

INITIAL STATEMENT OF REASONS

OSHAB OASIS System Rules of Practice and Procedure SAR 5108

The Occupational Safety and Health Appeals Board (Board) proposes to adopt regulations to accomplish several different purposes: First, and most predominantly, the Board proposes a set of rules designed to implement a new electronic document management, case management, and court calendaring software system, referred to as OSHAB Appeal Scheduling and Information System, or “OASIS”. The Board is an independent adjudicatory body; it renders decisions related to citations issued by the Division of Occupational Safety and Health (the Division) that are appealed by employers around the State of California. These appeals are heard by the Board’s Administrative Law Judges (ALJs) and may be appealed to its three-member Board. The staff of the Board are tasked with docketing appeals, scheduling hearings, and moving appeals through the process in a timely fashion. Staff currently manages the Board’s calendar, case load, and documents with the aid of paper files and a decades old database.

Second, the Board proposes a set of rules designed to codify and clarify current practices and offer greater uniformity and transparency in Board proceedings. Currently, the Board’s regulations do not reflect actual practice in some areas, or the technology in current use. These regulation changes seek to update the regulations to reflect actual practices in use at the Board. Third, the Board proposes a set of regulations designed to address and alleviate areas of confusion in Board proceedings. Current Board rules do not address certain questions, such as the applicability of the California Code of Judicial Ethics to the Board’s ALJs. The current Board regulations also do not discuss the limitations of discovery in Board proceedings. The proposed changes seek to clarify issues such as these that are a source of dispute for parties appearing at the Board. Fourth, the Board proposes a set of regulations to create greater institutional efficiencies. These proposed rule changes eliminate unnecessary paperwork hurdles and adopt practices that will make Board adjudication more modern and effective.

PROBLEM STATEMENT:

Rules 346, 346.1, 346.2, 347, 348, 355, 355.1, 355.2, 355.3, 355.4, 355.5, 355.6, 356, 359, 359.1, 361.3, 376.4, 376.8, 391.1 —Changes to Rules to Conform to the Board’s New Electronic Document Management System

The Board proposes the changes in Rules 346, 346.1, 346.2, 347, 348, 355, 355.1, 355.2, 355.3, 355.4, 355.5, 355.6, 356, 359, 359.1, 361.3, 376.4, 376.8, 391.1 to address the below listed problems:

The Board currently utilizes an antiquated and inflexible manual calendaring, case management, and document management system. The Board’s current system creates numerous workflow inefficiencies, such as requiring Board staff to manually enter data into the Board’s Oracle®

database and manually file and record information into various duplicate paper files. Board staff time is consumed with data entry and paper filing.

The manual system also creates multiple scheduling issues. Due to the constraints of the existing system, the Board must assign and schedule cases by geographic area. Geographic scheduling has developed as the only feasible means for Board staff to manage the schedules of its ALJs as well as the District Managers and Inspectors of the Division of Occupational Safety and Health. This geographic scheduling leads to the same Inspectors appearing before the same ALJs repeatedly over time. Parties on all sides may perceive this arrangement as being susceptible to unfairness or bias.

The manual system also causes delays due to its inability to de-conflict the scheduling calendar. Under the current system, cases are scheduled in the order they emerge from telephonic pre-hearing without settlement. After a case is scheduled, the scheduled dates may be vacated (or become open) when parties with conflicts request and are granted continuances, and when parties settle their cases. The current calendar system cannot account for these openings. The current calendaring system, a single-user manual calendaring system, is not able to de-conflict the calendars of parties to utilize dates on the calendar when they become available, and instead, new cases wait months for hearing.

To address the issues and inefficiencies created by the Board's current system, the Board intends to adopt the OASIS system. However, it cannot adopt and implement the OASIS system without changes to its regulations. Current Board regulations do not contemplate electronic filing of documents, automated case scheduling or electronic storage of documents. Thus, the Board must update its rules of practice and procedure to account for the new software, implement it, and ensure that it rolls-out smoothly.

Rules 372.6, 376, 380, 383, 392.5 —Conforming Regulations to Practices in Current Use at the Board

The Board proposes the changes to Rules 372.6, 376, 380, 383, 392.5 to address the below listed problems:

The Board's ALJs have broad discretionary authority under current Rule 350.1, and other regulations, to regulate the conduct of proceedings before them. This rule allows the ALJ to regulate the hearing process on a case by case basis, leading to ad hoc procedures. In addition, Board ALJs have used their discretionary authority under rule 350.1, and other regulations, to formulate practices and procedures that are well-established, but are not specifically stated in the rules. Some members of the regulated community may be unaware of those specific procedures. The Board proposes these rule changes to formalize procedures now used under the broad discretionary authority in section 350.1, and other regulations, and to provide greater uniformity and clarity regarding Board proceedings.

Rules 350.3, 352, 372.8 —New Regulations to Add Greater Clarity to Board Proceedings

The Board proposes changes to Rules 350.3, 352, 372.8 to address the below listed problems:

There is currently some confusion among ALJs regarding the extent to which the California Code of Judicial Ethics, and other similar ethical rules, apply to their conduct. There is also some confusion regarding which discovery mechanisms, and discovery procedures, are permissible in Board proceedings. The Board proposes changes to the regulations to address and alleviate this confusion.

