



Department of Corrections and Rehabilitation
NOTICE OF CHANGE TO REGULATIONS

Sections: 3492, 3493, 2449.2, 2449.3, 2449.4, 2449.5, 2449.6, 2449.7	NCR Number: 19-06	Publication Date: November 15, 2019	Effective Date: September 10, 2019
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INSTITUTION POSTING AND CERTIFICATION REQUIRED

This Notice announces the proposed amendment of Sections 3492 and 3493 of the California Code of Regulations (CCR), Title 15, Crime Prevention and Corrections, Division 3, and the amendment of Sections 2449.3, 2449.4, 2449.5, 2449.6, and 2449.7, and repeal of Section 2449.2, of Title 15, Division 2, regarding Supplemental Reforms to Parole Consideration for Determinately-Sentenced Nonviolent Offenders.

PUBLIC COMMENT PERIOD

The public comment period will close on **January 7, 2020 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 January 7, 2020.**

PUBLIC HEARING INFORMATION

A public hearing regarding these proposed regulations will be held **on January 7, 2020, from 2:00 pm to 3:00 pm 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 email. See Department Operations Manual Section 12010.6.7 for posting and certification of posting procedures.

CONTACT PERSON

Inquiries regarding this Notice should be directed to Josh Jugum, by mail to California Department of Corrections and Rehabilitation, RPMB, P.O. Box 942883, Sacramento, CA 94283-0001, by telephone at (916) 445-2266, or e-mail to RPMB@cdcr.ca.gov. Inquiries regarding the subject matter of these regulations should be directed to Mina Choi, Board of Parole Hearings, at (916) 324-6642.

Original Signed By:

RALPH M. DIAZ
Secretary
California Department of Corrections and Rehabilitation

Attachments

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 the Department), proposes to amend Sections 3492 and 3493 of Title 15, Division 3, Subchapter 5.5, Article 1, and amend Sections 2449.3, 2449.4, 2449.5, 2449.6, and 2449.7, and repeal Section 2449.2, of Title 15, Division 2, Chapter 3, Article 15, regarding Supplemental Reforms to Parole Consideration for Determinately-Sentenced Nonviolent Offenders.

PUBLIC HEARING

Date and Time: **January 7, 2020 – 2:00 p.m. to 3:00 p.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 **November 15, 2019** and closes on **January 7, 2020 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>
Josh Jugum	Y. Sun
Telephone: (916) 445-2266	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 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 Proposition 57, The Public Safety and Rehabilitation Act of 2016 (“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 McGhee* ordered the Department to repeal portions of Section 3492 of Title 15 of the California Code of Regulations and to make any further conforming changes necessary to effectuate the court's decision.

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

Following the publication on April 19, 2019, of Notice of Change to Regulations 19-02, concerning supplemental reforms to parole consideration for indeterminate-sentenced inmates, the court found in the matter of *In re McGhee* (2019) 34 Cal.App.5th 902, that regulations previously promulgated by CDCR establishing the determinately-sentenced nonviolent parole process did not comport with the constitutional provision they sought to implement. Specifically, the court struck down the public safety screening process which allowed CDCR to screen out certain nonviolent offenders from referral to the Board for parole consideration under the Board's determinately-sentenced nonviolent parole review.

Therefore, CDCR and the Board determined that amendments to these regulations are necessary to remove the public safety screening process and all other regulatory provisions related to CDCR's screening of inmates for public safety reasons prior to referral to the Board. This rulemaking action will remove any process for CDCR to screen nonviolent offenders for public safety reasons prior to referral to the Board as well as the portion of the Board's jurisdictional review process related to confirming agreement with CDCR's public safety screening results for a referred nonviolent offender.

This action will:

- Repeal the public safety screening process prior to referring otherwise eligible inmates to the Board of Parole Hearings for parole consideration, consistent with the *In re McGhee* court ruling.
- Repeal the Board's jurisdictional review process. This process has been made obsolete by the repeal of the public safety screening process.
- Establish a timeframe to ensure inmates who were determined to be ineligible under the now repealed public safety screening are reviewed again under the amended regulations.

