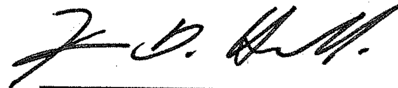
State of California
Office of Administrative Law

In re: **Department of Corrections and Rehabilitation**	**NOTICE OF APPROVAL OF CERTIFICATE OF COMPLIANCE**
Regulatory Action: **Title 15, California Code of Regulations**	**Government Code Sections 11349.1 and 11349.6(d)**
Adopt sections: **3495, 3496,, 3497, 2449.30, 2449.31, 2449.32, 2449.33, 2449.34** **Amend sections:** **2449.1, 3490, 3491** **Repeal sections:**	**OAL Matter Number: 2019-0909-02** **OAL Matter Type: Certificate of Compliance (C)**

This action by the Department of Corrections and Rehabilitation adopts and amends regulations to allow inmates who are incarcerated for a term of life with the possibility of parole for nonviolent offenses to be eligible for parole consideration by the Board of Parole Hearings.

OAL approves this regulatory action pursuant to section 11349.6(d) of the Government Code..

Date: October 21, 2019



Kevin D. Hull
Senior Attorney

For: Kenneth J. Pogue
Director

Original: Ralph Diaz, Secretary
Copy: Josh Jugum

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

CERT

(See instructions on reverse)

STD. 400 (REV. 01-2013)

For use by Secretary of State only

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z- 2019-0409-03	2019-0909-02C	

For use by Office of Administrative Law (OAL) only

2019 SEP -9 P 3:58

OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

ENDORSED - FILED
in the office of the Secretary of State of the State of California
OCT 21 2019
1:34 pm

AGENCY WITH RULEMAKING AUTHORITY
California Department of Corrections and Rehabilitation

AGENCY FILE NUMBER (If any)
18-0775

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/Withdrawn	2019, 16-Z	4/19/2019

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)
Supplemental Reforms to Parole Consideration

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
2018-1211-01EON, 2019-0521-04EON

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT
3495, 3496, 3497, 2449.30, 2449.31, 2449.32, 2449.33 and 2449.34

AMEND
2449.1, 3490, and 3491

TITLE(S)
Title 15

REPEAL

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☒ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify) ____
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
7/26 - 8/13/19

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))
- ☒ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify)

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☒ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify)

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Josh Jugum	916-445-2266		joshua.jugum@cdcr.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE
9-9-19

TYPED NAME AND TITLE OF SIGNATORY
Ralph M. Diaz, Secretary, CDCR

For use by Office of Administrative Law (OAL) only

AUTHORIZED FOR FILING AND PRINTING

OCT 21 2019

Office of Administrative Law

TEXT OF ADOPTED REGULATIONS

In the following text, ~~strikethrough~~ indicates deleted text; <u>underline</u>, 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 "<u>determinately-sentenced </u>nonviolent offender" if <u>the inmate was sentenced to a determinate term and</u> 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~~ <u>serving </u>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 "<u>determinately-sentenced</u> 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 <u>S</u>~~s~~ection 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 <u>S</u>~~s~~ection 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 S~~s~~ection 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 determinately-sentenced nonviolent offender, as defined in subsections 3490(a) and 3490(b), shall be eligible for parole consideration by the Board of Parole Hearings under A~~a~~rticle 15 of C~~c~~hapter 3 of D~~d~~ivision 2 of this title.

(b) Notwithstanding subsection (a), an inmate is not eligible for parole consideration by the Board of Parole Hearings under A~~a~~rticle 15 of C~~c~~hapter 3 of D~~d~~ivision 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 indeterminately-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 S~~s~~ection 3051 or 3055 of the Penal Code or the inmate has already been scheduled for an initial parole consideration hearing under S~~s~~ection 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 S~~s~~ections 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 S~~s~~ection 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 A~~a~~rticle 8 of C~~c~~hapter 1 of this D~~d~~ivision.

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. Referral to the Board of Parole Hearings.

(a) Inmates determined to be eligible for a parole consideration hearing under Section 3496 shall be referred to the Board of Parole Hearings at least 180 calendar days prior to their nonviolent parole eligible date unless they have 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.
(b) 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.
(c) 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.
(d) Referral results 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).

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 **the inmate was sentenced to a determinate 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 ~~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 S~~s~~ection 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 S~~s~~ection 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 S~~s~~ection 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 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 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 S~~s~~ection 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 S~~s~~ection 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 S~~s~~ection 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 both of the following are true:
(1) The inmate is eligible for a parole consideration hearing under section 3496 of Division 3 of this title; and
(2) 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 Section 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.
(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 subsection (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 subsection(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 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) 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) 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.

(c) 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.
(d) 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.
(e) 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.
(f) 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).

FINAL STATEMENT OF REASONS:

The Initial Statement of Reasons is incorporated by reference.

UPDATES TO THE INITIAL STATEMENT OF REASONS

On December 11, 2018, the Department submitted to the Office of Administrative Law (OAL) proposed emergency regulations concerning supplemental reforms to parole consideration. The emergency regulations were approved effective January 1, 2019. Notice of Change to Regulations 19-02 was published and distributed on April 19, 2019. Public comments were accepted through June 6, 2019. The Department received 29 comments during this period. A public hearing was held on June 6, 2019, at which two comments were received.

OAL approved an emergency readoption effective June 11, 2019. Emergency authority for the regulations will expire September 10, 2019.

Following the publication of the Notice of Change to Regulations, the Court of Appeal, First Appellate District, Division Four found 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, in *In re Tijue Adolphus McGhee* (2019) 34 Cal.App.5th 902, issued May 16, 2019, the court struck down the public safety screening process established in the California Code of Regulations, Title 15, Section 3492. This provision allowed CDCR to screen out for public safety reasons certain nonviolent offenders from referral to the Board for parole consideration under the Board's determinately-sentenced nonviolent parole review. The court found this action 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 this provision of the regulations down.

While the court's finding was limited to the public safety screening in CCR, Section 3492 governing consideration for determinately-sentenced inmates, the court's reasoning would logically apply to the public safety screening and referral process for indeterminately-sentenced nonviolent offenders under these proposed regulations (Section 3497). Therefore, CDCR and the Board determined that modifications to these proposed regulations were necessary to remove the public safety screening process and all other portions of the regulations related to CDCR's screening of inmates prior to referral for public safety reasons. Specifically, CDCR and the Board amended these proposed regulations to 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.

The amendments to the originally proposed text and the reasons for these revisions are explained below under the heading "Changes to the Text of Proposed Regulations Initially Noticed to the Public."

The *Notice of Change to Text as Originally Proposed* (Renotice) was distributed on July 26, 2019, to the people/organizations who provided comments during the initial public comment period, and posted on the Department's website. The Department accepted public comments from this date through August 13, 2019. Three comments were received during this period.

DETERMINATIONS, ASSESSMENTS, MANDATES, AND FISCAL IMPACT:

The Department has determined that no alternative considered would be more effective in carrying out the purpose for which this regulation is proposed, or would be as effective and less burdensome to affected private persons, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law, than the action proposed. No such

alternative has been proposed or brought to the attention of the Department during the course of this rulemaking action.

The Department has determined that this action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4 of the Government Code.

