

FINAL STATEMENT OF REASONS
for
PROPOSED AMENDMENTS TO REGULATIONS GOVERNING
LABOR COMPLIANCE PROGRAMS; COMPLIANCE MONITOR-
ING AND ENFORCEMENT BY DEPARTMENT OF INDUSTRIAL
RELATIONS and RELATED REVISIONS

CALIFORNIA CODE OF REGULATIONS
TITLE 8, CHAPTER 8, SUBCHAPTERS 4 THROUGH 4.8

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code Section 11346.9(d), the Director of the Department of Industrial Relations (“Director”) incorporates the Initial Statement of Reasons prepared in this rulemaking.

Revisions Following Initial Public Comment Period

The following sections were revised following the initial public comment period and circulated for further public comment: 16423, 16430, title of Subchapter 4.5, 16450 [non-substantive only], 16451, 16452, 16453, 16454 [title only], 16455, 16460, 16461, 16462, 16463, and 16464 [non-substantive only].

Section 16423. Approved Labor Compliance Programs Required by Statute.

At the end of subsection (b), the following sentence was added: “Notices provided pursuant to this subpart may be posted on the Department of Industrial Relations’ website.” This was added in response to a public comment that the Department should make maximum use of its website to post findings and notices from awarding agencies. It was also added (1) for the purpose of confirming that notices provided pursuant to this subsection are public information and (2) with the intent of making it easier for other agencies and the public to determine if an awarding agency has adopted its own labor compliance program or has entered into a contract with either an approved third party labor compliance program or the Department of Industrial Relations for labor compliance enforcement.

Section 16430. Annual Report.

At the end of subsection (a), a sentence was added to specify that the Director of the Department of Industrial Relations may provide for the filing of an interim or supplemental report to cover the gap between a labor compliance program’s current reporting period under the current regulation and the uniform July 1 to June 30 fiscal year reporting period that will apply to all programs under other amendments to this section. This was added in direct response to a public comment requesting clarification of what kind of report would be required for the gap created for some programs by the change in reporting periods.

In proposed subsection (e), the word “voluntarily” was changed to “voluntary.” This was a

typographical change only.

A new subsection (f) was added which states: “Annual reports are public records and may be posted on the Department of Industrial Relations’ website.” This was added in response to a related comment requesting that the Department make greater use of its website to post notices. It was also added for the purpose of clarifying that these reports are public information and available for public review.

Title of Subchapter 4.5 Compliance Monitoring and Enforcement by the Department of Industrial Relations

The words “and Enforcement” were added to this title in response to public comments seeking confirmation that enforcement is recognized as part of the Department’s statutory duty. The same revision was made in the titles and text of subsequent regulations except where the specific intent is to refer to the monitoring function only.

Section 16450. Applicability.

In subsection (d), the first letters in “Awarding Body” were capitalized to maintain consistency with how this term is shown elsewhere in the same section and in other public works regulations in Subchapters 3 and 4. This is a typographical change only that was also made in several places in section 16451.

Section 16451. Notice of Projects Subject to Fees.

In the introductory sentence of subsection (a), the word “chapter” was corrected to read “subchapter,” which is the intended scope of this regulation.

In subsection (a)(3)(F), the words “any state-issued public works bond” were inserted before the word “funding,” and the words “of that funding” were added after the word “source” at the end of the subsection. These revisions were made in response to public comments contending that the original language was overbroad and required extra information about funds and funding sources that might be difficult to compile and would not be needed by the Department to calculate the required monitoring fee.

The language of subsection (a)(3)(G) was restated to read as follows: “The estimated total project costs, exclusive of amounts paid for land acquisition.” This revision was made in response to public comments requesting a specific clarification of the prior language and for the purpose of making the language consistent with the underlying statutory terminology. A related expanded definition of “total project costs” was added to section 16452 (*see below*).

At the end of subsection (b), the following language was added: “Notices provided pursuant to this subpart or subpart (a) above may be posted on the Department of Industrial Relations’ website.” This was added in response to related comments requesting that the Department make greater use of its website to post notices. It was also added (1) for the purpose of confirming that notices provided pursuant to this section are public information, and (2) with the intent of making it easier for other agencies and the public to determine

which public works projects are subject to monitoring and enforcement by the Department under this subchapter.

In subsection (c), a statutory citation to the Labor Code was revised to make the citation consistent with the format of similar citations in subchapters 3 and 4. This is a non-substantial revision.

In the introductory sentence of subsection (d), the words “and enforcement” were added after the word “monitoring” in response to public comments seeking confirmation that enforcement is recognized as part of the Department’s statutory duty. In the first sentence of the Notice language, the word “and” was deleted from the name “Compliance Monitoring Unit” in order to make the name consistent throughout the regulations. In the first sentence of the second paragraph of the Notice language, the words “at least” were added before “the minimum hourly wage” in order to make the language more accurate from a legal standpoint and avoid having the language misinterpreted as prohibiting higher wage rates.

Section 16452. Fees for Compliance Monitoring and Enforcement by Department of Industrial Relations.

The words “and Enforcement” were added to the title in response to public comments seeking confirmation that enforcement is recognized as part of the Department’s statutory duty.

In subsection (a)(3), the word “section” was changed to “subchapter” in connection with a related revision to section 16451(a)(3)(G), in order to make the regulatory definition in this subsection applicable wherever the term “total project costs” is used in these regulations. After the word “shall,” the words “include all costs that are incident to the construction of a public works project, including but not limited to financing, engineering, architecture, surveying, testing, legal, and construction management expenses, but shall not” were added in response to public comments seeking clarifications of items included or excluded from “total project costs” for purposes of calculating fees due under the statute and these regulations. The additional language was drawn from the definition of “cost of a public building” in Government Code Section 15802(e) and makes explicit that the statutory term “total project costs” includes what are sometimes referred to as “soft costs.”

At the end of subsection (b), language was added to specify that where the fee is based on the receipt of state-issued bonds, an additional fee will be due for each successive release of such funding. This language was added to ensure that the entire fee due for bond-funded projects will be paid and to clarify that there may be multiple fee payments for these projects, in contrast to the other circumstance in which fees based on “total project costs” will be calculated and paid only once at the start of the project.

A new subsection (c) was added to set forth the standards for calculation and payment of fees based on “total project costs.” The introductory language specifies that the fee will be calculated based on total estimated costs at the time the awarding agency awards the public works contract that triggers the fee requirement, and that this will constitute the entire fee due for the project unless specified exceptions apply. Subsection (c)(1) specifies that the

Department may require verification of items used to calculate the estimate and may require the fee to be recalculated if not based on the regulatory definition of “total project costs” in subsection (a)(3). Subsection (c)(2) specifies that if bond-funding is obtained for a project which results in a higher fee under the bond proceeds formula (subsection (a)(2)(A)) than under the total project costs formula (subsection (a)(2)(B)), then an additional payment shall be made to reach the maximum fee required under the subsection (a)(2). Subsection (c)(3) specifies that if the Department receives payments in excess of the maximum allowable fee, it shall refund the excess. This entire subsection was drafted in response to public comments requesting clarification of how fee payments would be adjusted based on changes in project costs, including whether there would be additional charges or refunds. The Director decided to clarify that there would be a single fee that would be subject to modification only if miscalculated in the first place, if the subsequent receipt of bond funds changes the applicable fee formula (though it seems very unlikely this condition will ever occur), or if the Department receives duplicate payments. The Director also considered adopting a provision that would provide for later recalculation of fees and supplemental payments or refunds at the conclusion of the project. However, the Director decided against this option on the grounds that it likely would not generate sufficient additional fees or refunds (with project cost overruns likely to be far more typical than overestimates) to warrant the associated administrative and enforcement costs for awarding agencies and the Department.¹

The subsections originally designated as (c) and (d) have been redesignated as (d) and (e) respectively without any changes to the text.