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 indeterminate-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 has determined the proposed regulations are not inconsistent or incompatible with existing State regulations. Pursuant to this determination 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)), the proposed regulations are not inconsistent or incompatible with any existing laws or regulations.

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 to any local agency or school district that is required to be reimbursed: *None*
- Cost or savings to any state agency:
Cost of \$643,000 in fiscal year 2020-21, and ongoing cost will be \$698,000
- Cost or savings in federal funding to the state: *None*
- Other nondiscretionary cost or savings imposed on local agencies: *None*

EFFECT ON HOUSING COSTS

The Department has made an initial determination that the proposed action will have no 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, or by technical changes to an inmate's eligibility for parole consideration.

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

The proposed regulations will create state jobs due to the additional parole reviews required by the Act. The Department and the Board have determined that additional staff is necessary to conduct the additional review on the merits. The Board is requesting 3.1 Administrative Law Judge and 0.5 Administrative Law Judge II positions starting August 1, 2019.

This rulemaking action will have no impact on existing businesses, the creation of new businesses, or the

expansion of businesses currently doing business within the State of California.

The regulations enhance public safety by incentivizing determinately-sentenced nonviolent offenders to avoid prison misconduct and focus on their rehabilitation by 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.

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.

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 3492. Eligibility Review and Referral is amended as follows:

Section 3492. Public Safety Screening Eligibility Review and Referral to the Board of Parole Hearings.

(a) ~~Effective July 1, 2017, if an inmate is determined to be Eligible for parole consideration determinately-sentenced nonviolent offenders under Section 3491, he or she shall be screened under this section for possible referral referred to the Board of Parole Hearings for parole consideration.~~

~~(b) Inmates shall be screened under this section at least 35 calendar days prior to their nonviolent parole eligible date unless.~~

~~(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 been found guilty of a serious rule violation for a Division A-1 or Division A-2 offense as specified in subsection 3323(b) or 3323(c) within the past five years;~~

~~(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;~~

~~(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; and~~

~~(9) The their inmate's nonviolent parole eligible date falls at least less than 180 calendar days prior to his or her their earliest possible release date and or the inmate they will not reach his or her their earliest possible release date for at least in less than 210 calendar days.~~

~~(d) 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 parole consideration under article 15 of chapter 3 of division 2 of this title.~~

~~(e) (b) Inmates A review for possible referral to the Board under subsection (a) shall be screened conducted again under this section one year from the date of their the inmate's previous public safety screening review for referral until they are the inmate is released from custody or are is no longer eligible for parole consideration under Section 3491, 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 review the inmate for release under section 2449.2 of division 2 of this title;~~

~~(3) The inmate was referred to the Board of Parole Hearings and was denied release after a review on the merits under section 2449.4 of division 2 of this title;~~

~~(4) The inmate was referred to the Board of Parole Hearings and was denied release after a previous decision approving the inmate's release was vacated by the Board of Parole Hearings under section 2449.6 of division 2 of this title; or~~

~~(5) The inmate was referred to the Board of Parole Hearings and was denied release after a previous decision was reviewed by the Board of Parole Hearings under section 2449.7 of division 2 of this title.~~

~~(f)(c) Public safety screening and Rreferral results under subsection (a) 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 referred to the Board of Parole Hearings, he or she the inmate shall be provided information about the nonviolent offender parole process, including the opportunity to submit a written statement to the Board of Parole Hearings.~~

~~(g)(d) Public safety screenings and rReferrals review results under this subsection (a) are subject to the department's inmate appeal process in accordance with Aarticle 8 of Cchapter 1 of this Ddivision.~~

~~(e) Inmates who were ineligible for referral to the Board of Parole Hearings under the former public safety screening criteria shall be reviewed again under subsection (a), unless they are no longer eligible for parole consideration under Section 3491 or have been released.~~

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

Section 3493. Processing for Release.