Rules 350.4, 354, 364.2, 372.9, 376.7 —New Regulations to Add Greater Efficiency in Board Procedures

The Board proposes the changes to Rules 350.4, 354, 364.2, 376.7 to address the below listed problems:

There is concern that the Board's current processes and procedures are not the most efficient or economical. For instance, there is concern that it is an unnecessary expenditure of Board resources and time for an Administrative Law Judge to approve each and every settlement reached between the parties on a showing of good cause. There is concern that the Board takes too long, in some instances, to grant motions for party status. There is also concern that the Board's processes for creating the hearing record should provide additional and more efficient options for the parties. The Board proposes these regulations to address these inefficiencies and concerns.

Rules 356.1, 356.2, 371, 371.1, 371.2, 376.1, 378, 392 —Changes to Cross-References of Board Regulations and Other Minor Non-Substantive Modifications

The Board proposes changes to Rules 356.1, 356.2, 371, 371.1, 371.2, 376.1, 378, and 392:

The Board proposes these changes to renumber any cross-references to renumbered Rules of Practice and Procedure, and to make minor, non-substantive changes to capitalization, grammar, syntax, and/or word choice that are non-substantive in nature, and serve to create a more uniform set of procedural rules.

BENEFIT STATEMENTS:

Rules 346, 346.1, 346.2, 347, 348, 355, 355.1, 355.2, 355.3, 355.4, 355.5, 355.6, 356, 359, 359.1, 361.3, 376.4, 376.8, 391.1 —Changes to Rules to Conform to the Board's New Electronic Document Management System

The Board proposes the changes in Rules 346, 346.1, 346.2, 347, 348, 355, 355.1, 355.2, 355.3, 355.4, 355.5, 355.6, 356, 359, 359.1, 361.3, 376.4, 376.8, 391.1 to provide the below listed benefits:

The new OASIS system will permit the Board to address the inefficiencies created by the current antiquated system. The system permits enhancements to the Board's operations, processes, and procedures, including allowing electronic/online filing and communications and enhancements to its calendaring capabilities. The Board anticipates that this new system will provide many stakeholders with an easier and more efficient means of accessing Board services, and seeks to ensure that all parties have accurate and timely information as to how to use the new electronic system.

These proposed rules will update the Board's procedural rules to effectively implement and utilize the new OASIS system, and they will ensure that all parties are provided accurate and useful information regarding the utilization of the new electronic procedures where available.

For instance, proposed rule 361.3 implements a parties' ability to file an appeal online through the OASIS system, without requiring the use of the Board's current appeal form. In order to permit the online filing of pleadings, without the need to utilize the Board's current paper pleading form, the Board proposed changes to rule 361.3, Issues on Appeal, to clarify and delineate what an appeal must contain, and to explain the purpose of the pleading. The proposed rule specifies that the issues on appeal are those arising out of the facts and allegations set forth in the Division's action and the grounds set forth in the Appeal. The proposed rule requires the employer to specify which affirmative defenses it is raising and grants the employer the option to describe the facts that give rise to that affirmative defense. These proposed rules will allow the parties to file appeals through the OASIS system without utilizing the Board's current paper appeal forms. The proposed regulation will also enable the parties to better understand the issues and arguments raised by the parties and lead to less confusion.

Rules 376, 380, 383, 392.5 —Conforming Regulations to Practices in Current Use at the Board

The Board proposes the changes to Rules 376, 380, 383, 392.5 to provide the below listed benefits:

After reviewing its procedural rules, the practices of its ALJs, and comparing them with the APA and the procedural rules of other adjudicatory agencies, the Board has developed these proposed rules which will clarify and better define its procedures in regulating hearings and other Board proceedings such as motion hearings and status conferences. These rules clearly define and delineate Board practices that may be familiar to those stakeholders who regularly come before the Board, but are not clearly stated in procedural rules, and they provide greater uniformity in Board proceedings. The proposed changes will serve to create greater transparency in the Board appeals process, by ensuring that parties are provided with accurate Rules of Practice and Procedure that reflect the current state of Board processes. These changes include clarifying the rules to clearly state that failure to appear at a pre-hearing conference can be grounds for dismissal, as well as specifying that non-serious cases may be subject to alternatives to the

standard process. Other changes recognize new technologies currently in place at the Board and in use, such as electronic recording of hearings, and email delivery of hearing records.

Rules 350.3, 352, 372.8 —New Regulations to Add Greater Clarity to Board Proceedings

The Board proposes changes to Rules 350.3, 352, 372.8 to provide the below listed benefits:

After a review of current practices, the Administrative Procedure Act, and practices in use at other agencies with adjudicatory functions, such as the Office of Administrative Hearings, Workers Compensation Appeals Board and State Personnel Board, the Board proposes these additions to its current rules of practice and procedure to alleviate confusion that exists regarding Board proceedings.

Proposed rule 372.8 clarifies that the current discovery tools listed in the Board's regulations are the exclusive methods of discovery in Appeals Board hearings. This proposed rule, and other similar changes to the rules, will reduce uncertainty in discovery and permit greater uniformity in discovery proceedings.

Next, although Board ALJ's strive to comply with Administrative Adjudication Code of Ethics found in the APA, Article 16 (commencing with section 11475), uncertainty exists as to whether those sections technically apply to Board ALJs since they are officially classified as hearing officers. Proposed rule 350.3 dispels any uncertainty by definitely stating that the code applies to Board ALJs. This portion of the APA authorizes adoption of specified portions of the Code of Judicial Ethics by an agency employing hearing officers to function as Administrative Law Judges. This adoption will add greater consistency and clarity to Board rules through the application of a standard, uniform set of judicial ethics rules for all Board hearing officers and ALJs, which may be referred to and relied upon by the Hearing Officers, ALJs, and stakeholders. Further, with regard to the ALJ's ethical duties, the proposed change to rule 352 adds clarity, and eliminates confusion, regarding what ALJ's must do in the event of ex parte communications.