Section 16453. Voluntary Payment of Fees for Compliance Monitoring and Enforcement by Department of Industrial Relations in Lieu of Enforcing Labor Compliance Program.

The words “and Enforcement” were added to the title in response to public comments seeking confirmation that enforcement is recognized as part of the Department’s statutory duty.

A new subsection (d) was added to specify that the Labor Commissioner shall, upon request, enter into an agreement to provide labor compliance program services with any awarding agency that is required to have a labor compliance program under Public Resources Code Section 75050 by reason of its receipt of Proposition 84 funds, and also is obligated to pay a fee to the Department for compliance monitoring and enforcement under any other statute. The awarding agency would have to agree to pay a fee of no less than one-quarter of one percent of the Proposition 84 funds (the same as under the bond proceeds fee formula in section 16452(a)(1)), in addition to whatever fee is required under

¹ An overrun of \$100,000, for example, would generate an additional fee of only \$250. In order to comply with such a provision, awarding agencies would be required at their own expense to track costs and then send an additional notice and check, or in some cases a refund request, with supporting documentation at the conclusion of the project. This Department would also need to devote administrative staff and expense to evaluating these submissions, processing the additional fees or refunds, and following up with awarding agencies that fail to submit any information at the conclusion of a project.

the other statute. This provision was added in response to information indicating that water projects may be funded with a mixture of Proposition 84 funds, which will continue to require the use of an approved labor compliance program after these regulations become effective, and other state issued bonds such as Proposition 50, which will become subject to fee-based monitoring and enforcement by the Department. The Labor Commissioner is willing to accept responsibility as the labor compliance program under these circumstances in order to avoid unnecessary duplication of costs and efforts for awarding agencies that become subject to both requirements due to receipt of mixed funding. Awarding agencies would still have the option of not requesting such an agreement and instead using an approved labor compliance program to meet the Proposition 84 requirement while also paying a fee to the Department for compliance monitoring and enforcement under the other statute.

Section 16454. Payment of Fees for Compliance Monitoring and Enforcement by Department of Industrial Relations by an Awarding Body that Elects to Comply with the Requirements of Labor Code Section 1771.55(a).

The words “and Enforcement” were added to the title in response to public comments seeking confirmation that enforcement is recognized as part of the Department’s statutory duty. Another typographical change was made in the title by inserting the word “an” before the words “Awarding Body”.

Section 16455. Fee Waivers; Exemption from Requirements of this Subchapter.

The language of subsection (c) was redrafted to more closely conform to the language of Labor Code Section 1771.55(c) on which it is based. An additional sentence and four subsections were added to specify circumstances under which an awarding agency with an approved labor compliance program can use consultants for labor compliance services without losing its exemption from fees (*i.e.* its fee waiver) under the statute and this regulation: (1) for legal representation or other licensed professional services (referring to the type of services rather than simply the person providing the services); (2) for augmentation of staff performing required tasks (including site visits) so long as the consultants are not delegated discretionary authority and are under direct day-to-day control and supervision of awarding body labor compliance program staff; (3) as outside auditors or advisors without any authority to take or compel actual enforcement activities, or the withholding of same, by the awarding agency; or (4) for any other purpose that would not require payment of a fee under this subchapter or use of an approved labor compliance program under section 16423 of the labor compliance program regulations. This language was added in response to numerous public comments regarding the use of outside monitoring services for labor compliance work or to augment an awarding agency’s approved labor compliance program. While many of the comments were directed at the statute’s prohibition against granting fee waivers to programs that contract out labor compliance responsibilities to third party programs, the Director sought to clarify that certain existing practices of awarding body labor compliance programs, including use of outside legal counsel and of volunteers to assist with site monitoring, may continue without jeopardizing fee waivers.

In subsection (d), commas were inserted before and after the phrase “as specified in this section”, and the words “monitoring and” were inserted between “compliance” and “enforcement”. The wording was modified to clarify that fees retained by awarding agencies may be used for monitoring and enforcement and are not restricted to the latter.

A new subsection (e) was added to specify that fee waivers will be automatic for qualifying awarding body labor compliance programs, and that the Director will maintain a list of qualified programs, which may be posted on the Department’s website. This language was added in response to public comments concerning how fee waivers would be administered. The maintenance of a list of qualified programs is similar to the Director’s current responsibility to maintain lists of approved labor compliance programs under sections 16425(d) and 16426(d) of the labor compliance program regulations.

Section 16460. Establishment of Compliance Monitoring Unit.

In the title of this section, the word “and” was deleted from between the words “Compliance” and “Monitoring” in order to make the title of the Unit consistent with how it is designated in the text of this section. The word “and” was also removed from the name of the Unit in numerous locations in the text of sections 16461, 16462, and 16464.

In subsection (a), the word “specific” was added before the words “labor compliance monitoring . . .” in the first line, and the word “subpart,” which is the formal term used to identify a subsection in these regulations, was changed to “Article,” which is the intended scope of this regulation. A second sentence was added to specify that the Compliance Monitoring Unit’s functions are in addition to and do not limit or supplant the Labor Commissioner’s other traditional authorities and responsibilities in public works enforcement. The word change in the existing language was to correct a typographical error that had substantive consequences. The other language was added in response to public comments expressing concern that these regulations were redefining the entire scope of public works enforcement by the Labor Commissioner rather than just setting forth the additional fee-based monitoring and enforcement activities that will be undertaken pursuant to the legislative mandate of SBX2-9.

A new subsection (c) was added to specify that the failure of the Compliance Monitoring Unit, the Division of Labor Standards Enforcement, or the Department to meet specified obligations in this subchapter does not constitute a defense to any contractor violation of public works requirements in the Labor Code. This subsection corresponds to a similar provision found in section 16421(f) of the labor compliance program regulations.

§16461. Review of Payroll Records and other Monitoring and Investigative Activities of Compliance Monitoring Unit.

The word “and” was deleted from between the words “Compliance” and “Monitoring” in the title and in several places in the text of this section in order to refer to the new unit consistently as the “Compliance Monitoring Unit.”

A new subsection (g) was added to authorize the Labor Commissioner to develop and

make available a model prejob conference covering the topics listed in Appendix A following section 16421 of the labor compliance program regulations. This was added in response to several comments requesting the Department's involvement in prejob conferences. It is similar to a directive to develop training for labor compliance programs that is found in section 16434(e) of the labor compliance program regulations.

Section 16462. Complaints.

The word “and” was deleted from the name of the “Compliance Monitoring Unit” in the first lines of subsections (a) and (b). In response to public comments, language was added to subsection (a) to state that the Division of Labor Standards Enforcement may provide for electronic filing of complaints and to state that complaints need not conform to technical requirements as long as they provide specified information that is minimally necessary to enable the Division to commence an investigation into whether a violation occurred. Also in response to public comments, the sentence which specified that the Division has discretion not to investigate claims filed more than 90 days after completion of a project was deleted as unnecessary and inappropriate due to widespread misunderstanding of its intended scope and effect.

Section 16463. Withholding of Contract Payments When Payroll Records are Delinquent or Inadequate.

In subsection (d)(3), “Labor Compliance Program” was changed to “Labor Commissioner” to correct an unintended and obvious error in terminology.