The Department has determined that no reasonable alternatives to the regulations have been identified or brought to the attention of the Department that would lessen any adverse economic impact on small business than the action planned.

DOCUMENTS RELIED UPON:

All documents relied upon by the Department in proposing these regulations were identified and made available in the initial notice to the public. The amendments proposed in the *Notice of Change to Text as Originally Proposed* did not rely upon any new data or any technical, theoretical or empirical study, report, or similar document. The Department has relied upon the results of the Economic Impact Assessment, which can be found in the Notice of Proposed Regulations and is available for review as part of the rulemaking file.

CHANGES TO THE TEXT OF PROPOSED REGULATIONS INITIALLY NOTICED TO THE PUBLIC - RENOTICE

Section 3490, subsection (a) is *amended* to clarify that inmates may only meet the definition of "determinately-sentenced nonviolent offender" if the inmate is sentenced only to determinate terms. Clarifying that inmates may only meet the definition of "determinately-sentenced nonviolent offender" if the inmate is sentenced only to determinate terms is necessary to create consistency with Section 3495, subsection (a), which limits the definition of "indeterminately-sentenced nonviolent offenders" to inmates currently sentenced to an indeterminate term.

Section 3491, subsection (a) is *amended* to clarify that this eligibility review section applies only to determinately-sentenced nonviolent offenders under this article. This subsection is also amended to correct citation formatting for consistency and to add in a missing space. Clarifying that this eligibility review section applies only to determinately-sentenced nonviolent offenders is necessary to ensure that stakeholders understand the specific population to which this section applies. The indeterminately-sentenced nonviolent offenders receive an eligibility review under Section 3496. This subsection is also amended to correct citation formatting for consistency and to add in a missing space.

Sections 3495 through 3496 remain unchanged.

Section 3497 is *amended* to delete all authority for CDCR staff to screen out indeterminately-sentenced nonviolent offenders for public safety reasons. As modified, all offenders deemed to be eligible for nonviolent parole consideration under this article must be immediately referred to the Board of Parole Hearings 180 days prior to their nonviolent parole eligible date unless the offender has previously begun receiving parole consideration hearings before the Board or is otherwise eligible for release within 12 months. Deleting all authority for CDCR staff to screen out indeterminately-sentenced nonviolent offenders for public safety reasons is necessary to bring these proposed regulations into compliance with the intended effect of the court's decision in *In re McGhee*. While the court's holding in that case was specifically directed to the determinately-sentenced nonviolent offender parole process, CDCR and the Board determined that the court's reasoning would also apply to the indeterminately-sentenced nonviolent offender parole process. Thus, to fully implement the reasoning of the court's decision in *McGhee* and avoid further litigation, it is necessary to delete the CDCR process of screening eligible indeterminately-sentenced nonviolent offenders for public safety concerns prior to referring them to the Board for parole consideration.

CDCR and the Board also found that retaining CDCR's process of screening eligible indeterminately-sentenced nonviolent offenders for timing restrictions was necessary to ensure that state funds were not inappropriately wasted on hearings that would not result in earlier release. Specifically, if an indeterminately-sentenced nonviolent offender has already received a parole consideration hearing due to another parole eligible date, the nonviolent parole eligible date is moot because the inmate has already been considered for parole and is currently subject to the statutory period of denial imposed by the previous panel. Additionally, for indeterminately-sentenced nonviolent offenders who have not yet entered the hearing cycle, but who are scheduled to be released or to begin receiving hearings under another parole eligible date less than twelve months from their NPEDs, this process is unnecessary because the inmate will already be scheduled for a hearing under other law before the Board could complete the entire hearing process under these regulations. Specifically, once the Board confirms jurisdiction over an indeterminately-sentenced nonviolent offender, the Board requires approximately 180 days to schedule the hearing due to the period of time needed to meet statutory hearing notification requirements as well as pre-hearing preparation requirements, including completion of comprehensive risk assessments. Then, once the hearing is held, the Board's and Governor's statutory decision review periods extend between 120 and 150 days depending on the crime, followed by any time necessary to resolve referrals to the full Board sitting en banc and issue final release documents.

Therefore, CDCR and the Board found necessary to clarify that all offenders deemed to be eligible for nonviolent parole consideration under this article must be immediately referred to the Board of Parole Hearings upon reaching 180 days prior to their nonviolent parole eligible date unless the offender has previously begun receiving parole consideration hearings before the Board or is otherwise eligible for release within 12 months.

Section 2449.1, subsection (a) is *amended* to clarify that inmates may only meet the definition of "determinately-sentenced nonviolent offender" if the inmate is sentenced only to determinate terms. Clarifying that inmates may only meet the definition of "determinately-sentenced nonviolent offender" if the inmate is sentenced only to determinate terms is necessary to create consistency with Section 3491, subsection (a), which mirrors the same definitions, as well as Section 2449.31, subsection (a), which limits the definition of "indeterminately-sentenced nonviolent offenders" to inmates currently sentenced to an indeterminate term.

Section 2449.30, paragraph (a)(5) is *amended* to clarify that this specific exemption from nonviolent offender qualification applies only when the inmate is currently serving an indeterminate term (as opposed to a current determinate term) after already completing any determinate term, whether concurrent or consecutive, for a violent felony. This amendment is necessary to ensure that inmates whose current crimes include violent felonies are equally disqualified from this nonviolent parole consideration process. Specifically, in the original proposed language, this paragraph did not specify that this exemption was limited to inmates currently serving indeterminate terms, which is necessary to ensure that the inmates subject to this exception are being reviewed for eligibility under the correct article. Additionally, the original proposed language only exempted inmates when they were currently incarcerated on a life term after completing a concurrent term for a violent felony, but did not also exempt those who had completed a consecutive term for a violent felony. This created a disparity in that two inmates who committed identical violent determinate crimes and nonviolent life crimes resulting in identical sentences would be treated unequally under this process if the sentencing courts imposed concurrent sentences on one inmate and consecutive sentences on the other. The inmate with consecutive sentences would qualify for nonviolent parole consideration after completing the determinate term for the violent felony, but the inmate with concurrent sentences would not qualify as a nonviolent offender. In light of that inequity, CDCR and the Board determined that amending this paragraph to clarify that completion of either a concurrent or consecutive term for a violent felony was necessary to ensure equal treatment of inmates and prevent inmates who commit violent felonies from receiving parole consideration under the non-violent parole process.

Section 2449.31 is *amended* to delete all portions of the Board's jurisdictional review process relating to confirming the results of CDCR's public safety screening process or an indeterminately-sentenced nonviolent offender's eligibility for a new public safety screening one year after the Board deemed the person ineligible for referral due to public safety concerns under the Board's jurisdictional review. Deleting all portions of the Board's jurisdictional review process relating to CDCR's public safety screening process is necessary to effectuate the court's holding in *In re McGhee* because, with the elimination of this process from CDCR authority, the process no longer exists for the Board to review. Similarly, CDCR and the Board determined it is necessary that all portions of the Board's jurisdictional review process relating to an indeterminately-sentenced nonviolent offender's eligibility for a new public safety screening one year after the Board deemed the person ineligible for referral due to public safety concerns under the Board's jurisdictional review must be removed, because this no longer exists as a basis from which to deem an inmate ineligible for referral to the Board.

