuing a decision under subsection (a) or (c), a copy of the decision shall be served on the inmate and placed in the inmate's central file. The board shall, within five business days of issuing a decision under subsection (a), send notice of the decision to any victim or prosecuting agency, if any, who received notice of the scheduled parole consideration hearing.

(e) If a decision is vacated under subsection (c), the inmate shall be screened again for possible referral to the board as provided in subsection 3497(f) of Division 3 of this title.

(f) Inmates may request review of a decision issued under this section by writing the board as provided in section 2449.34 within 30 calendar days of being served the decision. Decisions under this section are not subject to the Department's inmate appeal process under Article 8 of Chapter 1 of Division 3 of this title.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a).

New Section 2449.34 is adopted to read:

2449.34. Review of Jurisdictional Decision.

(a) An inmate may request review of a jurisdictional decision issued under section 2449.31 by submitting a written request to the board within 30 calendar days of the inmate being served the decision. The inmate's written request shall include a description of why the inmate believes the previous decision was not correct and may include additional information not available to the hearing officer at the time the previous decision was issued.

(b) The Chief Hearing Officer or an associate chief deputy commissioner may also initiate a review under this section at any time prior to the inmate's initial parole consideration hearing if the previous decision contained an error of law, an error of fact, or if the board receives new information that would have materially impacted the previous decision had it been known at the time the decision was issued.

(c) A hearing officer, who was not involved in the original decision, shall complete a review of the decision within 30 calendar days of the board receiving the request.

(d) The hearing officer reviewing the previous decision shall consider all relevant and reliable information and issue a decision either concurring with the previous decision or overturning the previous decision with a statement of reasons supporting the new decision.

(e) A copy of the decision shall be served on the inmate and placed in the inmate's central file within 15 business days of being issued.

(f) If a decision under this section overturns a previous decision issued under section 2449.31 that determined the board did not have jurisdiction to review the inmate because he or she was not eligible for parole consideration, the board shall schedule the inmate for an initial parole consideration hearing within 180 calendar days.

(g) Decisions under this section are not subject to the Department's inmate appeal process under Article 8 of Chapter 1 of Division 3 of this title.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a).

INITIAL STATEMENT OF REASONS

in support of

**REGULATIONS TO BE ADOPTED OR AMENDED IN COMPLIANCE
WITH SECTION 32 OF ARTICLE 1 OF THE CALIFORNIA
CONSTITUTION**

amending:

TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 3. ADULT INSTITUTIONS, PROGRAMS AND PAROLE
SUBCHAPTER 5.5. PAROLE CONSIDERATION
ARTICLE 1. PAROLE CONSIDERATION FOR DETERMINATELY-SENTENCED
NONVIOLENT OFFENDERS

&

TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 15. PAROLE CONSIDERATION FOR DETERMINATELY-SENTENCED
NONVIOLENT OFFENDERS

and adopting:

TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 3. ADULT INSTITUTIONS, PROGRAMS AND PAROLE
SUBCHAPTER 5.5. PAROLE CONSIDERATION
NEW ARTICLE 2. PAROLE CONSIDERATION FOR
INDETERMINATELY-SENTENCED NONVIOLENT OFFENDERS

&

TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
NEW ARTICLE 16. PAROLE CONSIDERATION FOR
INDETERMINATELY-SENTENCED NONVIOLENT OFFENDERS

I. INTRODUCTION

The Public Safety and Rehabilitation Act of 2016 (the “Act”) was overwhelmingly approved by California voters on November 8, 2016. The Act authorized the California Department of Corrections and Rehabilitation (CDCR or the “Department”) to develop regulations establishing a process for nonviolent offenders who had served the full term for their primary offense in state prison to be considered for parole.

Specifically, the California Constitution was amended to include Section 32 of Article 1, which reads in relevant part as follows:

(a) The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law:

(1) Parole Consideration: Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.

(A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.

(b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.

Following the enactment of this constitutional provision, the Department established a file review parole consideration process for determinately-sentenced nonviolent offenders, meaning offenders currently serving only determinate sentences for solely nonviolent offenses, defined as offenses not listed as violent offenses in Penal Code section 667.5, subdivision (c). Regulations implementing this parole consideration process for nonviolent offenders were approved by the Office of Administrative Law on May 1, 2018. However, these regulations excluded from parole consideration under Proposition 57 all indeterminately-sentenced nonviolent offenders, meaning offenders currently serving one or more life sentences of any length for solely nonviolent offenses.

This exclusion was challenged in the Court of Appeals of the State of California, Second Appellate District. On September 7, 2018, in the matter of *In re Edwards*, the court ordered the Department to amend its regulations to allow indeterminately-sentenced nonviolent offenders to be eligible for parole consideration by the Board of Parole Hearings (BPH or “Board”) under Proposition 57.

II. OVERVIEW AND GENERAL NECESSITY

On July 1, 1977, California enacted determinate sentencing laws in Penal Code section 1170. Under this new sentencing scheme, most felonies specify three possible terms of imprisonment (the lower, middle, and upper terms) generally referred to as “determinate sentences.” These terms specify a prescribed number of years the inmate will serve for the crime. During sentencing, the trial court imposes one of these terms (lower, middle, or upper) for each crime convicted as well as any additional years for enhancements or alternative sentences. Once imposed, the total determinate sentence, including all crimes and enhancements, establishes the maximum term for which the inmate may be incarcerated. These inmates normally serve the prescribed lengths of their sentences, less any pre-conviction and post-conviction credits, and are released at the end of their term without any parole review.

When establishing the determinate sentencing laws, however, the Legislature made clear under Penal Code section 1168 that some crimes would remain punishable by imprisonment for an indeterminate term ranging from a designated minimum number of years to the remainder of the inmate’s life. In those cases, the court imposes the statutory life term, which in most cases will include the possibility of parole. Unlike determinately-sentenced inmates, to be released, an indeterminately-sentenced inmate must be found suitable for parole at a parole consideration hearing before the Board under Penal Code sections 3040, et seq.

Under Article 1, Section 32(a)(1), of the California Constitution, adopted under the Act, the Department was directed to establish a parole consideration process through which inmates currently serving prison sentences for only nonviolent felony offenses would be eligible for parole consideration after completing the full term for their primary offense, subject to certification by the Secretary of the Department that these implementing regulations protect and enhance public safety. Thus, the Department’s original regulations implementing the Act under Proposition 57 created a process for determinately-sentenced nonviolent offenders to be reviewed for parole after serving the full term of their primary offense. This parole process affords determinately-sentenced nonviolent offenders the opportunity to be reviewed by the Board and released prior to the end of their sentence if the offender demonstrates that he or she has been

rehabilitated and no longer poses a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity in the community. If approved for release, these inmates are released notwithstanding any additional sentences imposed by the court for lesser crimes, enhancements, or alternative (increased) sentence lengths.

These regulations are necessary to implement and interpret provisions of Proposition 57 and the court's order in *In re Edwards* by establishing a parole consideration process that provides indeterminately-sentenced nonviolent offenders a mechanism to be considered for parole upon serving the full term of their primary offense.

To fulfill the Act's directives, the Department amends Article 1 "Parole Consideration for Determinately-Sentenced Nonviolent Offenders," under previously established Title 15, Division 3, Chapter 1, Subchapter 5.5, with amendments to prior sections 3490 and 3491, and also amends Article 15 "Parole Consideration for Determinately-Sentenced Nonviolent Offenders," under previously established Title 15, Division 2, Chapter 3, with amendments to prior sections 2449.1. The Department also adopts new Article 2 "Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders," under previously established Title 15, Division 3, Chapter 1, Subchapter 5.5, with new sections 3495, 3496, 3497, and also adopts Article 16 "Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders," under previously established Title 15, Division 2, Chapter 3, with new sections 2449.30, 2449.31, 2449.32, 2449.33, and 2449.34.

In establishing this process, the Department found it necessary to consider both the previously established parole process for determinately-sentenced nonviolent offenders as well as the current parole consideration process for inmates sentenced to indeterminate terms of life with the possibility of parole. Specifically, the increased length of potential incarceration and the severity of their criminal histories warrant greater scrutiny for indeterminately-sentenced nonviolent offenders, such as an in-person hearing before the Board that is recorded and transcribed, comprehensive risk assessments by a forensic psychologist, appointment of counsel, and interpreters present, if needed. Thus, these regulations establish a nonviolent parole consideration process that in part mirrors the eligibility and public safety determinations of the existing nonviolent parole process for determinately-sentenced inmates, while also requiring a full parole consideration hearing similar to those currently conducted under Penal Code sections 3040, et seq., for other life-term inmates.

In these regulations, the Department proposes to clarify the definitions for the terms “nonviolent,” “full term,” and “primary offense” as they will apply to the indeterminately-sentenced nonviolent parole process, as well as establish how the Department and the Board identify the date upon which an inmate deemed to meet criteria as an indeterminately-sentenced nonviolent offender will be eligible for a parole consideration hearing. The Department further proposes to establish an eligibility determination process to identify and track qualified inmates. Additionally, to carry out the public-safety requirement of the constitutional provision, the Department proposes to establish a public-safety screening prior to referring otherwise qualified indeterminately-sentenced nonviolent offenders to the Board. Screening out inmates who have engaged in recent, serious institutional misconduct protects public safety and ensures that the Board is focusing its resources on the indeterminately-sentenced nonviolent offenders who are more likely to be found suitable for parole. Offenders who are screened out at this stage will be reviewed on an annual basis until they are deemed eligible for referral or become eligible for parole consideration hearings under other law.