A new subsection (i) was added to clarify that this section does not apply to withholdings based on issuance of a civil wage and penalty assessment for unpaid wages and penalties under Labor Code Sections 1775, 1776(g), and 1813. This subsection was added in response to public comments which perceived this regulation as curtailing existing enforcement authority rather than providing the Labor Commissioner with additional authority (corresponding with the authority provided to labor compliance programs under section 16435 of the labor compliance program regulations) to have contract payments withheld when and for so long as contractors do not submit required certified payroll records.

Section 16464. Issuance of Civil Wage and Penalty Assessment upon Determination that Contractor or Subcontractor has Violated Prevailing Wage Requirements.

The word “and” was deleted from the name of the “Compliance Monitoring Unit” in the first line.

Further Revisions After 15-day Public Comment Period

In **section 16421**, the deleted text of subsection (c) has been replaced by “[reserved]” to clarify that this subsection has no text and to avoid potential confusion that might arise out of redesignating the later subsections in this section.

In **section 16450 [Applicability]**, the following revisions were made.

In the introductory sentence, the words “shall become effective on August 1, 2010,” were inserted to specify the date on which this subchapter will become effective. There is no requirement to include this information in the regulatory text, but the Director has done so in order to clearly demarcate which projects are subject to fee-based monitoring and enforcement by the Department (because awarded after the effective date of the regulations and approval of the fee, as specified in Labor Code section 1771.3(b)), and which may remain subject to preexisting labor compliance program requirements because contracts were awarded prior to the effective date of these regulations.

In subdivision (a), the words “after the effective date of this subchapter” were inserted in the first line to further clarify which bond-funded projects fall within the requirements of this chapter and avoid having the subsection misconstrued as asserting authority over other projects that was not conferred by the SBX2-9 legislation. This change is considered to be nonsubstantial and without regulatory effect, since it reflects an existing statutory limitation, and therefore not subject to a public comment period per Government Code Section 11346.8(c)(1) and 1 Cal.Code Reg. sections 40 and 100.

In subdivisions (b) and (c), the words “public works” were inserted in the first line between the words “any” and “project” in order to maintain style consistency and not make the subsections susceptible to different interpretations. Also in subsection (c), “Department of Industrial Relations” was changed to “Labor Commissioner” to conform to the terminology in section 16453 to which this subsection refers. These changes are considered nonsubstantial and therefore not subject to a further public comment period per Government Code Section 11346.8(c)(1).

Periods were added at the end of the titles of sections **16450, 16451, 16452, 16453, and 16455** for style consistency.

In the second to last line of **section 16453**, the number of the referenced proposition was corrected to “84.” In the reference notes for sections **16450, 16451, 16452, 16453, and 16455**, references to Public Contracts Code Section 20209.24 were deleted due to the repeal of that section as of January 1, 2010. These are not regulatory changes.

LOCAL MANDATES DETERMINATION

The Director adopts his initial determination that these regulations do not impose mandates on local agencies or school districts, as set forth in the Notice of Proposed Rulemaking published on November 20, 2009.

SUMMARY AND RESPONSE TO COMMENTS

In accordance with Government Code Section 11346.45, a set of draft regulations was circulated and public discussions were held with persons who would be subject to or directly interested in the subject matter of the proposals, including representatives of labor compliance programs, labor-management monitoring groups, unions, contractors, and local agencies. Comments received in response to the initial set of draft regulations were considered in drafting the proposals

that were published with the Notice of Proposed Rulemaking, and the written comments are included in the rulemaking record. However, they are not the subject of further summary or response here since they predated the formal rulemaking.

During the initial public comment period, the Director received comments in response to the proposals either in writing, orally at the public hearing, or both, from the following individuals and entities: County of El Dorado Department of Transportation; California's Coalition for Adequate School Housing [C.A.S.H.]; Small School Districts Association [SSDA];² Association of California Construction Managers; Public Agency Law Group; Donald Carroll on behalf of Southern California Labor Management Operating Engineers Contract Compliance Committee [SCLMOECCC]; South Orange County Community College District; CS & Associates and The Solis Group [joint submission]; Terry Zinger on behalf of Golden State Labor Compliance and the Association of Labor Compliance Professionals; Moreno Valley Unified School District; Desert Sands Unified School District; Temple City Unified School District; Palo Verde College; Glendale Unified School District; Bonita Unified School District; Ventura Community College District; Scott A. Kronland on behalf of the State Building and Construction Trades Council; Diversified Business Services; Contractor Compliance & Monitoring, Inc. [CCMI]; Teresa Gonzalez-White; Patricia M. Gates on behalf of the Northern California Carpenters Regional Council [NCCRC]; Dusteen Ferguson of Team Labor Compliance; California Department of Transportation [Caltrans]; Fontana Unified School District; Labor Compliance Specialists, Inc.; Associated General Contractors of California; Miller Brown & Dannis; Los Angeles Unified School District Facilities Services Division [LAUSD]; Jeffrey A. VanderWal on behalf of Associated Builders and Contractors of California Cooperation Committee [ABC-CCC]; Dante John Nomellini, Jr.; Parsons Brinckeroff; Los Angeles Community College District; Roger Miller on behalf of the Operating Engineers Contract Compliance, Southern California; Ollie Bradshaw; Crescencio Garcia; James Reed of the Center for Contract Compliance; Sophia Espinoza of the Center for Contract Compliance; Juan Garza of the Joint Electrical Industry Fund; Doug Nareau; Robert Hansen of the Sheet Metal Workers Local 104; Diane Ravnik of the National Alliance for Fair Contracting; and Jay Hanson on behalf of the State Building and Construction Trades Council. Written comments were also received after the close of the comment period from the Community College Facility Coalition; West Hills Community College; and Mike Rainville of the California Department of Public Health.

During the additional public comment period provided after the issuance of the further revisions, written comments were received from the following individuals and entities: Association of California Construction Managers; Contractor Compliance & Monitoring, Inc. [CCMI]; Golden State Labor Compliance; Carpenters/Contractors Cooperation Committee; Los Angeles Unified School District Facilities Services Division [LAUSD]; Lin Daly Roberts; Patricia M. Gates on behalf of the Northern California Carpenters Regional Council [Carpenters]; and California's Coalition for Adequate School Housing [C.A.S.H].³

² SSSA concurred in the comments of C.A.S.H., which it attached, and did not submit additional comments of its own on the proposals.

³ Although the Notice of Modifications to Text of Proposed Amendments asked that additional comments be "limited to the modifications to the text of the proposed regulations," several of the commenters attached or restated comments that were submitted previously. Only those additional comments that were directed to the modifications are further summarized and responded to here.

The comments and responses are grouped by topic and section as indicated in the page number index below. Within each subject, comments and responses are also divided between the initial proposals and the further revisions. Comments designated as “oral” means that they were provided during the public hearing on January 6, 2010, and are distinct from the written comments that the same individual or entity may have presented. Comments designated as “written and oral” means that the summary incorporates related points raised by a commenter in both written and oral comments. However oral comments that essentially were identical to written comments are not separately noted.⁴

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Comment on Mandates on Local Agencies or School Districts:

Dusteen Ferguson of Team Labor Compliance: Implementation of SBX2-9 will take away option to contract for labor compliance services with the lowest responsible bidder. Under proposed “total project costs” formula, the state’s fee will be substantially higher than what Team Labor Compliance charged for \$17.7 million and \$22 million school projects in Coachella. Current third party administrators use construction costs, rather than total project costs.

⁴ In both written and oral comments, the terms “labor compliance program,” “Department of Industrial Relations,” “Division of Labor Standards Enforcement,” “Compliance Monitoring Unit,” and “certified payroll record [or report]” were often reduced to their acronyms “LCP,” “DIR,” “DLSE,” “CMU,” and “CPR.” If one of these acronyms was used in a comment, it may also appear that way in the comment summary below.