Section 2449.32 is *amended* to correct citation formatting for consistency and clarity.

Section 2449.33 is *amended* to delete all portions of the Board's process for vacating a jurisdictional decision relating to an indeterminately-sentenced nonviolent offender's eligibility for a new public safety screening one year after the Board deemed the person ineligible for referral due to public safety concerns under the Board's jurisdictional review. This section is further *amended* to correct citation formatting for consistency. Deleting all portions of the Board's process for vacating a jurisdictional decision relating to an indeterminately-sentenced nonviolent offender's eligibility for a new public safety screening one year after the Board deemed the person ineligible for referral due to public safety concerns is necessary to effectuate the court's holding in *In re McGhee* because, with the elimination of this process from CDCR authority, this process no longer exists for the Board to review. Additionally, correcting citation format is necessary to promote consistency and clarity within the regulations for stakeholders.

Section 2449.34 is *amended* to delete subsection (b), which previously authorized the Chief Hearing Officer or an Associate Chief Deputy Commissioner of the Board to initiate review of a jurisdictional decision at any time prior to the inmate's initial parole consideration hearing under the indeterminately-sentenced nonviolent parole process when the Board either discovered an error or fact or law or discovered new information materially impacting the prior decision. This section is further *amended* to update the remaining paragraph numbers. Deleting authority for the Chief Hearing Officer or Associate Chief Deputy Commissioner to initiate review of a jurisdictional decision upon discovering an error or fact or law or discovering new information materially impacting the prior decision is necessary because, following the eliminations of the screening for public safety concerns, the only remaining purpose of the Board's jurisdictional review is to confirm the inmate's eligibility as a nonviolent offender. If issues arise that raise questions respecting the inmate's eligibility, it is unnecessary for the Board to initiate a new jurisdictional review; rather, the matter would be referred to CDCR Case Records to conduct a new eligibility review under its own regulations using an agency's general power to correct errors in its own decisions.

SUMMARIES AND RESPONSES TO PUBLIC COMMENTS RECEIVED DURING THE INITIAL PUBLIC COMMENT PERIOD

Commenter 1:

Comment 1A: Commenter objects to the regulations and how they relate to people serving an indeterminately-sentence; stating that inmates who are eligible for early parole should be afforded the "paper parole process." Commenter states the law does not dictate who will be afforded the "paper parole process" or who will be afforded the "formal hearing process". Commenter indicates the Department is disregarding the law by not implementing the "paper parole process" for those serving an indeterminately-sentence.

Response: When establishing the determinate sentencing laws, 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.

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 a live hearing before the Board that is recorded and transcribed, comprehensive risk assessments by a forensic psychologist, appointment of counsel, and live interpreters, 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.

Proposition 57 changed the California Constitution to make inmates convicted of nonviolent felony offenses eligible for parole consideration. The proposition did not specify the method of parole consideration, preserving the Board's discretion as to the means of parole consideration for those qualifying under Proposition 57. Because the Penal Code clearly intended for indeterminately-sentenced inmates to be considered for parole at a hearing and also receive the rights enumerated in Penal Code section 3041.5, the Board views the nonviolent parole review process (NVPP) as adjusting the date on which these inmates become eligible parole consideration; however, the Board does not view the NVPP to modify the means by which these inmates are considered for parole. Therefore, indeterminately-sentenced inmates eligible for the NVPP will receive parole hearings, not the file review process.

Comment 1B: Commenter indicates that Proposition 57 states that once someone is denied parole, they are to be screened after one year, and every year thereafter until released. Commenter states the new regulations will cause those having to go through the formal parole process, to suffer parole denials of periods of 3, 5, 7, 10 or 15 years.

Response: Proposition 57 does not specify the frequency with which the Department or the Board must screen an inmate for consideration under the NVPP. Additionally, the Board views the NVPP to adjust the date on which indeterminately-sentenced inmates become eligible for parole consideration without modifying the means by which these inmates are considered for parole. Therefore, since these inmates receive hearings under Penal Code section 3041.5, accompanied by the rights and processes outlined therein, the statutory denial lengths also apply. However, those denied parole may invoke their right under Penal Code section 3041.5, subdivision (d)(1) to request an advanced hearing date.

Commenter 2:

Comment: Commenter disagrees with the regulations, indicating that good conduct credit should be applied to the Nonviolent Parole Eligible Date (NPED). Commenter indicates that by not applying good conduct credit to the NEPD it leaves the "strike" doubling untouched, which causes those sentenced under 1170(h) to have their term doubled by prior history, and does not allow for a review by BPH. Commenter states this is unnecessary and Proposition 57 gives CDCR the power to apply the credits.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenter 3:

Comment 3A: Commenter cites Title 15 sections 2449.32 and 2449.33, and states he does not agree with nonviolent third strikers having to appear before the Board of Parole Hearings for an in person hearing subject to a 3 to 15-year denial. Commenter does not feel he should be subject to the same stringent parole review as those who commit crimes like murder, because his offense does not carry a life-term.

Response: See response to Comment 1A. Additionally, since indeterminately-sentenced inmates receive hearings under Penal Code section 3041.5, accompanied by the rights and processes outlined therein, the statutory denial lengths also apply. However, those denied parole may invoke their right under Penal Code section 3041.5, subdivision (d)(1) to request an advanced hearing date.

Comment 3B: Commenter states the provisions for indeterminately-sentenced offenders is similar to section 3490(f), which was deemed "invalid" by the Sacramento County Judge on March 12, 2019.

Response: On August 21, 2019, in the *Canady* case, the Third District Court of Appeal issued a stay pending appeal of the superior court's order regarding the recalculation of nonviolent parole eligible dates. Therefore, the Sacramento Superior Court opinion the commenter cited is not law at this time. Following the final outcome of this appellate case, regulations will be amended, if necessary, to bring them into compliance with the court's ruling.

Comment 3C: Commenter states Proposition 57 passed in November 2016 and there has been no relief for nonviolent three strike offenders. Commenter indicates that pursuant to the *Edwards* case the Nonviolent Parole Eligible Date for third strikers who have served the full term of their primary offense are in the years 1999-2002, and his date is May 13, 2001. However, the inmate locator shows different dates and commenter does not know what these dates mean. Lastly, commenter refers to another inmates' case and states this inmate is a third striker also and received a "paper review process" like the second strikers. Commenter asks how this can happen, when a nonviolent third striker has to appear before a full panel.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 3D: Commenter states the regulations are contrary to the law and violate due process and equal protection provisions. Commenter further states the proposed regulations go overbroad in effecting what the voters wanted in passing Proposition 57. Commenter requests that the Department consider allowing nonviolent third strikers with eligibility dates under the Nonviolent Parole Eligible Date, a "paper review process", as afforded to other third strikers and second strikers.

Response: See response to Comment 1A.

Commenter 4:

Comment 4A: Commenter cites section 3491(b)(3) and section 3496(b) of the regulations, and disagrees with sex offenders being excluded from the parole consideration process. Commenter cites the California Constitution, Article I, Section 32(a)(1), and states early parole eligibility must be assessed based on the conviction for which the inmate is currently serving a state prison sentence, rather than criminal history. Commenter states this interpretation is supported by court case *In re Gadlin* (2019) 31 Cal. App. 5th 784, 789). Lastly, commenter states excluding prisoners who have to register as a sex offender in which they are not serving a current prison term from the parole process, violates the Constitution as cited above.