Rules 350.4, 354, 364.2, 376.7 —New Regulations to Add Greater Efficiency in Board Procedures

The Board proposes the changes to Rules 350.4, 354, 364.2, 376.7 to provide the below listed benefits:

The Board proposes the following changes to its rules to decrease the inefficiencies that exist in current Board practice. First, the Board proposes changes to the rules to provide additional efficient and cost-effective options pertaining to preparation of the hearing record. Parties often retain court reporters at their own expense to transcribe a hearing, but current rules prohibit the Board from relying on that transcript as the official record. The current Board rule does not allow any record except for the Board's own audio recording to be recognized as the official recording. Should a case proceed to the writ stage, the Board then must have the recording transcribed by a separate court reporter, which is an unnecessary duplication of efforts and costs in instances where there already exists a court reporter's transcript. Proposed change to rule 376.7, Hearing Recording, allows for a court reporter transcript or hearing tape to be designated as the official record of hearing, with agreement of all parties. The proposed change allows

parties to pay for a court reporter at their own expense. This will yield greater efficiency and cost reduction in proceedings by recognizing transcripts as the official record.

Second, through Rule 364.2, the Board seeks to facilitate more efficient use of party and ALJ time by specifying that the Division may dispose of an appeal by Settlement Order bearing the signature of the Division and employer or obligor, at any time after the Board obtains jurisdiction of the Appeal, subject to limited administrative review. The rule will expedite the processing of settlements and avoid the unnecessary usage of ALJ time to review settlements for a showing of good cause in cases where both the Employer and the Division agree to the settlement, subject to the right of parties to petition for relief in appropriate circumstances.

Third, the Board proposes a Self-Executing Order under rule 350.4 that will enable the Board to more efficiently process orders, particularly once the OASIS system is in place.

Rule 372.9 creates an automatic trigger for the Division to send its investigation file to an appellant in Board appeals, a practice already in use in some, but not all, Division offices.

Finally, in response to concerns that it takes too long for the Board to act on motions for party status, the Board seeks to ensure the expeditious processing of motions for party status by ensuring that such motions are heard within 30 days.

Rules 356.1, 356.2, 371, 371.1, 371.2, 376.1, 378, 392 —Changes to Cross-References of Board Regulations and Other Minor Non-Substantive Modifications

These cross-reference changes, and other related minor changes, are without regulatory effect under the California Code of Regulations (CCR) title 1, section 100(a)(4).

PURPOSE STATEMENT:

Section 346: To define the Board’s new electronic document, case management, and court calendar system, referred to as “OASIS” (OSHAB Appeal Scheduling and Information System).

Section 346.1: To specify that scanned documents have the same force and effect as an original document, although they may have page markings for record-keeping purposes, or may be a different size than the original document once scanned into the OASIS system.

Section 346.2: To specify that the OASIS electronic file is the official administrative record in all Board proceedings, and electronic records are considered official documents, with the exception that oversized, demonstrative, or other non-standard records need not be scanned into the OASIS system subject to compliance with 376.4. Clarifies that the Board accepts paper documents from all parties; the Board will scan paper documents if received.

Section 347: To define terms previously not used or defined, or to clarify terms, including: “Administrative Record”, “Completed Appeal”, “Declaration”, “Decision by an ALJ”, “Docketed”, “Hearing Record”, “Electronic Signature”, “Pleadings”. Provides clarity on key

terms used throughout the Rules of Practice and Procedure for parties navigating the appeals process.

Section 348: To specify that email is now an option for service of process in certain instances. Clarify that days are counted by calendar days. Updates the rule to conform with the new electronic case management system.

Section 350.3: To specify that the California Code of Judicial Ethics to the extent noted in the Administrative Adjudication Code of Ethics, Article 16 (commencing with Government Code section 11475) is applicable to hearing officers / ALJs of the Board. Provides clear judicial ethical standards and guidance on acceptable ALJ behavior to hearing officers/ ALJs, as well as to the regulated community and other stakeholders who come before the Board.

Section 350.4: To specify the conditions and use of an order which provides that when a given circumstance occurs, certain specific results must automatically follow. The “self-executing” order eliminates unnecessary ALJ and support staff steps.

Section 352: To clarify what constitutes an “ex parte communication”, and the actions an ALJ must take, should an ex parte communication take place. Conforms cross-references to other sections of the regulations.

Section 354: To specify that motions for party status must be heard within 30 days. Provides clear guidance to the parties and ALJs on the timing for hearings in these matters.

Section 355: Section 355 is intentionally left blank. The section is replaced with 355.1 through 355.6 for clarity. Service rules are revised to include electronic filing in the following sections.

Section 355.1: To specify that the Board will retain all official address records provided by the parties. The parties are responsible for communicating changes in address as soon as practicable, and for electing whether postal or email is suitable for communication from the Board. Will help ensure efficiency in Board proceedings, by ensuring parties receive timely communications from the Board.

Section 355.2: Defines the methods that the Board may use to serve a document on the parties. Allows parties to elect the preferred method of service for documents served on them by the Board. Specifies when service is complete and what constitutes proof of service. Provides greater clarity in the rule and a new electronic service option that may be of greater convenience to many stakeholders.

