

**State of California
Office of Administrative Law**

In re:
**Department of Corrections and
Rehabilitation**

Regulatory Action:

Title 15, California Code of Regulations

Adopt sections:

**Amend sections: 2449.3, 2449.4, 2449.5,
2449.6, 2449.7, 3492, 3493**

Repeal sections: 2449.2

**NOTICE OF APPROVAL OF CERTIFICATE OF
COMPLIANCE**

**Government Code Sections 11349.1 and
11349.6(d)**

OAL Matter Number: 2020-0213-02

**OAL Matter Type: Certificate of Compliance
(C)**

This certificate of compliance makes permanent the emergency regulations removing the CDCR public safety pre-screening process with respect to Proposition 57 parole considerations for determinatively-sentenced nonviolent inmates, to align the regulations with the judicial opinion of *In re McGhee* (2019) 34 Cal.App.5th 902. The action also amends related provisions. (See OAL Matter No. 2019-0821-04.)

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

Date: March 26, 2020



For: **Mark Storm
Senior Attorney**

**Kenneth J. Pogue
Director**

Original: **Ralph Diaz, Secretary**
Copy: **Josh Jugum**

NOTICE PUBLICATION/REGULATORY ACTION

SUBMISSION CERT

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2019-1105-08	REGULATORY ACTION NUMBER 2020-0213-02C	EMERGENCY NUMBER
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For use by Office of Administrative Law (OAL) only	
NOTICE	REGULATIONS

ENDORSED - FILED
in the office of the Secretary of State
of the State of California

2020 FEB 13 P 4: 21
OFFICE OF
ADMINISTRATIVE LAW

MAR 26 2020
2:07 PM

AGENCY WITH RULEMAKING AUTHORITY California Department of Corrections and Rehabilitation	AGENCY FILE NUMBER (if any) 19-0106
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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 <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	NOTICE REGISTER NUMBER 2019 46-2		PUBLICATION DATE 11/15/2019

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Reforms to Parole Consideration: Determinately-Sentenced NV Offenders	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) 2019-0821-04EON
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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.)	ACTION ON PROPOSED NOTICE
	ADOPT
	AMEND 2449.3, 2449.4, 2449.5, 2449.6, 2449.7, 3492, 3493
TITLE(S) 15	REPEAL 2449.2

3. TYPE OF FILING			
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input checked="" type="checkbox"/> 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.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §511349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input type="checkbox"/> Other (Specify) _____	

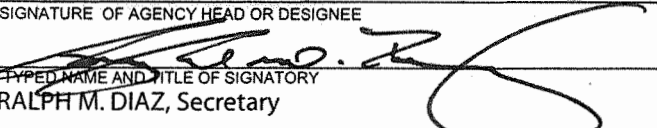
4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY			
<input checked="" type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal	
<input type="checkbox"/> Other (Specify) _____			

7. CONTACT PERSON Josh Jugum	TELEPHONE NUMBER 916 445-2266	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) joshua.jugum@cdcr.ca.gov
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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 2-7-20
TYPED NAME AND TITLE OF SIGNATORY RALPH M. DIAZ, Secretary	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

MAR 26 2020

Office of Administrative Law

TEXT OF ADOPTED REGULATIONS

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

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

Chapter 1. Rules and Regulations of Adult Operations and Programs

Subchapter 5.5. Parole Consideration

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

Section 3492. Eligibility Review and Referral is amended as follows:

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

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

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

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

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

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

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

~~(4) The inmate has not been found guilty of a serious rule violation for a Division A-1 or Division A-2 offense as specified in subsection 3323(b) or 3323(c) within the past five years;~~

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

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

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

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

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

~~(d) Within five business days of being screened, inmates who are eligible for referral under this section shall be referred to the Board of Parole Hearings for parole consideration under article 15 of chapter 3 of division 2 of this title.~~