Response: In *Gadlin*, the Court of Appeal held that individuals with only past registrable sex offenses cannot be excluded from the Board's nonviolent parole review process. On May 15, 2019, the California Supreme Court granted review of the case. Until the Supreme Court issues its ruling, all sex offenders

will remain excluded from the nonviolent parole review process. Regulations will be amended, if necessary, to bring them into compliance with the Supreme Court's ruling.

Comment 4B: Commenter states to deny all prisoners who have to register pursuant Penal Code 290, violates the California Constitution, as not all sex offenses are violent felonies. Commenter summarizes the language set forth in the ballot for Proposition 57, and states the plain language of the proposition is silent. However, commenter states the one thing that is clear, is that the California Constitution provides that any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration, even if they are required to register as a nonviolent sex offender.

Response: In *Gadlin*, the Court of Appeal held that individuals with only past registrable sex offenses cannot be excluded from the Board's nonviolent parole review process. On May 15, 2019, the California Supreme Court granted review of the case. Therefore, the *Gadlin* opinion the commenter cited is not law at this time. Until the Supreme Court issues its ruling, all sex offenders will remain excluded from the nonviolent parole review process. Regulations will be amended, if necessary, to bring them into compliance with the Supreme Court's ruling.

Comment 4C: Commenter cites section 2449.32(e) and states that after he does his time for his primary offense excluding his alternative sentence; he should no longer be considered an indeterminately-sentenced prisoner. Commenter states that this should apply to all inmates sentenced as nonviolent third strikers. Lastly, commenter states nonviolent third strikers should be reviewed once a year like nonviolent second strikers.

Response: See response to Comment 1A. Additionally, since indeterminately-sentenced inmates receive hearings under Penal Code section 3041.5, accompanied by the rights and processes outlined therein, the statutory denial lengths also apply. However, those denied parole may invoke their right under Penal Code section 3041.5, subdivision (d)(1) to request an advanced hearing date.

Comment 4D: Commenter states regarding the issue of sex offenders not being eligible for early parole, there have been three cases filed in the courts that have rule in favor of the prisoners, and his case is one of them. Commenter indicates that for CDCR to go against the California Constitution ends up costing tax payers money, when prisoners challenge and win.

Response: See response to Comment 4B. Until the Supreme Court issues its ruling in the *Gadlin* case, all sex offenders will remain excluded from the nonviolent parole review process. The *Alliance* case is also pending appeal at the Third District Court of Appeal and is, similarly, not law at this time. Following the final rulings in the *Gadlin* and *Alliance* cases, regulations will be amended, if necessary, to bring them into compliance with the courts' rulings.

Commenter 5:

Comment: Commenter cites court cases *In re Gregory Gadlin*, Second District Ct. of Appeal, No. B289852 *and Alliance for Constitutional Sex Offense Laws v. CDCR*, Third District Court of Appeal, No. C087294, and states based upon these court cases the Department cannot exclude anyone with a prior sex offense pursuant to Penal Code 290, from early parole consideration.

Response: See Response to Comment 4D.

Commenter 6:

Comment 6A: Commenter provides his personal case factors stating he is serving an indeterminate-sentenced under the Three Strikes Law. Commenter states he has a conviction for a sex offense which occurred 31 years ago, which is not included in his current conviction. Commenter asserts the Department discriminating against him by attempting to exclude him from the nonviolent parole process as a result of the sex crime.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the

comment. (See Gov. Code, § 11346.9, subd. (a)(3).) To the extent that this inmate is attempting to raise a *Gadlin* objection, see Response to Comment 4B.

Comment 6B: Commenter states subsection 3496(b) of the proposed regulations should be amended to include Penal Code 290 sex offenders who are not currently convicted of a sex offense in the nonviolent parole consideration process. Commenter explains that if he was to be included in this parole process, he would have completed serving his time on his primary offense.

Response: See Response to Comment 4B.

<u>Commenter 7:</u>

Comment 7A: Commenter cites his personal case factors and states he was sentenced under the Three Strikes Law and he is eligible for the nonviolent parole consideration process. Commenter indicates his case was to proceed to the "Jurisdictional Review" within 30 days from January 29, 2019 to February 27, 2019, which has already passed. Commenter asserts this is in violation of his due process and right to have a board hearing scheduled. Commenter states the regulations changed the Jurisdictional Review date to 15 days and he has been in prison for 31 months since the law passed. Commenter asked to be released according to the California Constitution Article 1, Section 32 (a).

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 7B: Commenter states the new regulations are illegal and "are not consistent with the California Constitution Article 1, Section 32(a) and violates the Second Appellant Court of Appeals ruling to evaluate eligible nonviolent offenders within 60 days." Commenter indicates he should be released to parole and not brought before a "full parole board", as if he was "sentenced like a violent P.C. 187 offenders."

Response: See response to Comment 1A. Additionally, 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 the regulations. 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).

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.

Comment 7C: Commenter states he was sentenced under Penal Code 1170, not under the "cancelled" Penal Code Section 1168, by which the board may consider hearings for crimes considered under Penal Code Sections 3040 et seq, which is for "violent offenses".

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 7D: Commenter states the Regulation and Policy Management Branch is not a legislative body that can "make up" new laws not approved by voters or the legislature. Therefore, commenter opposes the proposed regulations, stating they are illegal and may cause an adverse effect on inmates.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenter 8:

Comment 8A: Commenter cites new section 3495(a)(5) of the proposed regulations and states the Department made this determination on the belief that whether the offense was concurrent or consecutive the inmate is still incarcerated on the set of crimes that included the violent felony. Commenter states the "inmate is only incarcerated on the set of crimes that include the violent felony when multiple acts are committed to multiple victims of the same crime".

Response: The language "set of crimes" refers to all of the crimes for which the inmate is currently incarcerated, as opposed to crimes commited in the past for which the inmate has already completed serving incarceration and was discharged and released from prison. This interpretation is necessary because, 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 a term for a nonviolent felony after completing a concurrent 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.

Comment 8B: Commenter cites his personal case factors and asks why he does not qualify for nonviolent parole consideration. Commenter requests the Department consider his request.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenter 9:

Comment 9A: Commenter states section 2449.32 of the regulations "materially alter, amend, enlarge and impair the letter" of the California Constitution.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 9B: Commenter states CDCR has not created new regulations and have held nonviolent offenders to the same standard as violent offenders by giving nonviolent offenders the same denial period as violent offenders. Commenter asserts CDCR has violated third striker's due process and equal protection of the law by requiring them to have an in-person hearing with the board for parole consideration, while the nonviolent second strikers and not required to.

Response: See response to Comment 1A. Additionally, since indeterminately-sentenced inmates receive hearings under Penal Code section 3041.5, accompanied by the rights and processes outlined therein, the statutory denial lengths also apply. However, those denied parole may invoke their right under Penal Code section 3041.5, subdivision (d)(1) to request an advanced hearing date.