Section 355.3: This is a renumbering of the prior rule 355 with the addition of allowance of service via email by stipulation. To define the various methods by which parties may serve other parties. To allow that the parties may mutually agree upon electronic service. Clarifies the rule

to prevent miscommunication or misfiling that may hinder timely filing of an appeal by an appellant.

Section 355.4: To define the means by which a party may file a document with the Board, including mail, personal service or a new electronic filing option. The rule defines those documents that can be filed online. To ensure that all parties receive the documents filed with the Board in every appeal. Specifies when electronically filed documents shall be considered received by the Board.

Section 355.5: To define the requirements for documents filed by parties with the Board electronically. To ensure that documents submitted electronically are able to be received into the Board's electronic case management system.

Section 355.6: To define the requirements for paper documents filed by parties by hand or via mail. To ensure that these paper documents are capable of being entered into the Board's electronic case management system by Board staff via scanning technology.

Section 356: This change ensures cross-references to other Board regulations regarding service are correct, and changes the reference to 355(c) to 355.3. It also recognizes online appeal filing.

Section 356.1 and 356.2: To correct numbering cross-references in the regulation.

Section 359: To specify that the Board will also allow appeals to be filed via an electronic appeal form, in addition to methods enumerated in the current rule. Clarifies how to initiate an appeal of a citation. Creates a new option for filing (electronically) that many appellants may find to be more convenient and efficient. Also, clarifies those circumstances where the Board may find good cause for an appeal filed late, i.e. after the 15 day deadline for an appeal.

Section 359.1: To define the information and documents necessary to constitute a completed appeal without reliance on a specific form. Defines the basic information that is required in order for the Board to understand what is being appealed by the party. Clarifies the steps that must be taken for an appeal to be docketed, and a docket number to be assigned. Ensures that the appellant has information needed to properly initiate an appeal in the appeal timeframe, so that the appellant does not lose his or her right to appeal. Provides 15 days plus 5 days mailing (or, a total of 20 days) for perfecting an appeal. Ensures that appellant has information required to properly defend appeal.

Section 361.3: To define the issues on appeal as those arising out of the facts and allegations set forth in the Division's action and the grounds set forth in the appeal. Also requires the employer to specify the affirmative defenses it is raising. This will ensure all parties are aware of the issues being litigated, creating a more efficient appeal process. Ensures that an appellant does not waive their defenses because of lack of clarity in the Board's regulations regarding the

existence and availability of affirmative defenses. Additionally, the rule clarifies that defenses initially identified in the appeal may be amended pursuant to 371.2 to assure accuracy of pleading at the time of hearing and to assure that unsophisticated participants have the opportunity to be fully heard.

Section 364.2: To specify that the Division may dispose of an appeal by Settlement Order bearing signature of the Division and employer or obligor, at any time after the Board obtains jurisdiction of the Appeal. Allows 30 days for filing of Petition for Reconsideration by affected employees or a party based on certain defined grounds. Provides greater efficiency in Board proceedings by allowing parties to resolve their appeals via agreement. Removes language requiring the parties to submit their settlement to the Board by 10 a.m. the working day preceding the first day of the hearing; removes language that has not been followed in practice at the Board and is impractical, inefficient, and inaccurate.

Section 371: Change to ensure cross-references to other regulations, here to section 355(d) and 355(f), are correct. The reference is changed to 355.3 in both instances.

Section 371.1 and 371.2: Change to conform to an internal regulation cross-reference. The reference to section 355, 355.2, 355.2(c) and 355.2(d)(4) is proposed to be changed to 355.3 and 355.4.

Section 372.6: To clarify the motion to compel discovery procedures as found in Government Code 11507.7, and available to the parties in Board proceedings, and to allow for telephonic discovery dispute resolution proceedings, which more accurately reflects current practice. Assist all parties in following Board discovery procedures.

Section 372.8: To specify the Board's rules of practice and procedure providing for discovery define the sole and exclusive means of discovery in Board proceedings. Parties and ALJs are provided with guidance that no other methods of discovery may be utilized in a Board proceeding, eliminating confusion.

Section 372.9: To specify that after an appeal has been filed, the Division will send the appellant its investigatory file, excluding confidential attorney-client privileged materials, within 30 days. Provides a uniform mechanism for Board discovery to occur.

Section 376: To specify that appeals involving willful, serious, or repeat citations may be scheduled differently than cases that do not contain citations classified as such. Provide parties with guidance that cases involving only general or regulatory citations may be scheduled for hearing in a different way from these cases.

Section 376.1: Changes to conform to internal regulation reference number changes. The references to section 355(c) changed to 355.4 and 355.2 changed to 355.3 and 355.4.

Section 376.4: To specify the release of documents to a party by stipulation or order for the safekeeping of documents that are too big to be scanned, demonstrative evidence, or other evidence, until a final determination is reached. Allows photographs to be substituted in the record in lieu of evidence that cannot be scanned, at the agreement of the parties. To ensure efficient maintenance of evidence at Board proceedings.

Section 376.7: To specify that either a hearing recording or certified court reporter's transcript may be used in Board proceedings as an official record. Where agreed to, a court reporter will be paid for by the parties at their own expense. Greater efficiency in Board proceedings by recognizing transcripts as official records of the proceedings.

Section 376.8: To define the process by which the Board or ALJ is responsible for marking evidence in the record, and certifying that the evidence is recorded. Ensures that evidence is received and recorded in a standardized manner.

Section 378: Change to conform to an internal regulation reference number change. The reference to section 355.2 is no longer valid; the reference is updated to section 355.4 and 355.3.