Upon referral, the Department proposes to clarify how notification requirements for victims and prosecuting agencies apply to this process to ensure they have an opportunity to attend the parole consideration hearings as required under Penal Code section 3043. A jurisdictional review process is proposed as a second check to confirm an inmate’s eligibility for nonviolent offender parole review and the Department also proposes to clarify the process when the results of a jurisdictional review are vacated. The Department additionally proposes to establish the process through which the Board’s hearing officers will schedule initial parole consideration hearings for indeterminately-sentenced nonviolent offenders and clarify the laws governing assessments of suitability and the parole denial periods to which these offenders will be subject. Finally, the Department proposes to clarify the procedures through which inmates may seek redress of Department and Board decisions they feel were reached in error.

III. RULEMAKING AUTHORITY

In California, adopting, amending, or repealing a regulation requires an express grant of authority in law. As stated in Government Code section 11349, subdivision (b), “‘Authority’ means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.”

Ordinarily, the authority to adopt, amend, or repeal regulations in Division 3 of Title 15 (“Adult Institutions, Programs and Parole”) is found in Penal Code section 5058,

subdivision (a): “The [Secretary] may prescribe and amend rules and regulations for the administration of the prisons” The authority to do the same in Division 2 of Title 15 (“Board of Parole Hearings”) is found in Penal Code section 3052, which states, “The Board of Parole Hearings shall have the power to establish and enforce rules and regulations under which inmates committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole.”

With the passage of the Act, Article 1 of the California Constitution was amended to include section 32, subdivision (b), which states, “The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.” Accordingly, the Secretary has been granted broad authority under the California Constitution to adopt, amend, or repeal regulations in furtherance of the goals of the Act and hereby invokes that provision of law in support of this rulemaking action and affirmatively certifies that these regulations do protect and enhance public safety. Moreover, as noted above, the court in *In re Edwards* ordered the Department to amend its prior regulations implementing the Act to allow indeterminately-sentenced nonviolent offenders to be eligible for parole consideration by the Board.

IV. SPECIFIC PURPOSE AND NECESSITY FOR EACH PROPOSED REGULATORY SECTION PER GOVERNMENT CODE 11346.2(b)(1)

Through these regulations the Secretary proposes to create a parole consideration process for qualifying indeterminately-sentenced nonviolent offenders who have finished serving the full term of their primary offense. The Act does not create a right for these indeterminately-sentenced nonviolent offenders to be granted parole; rather, it authorizes the Department to establish this parole consideration process and through it promote the public safety and rehabilitation goals of the Act.

The regulations establish the process by which the Department identifies (1) which inmates qualify as indeterminately-sentenced nonviolent offenders, (2) when those offenders may be screened for possible referral to the Board, and (3) the criteria by which to determine when offenders are eligible for referral. Then, when an indeterminately-sentenced nonviolent offender is referred to the Board for nonviolent parole consideration, these regulations direct the Board to begin the parole consideration hearing process under Penal Code sections 3040, et seq. The regulations also establish the procedures by which inmates may seek redress of Department and Board decisions they feel were reached in error.

Title 15, Division 3, Subchapter 5.5, Article 1, Parole Consideration for Determinately-Sentenced Nonviolent Offenders.

Section 3490. Definitions.

This section previously defined the term “nonviolent offender” and excluded from the definition inmates currently serving life sentences or determinate sentences prior to beginning a life sentence for violent crime. Indeterminately-sentenced offenders who committed only nonviolent offenses were not excluded from the definition of “nonviolent offender” in this section but were nevertheless excluded from parole consideration in a different section.

This section is now amended in subsections (a) and (b) to clarify that this section defines the term “determinately-sentenced nonviolent offender,” rather than all “nonviolent offenders.” This amendment was necessary to clarify that the nonviolent parole review process under this article will apply solely to nonviolent offenders serving only determinate terms. Indeterminately-sentenced nonviolent offenders will be processed under the new Article 2. Additionally, paragraph (a)(3) was amended to replace “incarcerated for” with “serving” to clarify that inmates who are currently serving a term of life with the possibility of parole are excluded from the term “determinately-sentenced nonviolent offender” while inmates who are no longer serving an indeterminate term may be considered a “determinately-sentenced nonviolent offender” under subsection (b) once they have completed their indeterminate term and begin serving a determinate term for an in-prison offense that is not a “violent felony.” Paragraph (a)(4) was amended to remove “for a violent felony” to clarify that this section now excludes inmates from the definition of a “determinately-sentenced nonviolent offender” if they are currently serving any term prior to beginning a life sentence for any crime. Again, this was necessary because indeterminately-sentenced nonviolent offenders will be processed under new Article 2 and offenders who are currently serving a term for a “violent felony” or who are convicted of an in-prison offense that is a “violent felony” remain disqualified from both processes.

Section 3491. Eligibility Determination.

As noted above, the original definition of nonviolent offender in prior section 3490 did not exclude inmates serving life sentences for only nonviolent offenses. Thus, to limit this original parole file review process to determinately-sentenced inmates, paragraph (b)(1) of this section previously excluded indeterminately-sentenced inmates who specifically committed non-violent offenses from being eligible for the process notwithstanding the mandate in subsection (a) to initiate the parole file review process for nonviolent offenders.

In accordance with the court's order in *In re Edwards*, the Department is directed to establish a nonviolent parole consideration process for indeterminately-sentenced nonviolent offenders. Thus, subsection (b) of this section is amended to specifically exclude "indeterminately-sentenced nonviolent offenders" from the parole review process for determinately-sentenced nonviolent offenders under this article and clarify that they may be eligible for the parole process in Article 2 of this subchapter. This was necessary to clarify for inmates the specific article to which their case may be subject.

Additionally, subsection (d) was amended to clarify that one of the requirements for a new eligibility review under this article applies only when an inmate begins serving a new "determinate" term for a nonviolent in-prison offense. Again, this was necessary for clarification since eligibility following the start of a new indeterminate term would be determined under Article 2.

Title 15, Division 3, Subchapter 5.5, New Article 2, Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders.

Section 3495. Definitions.¹

This section is adopted to establish the definitions that will apply to this article.

Subsection 3495(a) defines key terms that will apply to the new parole consideration process for indeterminately-sentenced nonviolent offenders. First, this section defines a "nonviolent offender" as any inmate who is not (1) condemned, (2) currently incarcerated for a term of life without the possibility of parole, (3) currently serving a term of life with the possibility of parole for a violent felony, (4) currently serving a determinate term prior to beginning an indeterminate term for a violent felony, (5) currently serving an indeterminate term for a nonviolent felony after completing a concurrent or consecutive term for a violent felony, (6) currently sentenced to a violent felony for an in-prison offense, or (7) currently serving a determinate term for an in-prison offense after completing an indeterminate term of incarceration.

The Department determined that excluding condemned inmates and inmates currently serving a term of life without the possibility of parole from parole consideration under this article was necessary because the people of the State of California (through initiatives and the legislature) determined that such inmates have been convicted of violent offenses or other very serious crimes that require the longest possible period of incarceration consistent with public safety.

¹ The text of this section which is adopted for Division 3 appears below in new section 2449.30 of Division 2. The definitions are repeated in each section because Division 3 is applicable to the Department and Division 2 is applicable to the Board, yet clarity and consistency in their application by both entities is essential.

Additionally, in enacting Proposition 57, the express language of the provision indicates the people intended this parole process would not apply to inmates serving violent felonies, which the Department previously interpreted in accordance with Penal Code section 667.5, subdivision (c). Thus, the Department determined that inmates who are currently serving a term for (1) a violent felony offense, (2) a determinate term prior to beginning an indeterminate term for a violent felony, or (3) a term for a nonviolent felony after completing a concurrent or consecutive term for a violent felony, or who are currently sentenced on a violent felony for an in-prison offense should be excluded from parole consideration under this article because the crimes listed in that section of the Penal Code involve physical violence.

Subsection 3495(b) clarifies that, notwithstanding the definitions in subsection (a), which exclude inmates serving terms for indeterminate nonviolent offenses after completing terms for concurrent or consecutive violent felonies, inmates are still considered “indeterminately sentenced nonviolent offenders” if they have completed a determinate term of incarceration for a violent felony, and are now serving a separate indeterminate term for a nonviolent offense that was committed in prison. This is necessary because inmates who are currently serving indeterminate terms after completing a concurrent or consecutive term for a violent offense committed prior to entering prison are still incarcerated on the set of crimes that included the violent felony. In contrast, indeterminate sentences for in-prison offenses can only be served after an inmate has fully completed all of the determinate sentences for all of the crimes committed prior to entering prison and has discharged from all of those sentences. Thus, an inmate serving an indeterminate sentence for a nonviolent offense committed in prison is no longer incarcerated on the determinate term for a violent crime he or she committed before coming to prison. Thus, it is necessary to clarify that these inmates are included in the definition of indeterminately sentenced nonviolent offender notwithstanding subsection (a).