If an inmate is approved for release by the Board of Parole Hearings under Ssection 2449.4 of Ddivision 2 of this title and the decision is not vacated or overturned by the Board of Parole Hearings, the Division of Adult Institutions shall release the inmate 60 calendar days from the date of the Board of Parole Hearings' decision unless the inmate has an additional term to serve for an in-prison offense. Inmates released pursuant to this section shall be

released in accordance with Section 4755 of the Penal Code, Section 3075.2 of this title, and any other procedures required by law, including required notifications to victims and law enforcement agencies.

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

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.

Section 2449.2. Jurisdictional Review is repealed.

~~Section 2449.2. Jurisdictional Review.~~

~~(a) Within 15 calendar days of a referral from the department under section 3492 of division 3 of this title, a hearing officer shall review the inmate's case and determine whether the board has jurisdiction to review the inmate for release.~~

~~(b) The board has jurisdiction to review an inmate for release if all of the following are true:~~

~~(1) The inmate's earliest possible release date is at least 210 calendar days after the date of the department's referral and the inmate's earliest possible release date is at least 180 calendar days after his or her nonviolent parole eligible date;~~

~~(2) The inmate is eligible for parole consideration under section 3491 of division 3 of this title; and~~

~~(3) The inmate, as of the date of the jurisdictional review, meets the criteria for referral to the board under subsection 3492(c) of division 3 of this title.~~

~~(c) If the hearing officer determines the board does not have jurisdiction to review the inmate for release, 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 3492(e) of division 3 of this title.~~

~~(d) If the hearing officer determines the board has jurisdiction to review the inmate for release, the board shall proceed with the notification process outlined in section 2449.3 of this article.~~

~~(e) Inmates may seek review of decisions issued under this section by writing the board in accordance with section 2449.7 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).

Section 2449.3. Notification Process is amended as follows:

Section 2449.3. Notification Process.

(a) Within five business days of ~~a hearing officer determining the board has jurisdiction to review an inmate for release under section 2449.2~~an inmate being referred to the board for parole consideration under Section 3492 of Division 3 of this title, the board shall notify registered victims and the prosecuting agency or agencies of the inmate's pending parole review and provide an opportunity to submit a written statement.

(b) Responses to the board under this section must be in writing and postmarked or electronically stamped no later than 30 calendar days after the board issued the notification.

(c) A registered victim is any person who is registered as a victim with the department's Office of Victim and Survivor Rights and Services at the time of the inmate's referral to the board under Section 3492 of Division 3 of this title.

(d) The prosecuting agency or agencies include any California district attorney office responsible for prosecuting the inmate, or the State of California Office of the Attorney General if that office was responsible for prosecuting the inmate, for any crimes for which the inmate is currently incarcerated.

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

Section 2449.4. Review on the Merits is amended as follows:

Section 2449.4. Review on the Merits.

(a) Within 30 calendar days of the conclusion of the notification process described under ~~sub~~Section 2449.3(b), a hearing officer shall confirm the inmate is eligible for parole consideration under Section 3491 of Division 3 of this title and, if the inmate's eligibility is confirmed, review the inmate's case on the merits and determine whether to approve his or her the inmate's release. If the inmate is determined to be ineligible for parole consideration under Section 3491 of Division 3 of this title, the hearing officer shall issue a written decision as specified in subsection (d) without conducting a review on the merits under subsection (b) and (c).

(b) The hearing officer shall review and consider all relevant and reliable information about the inmate including, but not limited to:

(1) Information contained in the inmate's central file and the inmate's documented criminal history, including the inmate's Record of Arrests and Prosecutions (RAP sheets) and any return to prison with a new conviction after being released as a result of this section; and

(2) Written statements submitted by the inmate, any victims registered at the time of the referral, and the prosecuting agency or agencies that received notice under Section 2449.3.

(c) After reviewing and considering the relevant and reliable information, the hearing officer shall determine whether the inmate poses a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity as determined by considering and applying the factors in Section 2449.5.

(d) The hearing officer 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. The board shall, within five business days of issuing a decision, send notice of the decision to any victim who was registered at the time of the referral and any prosecuting agency or agencies that received notice under Section 2449.3.