Section 380: To specify the practices related to brief filing in use at the Board. To specify the standard procedures utilized in Board practices, including the simultaneous filing of briefs and 15 page limits on briefs, unless otherwise ordered by the ALJ.

Section 383: To specify the process an ALJ will engage in before dismissing an appeal for failure to appear. Define the steps a party may take if it wishes to appeal that dismissal. Extend the dismissal procedure to non-appearance at pre-hearing and settlement conferences. Include electronic service procedures so that the parties and Board may more efficiently communicate where electronic service has been selected by a party.

Section 391.1: Change to clarify the filing date of a petition for reconsideration removing the reference to "hand delivery" and the "mailing date".

Section 392: Change to conform to an internal regulation reference number change. The reference to section 355(c) and 355(e) changed to 355.2 and 355.4

Section 392.4: Change to conform to an internal regulation reference number change. The reference to section 355(c) changed to 355.2.

Section 392.5: To specify the current practice of recording hearings on a computerized device rather than a tape, and making that recording available to the parties via e-mail or other means if required. Ensuring that the Board rule reflects current practice and parties can request a hearing recording in an expeditious manner.

NECESSITY:

Section 346: The Section is necessary to inform the regulated community that the OASIS system exists and has been defined and named. Provides a definition to the term that will be used extensively throughout following regulations.

Section 346.1: Scanned documents must have the same force and effect as an original document, once scanned into the OASIS system, in order for the electronic system to function as a replacement to the Board's current paper filing system. In creating this rule, the Board has both looked to other procedural rules of other administrative adjudicatory agencies with online filing and case management capabilities, and has determined the capabilities of the system that it will be implementing in the future. The section is necessary to allow the Board to utilize its OASIS system for document management.

Section 346.2: The Board is responsible for taking evidence and maintaining the record in the appeals of citations issued by the Division of Occupational Safety and Health. Pursuant to its responsibility to maintain the official hearing record, the Board must maintain its official documents. Clarifies what that means when all documents are electronic. This eliminates confusion regarding what constitutes the official record.

Section 347: To define terms previously not used or defined so that the regulated community will understand terms used in OASIS and elsewhere. Necessity of specific definitions: "Administrative Record" needed so that the OASIS case management system will identify information that must be included in the administrative record that is required to be provided to Superior Courts in writ of mandate proceedings. There currently is no rule, and the items are assembled based on historical practice which does not guarantee consistent and complete records are provided to reviewing courts; "Completed Appeal" defines the information required to complete an appeal and dispenses with existing language referring to an appeal form. This allows parties to appeal without requirement of a form and provides the Board with the currently required information needed to process the appeal; Declaration is revised to remove awkward and outdated dual signature format in existing rule, and is consistent with civil practice in executing declarations; "Decision by Administrative Law Judge" is not defined but is referred to in the rules as the "decision" Since both the Board and an individual ALJ may issue "Decisions" the clarification is needed to distinguish between the two types of issuers; "Docketed" is clarified as receiving specific information, and the term is changed throughout the Rules to clarify this event marks the successful submission by an appellant, and the beginning of various specified processes depending on the classification of the appealed citations; "Electronic Signature" is a specific type of interaction with the OASIS system and is needed to allow external users to submit and to allow electronic service of documents by Board staff; "Hearing Record" definition is revised to remove ambiguity in the current role between the hearing record, which includes properly admitted evidence, and the hearing recording, which is just the audio recording; "Pleadings" requires this definition because it is used in describing the electronic case file and the administrative record and includes a variety of initiating and answering documents the parties

must file in order to perfect an appeal. Ensure parties have clear understanding of the terms used throughout the regulations.

Section 348: Directs how the computation of time will be made when service is made by the newly allowed method of e-mail. Because the Board's rules do not currently provide for e-mail service, the parties and the Board require a clear rule on how e-mail service will affect the time parties have to reply or act for filing.

Section 350.3: To adopt the portion of the Code of Judicial Ethics applicable to Administrative Law Judges as applicable to Appeals Board ALJs/hearing officers. The Government Code section 11475.10 requires an agency that wishes for the judicial ethics portion of the Administrative Procedure Act to apply to presiding officers who are not ALJs by civil service classification to enact a rule adopting those provisions of the Government Code.

Section 350.4: To authorize the issuance of Orders that become effective at a time stated as long as no objection to the order which demonstrates good cause is filed within a stated period of time. This reduces the number of documents staff must issue an order, as the Order executes upon the stated date. The rule is modeled after a similar rule at the Workers' Compensation Appeals Board and is necessary to eliminate redundant procedural steps and delay in processing orders for the parties.

Section 352: Clarifies the rules regarding an "ex parte communication", and the actions an ALJ and the Appeals Board must take, should an ex parte communication be received. Change is necessary so that Board ALJs and parties do not unwittingly make ex parte communications, and if those communications are made, to inform those making such communications that the ALJ or Board is required to rectify the communication through an appropriate action as defined in the rule. Section is necessary to eliminate disparate treatment of ex parte communications by different hearing officers / ALJs or the Board.

Section 354: To direct the ALJ to hear motions for party status within 30 days to ensure timely decisions related to party status. Also is making internal cross-reference changes to other regulations.

Section 355: This rule is being repealed. Necessary as the service rules need to encompass filing intent to appeal, serving the Board with necessary documents and information electronically through OASIS, e-mail, and elimination of fax service. Amendment of the rule resulted in a large and complex rule. For clarity, the Board proposes replacement of the rule with six new rules.