Commenter 10:

Comment: Commenter states sections 3491(b)(1), (b)(2) and (b)(3) are in violation of the California Constitution which states, "any person" and there are no exclusions provided. Commenter indicates any

person convicted of a nonviolent felony is eligible for early parole consideration. Commenter further states that during the parole consideration process inmates can be denied parole consideration, however, all nonviolent inmates must be considered.

Response: 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.

Regarding paragraph (b)(2), the only inmates excluded are those who will already receive a parole consideration hearing under Penal Code section 3051 or 3055. Therefore, these inmates will note be excluded from parole consideration; they will receive parole consideration through other law.

Regarding paragraph (b)(3), as explained in the Response to Comment 4B, in *Gadlin*, the Court of Appeal held that individuals with only past registrable sex offenses cannot be excluded from the Board's nonviolent parole review process. On May 15, 2019, the California Supreme Court granted review of the case. Until the Supreme Court issues its ruling, all sex offenders will remain excluded from the nonviolent parole review process. Regulations will be amended, if necessary, to bring them into compliance with the Supreme Court's ruling.

Commenter 11:

Comment: 11A: Commenter states the regulations create an "ex post facto" clause violation by extending the time frame for review.

Response: Prior to these regulations, only the determinately-sentenced inmates received annual reviews. These proposed regulations is establishing for the first time the nonviolent parole review process for nonviolent indeterminately-sentenced inmates. Therefore, there is no ex post facto violation for time frames ("denial lengths") for nonviolent indeterminately-sentenced inmates. The effect of establishing these regulations can only have the effect of shortening the period of time before which a person can be eligible for parole consideration.

Comment 11B: Commenter states that "non-violent means low risk", therefore, a full hearing should not be required. Commenter indicates a full board hearing was designed for "high risk" offenders and by having a full hearing for "low risk" offenders, is a "ex post factor" violation.

Response: See response to Comment 1A. Additionally, legal authority and case law do not support a definition that "non-violent means low risk." When defining "nonviolent" for purposes of the nonviolent parole review process, the Board relies on statutory authority and court decisions.

Inmates currently serving a term for a violent felony offense, as defined in Penal Code section 667.5, subdivision (c), are excluded from parole consideration because the crimes listed in that section of the Penal Code unquestionably involve physical violence. However, inmates who have completed a violent offense term but remain incarcerated for offenses that do not qualify as a violent felony will be eligible for parole consideration, in accordance with court decisions.

Comment 11C: Commenter states the "First Step Act" signed by the President Donald Trump, ended life sentences under the 3 strikes law. This added no more mandatory minimums.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized

or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenter 12:

Comment 12A: Commenter states the regulations are not in line with the intent of Proposition 57, and they undermine the *Edwards* ruling since indeterminately-sentenced nonviolent offenders are now included in the Proposition 57 regulations. In addition, commenter states the regulations do not "compliment" the *McGhee* ruling which states that CDCR does not have the authority to screen out nonviolent offenders who are eligible for parole consideration.

Response:

These regulations do not undermine the *Edwards* ruling; rather, they implement the court's order that the Department amend its regulations to allow indeterminately-sentenced nonviolent offenders to be eligible for parole consideration by the Board. Additionally, in response to the court's ruling in *McGhee,* the Department filed emergency regulations with the Office of Administrative Law (OAL) on August 21, 2019. The proposed emergency regulations incorporate the court's ruling and will become effective upon OAL's approval.

Comment 12B: Commenter states Proposition 57 was initially designed to include nonviolent offenders as well as "Third Strikers". However, it took two and half years for an appellate court ruling to order CDCR to comply with the inclusion of nonviolent third strikers.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 12C: Commenter states the criteria for nonviolent parole consideration should be the same for both indeterminately-sentenced and determinate-sentenced inmates. Commenter indicates that if CDCR was to make a uniform criteria for all eligible nonviolent offenders, the process should remain the same as it is for nonviolent determinately-sentenced inmates and just apply these criteria to the nonviolent indeterminately-sentenced to make it equal to both populations. Additionally, commenter states the solution is to amend "Subchapter 5.5 Parole Consideration for Determinately-Sentenced Nonviolent Offenders" to exclude "Determinately-Sentenced" from the text. The term nonviolent offender should encompass both nonviolent determinately and indeterminately sentenced offenders.

Response: See response to Comment 1A.

Comment 12D: Commenter states that if OAL does not comply with the specific court orders and refuses to regulate according to their assigned duties, the office should be investigated and held accountable both criminally and civilly.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenter 13:

Comment 13A: Commenter provides his personal case factors and states that subsection 3497(d) places his potential for parole consideration years away. Commenter indicates this delay in parole consideration denies his due process. Commenter states the proposed regulations do not follow the court's ruling pursuant to *In re Edwards,* "which requires the Department to include BPH to "calculate the Parole Eligibility Date as if the Three Strikes Law alternative sentence scheme had not existed at the time…." "2018 Cal App Lexis 801 at 17.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).).

Comment 13B: Commenter requests the regulations reflect that those sentenced pursuant to the Three Strikes Law not be required to have a physical hearing with the board and undergo the same parole review process as the nonviolent second strikers.

Response: See response to Comment 1A.

Commenter 14:

Comment: Commenter cites "The Public and Rehabilitation Act of 2016 ("The Act") was overwhelmingly approved by the California voters on November 8, 2016" and that his family and associates voted for the passage of "The Act". Commenter also cites, "Any person convicted of a nonviolent felony offense... shall be eligible for parole consideration…." (Id), and that subsection 3496(b) is contrary to the language of "The Act".

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenter 15:

Comment: 15A: Commenter supports any amendments that would lessen prison time for incarcerated individuals. Commenter states all individuals convicted of nonviolent felonies should be eligible for parole consideration upon completion of the base term of their primary offense, regardless of enhancements and alternative sentences.

Response: Inmates are eligible for parole consideration under the Board's nonviolent parole review process (NVPP) upon completion of the "full term" of their primary offense. Primary offense" means the single crime with the longest sentence imposed by any court, excluding all enhancements, alternative sentences, or consecutive sentences. For those inmates 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 "term imposed by the court" means the maximum term applicable by statute to the underlying nonviolent offense for which the inmate received the life term.

Comment 15B: Commenter states the intent of Proposition 57 is to provide rehabilitative programs to all incarcerated individuals to reduce recidivism, and excluding anyone from participating is contrary to the intent of Proposition 57. Commenter urges CDCR to "completely implement Proposition 57 and keep the full intent of the law".

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenters 16 and 17:

Comment: Commenters support the proposed regulations. Commenters state they have visited a friend who is incarcerated and that some inmates will perform better once they are home with family being monitored electronically by Parole Officers.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenters 18 through 23:

Comments: Commenters identify themselves as family and friends of an inmate who was sentenced as a nonviolent third striker who is currently incarcerated in CDCR. Commenters submitted letters of support for his early release pursuant to Proposition 57, indicating they are willing to support the inmate and hope his able to return home to his family and friends.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenter 24:

Comment: Commenter states the proposed regulations have not followed the intent of Proposition 57, which addresses all nonviolent convictions. Commenter states section 3491(a)(3) related to sex offenses should be deleted, stating registration can occur in minimal sentences as well as serious charges. Commenter indicates offenders with nonviolent offenses should be eligible for parole consideration and violent offenders should not be eligible.