Director's Response: These comments do not affect the local mandates determination, and that determination has not been changed. As the commenter recognizes, the requirement to use this Department for fee-based monitoring and enforcement is imposed by statute and not mandated by these regulations or subject to repeal by regulation. The maximum fee formulas are also set by statute, and are substantially less on a cost per project basis than what the State Allocation Board has provided for labor compliance in connection with awards of school construction bond funding over the past several years.⁵ Moreover, the emphasis on low-bid labor compliance has resulted in a widespread de-emphasis on formal enforcement by programs and districts that did not want to incur the expense of enforcement. This is what created the overall poor performance record, as documented by the Legislative Analyst's Office, that eventually led to the adoption of SBX2-9.

Comments on Costs or Savings to State Agencies and Nondiscretionary Costs or Savings Imposed on Local Agencies:

County of El Dorado Department of Transportation: Our agency currently performs the duties required of an approved Labor Compliance Program (LCP) but would have difficulty meeting the approval requirements necessary for DIR approval. Thus our agency will have to pay the fee while still having responsibility to take cognizance of violations and appropriate follow-up action, while having fewer funds available due to the collection of fees. Coordinating with DIR on noticing of requirements and withholding of contract funds will also increase our staff costs despite reduction in bond funds.

Dusteen Ferguson of Team Labor Compliance: The ebb and flow of construction projects must be considered. The Division of Labor Standards Enforcement will need to hire significant full-time staff with benefits and then will have no fees to cover these costs during lulls in construction.

Director's Response: These comments do not provide a basis for modifying this Costs Impacts determination. The obligation to take cognizance of violations and appropriate follow-up action is a historical and continuing responsibility of all public agencies engaged in public works construction. The obligation to pay a fee to the Department for monitoring and enforcement is a new obligation imposed by the Legislature under SBX2-9, rather than by these proposals. In many instances this new obligation replaces an existing statutory obligation to have a labor compliance program, and in those instances this change will reduce the cost of compliance monitoring and enforcement for affected agencies. The Department is endeavoring to further reduce costs for local agencies by obtaining payments and notices directly from bond-funding agencies, by combining the required project notice under these regulations with the notice that is already required under Labor Code Section 1773.3, and by enabling these notices to be completed and transmitted on-line. With re-

⁵ Using the "total project costs" fee formula, the commenter calculated the Department's fees at \$44,469 for the \$17.7 million project and \$55,908 for the \$22 million project in comparison to its own actual fees of \$40,140 and \$45,900 respectively. However, assuming the most likely scenario of these projects being subject to compliance monitoring solely due to receipt of state bond funds, the Department's fee under Labor Code Section 1771.75(a) would be limited to one-quarter of one percent of the bond proceeds, which typically only fund half of the project; and thus the Department's fees for the two projects would likely be only \$22,125 and \$27,500 respectively.

gard to funding and staff, the Department certainly will need to deal with the ebb and flow of fees based on fluctuations in fee-generating activities and will not be able to depend on general fund support given the serious budget difficulties that face the state. However, the Compliance Monitoring Unit will have the benefit of economies of scale and other tools that state agencies have used historically to handle fluctuating workloads, including shifting assignments or use of intermittent staff.

Comments on Economic Impacts on Business, on Elimination or Expansion of Jobs or Businesses, and on Small Business:

Diversified Business Services: “The passage of SBX2-9 will prohibit Third Party LCP firms from contracting opportunities which will jeopardize our ability to earn income and virtually put us out of business.”

Teresa Gonzalez-White: “This legislation will have huge impact on my small consulting business and all the other businesses that provide this type of service.” Consultants conduct interviews, audit payrolls, and make sure paperwork is in order so the state does not have to; if there are discrepancies that cannot be solved, they are sent to the Department of Labor for further investigation. What kind of manpower will the state have to be conducting all these services?

Dusteen Ferguson of Team Labor Compliance: The determinations that these proposals will not have impacts or affect the creation or elimination of jobs are false because these proposals will place my business out of business and my staff out of work. Public agencies will not have the election of participation that is referred to in the proposals; if they build or modernize a school, they will have to pay a fee.

Director’s Response: *The comments do not provide a basis for changing these impacts determinations. As two commenters recognize, it is the legislation rather than these regulations that requires fee-based monitoring and enforcement by this Department on specified projects and that does not allow fees to be waived for districts that contract out labor compliance to third parties. What the legislation eliminates is a source of funds for third party programs that the Legislature previously had created, largely through the adoption of Labor Code Section 1771.7 in 2002. Under that statute, school districts that wanted to use Proposition 47 or 55 funds were required to adopt and pay for a labor compliance program. However, districts were not mandated to seek that funding and therefore not mandated to adopt labor compliance programs. SBX2-9 converts this system to fee-based monitoring by the state with a substantial reduction in costs (overall) and administrative responsibilities for the districts. The Department will perform the same functions and will have the authority to take direct and appropriate enforcement action, without requiring an investigation or the approval of another agency.*

Comment on Known Cost Impacts on Representative Private Person or Business:

Dusteen Ferguson of Team Labor Compliance: Our experience indicates that the Director’s belief that “most contractors engaged in public works construction use electronic payroll systems” is a false statement. Many contractors are small firms that are new to public

works and prevailing wage requirements and do not utilize electronic systems to provide the paperwork for labor compliance.

Director's Response: This comment does not pertain to the cost impacts of the regulations. Moreover, nothing in this comment is inconsistent with our belief that most contractors use electronic payroll systems, which is not the same as saying that they use these systems to create the certified payroll reports required for prevailing wage compliance. However, we are in the process of implementing an electronic reporting system that contractors will be able to use without cost and that will allow contractors to transfer information from their existing payroll systems rather than having to create or recreate another set of records (paper or electronic) for prevailing wage compliance.

Comment on Item Added to Rulemaking Record with March revisions:

Patricia Gates on behalf of NCCRC: The Department noticed the public of an addition to the rulemaking record of a document entitled “*Labor Compliance Program Workload Estimate prepared for the Department of Industrial Relations by the Department of Finance, Office of State Audits and Evaluations (January 7, 2010).*” To the knowledge of the undersigned, this document has not been made available to the public for review, although comments are due [today].

Director's Response: In the Notice of Revised Modifications, just below the listed item, was a statement indicating that the item added to the rulemaking record was available for review through the close of the comment period during regular business hours, with the hours and location specified. This was pointed out in a reply e-mail, to which a .pdf copy of the document was attached, and which noted that comments could still be submitted for inclusion in the record, though they might not be responded to formally in this Final Statement of Reasons. No additional comments have been received.

Comments on Proposals in General and Uncategorized Comments:

Associated General Contractors of California [AGC]: AGC was actively involved in the development, amendment and passage of SBX2-9. The purpose of SBX2-9 was to bring statewide uniformity to the monitoring and enforcement of prevailing wage requirements of California Law. The proposed regulations are ambiguous in that they appear to deviate from the intent of SBX2-9 by (1) permitting existing labor compliance programs maintained by an awarding body to be operated by third parties under contract on projects other than those obtaining bond funding approval prior to the effective date of the regulations; (2) permitting awarding agencies prospectively to operate a program that is not approved for all agency projects; and (3) permitting agencies that presently do not have a labor compliance program to create and request approval of a program in the future. Clarify the regulations to (1) state definitively that the only labor compliance programs permitted to continue to operate after the bond-required labor compliance program requirements expire are those that were approved for all projects before the effective date of SBX2-9; (2) indicate that awarding agencies are not eligible for waiver of the compliance monitoring unit fee if they contract with a third party to operate or enforce an agency-maintained program; and (3) not permit the establishment of any new labor compliance programs on or after the ef-

fective date of SBX2-9.