Section 355.1: Necessary to ensure efficiency in Board proceedings, and to ensure all parties receive timely communications from the Board. Deadlines attach to many Board documents and affected persons need assurance that communications are received timely. In Board proceedings,

representatives are not always attorneys. Approximately 35% of Board appellants are represented by an attorney or non-attorney representative. Occasionally, representatives become non-responsive, putting the appellants' appeal in jeopardy of dismissal due to the lack of response. The rule is necessary to ensure that all parties, including the employer at all times, have the appropriate documents to pursue their appeals in a timely fashion, even in those instances where a designated representative may change or become non-responsive.

Section 355.2: Explains the methods of service a party may elect from the Board, and includes a new email service option from the Board to the parties. The rule is necessary to ensure the parties are aware of and may utilize the new electronic service option available with the Board's electronic case management system

Section 355.3: Explains the methods by which parties may serve other parties. This rule is necessary to ensure parties are able to timely file appeals and serve other documents on the parties in a Board action.

Section 355.4: This rule is necessary to ensure efficiency in Board proceedings, and to ensure all parties receive timely communications from the Board. To assure paper and electronic filing are equivalent and for electronic filing to assure integrity of contents of the Board's electronic file documents. The rejection of non-conforming electronic filings is required to ensure the accuracy of the electronic file the Board is responsible for maintaining through the appeal process.

Section 355.5: This section explains the requirements for documents filed by parties with the Board electronically. The Board explored regulations at other agencies which use electronic case management systems, such as the Workers Compensation Appeals Board, as well as the various options for scanning technologies, to determine the best practices that would be encapsulated in this regulation. It is necessary to ensure that documents submitted electronically are properly entered into the Board's electronic case management system.

355.6: Explains the requirements for documents filed by parties with the Board by hand or via regular mail (express or US mail). The Board explored regulations at other agencies which use electronic case management systems, as well as the various options for scanning technologies, to determine the best practices that would be encapsulated in this regulation. This section is necessary to ensure that documents submitted electronically are able to be received into the Board's electronic case management system by scanning performed by Board staff after receipt of the paper document through the mail, by hand delivery, or other acceptable method of paper service.

Section 356: Corrects cross-references to other regulations. It also recognizes online appeal filing.

Section 359: Since the OASIS system will accept electronic filing, rules defining its use are created to encourage its use. The OASIS system is being adopted in order to reduce or eliminate many cumbersome aspects of the current ORACLE database and manual file systems. Data entry errors are particularly wasteful of resources, delay collection of concluded cases, and delay suspension of collection upon timely filing of an appeal. The electronic filing will significantly increase case processing efficiency by automating this manual process. Users will have real-time information about additional information needed to accept the appeal and move it to the adjudication phase. Since the Board has the authority to allow late appeals on a showing of good cause, defining the two circumstances where good cause will be found adds consistency to Board discretionary actions, and is a useful way to collect relevant information via the OASIS system when appeal filings appear to be beyond the statutory 15 working-day time limit.

Section 359.1: Removes the requirement to use the Appeal Form as that Form has not gone through the rulemaking process, and it is not necessary to the operation to require a specific form. Instead, this rule specifies the information which is required in order for the Board to effectively suspend the collection of the issued citation during the appeal process and to process the appeal itself. An appealing employer must submit the written citations, along with minimal required contact information and its legal name and address to the Board in order to notify the collection unit of OSHA that an appeal has been filed. A form is not necessary because the OASIS system may collect the basic information recited in the regulation, or a letter may be mailed from the employer containing all the required information, along with copies of appealed citations, and this contains adequate information to the Board to open an appeal. Provides 15 days plus 5 days mailing (or, a total of 20 days) for perfecting an appeal.

Section 361.3: Defines the issues on appeal as those arising out of the facts and allegations set forth in the Division's action and the grounds set forth in the appeal. The employer is asked to list the affirmative defenses it is raising. Necessary to ensure all parties are aware of the issues being litigated, thereby creating a more efficient appeal process. This section ensures that the appellant does not waive defenses from lack of clarity in the Board's regulation.

Section 364.2: Allows the Division to dispose of an appeal by Settlement Order bearing signature of the Division and employer or obligor, at any time after the Board obtains jurisdiction of the Appeal. Allows 30 days for filing of Petition for Reconsideration by affected employees based on certain defined grounds. Creates greater efficiency in Board proceedings, by eliminating unnecessary steps in procedure that currently require time and paperwork processing by Board staff and ALJs. This is necessary to allow employers to withdraw their appeals with minimal delays and procedural burdens, and for increased Board efficiency.

Section 371: Change to conform to an internal regulation cross-reference number change. The references to sections 355.2, 355(d) and 355.2(c) and 355(f) are changed to sections 355.3 and 355.4.

Section 371.1: Change to conform to an internal regulation cross-reference number change. The references to sections 355.2, 355(d) and 355.2(c) and 355(f) are changed to sections 355.3 and 355.4.

371.2: Change to conform to an internal regulation cross-reference number change. The references to sections 355.2, 355(d) and 355.2(c) and 355(f) are changed to sections 355.3 and 355.4.

Section 372.6: This rule specifies the procedures for compelling discovery in Board proceedings. Simplifies and removes unnecessary and unclear language from the regulation. Creates a rule that is more consistent with the procedures found in the Administrative Procedure Act, and less complex for the parties to follow.

Section 372.8: Specifies that the listed provisions are the only discovery procedures available at Board hearings. This change is necessary to clarify to the parties, and Board ALJs, that other discovery procedures, which they may be familiar with from civil court proceedings or other administrative proceedings, are not authorized in Board proceedings.