~~(4)~~(e) If the hearing officer finds the inmate poses a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity, the hearing officer shall deny release and issue his or her decision.

~~(2)~~(f) If the hearing officer finds the inmate does not pose a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity, the hearing officer shall approve release and issue his or her decision unless the decision will result in the inmate being released two or more years prior to his or her earliest possible release date. If the decision will result in the inmate being released two or more years prior to his or her earliest possible release date, the decision shall be reviewed by an associate chief deputy commissioner or the Chief Hearing Officer before it is finalized and issued. If the associate chief deputy commissioner or the Chief Hearing Officer does not concur with the hearing officer's decision, he or she shall issue a new decision approving or denying release.

~~(e)~~ (g) Inmates approved for release under this section shall be processed for release by the department as described in Section 3493 of Division 3 of this title.

(f) (h) Inmates denied release under this section shall be ~~screened~~ reviewed for possible referral to the board again annually as provided in subsection 3492(~~eb~~) of Division 3 of this title.

~~(g)~~ (i) Inmates may seek review of decisions issued under this section by writing the board in accordance with Section 2449.7 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.

(j) The time period specified in subsection (a) shall be extended as necessary to ensure all inmates referred to the board under subsection (e) of Section 3492 of Division 3 of this title are reviewed by the board by no later than March 31, 2020.

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

Section 2449.5. Factors to Consider During a Review on the Merits is amended as follows:

Section 2449.5. Factors to Consider During a Review on the Merits.

Subsections 2449.5(a) through 2449.5(e)(4) are unchanged.

Subsection 2449.5(f) through (f)(5) are amended as follows:

(f) The following factors concerning the inmate's institutional behavior, work history, and rehabilitative programming as documented in the inmate's central file shall be considered as aggravating the inmate's risk.

(1) The inmate has been found guilty of institutional Rules Violation Reports resulting in physical injury or threat of physical injury since his or her last admission to prison or has one or more recent serious institutional Rules Violation Reports.

(2) There is reliable information in the confidential section of the inmate's central file indicating the inmate has engaged in criminal activity since his or her last admission to prison.

(3) The inmate has limited or no participation in available vocational, educational, or work assignments.

(4) The inmate has limited or no participation in available rehabilitative or self-help programming to address the circumstances that contributed to his or her criminal behavior, such as substance abuse, domestic violence, or gang involvement.

Subsections 2449.5(g) through 2449.5(h) are unchanged.

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

Section 2449.6. Vacating a Decision is amended as follows:

Section 2449.6. Vacating a Decision.

(a) If at any time prior to release an inmate previously approved for release under Section 2449.4 is subsequently determined to no longer be eligible for parole consideration under Section 3491 of Division 3 of this title ~~or to no longer meet the criteria for referral to the board under subsection 3492(e) of division 3 of this title~~, the Chief Hearing Officer or an associate chief deputy commissioner shall issue a written decision vacating the previous decision that includes a statement of reasons supporting the new decision.

(b) Within 15 business days of issuing a decision under subsection (a), 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 who was registered at the time of the referral and any prosecuting agency or agencies that received notice under Section 2449.3.

~~(c) If a decision is vacated under this section, the inmate shall be screened again for possible referral to the board as provided in subsection 3492(e) of division 3 of this title.~~

~~(d) Inmates may request review of a decision issued under this section by writing the board as provided in Section 2449.7 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).

Section 2449.7. Decision Review is amended as follows:

Section 2449.7. Decision Review.

(a) An inmate may request review of a ~~jurisdictional decision issued under section 2449.2, a~~ decision on the merits issued under Section 2449.4, or a decision vacating a previous approval for release issued under Section 2449.6 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.

Subsections 2449.7(b) through 2449.7(e) are unchanged.

(f) Within five business days of issuing a decision under this section that overturns a previous decision issued under Section 2449.4 or 2449.6, the board shall send notice of the decision to any victim who was registered at the time of the referral and any prosecuting agency or agencies that received notice under Section 2449.3. Inmates who are denied release under this section shall be ~~screened~~ reviewed for possible referral to the board again annually as provided in subsection 3492(eb) of Division 3 of this title.