Response: See Response to Comment 4B.

Commenter 25:

Comment 25A: Commenter states that there should be immediate parole considerations for all individuals convicted of nonviolent felonies that are serving their sentence beyond the base terms of their prior offense. Commenter indicates that Proposition 57 is still not fully implemented to the fullest intent of the initiative as all individuals convicted of nonviolent felonies, who served their primary offense term were eligible for early parole consideration when Proposition 57 passed in 2016; however, CDCR delayed the implementation of the law by arguing the nonviolent third strikers were not eligible. Commenter states for two years, incarcerated individuals, families and justice advocates have fought for CDCR to follow the law through litigation.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 25B: Commenter states that pursuant to the *Edwards* case, CDCR has been ordered to give parole consideration to nonviolent three strikers; however, CDCR has delayed the implementation of the process by having a two-tiered screening process. Commenter also cites the *Tijue Adolphus McGhee* case, where the courts ruled that CDCR has no authority to deny individuals convicted of nonviolent felonies early parole consideration due to in-custody conduct.

Response: See Response to Comment 7B.

Comment 25C: Commenter states even with the court decisions, CDCR is still attempting to delay implementing the law. Commenter indicates they have heard individuals who have served up to 20 years are being told to wait until 12/31/2020, which is making them by default serve their 25 years before being considered for parole. Commenter states the law was overwhelmingly passed in 2016, and there should be no delay with individuals convicted of nonviolent felonies not to receive early parole consideration.

Response: See response to Comment 7B.

Comment 25D: Commenter states earned credit should be applied towards earlier parole consideration dates for individuals eligible for elder parole or youth offender parole. Commenter indicates CDCR has placed restrictions on inmates eligible for elder parole or for youth offenders benefitting from Proposition 57. Commenter states CDCR does not consider a youth offender or elderly offender "initial" date under Proposition 57, which prevents them from earning credit toward their original parole hearing date. Commenter states this penalizes this population and prevents youth offender parole hearings and elderly parole hearings from accessing credit earning opportunities and rehabilitative programs under Proposition 57. Commenter states this practice is opposite the intent of Proposition 57.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 25E: Commenter states the intent of Proposition 57 is to:

- Allow individuals convicted with nonviolent felonies to be eligible for parole consideration after completing the base term of their sentence, instead of the longer sentence imposed due to enhancements, such as prior conviction and gang enhancements which drastically increase years of incarceration.
- Provide credits for good behavior and participation in programs to go towards earned release.
- Stop the direct filing of youth into the adult system.

Response: These regulations properly interpret, implement, clarify, or make specific the provision in part 1 of this comment. Specifically, these regulations define 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. Inmates will be eligible for parole consideration under the nonviolent parole review process upon the completion of the full term of their primary offense.

Parts 2 and 3 of this comment are not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenter 26:

Comment 26A: Commenter states it is unconstitutional and biased to exclude nonviolent sex offenders from Proposition 57.

Response: See response to Comment 4B. Until the Supreme Court issues its ruling in the *Gadlin* case, all sex offenders will remain excluded from the nonviolent parole review process.

Comment 26B: Commenter provides a summary of why certain weapon offenses and sex offenses should not be considered violent offenses. Commenter states "it's time to make justice- RIGHT again. To put thru more propositions thru the courts. To try to correct the wrongs that was done. And to MAKE AMERICA GREAT ONCE More. The land of the FREE and the proud!".

Response: With regard to the exclusion of sex offenses, see response to Comment 4B. Until the Supreme Court issues its ruling in the *Gadlin* case, all sex offenders will remain excluded from the nonviolent parole review process. With regard to the remaining portions of this comment, these portions are not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenter 27:

Comment 27A: Commenter cites the Initial Statement of Reasons regarding the definition of "full term", and "primary offense" as cited in sections 2449.1(e) and 3490(e). Commenter indicates that "full term" and "primary term" are reciprocal, and the definition of both these sections should include the "actual days, months and years"; because if the legislation did not intend for this, the wording in the constitution would have stated "not including any sentencing credits."

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 27B: Commenter states the definitions regarding sections 2449.1(d) through 2449.1(e) and sections 3490(d) through 3490(e) are duplicative and lack consistency with the controlling statute.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Commenter 28:

Comment 28A: Commenter states section 3495(a)(5) is not allowed to exclude inmates whose current offense alone is not defined as violent. Commenter states "CDCR's attempts to tether a current offense to a prior case, as in 3495(a)(5), are sheer acts of chicanery and obstruction".

Response: 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 a term for a nonviolent felony after completing a concurrent 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.

Comment 28B: Commenter cites case *In re Gadlin* where an inmate was convicted of a nonviolent felony and sentenced to a life term pursuant to the Three Strikes Law and states "CDCR tried to tether Gadlins current offense to a prior conviction, claiming he was not eligible for early parole consideration." Commenter indicates this operates against the voter's intent and the court found that the application of section 3491(a)(1) is contrary to Section 32(a)(1) of the constitution and that Gadlin and similarly situated inmates are entitled to early parole consdieration. Commenter states the Gadlin decision is equally applicable to section 3495(a)(5).

Response: See response to Comment 4B. Until the Supreme Court issues its ruling in the *Gadlin* case, all sex offenders will remain excluded from the nonviolent parole review process.

Comment 28C: Commenter cites Santa Barbara Court case no. 18CR08686 (Hon. James Herman) and states section 3491(b)(3) "ran afoul of 32(a)(1), and so does section 3495(a)(5), because CDCR is not allowed to touch the plain language of Proposition 57 as it was approved by the voters in 2016.

Response: See response to Comment 4B. Until the Supreme Court issues its ruling in the *Gadlin* case, all sex offenders will remain excluded from the nonviolent parole review process.

Comment 28D: Commenter states early parole consideration must be based on the conviction for the current offense not the prior criminal history. Commenter indicates this interpretation is supported by Section 32(a)(1) use of the singular form in “felony offense”, “primary offense”, and “term”. Commenter asserts the judge used this to clarify in the *Gadlin* case, that “Gadlins current offense triggering his Three Strikes term did not require registration..**!**”

Response: See response to Comment 4B. Until the Supreme Court issues its ruling in the *Gadlin* case, all sex offenders will remain excluded from the nonviolent parole review process..

Comment 28E: Commenter states the courts have ordered that sections 3491(b)(3) and 3495(a)(5) are to be void.

Response: See response to Comment 4B. Until the Supreme Court issues its ruling in the *Gadlin* case, all sex offenders will remain excluded from the nonviolent parole review process..

Comment 28F: Regarding section 2449.32(b)(c) and (e), commenter states CDCR is not allowed to alter the previous process where “all persons” who’s “current offense is nonviolent”, are to be reviewed for early parole consideration.

Response: See response to Comment 1A.

Comment 28G: Commenter provides a summary of how approximately 2 ½ years ago the Secretary of CDCR received $23 million extra dollars to implement Proposition 57, however, did not follow the intent of the proposition regarding the nonviolent parole process. Commenter cites *In re Edwards* and states this will be the first of many legal challenges against CDCR, as long as the department’s top management refuses to disobey “California voter’s interest for sentencing reform”.