Subsection 3495(c) defines the term “violent felony” as a crime or enhancement listed in Penal Code section 667.5, subdivision (c). This subdivision of Penal Code section 667.5 contains crimes that the California Legislature has established as “violent felonies.” The Department determined that defining violent felony by reference to this subdivision of the Penal Code was necessary to promote consistency with California’s determination of what constitutes a violent felony as well as consistency with the definition of violent felony in the determinately-sentenced nonviolent offender parole process.

Subsection 3495(d) defines the term “primary offense” to mean the single crime with the longest sentence imposed by any court, excluding all enhancements, alternative sentences, or consecutive sentences. The Department determined this definition best reflected the intent of the people and is necessary to promote consistency with the definition of primary offense in the determinately-sentenced nonviolent offender parole process.

Subsection 3495(e) defines the term “full term” to mean the actual number of years, months, and days the sentencing court imposed for that primary offense, not including any sentencing credits. Again, the Department determined this definition best reflected the intent of the people and is necessary to promote consistency with the definition of primary offense in the determinately-sentenced nonviolent offender parole process. However, because inmates under this article have been sentenced to an indeterminate term of life with the possibility of parole under an alternative sentencing scheme (such as the Three Strikes Law) for a nonviolent offense, the Department also found it necessary to clarify how it would determine the “sentence imposed by the court” for those nonviolent offenses consistent with the court’s ruling in *In re Edwards*. Thus, for indeterminate terms imposed for a nonviolent offense under an alternative sentencing scheme, this section clarifies the Department will consider the “term imposed by the court” to be the maximum term applicable by statute to the underlying nonviolent offense for which the inmate received the life term.

Subsection 3495(f) defines the term “nonviolent parole eligible date” (NPED) as the date on which an inmate becomes eligible to be scheduled for his or her initial parole consideration hearing under this article. Similar to determinately-sentenced nonviolent offenders, an eligible indeterminately-sentenced nonviolent offender will only be considered for parole after serving the actual number of years, months, and days imposed by the sentencing court for the crime with the longest sentence. Defining the nonviolent parole eligible date for inmates under this article was necessary to clarify when these inmates will be eligible for possible referral to the Board for parole consideration and to maintain consistency with the determinately-sentenced nonviolent offender parole process.

Section 3496. Eligibility Determination.

This section is adopted to describe how the Department will review each inmate to determine whether the inmate meets the definition of nonviolent offender contained in section 3495. This section also describes how the Department will determine when qualified nonviolent offenders under this article become eligible for possible referral to the Board for a parole consideration hearing so that these inmates can be properly scheduled for their hearings.

Subsection 3496(a) establishes that inmates who meet the definition of an indeterminately-sentenced nonviolent offender as defined in subsection 3495(a) will be eligible to begin receiving parole consideration hearings under the Board's indeterminately-sentenced nonviolent offender parole process established in new article 16 of chapter 3 of division 2 of this title as created in this regulation package. This clarification is necessary to inform inmates and other interested parties which parole process inmates will receive when deemed eligible for referral to the Board.

Subsection 3496(b) establishes that, notwithstanding subsection (a), inmates will be excluded from this parole process if they are convicted of a sexual offense that currently requires or will require they register pursuant to Penal Code sections 290 through 290.024. The Department determined this exclusion was necessary to protect public safety because the crimes listed in that section of the Penal Code reflect the determination of the people of the State of California (through initiatives and the legislature) that, "Sex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest." (Penal Code section 290.03.) Also, when the people of the State of California approved Proposition 35 on November 6, 2012, they declared that "Protecting every person in our state, particularly our children, from all forms of sexual exploitation is of paramount importance." (See Proposition – Californians Against Sexual Exploitation Act, 2012 Cal. Legis. Serv. Prop. 35 (Proposition 35) (WEST), section 2, paragraph 1.)

Subsection 3496(c) establishes that the Department shall conduct an initial eligibility determination for all inmates within 60 calendar days of admission to the Department. This requirement was necessary to ensure that qualifying indeterminately-sentenced nonviolent offenders are identified early and can be properly tracked and reviewed under this article. The Department requires this process to be completed within 60 calendar days to maintain consistency with the determinately-sentenced nonviolent offender parole process.

Subsection 3496(d) establishes that the Department shall conduct another eligibility determination for nonviolent offenders any time a sentencing court issues a new or amended abstract of judgment affecting their conviction or term of incarceration. This is necessary to ensure inmates are reviewed again following changes to their convictions or terms of incarceration imposed by the court to determine the impact of those changes on their nonviolent offender status. This subsection also requires the department to conduct a new eligibility review if an inmate discharges from all pre-prison crimes and begins serving terms for nonviolent in-prison offenses that must include at least one indeterminate term. This was necessary because an inmate serving

terms for pre-prison crimes that included a violent felony would have previously been excluded from the nonviolent parole process because of the violent felony. However, as explained above, once the inmate completes serving the sentences for all of the offenses committed prior to entering prison, and begins serving his or her sentences for crimes committed while in prison, the inmate may now qualify as an indeterminately-sentenced nonviolent inmate if all of his or her remaining terms are for nonviolent offenses. Requiring at least one of the remaining terms to be an indeterminate sentence was also necessary because if all of the remaining sentences are determinate, the inmate is not subject to this article and would instead need to be reviewed under Article 1.

Subsection 3496(e) establishes three required steps for the eligibility determination process, which includes determining if the inmate meets the definition for inclusion as a nonviolent offender, identifying the inmate's primary offense, and calculating the inmate's nonviolent parole eligible date by determining when the inmate will complete the full term of his or her primary offense. These steps are necessary to ensure inmates are properly qualified as nonviolent offenders and that the dates on which the Department and Board need to take their respective actions under this regulatory process are properly established and tracked. This subsection also clarifies that, when identifying an indeterminately-sentenced nonviolent offender's primary offense, the department is required to also consider any sentences for in-prison offenses that the inmate is currently serving or has yet to serve. This is necessary because the inmate's longest term of incarceration may have been imposed by a court for an in-prison offense, which would then render that offense the primary offense.

Subsection 3496(f) requires the Department to properly serve and file eligibility reviews under this section within 15 business days. This requirement is necessary to maintain consistency with the determinately-sentenced nonviolent offender parole process and protect due process by ensuring that inmates are aware of the determinations and have the ability to appeal a decision they feel was in error. Additionally, 15 business days is necessary to ensure that the Department has sufficient time to complete the steps required to serve and file documents in the inmate's file.

Subsection 3496(g) establishes that eligibility determinations are subject to the Department's inmate appeal process. This clarification is necessary to maintain consistency with the determinately-sentenced nonviolent offender parole process and ensure that inmates understand the proper channel through which to challenge an eligibility determination they feel was made in error.

Section 3497. Public-Safety Screening.

This section is adopted to describe how the Department will screen indeterminately-sentenced nonviolent offenders to determine whether they should be referred to the Board for parole consideration or instead be deferred for one year due to recent institutional misconduct, indicating that they pose an unreasonable risk to the community. Under the screening process in this section, the Department will review the inmate's current case factors as his or her nonviolent parole eligible date approaches to determine whether the inmate has committed a listed offense. Only inmates who pass this public-safety screening are referred to the Board. Such screening protects public safety and ensures that the Board focuses its resources on inmates who are more likely to be found suitable for parole. This screening also promotes consistency with the determinately-sentenced nonviolent offender parole process.

Subsection 3497(a) directs the Department to apply the screening process in this section to indeterminately-sentenced nonviolent offenders who have been deemed eligible for possible referral to the Board, meaning they are within the designated amount of time to their nonviolent parole eligible dates as established in subsection (b). This was necessary to clarify that the screening process in this section must be completed before an inmate can be referred to the Board for parole consideration as established in these regulations.

Subsection 3497(b) establishes that the Department must screen nonviolent offenders for potential referral to the Board at least 180 calendar days prior to their nonviolent parole eligible date. This is to ensure that eligible inmates are referred to the Board early enough for the Board to complete all required pre-hearing processes in new Article 16 of Title 15, Division 2, Chapter 3, and other required processes required by state and federal law, prior to the inmate reaching his or her nonviolent parole eligible date. The Department deemed it necessary for this referral date to differ from the referral date in the determinately-sentenced nonviolent offender parole process because of the additional pre-hearing processes and requirements for the Board to conduct parole consideration hearings, including the timing of victim and other required notifications, scheduling and completion of Comprehensive Risk Assessments, disability reviews required under the Americans with Disability Act, and other necessary pre-hearing functions.

Subsection 3497(c) contains the eight screening criteria the Department will apply to determine whether a nonviolent offender will be referred to the Board. For consistency with the determinately-sentenced nonviolent parole process, the Department again used the same criteria originally established for the parole consideration process for nonviolent second-strike offenders, which was implemented

pursuant to a federal court order issued in 2014 in the *Plata/Coleman* class action litigation. These criteria have served to protect public safety in both the court-ordered process and the determinately-sentenced nonviolent parole process; therefore, the Department deemed them necessary to continue to protect public safety in this new parole consideration process. Under these eight criteria, indeterminately-sentenced nonviolent offenders will automatically be screened out if their prison records establish they have recently committed serious misconduct indicating they pose an unreasonable risk of violence.