(g) If a decision under this section overturns a previous decision that determined the ~~board did not have jurisdiction to review the inmate because he or she was not eligible for referral under section 2449.2~~ inmate was not eligible for parole consideration under Section 3491 of Division 3 of this title, the board shall proceed with the notification process outlined in Section 2449.3. The board shall also, within 60 calendar days, conduct a review on the merits under Section 2449.4.

(h) 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 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

Division 2. Board of Parole Hearings

Chapter 3. Parole Release

Article 15. Parole Consideration for Determinately-Sentenced Nonviolent Offenders

Repealing:

Division 2. Board of Parole Hearings

Chapter 3. Parole Release

Article 15. Parole Consideration for Determinately-Sentenced Nonviolent Offenders
Section 2449.2

INTRODUCTION

Article 1, Section 32(a)(1) of the California Constitution, as adopted under The Public Safety and Rehabilitation Act of 2016 (“the Act”), directed the California Department of Corrections and Rehabilitation (Department) to establish a parole consideration process through which inmates currently serving prison sentences for only nonviolent felony offenses would be eligible for parole consideration by the Board of Parole Hearings (Board) after completing the full term of their primary offense, subject to certification by the Secretary of the Department that these implementing regulations protect and enhance public safety. Thus, the Department promulgated regulations and created a process for determinately-sentenced nonviolent offenders to be reviewed for parole after serving the full term of their primary offense.

Under existing regulations, the Department screened all determinately-sentenced offenders and determined their eligibility for parole consideration through a public safety screening process. Thus, the Department would not refer to the Board for parole consideration any offender deemed ineligible under the public safety screening process. However, the First District Court of Appeal in *In re McGhee* (2019) 34 Cal.App.5th 902 struck down the public screening process established in California Code of Regulations, Title 15, Section 3492. The court found the public safety screening process was inconsistent with the mandate in California Constitution, article I, Section 32 for nonviolent offenders to be eligible for referral to the Board for parole consideration. Thus, the court determined the public safety screening did not comport with the constitutional provision it sought to implement and struck down this portion of the regulation. The court issued this decision on May 16, 2019, and the remittitur issued on July 2, 2019.

The Department and the Board submitted an emergency rulemaking to modify existing regulations to comport with the *McGhee* decision. This emergency action was approved by the Office of Administrative Law on September 10, 2019.

OVERVIEW AND GENERAL NECESSITY

Following the *In re McGhee* decision, the Department and the Board determined that existing regulations needed to be modified to remove the public safety screening process and all other portions of the regulations related to the Department's screening of offenders prior to referral for public safety reasons. Specifically, the Department and the Board amended these proposed regulations to remove any process for the Department to screen nonviolent offenders for public safety reasons prior to referral to the Board as well as the portion of the Board's jurisdictional review process related to confirming agreement with the Department's screening results for a referred nonviolent offender.

Additionally, CDCR and the Board found minor citation modifications were necessary to enhance the clarity and consistency of these regulations.

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 McGhee* ordered the Department to repeal portions of Section 3492 of Title 15 of the California Code of Regulations and to make any further conforming changes necessary to effectuate the court's decision.

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

Title 15, Division 3.

Section 3492. Eligibility Review and Referral to the Board of Parole Hearings.

Section 3492 is amended to remove all authority for Department staff to screen out determinately-sentenced nonviolent offenders for public safety reasons. This section also replaces the former public safety screenings with eligibility reviews. Deleting all authority for Department staff to screen out determinately-sentenced nonviolent offenders for public safety

reasons is necessary to bring these proposed regulations into compliance with the court's decision in *In re McGhee*. To fully implement the reasoning of the court's decision and avoid further litigation, it is necessary to eliminate the Department's process of screening eligible determinately-sentenced nonviolent offenders for public safety concerns prior to referring them to the Board for parole consideration.