Director's response: Although the Associated General Contractors and others involved in the development and passage of SBX2-9 may have intended with its passage to eliminate all but a handful of long-standing labor compliance programs, the legislation cannot be fairly read as accomplishing that result. To begin with, the concept of programs being approved for "all projects" or for only some projects has never been recognized by statute or regulation for any purpose other than the right to higher prevailing wage exemptions, as specified in Labor Code Section 1771.5(a) and carried over into Labor Code Section 1771.55(a); and see also 8 Cal.Code Reg. section 16433. The statutory components of Labor Code Section 1771.5(b) apply to all programs, and the Director evaluates and approves programs using criteria found in 8 Cal.Code Reg. sections 16425 and 16426, without regard to whether they will enforce on all or only some projects.

SBX2-9 contained no language that purports to eliminate any existing programs or preclude the establishment of new ones. Instead it created a disincentive against the use of third party programs by making awarding agencies that contract out enforcement responsibilities ineligible for fee waivers.⁶ Even with this disincentive, which other commenters say will put them out of business, labor compliance programs will still be required under about a dozen statutes for projects awarded prior to the effective date of these regulations, and in the case of Proposition 84-funded water projects, until those funds are exhausted or Public Resources Code Section 75075 is amended or repealed by another voter initiative. Consequently, the Director has continued to approve programs, oversee them, and revoke approvals under the existing regulatory framework.

For these reasons, the Director cannot make the first or third clarification requested in this comment. With regard to awarding agencies that contract out labor compliance responsibilities to third parties being ineligible for fee waivers, that limitation is clearly spelled out and further clarified as to its scope in section 16455 of these regulations.

Jeffrey VanderWal on behalf of ABC-CCC: "The proposed regulations should clarify that entities, like ABC-CCC, that are organized and approved to accept employer contributions pursuant to ... Labor Code section 1773.1(a)(9), are entitled to equal treatment [with entities that accept contributions pursuant to Section 1773.1(a)(7)] under Title 8, Chapters 3 and 4 of the California Code of Regulations."

Director's Response: This suggestion is outside the scope of these proposals. The suggestion is also unclear in that it refers to a statutory section which itemizes categories of employer benefit payments which are included in the calculation of prevailing wage rates, but which says nothing about entities or the rights of entities that receive those types of payments. The joint labor-management committees referred to in subsection (a)(7) of Labor Code Section 1773.1, are not accorded specific rights under this statute but rather under express language found in other statutes such as Labor Code Sections 1771.2 [right to

⁶ The same waiver language is found in the general statute, Section 1771.55(c), as well as in project-specific statutes such as Labor Code Section 1771.75(a), and does expressly limit waivers to awarding bodies that use their program "for every public works project under the authority of the authority" which is the "all projects" language attached to the higher prevailing wage exemptions in Section 1771.5(a) and its successor Section 1771.55(a).

bring action for prevailing wage violations] and 1776(e) [right to obtain partially unretracted certified payroll records]. Thus, legislation would likely be required to extend these rights to other kinds of entities.

County of El Dorado Department of Transportation: 1. Our agency is concerned over whether the Compliance Monitoring Unit can meet its obligations. The proposed regulations include limited site visits and lack of commitment to examine records, which with the question of adequate staffing and furloughs may cause DIR's goal of more effective monitoring and enforcement to be unachievable. DIR will have only a limited view of conditions related to compliance, and should it order an erroneous withholding of contract payments for delinquent or inadequate records, our agency will have to pay interest on the unpaid amounts (based on contractual relationship with contractor). 2. To avoid reduction in funding for specific projects, fees should be charged on a programmatic basis rather than a project basis.

Director's Response: 1. *These regulations represent a balance between what the Department can do to achieve effective monitoring and enforcement in light of its statewide responsibilities and resource limitations. While more site visits and payroll confirmations might improve the effectiveness of the Department's efforts, the Department also has the benefit of its institutional expertise and the Division of Labor Standards Enforcement's singular focus on enforcement to do a better job with fewer resources than local agencies have been able to do historically, with or without labor compliance programs. It is unclear why an erroneous withholding for delinquent payroll reports would subject a local agency to interest charges; however, it should be noted that section 16463(f) provides for immediate notice of the right to an expedited hearing on any such notice to determine whether the reports are in fact missing or incomplete.* 2. *The charging of fees on a project basis is set by statute and not subject to modification by regulation. However, fees under SBX2-9 and these regulations represent a smaller fraction of costs than generally spent for labor compliance programs, and the Department is endeavoring to have these fees paid by bond-funding agencies so that bond fund recipients will not need to worry about calculating and paying a piece of their project funding to this Department.*

Diversified Business Services: Some of the regulations are confusing and undoubtedly harmful to workers and public who rely on ground level enforcement by proactive third party LCPs. Relying on after-the-fact complaints to address underpayments will result in untimely reimbursements or no reimbursements to workers who move and do not have forwarding addresses.

James Reed of Center for Contract Compliance [oral]: "My disappointment primarily is with the Building Trades, who initiated a great process in bringing forth third-party LCPs and [now] have banished them . . . with their legislation. . . . My fear is that compliance overall will suffer from this." The State should hold another meeting to clarify these regulations once they are approved.

Jay Hanson of the State Building Trades [oral]: "Overall, we're very satisfied with the regulations and think they're going in the correct direction. Obviously it is the ability of the division to carry out the regulations as written that is going to determine how success-

ful this is.”

Director’s Response: The first commenter misperceives the nature of the legislation and these regulations, which will create a proactive monitoring system administered the Compliance Monitoring Unit within the Division of Labor Standards Enforcement, rather than relying upon after-the-fact complaints, which is how the Division historically has enforced prevailing wage requirements. The Director agrees with and will endeavor to follow through on the suggestion to hold another meeting to clarify these regulations once adopted. Department representatives have already spoken to several groups about both the regulatory requirements and how the new monitoring and enforcement system will function in practice.

CCMI: These regulations create a double standard for continuing LCPs, in that LCPs are required to do a prejob conference, weekly jobsite visits, and monthly confirmation, but DIR will be under no corresponding mandates. At a minimum, there should be a similar standard of compliance and review requirements for awarding body LCPs, third party LCPs, and DIR’s own staff.

LAUSD: Because exempt awarding body LCPs will be limited to same fee as DIR collects under SBX2-9, the monitoring and enforcement requirements in Subchapter 4 (LCP regulations) should be parallel to the ones created by the proposals. The LCPs that were the target of the 2008 regulatory amendments are being phased out, while additional monitoring and enforcement requirements remain and may act as a deterrent to potential bidders on LCP-enforced projects. LAUSD therefore recommends that the LCP regulations be amended to match the performance requirements of these proposals.

Jeffrey VanderWal on behalf of ABC-CCC: Per the directive in SBX2-9, the regulations should require the Compliance Monitoring Unit to be responsible for enforcement and monitoring on a level comparable to what is currently required of labor compliance programs under 8 Cal.Code Reg. sections 16421 – 16439.