First, those inmates who engage in serious misconduct while in prison such that they must be segregated from the general population are often placed in security housing units because they pose an unreasonable risk of violence to other inmates or staff. Placement in a security housing unit is reserved for the most serious offenses committed in prison, clearly indicating that the nonviolent offender continues to pose a risk to public safety. Thus, the Department deemed it necessary to screen out of the parole consideration process those nonviolent offenders who are currently placed in a security housing unit, or have been assessed a security housing unit term or been placed in a security housing unit in the past five years, because their prison records contains clear evidence that they are not currently suitable for parole.

Second, nonviolent offenders will be screened out if, in the past five years, they have been found guilty of certain rules violations that are indicative of current unreasonable risk to society even if they did not result in a security housing unit term. Specifically, this subsection screens out inmates who were found guilty within the last five years of committing a Division A-1 or Division A-2 rules violation because these are most serious prison rules violations, amounting to in-prison felony offenses. Committing new felony-level offenses is indicative of continuing criminal thinking demonstrating unsuitability for parole. Similarly, this subsection screens out inmates who were found guilty within the last five years of committing battery on a peace officer using a weapon or causing great bodily injury, or battery on a non-prisoner, because battery involves physical violence demonstrating that the inmate is not suitable for parole. This subsection also screens out inmates who were found guilty within the last five years of a serious rules violation for threatening to kill or cause serious bodily injury to a public official, their immediate family, their staff, or their staff's immediate family because these actions also demonstrate the inmate is not currently suitable for parole.

Third, this subsection screens out any nonviolent offenders who have been placed in Work Group C within the last year because placement in this work group occurs when an inmate's privileges are revoked for disciplinary reasons, indicating that the inmate is not currently suitable for parole.

Fourth, nonviolent offenders will be screened out if, in the past year, they have been found guilty of two or more serious rules violations, even if they did not result in a security housing unit term. Recently committing multiple serious violations is also indicative of continuing criminal thinking demonstrating unsuitability for parole.

Fifth, nonviolent offenders are screened out if their prison record indicates they have been found guilty within the past year of a rules violation involving drug-related offenses or refusal to provide a urine sample. Ongoing involvement with drugs is a consistent predictor of criminal conduct, which indicates the inmate is not suitable for parole. Similarly, nonviolent offenders are screened out if their prison record indicates they have been found guilty within the past year of a rules violation with any nexus to a Security Threat Group (i.e., prison gang). The Department deemed it necessary to screen out these nonviolent offenders because continuing Security Threat Group activity is indicative of continuing criminal mentality demonstrating these inmates are not currently suitable for parole.

Subsection 3497(d) establishes that otherwise eligible indeterminately-sentenced nonviolent offenders will not be referred to the Board under this parole process if, on the date of the screening, the inmate (1) has previously been scheduled for a parole consideration hearing under any other provision of law or (2) will be eligible for a parole consideration hearing under any other provision of law within the next 12 months.

Excluding inmates who are already in the Board's parole hearing cycle or who are currently scheduled for hearings is necessary because this process does not create a separate hearing track. Rather, this process provides the opportunity for indeterminately-sentenced nonviolent offenders to begin receiving their parole consideration hearings following completion of their primary term unless the inmate is eligible to begin receiving hearings earlier under other law. Thus, if the inmate's hearing was already scheduled, this process is unnecessary for the inmate to begin receiving hearings.

For similar reasons, it is necessary to also exclude inmates who are eligible to begin receiving hearings within 12 months under other laws. As explained above, these regulations generally provide indeterminately-sentenced nonviolent offenders who have not behaved negatively in prison with an earlier parole hearing once they are within six months of their NPED. In normal cases, these hearings will occur within approximately eight months of the public safety screening because this is done 180 calendar days prior to the inmate's NPED and, as explained further below the hearing is then scheduled for eligible offenders within 60 calendar following the NPED

(180 days plus 60 days equals approximately eight months). Moreover, because these hearings are subject to all applicable Board and Governor statutory decision review periods, if the offender was granted at his or her initial parole consideration hearing, the expected date of release would fall up to five months after the date of the hearing. Consequently, the expected date of release for an indeterminate-sentenced nonviolent offender who was found suitable at his or her initial parole consideration hearing would be approximately 13 months after the date of referral under this section.

Because of all of the pre-hearing and post-hearing processes required for full parole consideration hearings before the board, referring these inmates under the parole process in this article would not have a substantial impact on how quickly they could be considered for parole and subsequently released if they were found suitable. Moreover, with the multiple recent changes in the past few years to laws affecting when inmates may come before the board for parole consideration, including the enactment and amendment of Youth Offender laws in Penal Code section 3051, the enactment of Elderly Offender laws in Penal Code section 3055, and the enactment of the nonviolent parole processes for determinately and indeterminately-sentenced inmates, as well as the statutorily-imposed dates by which the Board is required to conduct the hearings for inmates who became immediately eligible for hearings under those changes, the Board anticipates scheduling an average of 7,600 hearings per year for the next three fiscal years, up from an average of 5,300 from prior years. Thus, referring indeterminately-sentenced nonviolent offenders for hearings under this article when they are already within 12 months of being scheduled for their initial hearing under other law would significantly tax the Board's already stretched resources for what would be at most a diminutive impact on when the inmate would receive his or her hearing and possibly be released. For these reasons, the Board determined excluding from referral any indeterminately-sentenced nonviolent offenders who are already within 12 months of their hearing date under other law was necessary to conserve limited resources and ensure that all other inmates entitled to parole consideration hearings under other law can be timely heard.

Subsection 3497(e) establishes that nonviolent offenders who are not screened out under this section shall be referred to the Board for parole consideration within five business days of the screening. This is necessary to ensure that the Board receives the referral with sufficient time to complete all necessary pre-hearing requirements prior to the date of the hearing.

Subsection 3497(f) requires nonviolent offenders who are screened out to be screened again by the Department one year later and each year thereafter until they are referred to the Board or are no longer eligible for referral, either because the Department determined the inmate was no longer eligible or the Board determined that it lacks jurisdiction under new section 2449.31 to conduct a parole consideration hearing through this parole process. This requirement is necessary to ensure that indeterminately-sentenced nonviolent offenders who are screened out of the parole consideration process are reviewed regularly to determine if their prison record continues to demonstrate they are a risk to public safety, unless they become ineligible or they begin the parole consideration hearing cycle under this process or other law.

Subsection 3497(g) requires the Department to notify inmates of the results of their public-safety screenings and place the results in their central file within 15 business days of the date of the screening. This requirement is necessary for transparency and to ensure they can appeal the Department's decision if they believe it was made in error. Additionally, 15 business days is necessary to ensure that the Department has sufficient time to complete the steps required to serve and file documents in the inmate's file. This subsection also requires the Department provide information to the nonviolent offender about the parole consideration hearing process, which is necessary for transparency and to provide inmates with the opportunity to prepare for their hearings.

Subsection 3497(h) clarifies that public-safety screening determinations are also subject to the Department's Inmate Appeal Process, which is necessary so inmates understand the proper channel through which to challenge a determination they feel was made in error.

Title 15, Division 2, Chapter 3, Article 15, Parole Consideration for Determinately-Sentenced Nonviolent Offenders.

Section 2449.1. Definitions.

This section essentially mirrors section 3490 of Division 3 of this title. Thus, this section also previously excluded inmates currently serving life sentences or determinate sentences prior to beginning a life sentence for violent crime from the definition of nonviolent offender under this article. As previously noted, indeterminately-sentenced offenders who committed only nonviolent offenses were not excluded from the definition of "nonviolent" but were excluded from parole review in a different section under Article 1 of Division 3.

This section is amended in subsections (a) and (b) to be consistent with section 3490 to clarify that this section defines the term “determinately-sentenced nonviolent offender,” rather than all “nonviolent offenders.” Additionally, paragraphs (a)(3) and (a)(4) were amended to remove “for a violent felony” to clarify that this section now excludes inmates from the definition of “determinately-sentenced nonviolent offender” if they are currently serving a life sentence or a determinate sentence prior to beginning a life sentence. This amendment was necessary to clarify that the nonviolent parole review process under this article will apply solely to nonviolent offenders who are serving only determinate terms. Indeterminately-sentenced nonviolent offenders will be processed under the new Article 16. Again, this was necessary because indeterminately sentenced nonviolent offenders will be processed under new Article 16 and inmates serving a term for a violent felony or who commit an in-prison offense that is a violent felony remain disqualified from both processes.

The section is also amended to establish in subsection (g) that hearing officers are limited to commissioners, deputy commissioners, associate chief deputy commissioners, or the Chief Hearing Officer. This amendment was necessary to clarify which Board personnel are charged with responsibility for making suitability or decision review determinations under this article. Additionally, commissioners, deputy commissioners, associate chief deputy commissioners, and the Chief Hearing Officer are all specifically trained to assess suitability or conduct decision review of jurisdictional decisions and are, therefore, the most qualified and appropriate personnel to make these determinations.