Specifically, **subsection 3492(a)** is amended to specify that Section 3492 applies only to determinately-sentenced nonviolent offenders. This clarification is necessary because recently adopted regulations, following *In re Edwards* (2018) 26 Cal.App.5th 1181, established a parole consideration process for indeterminate-sentenced nonviolent offenders upon serving the full term of their primary offense. Therefore, subsection 3492(a) specifies that the referral process in Section 3492 applies only to determinately-sentenced offenders.

Subsection (a) also specifies that all offenders deemed eligible for nonviolent parole consideration under this article must be referred to the Board 35 days prior to their nonviolent parole eligible date (NPED), unless their NPED is less than 180 days prior to their earliest possible release date (EPRD) or they will reach their EPRD within 210 days. Retaining the Department's process of screening eligible determinately-sentenced nonviolent offenders for timing restrictions was necessary to ensure the Board's resources were not inappropriately wasted on reviews that would not result in an earlier release or result in an earlier release by a very minimal amount. Therefore, the proposed regulations retain the Department's review of timing restrictions to determine the eligibility of offenders being referred to the Board.

The **original subsections 3492(b), (c), and (d)** are deleted because they describe the public safety screening process, which was invalidated by the court's decision in *In re McGhee*.

The **proposed subsections 3492(b), (c), and (d)** replace references to the public safety screenings with "review and referral," as these new terms more accurately reflect the new eligibility review process. Additionally, subsection (d) is amended to correct citation formatting for consistency.

The **proposed subsection 3492(e)** establishes that the Department shall review all offenders who were not referred to the Board because they did not meet the now-repealed public safety screening criteria. Subsection (e) also establishes that the Department does not need to review again any offenders ineligible for parole consideration under Section 3491, as these offenders were ruled out based on criteria other than the public safety screening criteria. Therefore, their ineligibility remains valid.

Section 3493. Processing for Release.

This section is amended to correct citation formatting. Correcting citation format is necessary to promote consistency and clarity.

Title 15, Division 2.

Section 2449.2. Jurisdictional Review.

This section is repealed to remove all portions of the Board's jurisdictional review process relating to confirming the results of the Department's public safety screening process and serving a copy of the decision of the jurisdictional review on the offender. Deleting this section is necessary to effectuate the court's holding in *In re McGhee*. The Department's process for screening offenders under the public safety screening criteria no longer exists, and therefore there is no screening process for the Board to review or for offenders to appeal.

Section 2449.3. Notification Process.

Subsection 2449.3(a) is amended to delete any reference to the jurisdictional review in accordance with Section 2449.2 because the section is being deleted. Instead, this section is amended to reference the eligibility referral process by the Department. Since the jurisdictional review under Section 2449.2 is being eliminated, offenders found eligible for referral to the Board will automatically trigger the notification process outlined in this section.

Subsection 2449.3(b) is unchanged.

Subsection 2449.3(c) is amended to correct citation formatting for consistency and clarity.

Section 2449.4. Review on the Merits.

Subsection 2449.4(a) incorporates a portion of the deleted jurisdictional review outlined in Section 2449.2, which required the Board to confirm that the inmate was eligible under Section 3491. This eligibility confirmation is necessary so that any errors in eligibility are caught early on, conserving the Board's resources for the review of those offenders actually eligible for a review on the merits. This section also adds that if it is discovered during the eligibility confirmation review that the offender was erroneously referred to the Board, the hearing officer shall issue a written decision without conducting a review on the merits. Because the Department serves an offender deemed eligible for referral to the Board with the eligibility results, it is necessary to clarify for the inmate with a written decision that the eligibility referral was in error and the Board will not conduct a review on the merits.

Subsections 2449.4(b) through 2449.4(c) are unchanged.

Subsections 2449.4(d) is amended to renumber the paragraphs to be **subsections 2449.4(e) and 2449.4(f)** to promote clarity.

Subsection 2449.4(g) is amended to correct citation formatting for consistency and clarity.