Response: This comment is not specifically directed at the Department’s proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 28H: Commenter disagrees with section 2449.32(c),(d) and (e), stating it is the voter’s intent to have indeterminately-sentenced inmates have the same early parole review process as determinately-sentenced inmates.

Response: See response to Comment 1A.

<u>Commenter 29:</u>

Comment 29A: Commenter attached a copy of the NCR-19-02, submits a comment pursuant to Section 8 of the “The Public Safety and Rehabilitation Act of 2016”, and states his comments are based upon the Department having greater access to prison administrative records, court documents, relevant materials on file with California Secretary of State and other federal agencies. Commenter states the public comments are based upon other public comments, submitted on or before June 6, 2019.

Response: This comment is not specifically directed at the Department’s proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29B: Commenter states the Department has no jurisdiction, authority, discretion or power to enforce the proposed regulations that determine "eligibility" of nonviolent inmates for parole consideration.

Response: See Response to Comment 7B.

Comment 29C: Commenter summarizes the text and voter's pamphlet of Proposition 57 and states it is obvious the electorate intended to establish a new rule that all nonviolent offenders are eligible for parole consideration when they complete the full term of their primary offense.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29D: Commenter attached and refers the Notice of Change to Regulations (NCR 19-02) as a comment regarding the eligibility of nonviolent inmates for parole consideration. Commenter also refers to Section 8 of The Public Safety and Rehabilitation Act of 2016. Commenter cites several court cases and letters from his appeals within the institution, stating he has previously commented and the comments demonstrate "that by applying the principles of statutory construction to Proposition 36, Proposition 47, and Proposition 57, regulations and enforce the Department to determine "eligibility of nonviolent inmates for "parole consideration".

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29E: Commenter states pursuant to Section 8 of Proposition 57 and Article III of the California Constitution, the Department has no jurisdiction, authority or power under Penal Code 5058 or other statutes, to implement and enforce the regulations regarding parole consideration for nonviolent inmates.

Response: The Public Safety and Rehabilitation Act of 2016 amended the California Constitution to include Section 32 of Article 1, which specifically mandates that the Department of Corrections and Rehabilitation adopt regulations to further the nonviolent parole review process.

Comment 29F: Commenter cites Article IV and I of the California Constitution and several court cases. Commenter states the Department had a fair opportunity to litigate the issue of parole eligibility and are prohibited from not complying with the rule of law, "that parole eligibility under Article I, 32 applies only to prisoners convicted of nonviolent felonies." (Brown v. Superior Court 2016).

Response: When defining "nonviolent" for purposes of the nonviolent parole review process, the Board relies on statutory authority and court decisions. Inmates currently serving a term for a violent felony offense, as defined in Penal Code section 667.5, subdivision (c), are excluded from parole consideration because the California Legislature determined the crimes listed in that section of the Penal Code unquestionably involve physical violence.

Additionally, inmates are excluded from the nonviolent parole review 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.)

Comment 29G: Commenter cites *In re Edwards* and states the proposed regulations apply to nonviolent third strikers.

Response: This comment is a correct observation to which a response is not necessary.

Comment 29H: Commenter cites *Brown v. Superior Court* and states the Department is bound by this court decision “that all state prisoners convicted of a nonviolent felony offense would be eligible for parole consideration after completing the full term for their primary offense. Commenter indicates this is “defined as the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement consecutive sentence or alternate sentence.”

Response: See the response to comment 29F. Additionally, the issue in *Brown* was whether the amendments to a proposed ballot measure was “reasonably” germane to the original measure. The California Supreme Court held that the amendments were reasonably germane. The commenter refers to statements not reflective of the Court’s holdings, and therefore, not binding on the Department or the Board.

Comment 29I: Commenter provides a summary of different court cases and claims the following: 1) the Department has refused to provide adequate health care to prisoners; 2) the Department has been ordered to implement sentencing and parole reforms and reduce prison population and; 3) the Department has been ordered to create Elderly Parole Release criteria. Commenter states the Department has failed to follow the courts order, and it has resulted in wasting millions of dollars. Commenter states California voters and the legislation was coerced into passing the Three Strikes Law which only exacerbated the Departments failure in providing adequate health care.

Response: This comment is not specifically directed at the Department’s proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29J: Commenter summarizes the history of the Three Strikes Law, citing the different Assembly Bills, propositions and organizations involved in the development of the law. Commenter provides his personal case factors and states as a result of the Three Strikes Law he was committed to state prison for 25 years to life.

Response: This comment is not specifically directed at the Department’s proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29K: Commenter cites and refers to documents to show how the Three Strikes Law exacerbated the prison population. Commenter provides statistics and numbers of how the prison population increased due to the Three Strikes Law. Commenter summarizes the cost of housing inmates sentenced pursuant to the Three Strikes Law and indicates how this cost will increase as inmates get older.

Response: This comment is not specifically directed at the Department’s proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29L: Commenter provides a summary and analysis of Proposition 66, stating if California voters were not coerced into defeating the proposition the Three Strikes Law would have been amended to require only serious or violent felony convictions, which would have reduced spending taxpayer dollars on the prison system.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29M: Commenter provides a summary and analysis of Proposition 36 which was passed in 2012. Commenter states Proposition 36 amended the Three Strikes Law which now requires a defendant to have a current conviction for a serious or violent felony and two prior serious or violent felonies to receive a life sentence. Commenter states inmates sentenced pursuant to the Three Strikes Law are eligible to petition the court for resentencing if their case meets the criteria for resentencing. Commenter indicates the "Three Strikes Reform Act of 2012" was not to impose a life sentence for nonviolent offenses, but for violent repeat offenders.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29N: Commenter states on November 4, 2014, California voters approved Proposition 47, "The Safe Neighborhood and Schools Act", which reduced certain drug related offenses that were felonies to misdemeanors. Commenters indicates if eligible, an inmate can be resentenced and have a felony reduced to a misdemeanor pursuant to Proposition 47. Commenter states like Proposition 36, this will allow the prison population and reduce wasteful spending.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29O: Commenter cites and summarizes Proposition 57, which was voted on and passed on November 8, 2016. Commenter states it was the intent of California voters that the Board of Parole Hearings would determine who is eligible for release, not CDCR. Commenter indicates Proposition 57 was based upon the California Supreme Court stating "Parole eligibility in Proposition 57 applies only to prisoners convicted of nonviolent felonies." (Brown v. Superior Court).

Response: Commenter's concerns are addressed in the changes made to these proposed regulations in response to the court's ruling in *In re Tijue Adolphus McGhee* (2019) 34 Cal.App.5th 902. While the court's finding was limited to the public screening in Cal. Code Regs., tit. 15, §3492 governing consideration for determinately-sentenced inmates, the court's reasoning would logically apply to the public safety screening and referral process for indeterminately-sentenced nonviolent offenders under these proposed regulations (Cal. Code Regs., tit. 15, § 3497. Therefore, CDCR and the Board determined that modifications to these proposed regulations were necessary to remove the public safety screening process and all other portions of the regulations related to CDCR's screening inmates prior to referral for public safety reasons. Specifically, CDCR and the Board amended these proposed regulations to 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 screening results for a referred nonviolent offender. These amendments were submitted to the public in the re-notice dated July 26, 2019.