Title 15, Division 2, Chapter 3, NEW Article 16, Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders.

Section 2449.30. Definitions.

This section essentially mirrors section 3495 of Division 3 of this title, and is adopted to establish the definitions that will apply to this article.

Subsection 2449.30(a) defines key terms that will apply to the new parole consideration process for indeterminately-sentenced nonviolent offenders. First, this section defines an “indeterminately-sentenced nonviolent offender” as any inmate who is not (1) condemned, (2) currently incarcerated for a term of life without the possibility of parole, (3) currently serving a term of life with the possibility of parole for a violent felony, (4) currently serving a determinate term prior to beginning an indeterminate term for a violent felony, (5) currently serving a term for a nonviolent felony after completing a concurrent or consecutive term for a violent felony, (6) currently sentenced to a violent

felony for an in-prison offense, or (7) currently serving a determinate term for an in-prison offense after completing an indeterminate term of incarceration.

The Department determined that excluding condemned inmates and inmates currently serving a term of life without the possibility of parole from parole consideration under this article was necessary because the people of the State of California (through initiatives and the legislature) determined that such inmates have been convicted of violent offenses or other very serious crimes that require the longest possible period of incarceration consistent with public safety.

Additionally, in enacting Proposition 57, the express language of the provision indicates the people intended this parole process would not apply to inmates serving violent felonies, which the Board previously interpreted in accordance with Penal Code section 667.5, subdivision (c). Thus, the Department determined that excluding inmates from parole consideration who are currently serving a term for (1) a violent felony offense, (2) a determinate term prior to beginning an indeterminate term for a violent felony, or (3) a term for a nonviolent felony after completing a concurrent or consecutive term for a violent felony, or who are currently sentenced to a violent felony for an in-prison offense was necessary because the crimes listed in that section of the Penal Code involve physical violence.

Subsection 2449.30(b) clarifies that, similar to section 3495, notwithstanding the definitions in subsection (a), which exclude inmates serving terms for indeterminate nonviolent offenses after completing terms for concurrent or consecutive violent felonies, inmates are still considered “indeterminately-sentenced nonviolent offenders” if they have completed a determinate term of incarceration for a violent felony, and are now serving a separate indeterminate term for a nonviolent offense that was committed in prison. As explained above, this is necessary because inmates who are currently serving indeterminate terms after completing a concurrent or consecutive term for a violent offense committed prior to entering prison are still incarcerated on the set of crimes that included the violent felony. Indeterminate sentences for in-prison offenses can only be served after an inmate has fully completed all of the determinate sentences for all of the crimes committed prior to entering prison and has discharged from all of those sentences. Thus, an inmate serving an indeterminate sentence for a nonviolent offense committed in prison is no longer incarcerated on the determinate term for a violent crime that he or she committed before coming to prison. Thus, it is necessary to clarify that these inmates are included in the definition of indeterminately-sentenced nonviolent offender notwithstanding subsection (a).

Subsection 2449.30(c) defines the term “violent felony” as a crime or enhancement listed in Penal Code section 667.5, subdivision (c). This subdivision of Penal Code section 667.5 contains crimes that the California Legislature has established as “violent felonies.” The Department determined that defining violent felony by reference to this subdivision of the Penal Code was necessary to promote consistency with California’s determination of what constitutes a violent felony as well as consistency with the definition of violent felony in the determinately-sentenced nonviolent offender parole process.

Subsection 2449.30(d) defines the term “primary offense” to mean the single crime with the longest sentence imposed by any court, excluding all enhancements, alternative sentences, or consecutive sentences. The Department determined this definition best reflected the intent of the people and is necessary to promote consistency with the definition of primary offense in the determinately-sentenced nonviolent offender parole process.

Subsection 2449.30(e) defines the term “full term” to mean the actual number of years, months, and days the sentencing court imposed for that primary offense, not including any sentencing credits. Again, the Department determined this definition best reflected the intent of the people and is necessary to promote consistency with the definition of primary offense in the determinately-sentenced nonviolent offender parole process. However, because inmates under this article have been sentenced to an indeterminate term of life with the possibility of parole under an alternative sentencing scheme (such as the Three Strikes Law) for a nonviolent offense, the Department also found it necessary to clarify how it would determine the “sentence imposed by the court” for those nonviolent offenses consistent with the court’s ruling in *In re Edwards*. Thus, for indeterminate terms imposed for a nonviolent offense under an alternative sentencing scheme, this section clarifies the Department will consider the “term imposed by the court” to be the maximum term applicable by statute to the underlying nonviolent offense for which the inmate received the life term.

Subsection 2449.30(f) defines the term “nonviolent parole eligible date” (NPED) as the date on which an inmate becomes eligible to be scheduled for his or her initial parole consideration hearing under this article. Similarly to determinately-sentenced nonviolent offenders, an eligible indeterminately-sentenced nonviolent offender will be considered for parole after serving the actual number of years, months, and days imposed by the sentencing court for the crime with the longest sentence. Defining the nonviolent parole eligible date for inmates under this article was necessary to clarify for these inmates when they will be eligible for possible referral to the Board for parole

consideration and to maintain consistency with the determinately-sentenced nonviolent offender parole process.

Subsection 2449.30(g) establishes that hearing officers are commissioners, deputy commissioners, associate chief deputy commissioners, or the Chief Hearing Officer. This amendment was necessary to clarify which Board personnel are charged with responsibility for making suitability or jurisdictional review determinations under this article. Additionally, commissioners, deputy commissioners, associate chief deputy commissioners, and the Chief Hearing Officer are all specifically trained to assess suitability or conduct decision review of jurisdictional decisions and are, therefore, the most qualified personnel to make these determinations.

Section 2449.31. Jurisdictional Review.

This section is adopted to describe the Board's process for conducting a jurisdictional review prior to conducting a parole consideration hearing for indeterminately-sentenced nonviolent offenders to ensure that the inmate who has been referred to the Board qualifies as a nonviolent offender under proposed section 3495 above and is currently eligible for referral to the Board under proposed section 3496 following the public safety screening in proposed section 3497. This section is necessary to protect public safety by confirming that the referred nonviolent offender is eligible before the Board conducts a full nonviolent parole consideration hearing significantly earlier than the inmate would have been eligible under prior law.

Subsection 2449.31(a) establishes that jurisdictional reviews shall be conducted by hearing officers employed by the Board. This is necessary to clarify that only those personnel who have been trained to conduct a wide range of administrative law hearings and reviews for the Board and who have been specially trained on the applicable legal standards will conduct these reviews. This subsection also requires the jurisdictional review to be completed within 15 calendar days of referral. This deadline was necessary to ensure that the Board has sufficient time following a determination that jurisdiction exists to complete all necessary pre-hearing requirements prior to the date of the hearing.

Subsection 2449.31(b) defines the process used by the Board to determine if it has jurisdiction to conduct a parole consideration hearing for an indeterminately-sentenced nonviolent offender. In accordance with proposed sections 3496 and 3497 above, a hearing officer must determine whether the offender referred to the Board (1) is currently eligible for an indeterminately-sentenced nonviolent offender parole consideration hearing under the Department's eligibility determination process in proposed section 3496, (2) is currently qualified for referral to the Board under the

Department's public-safety screening criteria in section 3497, (3) has not previously been scheduled for a parole consideration hearing under any other provision of law, and is not eligible for a parole consideration hearing under any other provision of law during the 12 months following the date of the referral screening under section 3497. If the answer to all three of the above inquiries is "yes," then the Board has jurisdiction and shall consider the offender for parole. This process is necessary to protect public safety and ensure the Board applies its limited resources to inmates who meet the eligibility and referral criteria.

Subsection 2449.31(c) establishes the Board's procedures when the hearing officer finds the Board lacks jurisdiction to conduct a parole consideration hearing under this article. Upon determination that the Board lacks jurisdiction, this subsection requires the hearing officer to issue a written decision, including a statement of reasons explaining the decision. This subsection also requires the Board to notify the inmate of the Board's jurisdictional decision within 15 business days of the decision being issued. These requirements are necessary to ensure transparency and provide the inmate with an opportunity to seek review of the Board's jurisdictional decision under section 2449.34 below. Additionally, 15 business days is necessary to ensure that the Board has sufficient time to complete the steps required to serve and file documents in the inmate's file.

Subsection 2449.31(d) establishes the Board's procedures when the hearing officer finds the Board has jurisdiction to conduct a parole consideration hearing under this article. Upon determination that the Board has jurisdiction, this subsection requires the Board to schedule the indeterminately-sentenced nonviolent offender for his or her initial parole consideration hearing under proposed section 2449.32. This is required to clarify that, once the Board confirms it has jurisdiction, the Board must then commence with the parole consideration hearing process.

Subsection 2449.31(e) clarifies that the Board's jurisdictional determinations under this section are not subject to the Department's Inmate Appeal Process, since Board actions are exempted from that process, but are instead subject to the decision review process described in proposed section 2449.34 below. This is necessary to ensure that inmates are afforded a means to raise concerns they may have regarding the results of a jurisdictional determination and for the Board to correct any errors.