Section 372.9: Specifies that the Division will provide its investigatory file, excluding certain privileged material, to the appellant, within the defined timeframe, after an appeal has been filed. Ensures that unrepresented appellants are able to access the investigatory file in a timely fashion and provides parties with the information required to conduct settlement discussions and to litigate their claims.

Section 376: Specifies that appeals not involving willful, serious, or repeat citations may be scheduled differently from others. For efficiency and the conservation of Board resources, it is necessary and efficient to place on a separate track those cases involving only regulatory or general citations. The current regulation states the classification may be considered when calendaring, but this proposed change informs the regulated community that a different scheduling process can be used for cases with differing classification.

Section 376.1: Change to ensure cross-referenced regulation is correctly cited. The reference to sections 355.2(e) and 355.2 is changed to section 355.3 and 355.4.

Section 376.4: Documents may be released to a party by stipulation or order of the ALJ for safekeeping during the pendency of the appeal and decision process if they are too big or otherwise inappropriate to be scanned, demonstrative evidence, or other evidence, until a final determination is reached. Allows photographs to be substituted in the record for evidence that cannot be scanned, at the agreement of the parties. Necessary to ensure efficient maintenance of evidence in Board proceedings as the Board has limited space and resources for storage of large evidence.

Section 376.7: Adds the option that either a hearing recording or court reporter transcript may be used at Board hearings as the official record. Where agreed to, a court reporter will be paid for by the parties at their own expense. The necessity of the regulation is that in its current form, only the Board's audio hearing record may be recognized as the official record. Allowing the parties and the ALJ to adopt a court reporter's transcript as the record is necessary for increased efficiency in Board proceedings as these proceedings have become longer and more complex over time.

Section: 376.8: Identifies the process through which the Board or ALJ marks evidence in the record, and certifies that the evidence is recorded. Necessary to ensure a consistent method of receiving evidence in all Board proceedings for the maintenance of consistent administrative records for writ proceedings, as well as for functional and uniform storage and retrieval of case file documents within OASIS.

Section 378: Change to conform to an internal regulation reference number change. The reference to section 355.2 and 355.2(3) is no longer accurate; the reference is updated to sections 355.4 and 355.3.

Section 380: This rule is necessary to make uniform the process of filing post hearing briefs with the judge who heard the appeal. This aspect of board process is governed by the general discretion of ALJs to control the proceedings, and this leads to inconsistent requirements among judges regarding brief length, whether briefs are concurrent or staggered, and the amount of time parties have to complete them. The uniform rule is necessary to prevent some parties from having to respond to exceptionally lengthy briefs. The rule is also consistent with the California Rules of Court Rule 3.1113 subsection (d) governing page length. The new rule will anticipate simultaneous post hearing briefs, unless otherwise ordered by the ALJ. And, it specifically states the judge may request pre-hearing briefs if they would assist the hearing judge in identifying issues. Also provides a specific mechanism for the general requirement in existing rule 376.1(d) to identify issues prior to taking evidence. Rule 376.1(d) states "The taking of evidence in a hearing shall be conducted by the Appeals Board in a manner best suited to ascertain the facts and safeguard the rights of parties. Prior to taking evidence, the Appeals Board shall define the issues and explain the order in which evidence will be received." This proposed change informs the regulated community that briefing by the parties may be required by the ALJ if it would assist the judge in fulfilling this existing duty to identify issues. Last, subsection (c) proposed for amendment herein describes the required content of a brief as containing reference to authorities that support the parties contentions made during the hearing. Many participants in board hearings are non-lawyers, and no current rule describes the contents of a brief. This clarification is broad enough to allow for all viable arguments, and describes for all participants that legal authority is needed to support positions taken in the course of the hearing.

Section 383: The rule is necessary so that the rules reflect current practice and to provide parties, and ALJs, clear guidance on the dismissal procedures for failure to appear and the steps for appealing such a dismissal. Current Board processes include the issuance of an Order to Show Cause why an appeal should not be dismissed for failure to attend a telephonic prehearing conference, and a small but consistent number of cases are dismissed using this discretionary process of a judge. The proposed regulation describes the process an ALJ engages in before dismissing an appeal for failure to appear, including the steps a party may take if it wishes to appeal that dismissal, and also extends the dismissal procedure to non-appearance at prehearing and settlement conferences. By including dismissal as a potential consequence for failing to attend a telephonic prehearing conference, the rule better informs the regulated community of existing specific Board processes. The regulation also includes electronic service procedures so that the parties and Board may more efficiently communicate where electronic service has been selected by a party.

Section 391.1: Change to clarify the filing date of a petition for reconsideration removing the reference to “hand delivery” and the “mailing date”. The change simplifies the calculation of the filing date by removing extra procedural calculations.

Section 392: Change to conform to an internal regulation cross-reference. The references to section 355.2 and 355.2(c) are changed to 355.3 and 355.4.

Section 392.4: Change to conform to an internal regulation cross-reference. The reference to section 355.2 is changed to 355.3, 355.3 subdivision (e) and 355.4.

Section 392.5: Conforms with current practice of recording hearings on a computerized recording, and making that recording available to the parties via e-mail. Necessary to ensure that the Board rule reflects current practice and parties can request a hearing recording in an expeditious manner.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS:

The Board has made site visits to review the computerized case management systems at the Orange County Superior Court, the California State Personnel Board, and Office of Administrative Hearings. It has reviewed the regulations governing the electronic case management programs of these systems as well as the California Workers Compensation Appeals Board, California Unemployment Insurance Appeals Board and reviewed the California and Arizona Rules of Court. It has also reviewed the Federal OSHA procedural rules and a study on Federal OSHA adjudication entitled: *Dispute Resolution in the Administrative Process: Evaluation of the Occupational Safety and Health Review Commission Settlement Part Program*, Bingham, Malatesta, Foxworthy, and Reuter.