Director’s Response: While the Subchapter 4.5 regulations were drafted in consideration of the labor compliance program regulations in Subchapter 4 and are designed to operate in a similar manner, they do not impose parallel requirements because the Department and labor compliance programs are not equivalent in terms of function or resources. An apparent misconception about awarding body labor compliance programs is that they have always derived their entire funding from the state and thus face the same constraints as the Department in doing more with less under SBX2-9. In fact, the state provided no dedicated funding for labor compliance programs when they were first established under state law through the adoption of Labor Code Section 1771.5 in 1989. Nevertheless, several awarding body programs such as LAUSD, Caltrans, and the City of Los Angeles (which are now referred to as “legacy programs”) sought and obtained approval under that law in order to take advantage of higher exemptions from prevailing wage requirements (under Section 1771.5(a)) and retain their own penalty assessments. These programs were operated and self-funded by those agencies within the broader context of public works contract administration. It was only after the 2002 adoption of Labor Code Sections 1771.7 and 1771.8 (requiring the use of labor compliance programs for certain

bond-funded projects) that awarding agencies started receiving an additional allocation of state bond funds (which the awarding agencies were expected but not always required to match) for their labor compliance programs. The 2002 legislation and dedicated funding were also responsible for the “cottage industry” of third party labor compliance programs that sprung up to help local agencies meet this new obligation, and it was the widespread ensuing performance issues associated with bond-funded labor compliance programs that eventually led to the adoption of SBX2-9.

The impetus for the 2008 amendments to the labor compliance program regulations came in large part from programs and awarding agencies who believed that the preexisting text did not provide adequate direction. The specific performance standards adopted at that time were consistent with what legacy programs like Caltrans were already doing, but problematic for programs that did only partial enforcement and for underbidding third party programs that lacked sufficient staff or were too remotely situated from the projects they were monitoring to provide proper service. Weekly site visits are often mentioned as the most onerous (or alternatively the most important) of these performance standards; yet they should be a non-issue for awarding agencies that customarily have a representative on site daily to oversee a project, while conversely, the inability or unwillingness of other programs to maintain a regular on-site presence tends to make those programs invisible to the contractors and workers with whom they are expected to interact or who may need their assistance. In any event, there has been no evidence supplied to the Department thus far that these performance standards have been too expensive or onerous for the over 100 approved programs that continue in operation at this time, including legacy programs that receive little or no fee support from the state for their labor compliance work.

The Department itself is different in terms of available resources in that the fees generated on SBX2-9 projects will provide the sole funding for compliance monitoring and related enforcement under these regulations, and the Department will have to carry out its responsibilities for hundreds of projects statewide at any given time. The Department will be dependent on notices from awarding agencies and other agencies to ascertain which projects are subject to fee-based monitoring and enforcement, and in many instances projects may be well underway or even nearing completion before they receive the state bond-funding that will trigger the Department’s monitoring and enforcement responsibilities. On the other hand, the Division of Labor Standards Enforcement’s institutional expertise and singular focus on labor standards enforcement enable it to do more with less. In addition, because the Division’s enforcement authority is clearly recognized throughout the state, the Division and its Compliance Monitoring Unit will not need to maintain a regular presence on project sites in order to make contractors and workers aware of that authority. Division representatives will also carry a “bigger stick” when they visit project sites, since they will have the authority to cite employers for any observable violation of state labor standards and not just prevailing wage violations. Consequently the performance standards that will govern the work of the Compliance Monitoring Unit do not need to be the same as the standards that govern labor compliance programs.⁷

⁷ The Legislature recognized these distinctions in Labor Code Section 1771.55(b)(2)’s directive to “give consideration to” the regulatory duties of labor compliance programs when adopting these regulations. If the Legislature had intended for the Department to have the same set of responsibilities as labor compliance programs, it would have said so directly in the legislation.

C.A.S.H.: DIR needs to recognize schools as safe zones, as required by state law, and should amend the proposals to adopt a procedure for notifying a school district prior to conducting an on-site investigation or monitoring activity and requesting a district chaperone for the visit.

Director's Response: The Director appreciates being alerted to this concern and intends to follow all existing requirements governing state investigators visiting school construction sites whenever students may be present. The Compliance Monitoring Unit will adopt protocols to ensure that these requirements are followed. However, it would not be appropriate for the Department to try to revise Education Code or Government Code requirements through its own regulations, nor would it be necessary or prudent to require advance notice or a chaperone for school construction sites in the typical situation where the possibility of interacting with students is precluded by physical barriers or by schedules that require construction work to be performed after hours or between sessions.

Caltrans: 1. Apprenticeship responsibilities were not specifically addressed, but Caltrans assumes that the Compliance Monitoring Unit will refer apprenticeship wage violations to [DAS] for enforcement in the absence of a specific requirement in the regulations as written. 2. Caltrans acts as a funding agency for over 600 local agencies that award federal aid transportation projects, and that are required to enforce Davis-Bacon as well as state prevailing wage requirements. Contractors will still be required to submit certified payroll records to awarding bodies as a condition of their federal funding as well as to the Compliance Monitoring Unit. The Department should work with awarding agencies with federal contracting requirements to avoid a duplication of enforcement efforts.

Director's response: The Department's specific task in adopting these regulations is to set forth the manner in which the Department will ensure compliance with and enforce prevailing wage requirements (Labor Code Section 1771.55(b)(2)). Mindful of the regulatory review standards of "necessity" and "nonduplication" (Government Code Sections 11349 and 11349.1), these regulations focus on the new activities that will be undertaken by the Department and the Division, through the Compliance Monitoring Unit, rather than restating the Division's full range of authorities and procedures with respect to prevailing wage enforcement. As noted in section 16460(a), the Compliance Monitoring Unit is being established as a unit within the Division to accomplish specific monitoring tasks that historically have not been performed by the Division. When the Unit uncovers prevailing wage violations, including apprenticeship wage violations, those violations will be enforced by Division personnel just as violations discovered through the investigation of outside complaints are enforced now. In response to related concerns over whether these regulations signaled an intent to limit the Division's authority and role as an enforcement agency, a sentence was added at the end of subsection 16460(a) stating that the Compliance Monitoring Unit's functions are in addition to and not in the place of the Division's other statutory and regulatory authority.

The Department shares Caltrans' interest in avoiding, insofar as possible, any duplication of reporting responsibilities or enforcement efforts on projects that are subject to multiple enforcement schemes. There are differences in the certified payroll reports prepared for the state and for enforcement of federal Davis-Bacon requirements, based on differences in

state and federal laws. However, the Department is working on designing its electronic payroll reporting system so that the system can accept all the information needed for either type of report, and awarding agencies can retrieve the information required under either format. The Department is also designing the system so that awarding bodies and prime contractors can obtain or have access to these reports at the same time they are transmitted to the Compliance Monitoring Unit. Because the Division does not enforce Davis-Bacon requirements, it will take more study and discussions with affected parties to determine how to best coordinate enforcement efforts, although the Department certainly wishes to avoid spending limited enforcement dollars on duplicative efforts.

Comments on Proposals in General and Uncategorized Comments following March revisions:

CCMI: If DIR is unable due to funding to fully implement the standards it imposes on LCPs, then agency LCPs should only be required to (1) interview employees once per month unless circumstances dictate more frequent interviews; (2) if 50% of all workers on a project have been interviewed, then the LCP can cease additional interviews; and (3) request verification of contractor and subcontractor payments at least once per project but not once per month per contractor. Finally LCPs have responsibilities with respect to apprenticeship requirements that are not spelled out here; the CMU should also monitor those requirements.

Lin Daly Roberts: [The commenter requested confirmation of the accuracy of five interpretive statements concerning the impacts of SBX2-9 and these regulations on third party and awarding body labor compliance programs.]

Director's Response: These comments do not pertain to any of the modified text and therefore do not require further comment. Nevertheless, the Director refers the first commenter to the response above regarding parallel treatment of the Department with labor compliance programs. With regard to the commenter's specific suggestions, the Director also notes as follows. First, while section 16432(d) of the labor compliance program regulations requires weekly site visits when workers are present, there is no express mandate or frequency standard for interviewing workers. Second, the apprenticeship duties set forth in section 16434(c) of the labor compliance program regulations were added to assist programs in distinguishing between prevailing wage issues involving apprentices that they are required to enforce and other issues that must be referred to the Division of Apprenticeship Standards for handling. Division personnel do not need this sort of regulatory guidance, and the fact that it is not spelled out in the regulations does not mean that the Compliance Monitoring Unit will ignore apprenticeship requirements.