Section 2449.32. Parole Consideration Hearings.

This section is adopted to establish the Board's procedures for scheduling indeterminately-sentenced nonviolent offenders for their initial parole consideration hearings under this article following the determination that the Board has jurisdiction to proceed.

Subsection 2449.32(a)(1) establishes the timing of how an indeterminately-sentenced nonviolent offender referred to the Board at least 180 calendar days prior to the NPED will be scheduled for his or her initial parole consideration hearing under this article. This provision establishes the general scheduling rule because, once the Board has scheduled hearings for inmates who are immediately eligible for a hearing as a result of these regulations under paragraph (a)(2) and subsection (b) of this section, all qualified indeterminately-sentenced nonviolent offenders must from that point forward be screened and referred (if eligible) at least 180 calendar days prior to their NPEDs. Specifically, once the Board has determined that it has jurisdiction to conduct an initial parole consideration hearing under these regulations, the Board is required to schedule the inmate for a hearing by no later than 60 calendar days following their NPED. This was necessary to ensure inmates are heard as quickly as possible once they reach their nonviolent parole eligible date, while giving the Board the needed flexibility to schedule these hearings in a manner that balances numerous requirements, such as notice requirements to victims, prosecuting agencies, and other required parties as well as appointing counsel, preparing comprehensive risk assessments, hiring interpreters (if necessary) and determining the availability of hearing officers at each institution each week. Additionally, the emergency version of these regulations inadvertently omitted the word "calendar" in front of these time period designations. Adding this in is necessary to clarify for persons subject to these regulations that the board was referring to calendar days, rather than business days.

Subsection 2449.32(a)(2) establishes the timing for scheduling an indeterminately-sentenced nonviolent offender for his or her initial parole consideration hearing under this article if the inmate is referred to the Board less than 180 calendar days prior to his or her NPED or his or her NPED is in the past. This provision will apply to inmates who are close to having served the full term of their primary offense when they are first admitted to state prison, such as when an inmate has been in custody for a long period of time pending trial. This provision will also apply to inmates who fail to pass the public safety screening criteria and upon subsequent review one year later pass the public safety screening criteria pursuant to section 3497 and are referred to the Board. In these cases, the inmate's NPED will be less than 180 calendar days (in the future or it will be in the past as of the day the inmate is referred to the Board for a

parole consideration hearing. This section clarifies that the Board will schedule a parole consideration hearing for these inmates within one year from the date of the referral. These inmates will have had little time to engage in rehabilitative programs or will have exhibited recent negative behavior in prison. Consequently, the Board determined that, to ensure it continues to focus its limited resources on those inmates who are more likely to be found suitable for parole, it was reasonable to require that these inmates be scheduled for a parole consideration hearing within one year of the date the inmate is referred to the Board. Additionally, the emergency version of these regulations inadvertently omitted the word “calendar” in front of this time period designation. Adding this in is necessary to clarify for persons subject to these regulations that the board was referring to calendar days, rather than business days.

Subsection 2449.32(b) establishes deadlines by which, notwithstanding subsection (a), the Board will complete all initial parole consideration hearings for indeterminately-sentenced nonviolent offenders who are eligible for a hearing under this article on or before December 31, 2021. Upon the effective date of the court’s decision in *In re Edwards*, a large number of indeterminately-sentenced nonviolent offenders had already served the full term of their primary offense and were eligible for possible referral to the Board for a parole consideration hearing. Specifically, the Board estimates more than 1,800 inmates will be immediately eligible for referral to the Board for a parole consideration hearing under this article. The Board needs additional time to schedule these hearings so as to avoid cancelling or postponing hearings for other inmates who are entitled to a parole consideration hearing under the law, including about 1,800 parole hearings for determinately-sentenced youthful offenders who are entitled to a parole consideration hearing on or before December 31, 2021, under Senate Bill 261 (Chapter 471, Statutes of 2015) and Assembly Bill 1308 (Chapter 675, Statutes of 2017). Thus, this provision sets the dates by which inmates who are eligible for a parole consideration hearing on or before December 31, 2021, must be scheduled for their initial parole consideration hearing.

Setting these maximum timelines is necessary to ensure that all hearings are scheduled within a reasonable time and that all eligible inmates are provided an opportunity to be considered for parole. Additionally, prioritizing those inmates who, as of January 1, 2019, have been incarcerated for 20 years or more and who are within five years of their Minimum Eligible Parole Date is necessary to promote equity since these inmates have already served significant lengths of time. It will also ensure the Board focuses its limited resources first on those inmates who are more likely to be found suitable due to their advanced age and length of incarceration.

Subsection 2449.32(c) requires hearing panels to conduct parole consideration hearings for indeterminate-sentenced nonviolent offenders in compliance with the requirements for initial and subsequent parole consideration hearings described in Division 2 of Title 15, Penal Code sections 3040, et seq., and applicable case law. This is necessary to clarify the laws under which these hearings will be conducted and to promote consistency between determinations of suitability under these regulations and for all other indeterminate-sentenced inmates. Moreover, because the increased potential incarceration and seriousness of these inmates' criminal histories warrant greater scrutiny, requiring these parole reviews to be conducted as full parole consideration hearings is further necessary to protect both public safety and due process.

Subsection 2449.32(d) establishes procedures following a grant of parole under this article. Specifically, this section clarifies that indeterminate-sentenced nonviolent offender parole consideration hearings are subject to all statutory decision review periods that apply to all other parole consideration hearings for indeterminate-sentenced offenders, which is necessary to meet statutory requirements for parole hearings and ensure the greatest possible accuracy in these suitability determinations. This section also clarifies that, if the hearing panel finds the offender suitable for parole and the hearing decision is not vacated or rescinded, the indeterminate-sentenced nonviolent offender will be released regardless of other future parole eligible dates, which is necessary to ensure indeterminate-sentenced nonviolent offenders are released once they are determined to no longer pose an unreasonable risk to public safety and their parole grants are final.

Subsection 2449.32(e) establishes that the denial periods to which an indeterminate-sentenced nonviolent offender is subject after a hearing panel finds the offender is not currently suitable for parole adhere to Penal Code section 3041.5(b)(3) and its mandated denial lengths from the passage of the Victims' Bill of Rights Act of 2008, more commonly known as "Marsy's Law." This is necessary to ensure that the victims' rights respecting denial length at parole hearings for indeterminate-sentenced hearings are upheld and that inmates understand the denial periods to which they will be subject under this process.

Section 2449.33. Vacating a Jurisdictional Review Decision.

This section is adopted to establish the requirements and processes for vacating a prior jurisdictional review decision under section 2449.31.

Subsection 2449.33(a) establishes the process when, following a jurisdictional review decision finding that the Board had jurisdiction to proceed with a parole consideration hearing for an indeterminately-sentenced nonviolent offender under this article, the Board subsequently discovers, after the hearing but before the offender is released, that the offender was subsequently deemed to be ineligible for the nonviolent offender parole process under section 3496 of Division 3 because he or she is not an indeterminately-sentenced nonviolent offender or is convicted of a sexual offense. This section requires the Chief Hearing Officer or Associate Chief Deputy Commissioner to issue a decision vacating the prior finding of jurisdiction, including a statement of reasons, and to also vacate any suitability decisions from parole consideration hearings held under this article. Requiring the written decision is necessary to ensure that the Board's reasons for vacating the jurisdictional finding and suitability determinations are documented and explained in the inmate's record for transparency. Additionally, requiring that any parole consideration hearing decisions be vacated is necessary because, since the Board subsequently determined it lacked jurisdiction to conduct the hearings, those hearings have no legal effect. Vacating the hearing decisions correctly removes the results of those hearings from the offender's record.

This section further clarifies that the provisions of Penal Code section 3041(b)(3) do not apply to parole decisions vacated under this section. Penal Code section 3041(b)(3) states that the decision of a panel shall not be disapproved and referred for rehearing except by a majority vote of the board, sitting en banc, following a public meeting. This section is necessary to clarify that when the Board subsequently determines it had no legal authority to conduct a parole consideration hearing under this article, a hearing officer can vacate the prior hearing decisions and that this is not considered to be a disapproval of the panel's decision and referral for rehearing under Penal Code section 3041(b)(3). An inmate's eligibility as an indeterminately-sentenced nonviolent offender is determined by the Department under section 3496 of Division 3. It is, therefore, not a determination that can be overturned by a majority vote of the full Board. It is a decision that is subject to review under the Department's Inmate Appeals process under section 3496(g).

Subsection 2449.33(b) establishes that, notwithstanding subsection (a), the Board will not vacate for lack of jurisdiction a hearing held under this article when the inmate is currently eligible for a parole consideration hearing under another provision of law. This is necessary to preserve the inmate's rights to a hearing under other laws since, had the Board initially found a lack of jurisdiction to conduct a parole consideration hearing under this article, these inmates either would have already received or would be scheduled to receive a parole consideration hearing under another provision of law. Thus, even though the Board lacked jurisdiction to conduct the

nonviolent offender parole consideration hearing, the Board nevertheless had jurisdiction to conduct a parole consideration hearing for the inmate under another provision of law and the same results would have been reached at a hearing under the other law.