Subsection 2449.4(h) is amended to specify that an offender who is reviewed on the merits by the Board but is denied parole will be reviewed by the Department again annually, as outlined in Section 3492. "Annually" is added to this section for clarity and consistency with Section 3492. The term "reviewed" replaces any reference to screening, as the Department no longer conducts the public safety screening process. Subsection 2449.4(h) is also amended to correct citation formatting for consistency.

Subsection 2449.4(i) is amended to correct citation formatting for consistency and clarity.

Subsection 2449.4(j) is added to extend the standard timeframe for the Board's review on the merits under subsection (a), which requires the Board to complete the review within 30 calendar days of the conclusion of the notification process in Section 2449.3. This is necessary for the Board to process and review the temporary increase in the number of offenders who will have to be reviewed on the merits. Upon the effective date of the court's decision in *In re McGhee*, a large number of determinately-sentenced nonviolent offenders previously screened out under the Department's public safety screening process became eligible for another review without the public safety screening. Under these proposed regulations, specifically subsection 3492(e), the Department must re-review offenders previously screened out under the public safety screening process. Therefore, the Board expects a greater number of referrals during the Department's re-review process. To conduct increased reviews on the merits during this time period, it is

necessary for the Board to extend the usual 30-day deadline for completing reviews on the merits.

Subsection (j) also sets a deadline of March 31, 2020, by which the Board must review cases referred under subsection 3492(e). The March 31, 2020 deadline accounts for the notification process under Section 2449.3 and the 30 calendar days allotted under Section 2449.4 for a review on the merits. March 31, 2020, is a timely and reasonable date by which the Board is expected to complete its reviews.

Section 2449.5. Factors to Consider During a Review on the Merits.

Subsections 2449.5(a) through 2449.5(e) are unchanged.

Subsection 2449.5(f) adds one of the public screening criteria previously used by the Department to deem an offender ineligible for referral to the Board as one of the Board's factors for consideration in determining suitability for parole under this process. Prior to the elimination of the public safety screening process, offenders were automatically excluded from being referred to the Board if they had two or more serious Rules Violation Reports (RVR), as this was highly indicative of an offender's risk of violence or significant criminal activity. Now, with the elimination of the screening process, it is necessary for the Board to review the offender's serious misbehavior on an individualized basis. These regulations previously required consideration of RVRs involving physical injury or threat of physical injury, as these violations clearly constitute behavior aggravating an offender's risk. Likewise, serious RVRs represent conduct most concerning in an institutional setting and aggravating the offender's risk. Because these regulations eliminate the public safety screening process, it is necessary to incorporate this pertinent criterion into the Board's review on the merits when considering an offender for parole. Notably, this aggravating factor is qualified by the fact that the serious RVR must be recent, as this is most indicative of the offender's risk.

Subsections 2449.5(g) through 2449.5(h) are unchanged.

Section 2449.6. Vacating a Decision.

Subsection 2449.6(a) is amended to remove any reference to the public safety screening process, which is no longer in effect due to *In re McGhee*. This subsection is also amended to correct citation formatting for consistency.

Subsection 2449.6(b) is unchanged.

Subsection 2449.6(c) is amended to remove language that an offender will be re-screened by the Department in accordance with the former subsection 3492(e), which allowed annual re-screenings unless the offender was found to be ineligible under Section 3491. This former subsection 3492(e) was intended to provide annual re-screenings for those offenders who were screened out under the public safety screening criteria, because an offender's qualification could vary year to year. For example, one of the screening criteria was that the inmate is not currently serving a Security Housing Unit term. An inmate previously screened out based on this criterion could be found eligible for referral to the Board during a subsequent re-screening if the offender is no longer serving a Security Housing Unit term. Section 3491, on the other hand, reflect eligibility reviews based on static, non-variable factors. Therefore, an offender found to be ineligible for referral to the Board under Section 3491 will not become eligible absent a change in law or a change in circumstances already accounted for in Section 3491, making annual reviews unnecessary. Consequently, it is

necessary to amend subsection 2449.6(c) to remove the reference to annual reviews for those offenders who have been deemed ineligible for review under Section 3491.