The second commenter's submission does not comment on any specific text and in some respects raises issues of statutory interpretation, contractual relationships, and labor compliance program responsibilities that are outside the scope of this proceeding. These questions may be raised with the Department separately but cannot be addressed within the context of this rulemaking.

Comments on section 16421(c):

CS & Associates and The Solis Group: Do not delete this section. Deletion of this subsec-

tion eliminates the difference between third party providers and awarding body LCPs and may be premature in light of other proposed changes that may occur through legislation.

Parsons Brinckerhoff: Remove language “pertaining to the governmental rights and responsibilities of private entities when operating labor compliance programs on behalf of awarding agencies.”

Director’s Response: The suggestion to leave this subsection in the regulation was not accepted. The Director is not aware of any pending legislative proposals that would restore or accord any special status to third party providers. As several other commenters note, SBX2-9 essentially takes away the option of contracting out fee-supported labor compliance responsibilities to a third party. The second commenter appears to be quoting from the Notice of Proposed Rulemaking but apparently supports the revision.

Comments on section 16423(b):

Donald Carroll on behalf of SCLMOECCC: Maximum use should be made of the Department’s website to post findings, notices, and agreements.

Sophia Espinoza of Center for Contract Compliance [oral]: Clarify whether the required notices pertain to existing contracts or only new contracts after the new regulations are adopted.

Parsons Brinckerhoff: Adopt language “to adopt or contract for labor compliance program to the department or third party labor compliance provider.”

Director’s Response: The Director concurs that the Department’s website should be utilized to provide information to the regulated public and the Director will post information as appropriate. The other suggestions were not accepted. Because the notice items that are being added to this regulation pertain to circumstances that can only exist after the new subchapter 4.5 regulations become effective, there is no need to clarify their non-applicability to preexisting contracts. The third commenter’s suggestion was presented without any explanation, and the Director is unable to discern either a purpose or a specific location for inserting the suggested language.

Comments on section 16425:

CS & Associates and The Solis Group: Establish independent review and handling of awarding agency application for LCP approval by a neutral and objective committee.

Director’s Response: The Director did not propose any amendments to this section, and did not accept this suggestion. No explanation was offered for making this change, and the Director is not aware of any criticism of the fairness of the current application process.

Comments on section 16427:

CS & Associates and The Solis Group: Revise the proposed new criteria to having a track record of taking cognizance of violations rather than obtaining approval of forfeitures.

CCMI: Allow programs with extended authority to (1) only conduct job site visits once per month (or less if workers from all contractors and subcontractors have been interviewed); (2) provide LCP checklist information electronically rather than requiring actual attendance at prejob conference; and (3) cease random verification of payroll checks once a sufficient number (i.e. three) have been verified for each contractor.

Director's Response: The suggestions were not accepted. As noted in the Initial Statement of Reasons, one of the principal benefits of extended authority is having forfeiture requests approved automatically. While having a track record of taking cognizance of violations may demonstrate a program's skill in identifying and seeking correction of violations, it does not demonstrate the program's ability to initiate a formal enforcement action through a request for approval of forfeiture, and therefore does not provide a basis for streamlining forfeiture approvals. The second commenter offers no rationale, and the Director is aware of none, for relaxing monitoring standards on projects monitored by labor compliance programs with extended authority. With regard to the specific suggestion on pre-job conferences, the Director notes that attendance in person is not required under existing regulatory requirements.

Comments on section 16428:

Patricia Gates on behalf of NCCRC: Delete proposed changes and keep existing language. New standard creates strong affirmative defenses, increases the Director's burden of proof at the revocation hearing, costs more time and resources in prosecuting LCPs, and adds complicated issues of fact and law. Standards are vague and conflict with statute. Also, since DIR has the discretion to provide a copy of the complaint to the LCP, the complainant should not have to.

LAUSD: LAUSD applauds the setting of minimum threshold standards for revocation. LAUSD recommends that current proposed language be amended to state that cause for revocation "must include the following three factors" as set forth in the proposed additions to subsection (a)(1). LAUSD also recommends that "serious or sustained" be changed to "serious and sustained."

Director's Response: These suggestions, which present opposite views of the same amendments, were not accepted. With regard to the first set of comments, the standard does not alter the Director's discretion, does not create any new defenses or burdens of proof, and does not conflict with any statute. It creates a minimum standard to discourage complaints that arise out of disputes over policy rather than quality of enforcement. To not have this minimum standard suggests that revocation should be allowed for trivial or isolated errors that do not harm workers or for following an enforcement policy of the Labor Commissioner that the complainant disagrees with. It also suggests that any complaint warrants a full blown investigation and hearing on the program's performance. Finally, not serving a copy of the complaint on the respondent is unfair and serves only to delay processing and resolution of the complaint.

Regarding the second set of comments, the "must" language from the Notice of Proposed Rulemaking does not belong in the introductory language in subsection (a), as suggested,

because the three new factors do not apply to all causes for revocation, including the most common cause, which is failure to file annual reports. The “serious or sustained” standard also was not changed because it addresses two distinct situations, either of which may warrant revocation without the other factor being present. For example, refusing to enforce prevailing wage requirements due to a conflict of interest or refusing to take any action against a contractor demanding kickbacks is a “serious” violation that need not be sustained to warrant revocation. On the other hand, tolerating and never penalizing a contractor for repeated minor underpayments would be an example of a “sustained” violation, even though the contractor violations might not seem “serious.”

Comments on section 16428 following March revisions:

Carpenters/Contractors Cooperation Committee: The proposed amendments to subsection (a)(1) will complicate the ability of the Director to revoke approval of an LCP. The new terms are not defined and are vague and will allow more programs to be successful in mounting a defense to revocation. The proposed amendments should be deleted.

Patricia Gates on behalf of NCCRC: [Reiterates prior comments on this section.]

LAUSD: Clarify meaning of “serious or sustained” and strengthen standard to “serious and sustained.”

Director’s Response: *These comments do not pertain to any of the revisions to the proposals and therefore do not require a response. These comments have also been addressed in the response immediately above.*

Comments on section 16431:

CCMI: Supports creating a single reporting date for LCP annual reporting.

Sophia Espinoza of Center for Contract Compliance: Clarify whether the revision in the annual reporting period will require an additional report or just one longer report for the period when the changeover is made.

Director’s Response: *The first comment requires no response. In response to the second comment, a sentence was added to subsection (a) to specify that the Director may require an interim or supplemental report to cover any gap between a program’s old and new reporting periods.*

Comment on section 16431 following March revisions:

CCMI: Strongly support posting annual reports on DIR website.

Director’s Response: *The Director concurs that the Department’s website should be utilized to provide information to the regulated public and the Director will post information as appropriate.*

Comments on Subchapter 4.5 Title:

Donald Carroll for the SCLMOECCC: Add the word “Enforcement” because that is part of the statutory duty.

Director’s Response: This recommendation was accepted, and corresponding changes were also made to the titles of sections 16452, 16453, and 16454.

Comments on section 16450:

CCMI: 1. Specify that the LCP requirements under Proposition 84 are not subject to this provision and that all projects using Proposition 84 funding for construction are subject to the original LCP provisions. 2. Clarify whether subsection (a) applies to all current bonds, including those not originally subject to LCP requirements, or only new bonds.