This section further clarifies that, notwithstanding subsection (a), the Board will not vacate for lack of jurisdiction a hearing held under this article when the inmate will be eligible within 18 months for a hearing under another law. This is necessary to preserve hearing results for inmates, victims, and prosecutors and to preserve the Board's limited resources by avoiding the need for the Board to conduct a new hearing 18 months later. If the inmate is denied parole for five years, there is no need to conduct another hearing 18 months later when it is unlikely the inmate will be suitable for parole. In addition, the Board has processes for advancing parole hearing dates if there is new information or a change in circumstances such that there is a reasonable likelihood that the additional incarceration is not necessary to protect the public and victims. If the inmate is granted parole, there is similarly no need to conduct another hearing to determine whether he or she continues to not pose a current, unreasonable risk to public safety. The Board also has processes for rescinding grants of parole if the Board discovers new information that the inmate is no longer suitable for parole. If the parole grant is not otherwise rescinded or vacated, the inmate will be processed for release upon reaching his or her earliest parole eligible date according to any other applicable law.

Subsection 2449.33(c) establishes the process when, following a jurisdictional review decision that the Board had jurisdiction to proceed with a parole consideration hearing for an indeterminate-sentenced nonviolent offender under this article, the Board subsequently discovers, before conducting the initial parole consideration hearing, that the offender was ineligible for referral to the Board under CDCR's public safety screening as described in section 3497 of Division 3 at the time the Board conducted its jurisdictional review. Limiting the scope of review under this section to the facts as they existed on the day of the original jurisdictional review is necessary to stabilize and bring certainty to the Board's hearing schedule by limiting the circumstances under which the Board will have to cancel and reschedule hearings to those circumstances that are not subject to rapid change. Hearings are scheduled six to eight months in advance and significant resources are expended well in advance of each hearing, such as the completion of a comprehensive risk assessment by a forensic psychologist who interviews the inmate and reviews the inmate's central file, the hiring of an attorney who is expected to meet with the inmate well in advance of the hearing, sending notices to registered victims and prosecutors, travel planning by victims and prosecutors, etc. Changes in eligibility for referral to the Board due to alleged subsequent negative behavior by an inmate could take weeks or months to become

final under the Department's processes for imposing rules violations. And once final, rules violations can be appealed and subsequently overturned. It would not be a prudent use of resources if the scheduling of hearings were contingent on factors that are susceptible to significant change, to the detriment of inmates, inmate counsel, and victims and prosecutors who may have been notified and incurred travel expenses. Nor would it be equitable to the inmate if the Board were to cancel a hearing based on a rules violation that has not been fully adjudicated. Any alleged negative behavior that occurs after the Board's jurisdictional review will be addressed with the inmate at the parole hearing and if the inmate is denied parole, may be considered when determining the length of the denial. However, if there was an error and the inmate was not eligible for referral to the Board when the Board conducted its jurisdictional review, this section requires the Chief Hearing Officer or Associate Chief Deputy Commissioner to issue a decision vacating the prior finding of jurisdiction, including a statement of reasons, and to also cancel the scheduled hearing date unless the inmate will be eligible by that date for a parole consideration hearing under other law. It is anticipated that such circumstances will only rarely occur, thus minimizing this section's impact on the Board's hearing cycle, victims, inmates, inmate counsel, and prosecutors. It is, however, nevertheless important for the Board to have a mechanism available to address unexpected circumstances when errors occur.

Requiring a written decision is necessary to ensure that the Board's reasons for vacating the jurisdictional finding is documented and explained in the inmate's record for transparency. Additionally, requiring cancellation of the hearing is necessary to avoid conducting a hearing for an inmate who was erroneously determined to be eligible for referral to the Board. However, it is also necessary to create an exemption for inmates who will be eligible for hearings under other law to protect the due process of those inmates by ensuring that they still receive timely hearings under the other laws.

Subsection 2449.33(d) requires any decisions vacating a jurisdictional review under subsection (a) or (c) of this section to be served on the inmate and placed in the inmate's central file record within 15 business days of the date of the decision. This is necessary for transparency and to protect the inmate's due process rights by timely providing the inmate with an explanation for the Board's actions. Additionally, this is necessary to provide the inmate with the opportunity to properly seek remedy under section 2449.34 of this article for a decision they feel was in error.

This section also requires any decisions vacating a jurisdictional review specifically under subsection (a) of this section to be sent to any victim or prosecuting agency who received notice of the scheduled hearing within five business days of the date of the decision. This is necessary for transparency and to protect the victims' rights.

Additionally, this is necessary to ensure that the prosecuting agency is aware of the changes to the inmate's eligibility for parole consideration and the hearing results being vacated. Furthermore, five business days is necessary to ensure that the Board has sufficient time to complete the steps required to send these documents to the appropriate parties.

Subsection 2449.33(e) establishes the next step after the Board vacates a jurisdictional decision under subsection (c) after finding the offender was subsequently deemed ineligible for referral to the Board under CDCR's public safety screening as described in section 3497. Specifically, this section clarifies that, after the jurisdictional decision is vacated and any future scheduled hearings are cancelled, the inmate will be screened through the public safety screening under section 3497 again in accordance with the timelines in section 3497(f). This was necessary to clarify that, since the inmate should not have been previously referred to the Board, the inmate will still be screened one year after the prior screening to determine whether he or she is eligible for referral at that time. As noted above under the explanation for section 3497(f), the annual public safety screenings are necessary to ensure that indeterminately-sentenced nonviolent offenders are reviewed regularly to determine if their current prison record continues to demonstrate they pose a current unreasonable risk to the community such that they should not be referred to the Board for a parole consideration hearing.

Subsection 2449.33(f) establishes that Board's decisions to vacate prior jurisdictional determinations under this section are not subject to the Department's Inmate Appeal Process, since Board actions are exempted from that process, but are instead subject to the decision review process described in proposed section 2449.34 below. This is necessary to ensure that inmates are afforded a means to raise any concerns they may have regarding the results of a jurisdictional determination and for the Board to correct any errors.

Section 2449.34. Review of Jurisdictional Decision.

This section is adopted to establish the requirements and processes for the Board to conduct a review, by the Board's own motion or following a request by an inmate, of a prior jurisdictional decision.

Subsection 2449.34(a) establishes the requirements and timelines for an inmate to request the Board's review of a prior decision regarding the Board's jurisdiction to conduct a nonviolent offender parole consideration hearing. Specifically, this section requires inmates to submit these requests in writing, establishes what must be included in the written request, and establishes the deadline of 30 calendar days from the date of the jurisdictional decision for the inmate to submit the written request for review.

This section is necessary to clarify for inmates how to properly raise any concerns they may have regarding the results of a jurisdictional determination and for the Board to correct any errors. Requiring these requests to be submitted in writing is necessary for the Board to be able to track these requests and all Board actions taken in response to the requests to ensure that all timely requests are properly processed. Moreover, requiring the written request to include a description of why the inmate believes the prior decision is not correct is necessary to help draw the Board's attention to any possible errors. Similarly, allowing the submission of additional information is necessary to allow the inmate to submit any information that has a bearing on whether the Board erred in the prior jurisdictional decision so that the Board can ensure the greatest possible accuracy in these determinations. Furthermore, establishing the 30 calendar day timeline is necessary to ensure the Board can quickly amend any erroneous decisions while still allowing inmates sufficient time to submit their written requests.

Subsection 2449.34(b) establishes the requirements and timelines when the Board elects to initiate review of a prior decision regarding the Board's jurisdiction to conduct a nonviolent offender parole consideration hearing. Specifically, this section authorizes the Board to initiate review of a prior jurisdictional decision at any time prior to the inmate's initial parole consideration hearing, but only when the prior decision contained an error of law or fact or the Board received new information that, if known, would have materially impacted the decision.

This section is necessary to clarify when and under what circumstances the Board may review a prior jurisdictional determination and correct any errors that are not otherwise identified or corrected by the Department under sections 3496 and 3497 of Division 3. Limiting the authorization for the Board to initiate review of a jurisdictional decision to any time prior to the initial hearing is consistent with section 2449.33(c), which is appropriate because decisions under this subdivision will be limited to those based on the inmate's eligibility for referral to the Board under section 3497 of Division 3. If the Department erred in determining the inmate to be an indeterminate-sentenced nonviolent offender, the Department will correct its decision under section 3496 of Division 3 so as to avoid future unwarranted public safety screenings under section 3497 of Division 3 and to remove the inmate's NPED from the Department's computer system. This will trigger a notification to the inmate, with an opportunity for review of the decision under the Department's Inmate Appeals Process, and the Board will vacate its prior jurisdictional review under section 2449.33. Additionally, limiting review to situations where the Board discovers either (1) an error of fact or law or (2) new information is necessary to promote consistency with the Board's standard for reviewing other Board decisions under section 2042 of this title and to ensure that the Board

disturbs jurisdictional determinations under this article only when they legally require correction.