Subsection 2449.6(d) is renumbered to subsection (c), as the former subsection (c) has been deleted.

Section 2449.7. Decision Review.

Subsection 2449.7(a) is amended to remove the reference to the Board's review of a jurisdictional decision issued under Section 2449.2. Section 2449.2 is being deleted under the proposed regulations, and therefore, the Board will no longer conduct jurisdictional reviews. Accordingly, an inmate can no longer request the Board to review a prior jurisdictional review. Subsection (a) is also amended to remove a comma.

Subsections 2449.7(b) through 2449.7(e) are unchanged.

Subsection 2449.7(f) is amended to replace "screened" with "reviewed" to more accurately reflect the proposed regulations' deletion of the public safety screening process. This subsection also reiterates that the Board will review offenders annually as provided in subsection 3492(b) to provide clarity.

Subsection 2449.7(g) is amended to remove the reference to the Board's jurisdictional review under Section 2449.2, as the Board no longer conducts these reviews following the *In re McGhee* decision. However, under the proposed language in Section 2449.4, the Board will continue to confirm an inmate's eligibility for parole consideration under Section 3491. Therefore, it is necessary to add language accounting for this confirmation step in subsection 2449.7(g) and to clarify that the notification process outlined in Section 2449.3 will still occur if a previous Board decision finding an inmate ineligible under Section 3491 is overturned because the inmate is found to be eligible.

Subsection 2449.7(h) is amended to correct citation formatting for consistency and clarity.

ANTICIPATED BENEFITS OF THE REGULATIONS

The Department proposes these regulations with the goal of making prisons and communities safer by incentivizing inmates to participate in rehabilitative programs and service opportunities that enhance skills and employability, thus improving inmate behavior and creating a safer prison environment for inmates and staff. In addition, the proposed regulations will bring the Department into compliance with the *In re McGhee* court ruling.

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:

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 nonviolent parole under The Public Safety and Rehabilitation Act of 2016, as interpreted by the Court of Appeals in *In re McGhee*. The nonviolent parole consideration process will necessarily create state jobs due to the additional parole reviews required by the Act.

The proposed action eliminates the Department's public safety screening process and requires the Board to conduct reviews on the merits for any offender referred to the Board. Prior to *In re McGhee*, the Board did not review on the merits any case in which the offender was screened out under the public safety screening process. After the *In re McGhee* decision, however, the public safety screening process has been eliminated, which means more offenders will be referred to the Board.

The Board has determined that additional staff is necessary to conduct the additional review on the merits. The Board is requesting 3.1 Administrative Law Judge and 0.5 Administrative Law Judge II positions starting August 1, 2019.

No jobs in California will be eliminated as a result of these changes, and private sector jobs will not be affected.

Creation of New Businesses or Elimination of Existing Businesses within the State

This rulemaking action will have no impact on existing businesses, or the creation of new businesses, within the State of California, because businesses will not be affected by technical changes to an inmate's eligibility for parole consideration.

Expansion of Businesses Currently Doing Business within the State.

The Department has determined that the proposed regulations will have no impact on the expansion of businesses currently doing business within California, because businesses will not be affected by technical changes to an inmate's eligibility for parole consideration.

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

This regulation enhances public safety by incentivizing determinately-sentenced nonviolent offenders to avoid prison misconduct and focus on their rehabilitation by 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.

CONSIDERATION OF ALTERNATIVES

The Department must determine no reasonable alternatives considered, or that have otherwise been identified and brought to the attention of the Department, 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 the statutory policy or other provision of law.

Currently, no reasonable alternatives have been brought to the attention of the Department that would alter the Department's initial determination.

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.

DOCUMENTS RELIED UPON

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

1. *In re McGhee* (2019) 34 Cal.App.5th 902
2. *In re Edwards* (2018) 26 Cal.App.5th 1181.

These documents can be reviewed on the CDCR website at the following address:

<https://www.cdcr.ca.gov/regulations/adult-operations/pending-changes-to-department-rules-2/>