~~(e) (b) Inmates A review for possible referral to the Board under subsection (a) shall be screened conducted again under this section one year from the date of their the inmate's previous public safety screening review for referral until they are the inmate is released from custody or are is no longer eligible for parole consideration under Ssection 3491, if any of the following apply:~~

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

~~(2) The inmate was referred to the Board of Parole Hearings and a hearing officer determined the Board of Parole Hearings did not have jurisdiction to review the inmate for release under section 2449.2 of division 2 of this title;~~

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

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

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

~~(f)(c) Public safety screening and Rreferral results under subsection (a) shall be served on the inmate and placed in the inmate's central file within 15 business days of being completed and, if the inmate is deemed eligible for referral referred to the Board of Parole Hearings, he or she the inmate shall be provided information about the nonviolent offender parole process, including the opportunity to submit a written statement to the Board of Parole Hearings.~~

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

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

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

Section 3493. Processing for Release.

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

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

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

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

Chapter 3. Parole Release.

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

Section 2449.2. Jurisdictional Review is repealed.

~~Section 2449.2. Jurisdictional Review.~~

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

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

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

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

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

~~(c) If the hearing officer determines the board does not have jurisdiction to review the inmate for release, he or she shall issue a written decision that includes a statement of reasons supporting the decision. A copy of the decision shall be served on the inmate and placed in the inmate's central file within 15 business days of being issued. Inmates determined to be ineligible for referral to the board under this section shall be screened for possible referral to the board again as provided in subsection 3492(e) of division 3 of this title.~~

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

~~(e) Inmates may seek review of decisions issued under this section by writing the board in accordance with section 2449.7 within 30 calendar days of being served the decision. Decisions issued under this section are not subject to the department's inmate appeal process under article 8 of chapter 1 of division 3 of this title.~~

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

Section 2449.3. Notification Process is amended as follows:

Section 2449.3. Notification Process.

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

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

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

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

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

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

Section 2449.4. Review on the Merits.

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

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

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

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

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

(d) The hearing officer shall issue a written decision that includes a statement of reasons supporting the decision. A copy of the decision shall be served on the inmate and placed in the inmate's central file within 15 business days of being issued. The board shall, within five business days of issuing a decision, send notice of the decision to any victim who was registered at the time of the referral and any prosecuting agency or agencies that received notice under Section 2449.3.

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

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

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

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

~~(g)~~ (i) Inmates may seek review of decisions issued under this section by writing the board in accordance with Section 2449.7 within 30 calendar days of being served the decision. Decisions issued under this section are not subject to the department's inmate appeal process under Article 8 of Chapter 1 of Division 3 of this title.

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

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

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

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

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

Subsection 2449.5(f) through (f)(4) are amended as follows:

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

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

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

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

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

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

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

Section 2449.6. Vacating a Decision is amended as follows:

Section 2449.6. Vacating a Decision.

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

(b) Within 15 business days of issuing a decision under subsection (a), a copy of the decision shall be served on the inmate and placed in the inmate's central file. The board shall, within five business days of issuing a decision under subsection (a), send notice of the decision to any victim who was registered at the time of the referral and any prosecuting agency or agencies that received notice under ~~Section 2449.3~~.

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

~~(d) Inmates may request review of a decision issued under this section by writing the board as provided in Section 2449.7 within 30 calendar days of being served the decision. Decisions under this section are not subject to the department's inmate appeal process under Article 8 of Chapter 1 of Division 3 of this title.~~

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

Section 2449.7. Decision Review is amended as follows:

Section 2449.7. Decision Review.

(a) An inmate may request review of a ~~jurisdictional decision issued under section 2449.2, a~~ decision on the merits issued under Section 2449.4, or a decision vacating a previous approval for release issued under Section 2449.6 by submitting a written request to the board within 30 calendar days of the inmate being served the decision. The inmate's written request shall include a description of why the inmate believes the previous decision was not correct and may include additional information not available to the hearing officer at the time the previous decision was issued.

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

Subsections 2449.7(f) through 2449.7(h) are amended as follows:

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

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

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

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