Subsection 2449.34(c) establishes who must conduct a review of a prior jurisdictional decision as well as the timelines for when the review must be complete. Specifically, only a hearing officer who was not involved in the original decision can complete a review of the decision, which is necessary to promote the greatest accuracy and prevent bias by reviewers. Additionally, this section requires reviews to be completed within 30 calendar days of the Board receiving the request, which is necessary to ensure that inmates receive timely responses to their requests and the Board can take all necessary actions following the results of the review.

Subsection 2449.34(d) establishes the information the reviewing officer must consider and the requirements for documenting the results of the review. Specifically, the reviewing officer must consider all relevant and reliable information, which is necessary to ensure the greatest possible accuracy in these jurisdictional decisions. Additionally, this section requires the hearing officer to issue a decision either concurring with or overturning the previous decision and requires the decision to include a statement of reasons supporting the new decision. This requirement is necessary to promote transparency and protect the inmate's due process rights by timely providing the inmate with an explanation for the Board's actions.

Subsection 2449.34(e) establishes the timing for when the results of review under this section must be served on the inmate and placed in the central file. Specifically, the results must be served on the inmate and placed in the file within 15 business days of the date on which the decision was issued. This requirement is necessary to ensure that the inmate quickly receives the results of any decision review conducted under this section. Additionally, 15 business days is necessary to ensure that the Department has sufficient time to complete the steps required to serve and file documents in the inmate's file.

Subsection 2449.34(f) establishes the process Board's process for vacating a prior jurisdictional decision that resulted in a finding that it did not have jurisdiction to conduct a parole consideration hearing under this article. Specifically, in such a case, this section requires the Board to schedule the nonviolent offender, over whom the Board has now determined it has jurisdiction, for his or her initial parole consideration hearing within 180 calendar days of the date the Board vacates the prior jurisdictional decision. This is necessary to ensure that, upon a subsequent determination that the Board has jurisdiction to schedule the initial hearing, the inmate be scheduled for a

hearing as quickly as possible. However, it is also necessary to allow the Board 180 calendar days to schedule the hearing due to all of the necessary pre-hearing notifications and processes described above. Additionally, the emergency version of these regulations inadvertently omitted the word “calendar” in front of this time period designation. Adding this in is necessary to clarify for persons subject to these regulations that the board was referring to calendar days, rather than business days.

Subsection 2449.34(g) establishes that a decision to vacate a prior jurisdictional determination under this section is not subject to the Department’s Inmate Appeal Process. This is necessary to clarify for inmates that this process is not subject to the department’s Inmate Appeal Process since Board actions are exempted from that process. Additionally, since this section governs reviews, which can be initiated by inmates, this section provides inmates with their remedy for challenging prior decisions they feel are in error, which exhausts their administrative remedies on jurisdiction decisions issued under this article.

V. ANTICIPATED BENEFITS OF THE REGULATIONS

The establishment of the nonviolent offender parole consideration process will make prisons and communities safer by encouraging and motivating indeterminately-sentenced nonviolent offenders to participate in rehabilitative programs and service opportunities that create skills and, employability. The proposed regulations establish rigorous screening criteria for inmates and notification procedures for registered victims and prosecuting agencies. Establishing screening criteria benefits public safety by excluding inmates who are more likely to pose a risk to the public and provides nonviolent offenders with substantial motivation to avoid prison misconduct and focus on their rehabilitation. Establishing notification processes benefits public safety by ensuring that registered victims and prosecuting agencies, as well as other interested parties, have the opportunity to submit additional information regarding the nonviolent offender for the Board’s consideration. Under the proposed regulations, the Board will review all relevant and reliable evidence, including an inmate’s full criminal history, institutional behavior, rehabilitative efforts, and statements from interested parties to determine whether the inmate poses a current unreasonable risk to public safety. This process will enhance public safety by motivating eligible inmates to take responsibility for their own rehabilitation and work to prepare themselves to be productive members of the community upon their release.

VI. ECONOMIC IMPACT ASSESSMENT

In accordance with Government Code section 11346.3(b), the Department and the Board have made the following assessments regarding the proposed regulations:

A. Creation or Elimination of Jobs within the State of California

This proposed rulemaking action is designed to implement the will of California voters when they enacted the nonviolent parole under The Public Safety and Rehabilitation Act of 2016, as interpreted by the Court of Appeals in *In re Edwards*. As for job creation, the nonviolent parole consideration process will necessarily create jobs at the Board due to the additional parole reviews required by the Act.

Specifically, the proposed action is designed to establish a parole consideration process that provides indeterminately-sentenced nonviolent offenders a similar mechanism to be considered for parole upon serving the full term of their primary offense, in accordance with Proposition 57 and the court's order in *In re Edwards*.

The Department has determined that the establishment of this process will result in approximately 1,800 additional hearings over the next two fiscal years (FY 2019-20 and FY 2020-21), which will necessarily require additional staff to absorb these added requirements including screening inmates for eligibility, calculating NPEDs, serving documents on inmates, filing documents in inmate central files, conducting jurisdictional reviews, sending notices, scheduling hearings, conducting all necessary pre-hearing processes, including appointing attorneys, conducting comprehensive risk assessments, hiring interpreters if necessary, conducting the hearings, conducting review of the hearing decisions, and conducting reviews of jurisdictional decisions, as needed.

With the increase in workload associated with implementing the indeterminately-sentenced nonviolent parole process and conducting the increased number of parole consideration hearings under this process, the Governor's Proposed Budget for Fiscal Year 2019-20 includes \$8.2 million and 23.9 permanent, full-time positions to accommodate the projected increase in parole consideration hearings associated with these regulations. With regard to Fiscal Years 2020-21, the Department is requesting \$8.2 million and 12.5 permanent full-time positions. For Fiscal Year 2021-22, the Department is requesting \$2.9 million and 12.5 permanent full-time positions. No jobs in California have been eliminated as a result of these changes.

B. Creation of New Businesses or Elimination or Expansion of Existing Businesses Currently Doing Business within the State of California

This rulemaking action will not have an adverse economic impact on existing businesses within the State of California, including the ability of California businesses to compete with businesses in other states, because private businesses are not significantly affected by the management of correctional facilities. No businesses are expected to be eliminated. These proposed regulations may lead to the creation of new businesses in California to fill the need for increased rehabilitative programming mandated by The Public Safety and Rehabilitation Act of 2016. These proposed regulations may also lead to the expansion of existing businesses in California to fill the need for increased rehabilitative programming mandated by The Public Safety and Rehabilitation Act of 2016.

C. Significant Adverse Economic Impact on Business / Investment in the State / Incentives for Innovation

The Department has made an initial determination that the proposed regulations will not have a significant adverse economic impact on business, investment in the state, or incentives for innovation in products, materials, or processes. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination. The proposed regulations affect the internal management of the Department and the Board only, and place no requirements or restrictions on businesses. Additionally, the internal management of the Department and Board have no impact on business investments in the state or state incentives for innovations in products, materials, or processes.

D. Anticipated Benefits to the Health, Safety, and Welfare of California Residents, Worker Safety, and the State's Environment and Quality of Life

As explained above in greater detail, this regulation enhances public safety by motivating indeterminately-sentenced nonviolent offenders to avoid prison misconduct and focus on their rehabilitation through participating in rehabilitative programs and service opportunities that create skills and employability to prepare themselves to be productive members of the community upon their release. This regulation also benefits public safety by ensuring that registered victims and prosecuting agencies, as well as other interested parties, have the opportunity to submit additional information regarding the nonviolent offender for the Board's consideration.

VII. CONSIDERATION OF ALTERNATIVES

The Department has determined that no reasonable alternatives considered, or that have otherwise been identified and brought to the attention of the Department and the Board would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing and equally effective in implementing The Public Safety and Rehabilitation Act of 2016.

The Department and the Board have made an initial determination that no reasonable alternatives to the regulations have been identified or brought to the attention of the Department or the Board that would lessen adverse impacts on small business, if any.

VIII. LOCAL MANDATES

The Department has determined that this action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement pursuant to Government Code section 17561.

IX. ADDITIONAL FINDINGS

In proposing these regulations, the Department relied upon the following documents:

1. *In re Edwards* (2018) 26 Cal.App.5th 1181.
https://www.cdcr.ca.gov/Regulations/Adult_Operations/Pending_Rules_Page.html
2. Official Voter Information Guide, Proposition 57, November 8, 2016 Election.
https://www.cdcr.ca.gov/Regulations/Adult_Operations/Pending_Rules_Page.html
3. Three-Judge Court Order Granting in Part and Denying in Part the State's Request for an Extension of the Population Reduction Deadline (February 10, 2014).
https://www.cdcr.ca.gov/Regulations/Adult_Operations/Pending_Rules_Page.html
4. Report Filed with Three-Judge Panel Regarding Nonviolent Second Striker Process (December 1, 2014).
https://www.cdcr.ca.gov/Regulations/Adult_Operations/Pending_Rules_Page.html
5. Governor's Budget Summary for Fiscal Year 2017-2018, Public Safety.
https://www.cdcr.ca.gov/Regulations/Adult_Operations/Pending_Rules_Page.html