ECONOMIC IMPACT ASSESSMENT:

Economic Impact Assessment per Government Code section 11346.3, subdivision (b):

For amendments to Cal/OSHA Appeals Board Rules of Practice and Procedure

Economic Impact Assessment

The Appeals Board has determined that the proposed regulatory action related to its electronic filing and case management system will not have a significant or discernible adverse impact on small or large businesses.

Specifically, the proposed rule changes will allow for electronic submission of documents in addition to the Board's current paper submission procedures, eliminate facsimile submission, and allow for e-mail communications in certain instances. These regulations do *not* require any individual or business to adopt electronic filing, but simply add electronic filing as an option to the Board's current paper filing procedures. This serves to provide stakeholders with an additional means of accessing the services of the Board that they may utilize at their option, but are *not* mandated to use.

The proposed rules allow for the Board to store documents electronically, and to recognize scanned electronic documents as evidence in Board proceedings. These changes are necessary to conform the Board's rules to the new technology that the Board will be implementing in its case management process. The proposed rules do not require electronic filing, but add electronic filing to paper filing as an option for business, eliminating the costs of postage and additional printing and copying for those businesses that chose to take advantage of the option. No individual or business is required to purchase or use new technologies as a result of these rulemaking changes.

The proposed rules conform the Board's Rules of Practice and Procedure to its current procedures. Proposed rules clarify the procedures related to practices at hearing involving filing of an appeal, issues on appeal, time and place of hearing, briefs, hearing recording, requests for the hearing record, and Employer posting of documents. The clarification of these procedures does not adversely affect small or large businesses. It simply clarifies the appeal process, so that parties are adequately notified of the procedures that govern appeal proceedings, and are able to properly file an appeal and represent themselves at an appeal hearing. The Board also proposes amendments to its procedural rules that specify that ALJs / hearing officers are subject to the California Code of Judicial Ethics, request that the parties provide the issues that are on appeal in a hearing, and allow the Division to dispose of an appeal through a Settlement Order, with the signature of all parties. The rules also specify that a court reporter's transcript may be used as the official record of a Board proceeding. Clarity of rules and increased efficiency and transparency in the Board's regulations will lead to a lesser burden on stakeholders to appear

before the Board, which is beneficial for all businesses. Because these rules are merely procedural in nature, they do not have any significant adverse economic impact on businesses.

Finally, changes to rules 371, 371.2, 376.1, 378, 392 and 392.4 constitute changes only to cross-references of regulations, and have no financial impact on any party.

(1) CREATION/ELIMINATION OF JOBS WITHIN THE STATE OF CALIFORNIA

The amendments proposed to the Board's rules of practice and procedure are not expected to have any direct impact on the creation or elimination of jobs within the State of California, because the amendments affect only procedural aspects of administrative proceedings regarding Occupational Safety and Health citations. And much of these processes and procedures are currently in existence, and these changes only seek to clarify or make changes to those rules of practice and procedure that will increase efficiencies and benefit parties that come before the Board.

(2) CREATION OF NEW OR ELIMINATION OF EXISTING BUSINESSES WITHIN THE STATE OF CALIFORNIA

It is estimated that no businesses within the State of California will be created or eliminated by these proposed regulations which serve only to clarify Board rules of practice and procedure for appealing a citation.

(3) EXPANSION OF BUSINESSES WITHIN THE STATE OF CALIFORNIA

It is not expected that any business will find reason to expand its business based on these regulations, which serve to clarify the Rules of Practice and Procedure for appealing a citation at the Appeals Board.

(4) BENEFITS OF THE REGULATION TO THE HEALTH AND WELFARE OF CALIFORNIA RESIDENTS, WORKER SAFETY, AND THE STATE'S ENVIRONMENT

The amendments directly benefit the health and welfare of California workers by adding an additional, completely optional, means (electronic filing) by which parties may file and pursue a citation at the Appeals Board. By providing another way for the parties to access the appeals process, and by clarifying and increasing efficiency in the administrative process generally, worker safety and health will benefit.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES:

With the exception to the rules discussed below, no reasonable alternatives have been identified by the Board or have otherwise been identified and brought to its attention that would be more effective in carrying out the purpose for which the action is proposed, would be as effective and

less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Electronic Filing Receipt Alternative 1 for section 355.4

Several parties expressed interest in being able to file documents online with the Appeals Board in the evening, up to midnight, and noted this alternative as one of the benefits of moving to an electronic case management system. This alternative was suggested in Section 355.4(d), which requires electronically filed documents to be in transmission by 5:00 pm Pacific time. The Board is amenable to this suggestion and initially began an amendment of the rule. However, as the Board researched the issue, it became apparent that more information would be needed before such a rule could be adopted. The Board is currently exploring several options for its computer system, and does not have certainty on the amount and length of downtime the system will need for batching and other system maintenance during hours when the Appeals Board is closed. Without that information, the Appeals Board cannot ensure that it will have the functionality necessary to properly process online 24 hours a day, 7 days a week. The Board will continue to explore options to expand online appeal filing and will work with stakeholders to expand these options as the OASIS system is rolled out.