Comment 29P: Commenter states it was the intent of the California voters when passing Proposition 57 to reduce the prison population, remedy the inadequate health care and reduce wasteful spending. Commenter also discusses the Legislative Analysis budget of 2017-18 and how it relates to the Three Strikes Law and the difference between the Department's interpretations of the nonviolent parole process.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29Q: Commenter refers to the Association of Deputy District Attorney's fact sheet and states the association opposed Proposition 57 and states contrary to the Department's interpretation of the proposition, it is mandated that "all nonviolent inmates sentenced to state prison are eligible for parole consideration, after completing their full term of his or her primary offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence."

Response: See response to comment 29F.

Comment 29R: Commenter refers to and cites the following legislation:

- Assembly Bill 665- regarding the amendment to Penal Code Section 1170.91 for military veterans.
- Assembly Bill 2845- regarding the governor's authority to grand reprieves, pardons and commutations.
- Senate Bill 1437- regarding the elimination of the Felony, Murder Rule.
- Assembly Bill 2942- regarding the amendment to Penal Code 1170.

Commenter states based upon the above information the California voters and legislatures "finally got fed up" with the Department refusing to implement reform in sentencing, parole and other measures to reduce the prison population and to provide adequate health care.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29S: Commenter states that applying principles of statutory construction to Proposition 36 and Proposition 47 to Proposition 57 demonstrates that the Department has no jurisdiction, authority, discretion or power to enforce the proposed regulations, regarding eligibility of nonviolent inmates for parole consideration. Commenter indicates that "in interpreting a voter initiative, such as prop 36, prop 47, and Prop 57 the same principles that govern statutory construction applies".

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29T: Commenter summarizes Proposition 36, Proposition 47 and Proposition 57. Commenter states California voters approved Proposition 36 and Proposition 47, "intentionally and purposely in the disparate inclusion of super strikes, offenses requiring registration as sex offender and other factors

disqualifying individuals from the benefits of the new law from Prop 36 and Prop 47." Commenter indicates voters approved Proposition 57 and determined eligibility for parole consideration only to prisoners convicted of nonviolent felonies after completing the full term of their primary offense. Commenter cites section 32(a)(1) regarding the definition of full term.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29U: Commenter cites court case *Brown v. Superior Court*, and states "all nonviolent state prisoners are eligible for parole consideration, and they are eligible when they complete the full term for their primary offense."

Response: See responses to comments 29F and 29H.

Comment 29V: Commenter cites statutory construction and refers to the proposed regulations, stating it is the courts obligation to strike down the regulations. Commenter states the California voters knew what they were doing when they approved Proposition 57, which demonstrates the Department has no authority to enforce the proposition when determining eligibility for parole consideration for nonviolent offenders.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29W: Commenter provides his personal case factors and states he has been denied due process, and the Department has no authority to restrain his liberty. Commenter provides a summary of the prison population and how the recidivism rate of lifers is lower than other prisoners. Commenter states "that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." Commenter continues to state that "similarly situated in this context means that the compared groups are similarly situated for purposes of the law challenged." Commenter indicates he is "similarly situated to prisoners convicted of nonviolent felonies for being eligible for parole consideration", pursuant to the proposed regulations. Commenter continues to cite court cases, and applying them to different individual situations and scenarios.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29X: Commenter states the Department has been committing fraud by claiming they have implemented reforms in sentencing, parole and other remedial measures to reduce the prison population. Commenter indicates the Department falsely claimed that Proposition 57 was "the states durable remedy but failed to inform the federal Three-Judge Court that they excluded nonviolent inmates for parole consideration who had an indeterminate life sentence." Lastly, commenter states the Department failed to inform the federal court that they were not referring three strike lifers who were 60 years old and had served 25 years of their sentence, and falsely claimed they are providing adequate health care to prisoners.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized

or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

Comment 29Y: Commenter states the Department has no authority to implement the proposed regulations regarding the nonviolent parole consideration. Commenter states the regulations should be "stricken from the record as constitutionally invalid."

Response: The Public Safety and Rehabilitation Act of 2016 amended the California Constitution to include Section 32 of Article 1, which specifically mandates that the Department of Corrections and Rehabilitation adopt regulations to further the nonviolent parole review process.

PUBLIC HEARING COMMENTS:
Public hearing was held on June 6, 2019 at 10:30 am.

Speaker 1:

Commenter read letter into the record. This comment is duplicative of commenter 25.

Response: Refer to comment 25, for summary and response.

Speaker 2:

Commenter read the letter into the record. Commenter states CDCR has placed restrictions on inmates eligible for Elder Parole or for Youth Offender Parole (YOP) Hearing from benefitting from Proposition 57 by not considering a YOP hearing or Elderly Parole Hearing date to be the "initial" date. Commenter indicates this eliminates a large percentage of those who are eligible for early parole through YOP or Elderly Parole programs since they can only earn credits towards their original parole hearing date. Commenter states when Proposition 57 passed, it was the intent of the voters to provide rehabilitative and incentives to inmates to make positive changes reduce recidivism and the number of individuals serving long sentences. Commenter indicates by not allowing the earned credits to apply towards an earlier parole hearing, takes a step backward and is not the intent Proposition 57. Commenter states policy should allow earned credits to advance YOP hearings.

Response: This comment is not specifically directed at the Department's proposed regulations or to the procedures followed by the department in proposing or adopting these regulations or is too generalized or personalized so that no meaningful response can be formulated to refute or accommodate the comment. (See Gov. Code, § 11346.9, subd. (a)(3).)

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS RECEIVED DURING THE RENOTICE PUBLIC COMMENT PERIOD:

Commenter 1:

Commenter states that he supports the changes to the proposed regulations described in the Notice of Change to Text as Originally Proposed.

Response: The Department acknowledges the commenter's support.

Commenter 2:

Commenter states the amended regulations are not consistent with the *Gadlin* ruling, which "struck down the exclusion of incarcerated individuals who were previously sentenced for a sex crime, but were currently serving time as a nonviolent crime".

Response: In *Gadlin*, the Court of Appeal held that individuals with only past registrable sex offenses cannot be excluded from the Board's nonviolent parole review process. On May 15, 2019, the California Supreme Court granted review of the case. Until the Supreme Court issues its ruling, all sex offenders will remain excluded from the nonviolent parole review process. Regulations will be amended, if necessary, to bring them into compliance with the Supreme Court's ruling.

Commenter 3:

Commenter objects to the fact that no amendments were made to proposed subsections 3491(b)(3) and 3496(b), relating to inmates required to register pursuant to Penal Code Section 290. Commenter references the *Gadlin* ruling as well as his own case (*O'Keefe*). Commenter summarizes his own case history and asks "How many times is CDCR going to amend these regulations before CDCR get them right?"

Response: In *Gadlin*, the Court of Appeal held that individuals with only past registrable sex offenses cannot be excluded from the Board's nonviolent parole review process. On May 15, 2019, the California Supreme Court granted review of the case. Until the Supreme Court issues its ruling, all sex offenders will remain excluded from the nonviolent parole review process. Regulations will be amended, if necessary, to bring them into compliance with the Supreme Court's ruling. Individuals affected by the Supreme Court's ruling will be notified should they become eligible for consideration under the Board's nonviolent parole review process.