CS & Associates and The Solis Group: 1. Revise subsection (a) to limit applicability to projects receiving 50% or more of funding from state-issued bonds. 2. Projects “under any other statutory mandate” should be excluded except for those projects utilizing state-issued public works construction bond funds.

Director’s Response: A non-substantive clarification has been added to the final text of subsection (a) to specify that only bond-funded projects awarded after the effective date of these regulations are covered. This was done to avoid having the language misinterpreted as covering projects awarded prior to the effective date, which would be contrary to the language of SBX2-9. With this exception, the suggestions were not accepted. The purpose of this section was to collect the four types of circumstances under which public works projects will be subject to this subchapter, and not to restate or redefine the requirements or scope of the sixteen referenced statutes (which are listed in the reference note to the section) or the additional statute mentioned by the first commenter that was not amended by SBX2-9. With regard to which bonds are covered, the Director believes that the statutory language of Labor Code Section 1771.3(a)(2) is clear, and that “any” means “any” rather than only those current bonds that had a labor compliance program requirement or only new bonds. The cut-off point that is expressed in the statute is that the fee (and fee-based monitoring and enforcement) “shall not apply to any contract awarded prior to the effective date of [these] regulations[.]” (Section 1771.3(b).) The date was moved to subsection (a) to clarify that the regulations apply only to state construction bond projects awarded on or after August 1, 2010 rather than to the entirety of section 16450.

The second set of comments above essentially asks the Director to impose limits and exclusions on the range of projects for which coverage is mandated by statute, which the Director plainly has no authority to do by regulation.

Comments on section 16451:

Public Agency Law Group and West Community College District [late]: Modify so that notice of a project is required upon release of construction funds rather than upon fund

commitment, which may precede construction by years.

South Orange County Community College District: Require notice upon receipt of funding notice via the DF14D for the construction phase of the project.

Donald Carroll on behalf of SCLMOECCC: Maximum use should be made of the Department's website to post findings, notices, and agreements.

CS & Associates and The Solis Group: The notice requirements as drafted will create huge gaps in monitoring and enforcement and added hardships for awarding bodies that pay fees and still participate in LCP administration. Streamline the notification process through an on-line process and utilize other data generated by other State agencies on when projects receive plan or funding approval. The Department should also be responsible for all aspects of labor compliance program administration, including determining when the project commences and determining project milestones through site visits.

Miller Brown Dannis: 1. Many districts fund projects with local bond funds or other local facilities funds and seek state-bond reimbursement after conclusion of the project. The regulations do not provide for timely notice and fee payment in situation where district plans to seek state-bond reimbursement after conclusion of a project. Without prior notice of project, DIR would not be able to monitor and enforce, and the lack of DIR monitoring and enforcement could be a basis for denying reimbursement. An alternative notice structure is needed for districts seeking stand-bond fund reimbursement with the fees to be deferred until state-bond funds are allocated to the project. 2. In community college district multiple fund release situation, notice and funding should be timed for construction phase rather than first fund release.

LAUSD: In many cases, funding from the State Allocation Board may not be received until after a project begins. An LCP may therefore be required to pay the fee to DIR out-of-pocket with no certainty of when the amount would be recovered. A clear distinction should be made between when the funding agency awards/releases the funds and when funds are received by the awarding body. Separate the Notice of Projects requirement in this section from the Fee Requirement in section 16452 so that the notice and fee payment are not required at the same time and fees are only required to be paid after funds are received.

Director's Response: *The Director concurs that the Department's website should be utilized to provide information to the regulated public and the Director will post information as appropriate. Otherwise, no revisions were made in response to these comments. The suggestions to tie project notice requirements more closely to the start of construction or fund releases make sense in abstract from the perspective of specific types of awarding agencies and projects, but this would lead to multiple standards to accommodate different scenarios and create unnecessary confusion over when to send a notice. From the Department's standpoint, the objective is to require notices at the time that applicability of SBX2-9 to a project is established (through the award of state bonds, the award of a design-build contract, or other triggering event under one of the statutes). If this notice is months or even years before the start of construction in some cases (which is unlikely to be*

the norm), it nevertheless will enable to Department to place the project in line for compliance monitoring and enforcement when relevant work activities commence. The circumstance of completed projects becoming subject to SBX2-9 after the fact, based on an application for state bond reimbursement funding (which the commenter refers to as a potential “catch 22” situation) is a statutory conundrum rather than something that can be adjusted or fixed by regulation. The various provisions of SBX2-9 require that the fees paid to the Department be used only for the monitoring and enforcement of projects that are subject to the fee. Thus the Department cannot conduct fee-based monitoring and enforcement under the assumption that a project may become subject to the fee through a later reimbursement, unless there is some other source of funding to support this activity.

The Director agrees with the suggestions to streamline notices through the use of online notices and data from other agencies. The Department is in the process of modifying the current DAS-13 form into a single notice that can be used by awarding agencies to provide both the information required by this regulation and Labor Code Section 1773.3, and that can be completed and transmitted online. The Department also is meeting with other state bond-funding agencies in an effort to reach agreements to receive project notices and fee payments from those agencies on bond-funded projects (as proposed in section 16452(e)), thereby relieving awarding agencies of the responsibility to send notices or fee payments for those projects. The other suggestions about responsibilities for all aspects of administration and site visits are addressed under the general comments above and under section 16461 below.

C.A.S.H.: 1. Clarify subsection (a)(3)(F) to indicate that project fund sources means funds provided by the State. 2. Clarify subsection (a)(3)(G) to define amount “awarded” for the project as the amount of funds provided for the project by the state.

CCMI: 1. Requirement in subsection (a)(3)(F) to list funding sources and amounts would be extremely burdensome to small agencies, particularly with respect to amounts, which would lead to delays in getting notices completed and forwarded; and funding from one source is often substituted for another after project is started. 2. Strongly recommend proposal in subsection (b) to provide for a single notice form that meets both SBX2-9 and Division of Apprenticeship Standards requirements.

Director’s Response: Subsection (a)(3)(F) was redrafted in response to these comments to require only information on state bond funding, since that is the only information required for purposes of calculating the fee due under section 16452(a)(1) or 16452(a)(2)(A). Subsection (a)(3)(G) was also redrafted, but not in the way suggested above because the intent is to ascertain the overall cost of the project rather than just the amount of the state’s contribution. The original language of subsection (a)(3)(G) tracked an item on the DAS-13 form (used to report public works contracts pursuant to Labor Code Section 1773.3). For purposes of this regulation, however, the language was modified in conjunction with revisions to section 16452(a)(3) to obtain the information needed to calculate the fee required under the “total project costs” formula. As noted in the response to the preceding set of comments, the Department is in the process of modifying the DAS-13 form into a combined notice that can be used to comply with this regulation and Labor Code Section 1773.3.

Diane Ravnik [oral]: The jobsite notice language in subsection (d) is excellent but not a substitute for information to be given at a prejob conference or even a pre-bid conference.

Director's Response: *The issue of prejob conferences is addressed under section 16461 below.*

Comments on section 16451 after March revisions:

CCMI: Request clarification of whether this section applies to awarding bodies using their own LCPs in lieu of paying fees, and in particular whether they will be required to submit any contracts or forms.

C.A.S.H.: Amend subsection (a)(3)(F) as follows:

“The source or sources of any state-issued public works bond funding for the projects, exclusive of state-issued bond funds expended for purposes of acquiring land, including but not limited to costs associated with eminent domain proceedings, and the amounts paid or estimated to be paid by each source of that funding.”

Director's response: *No language was modified in response to these comments. The first comment is a request for an interpretation rather than a comment on the March revisions. In response to that comment, however, the Director notes that the responsibilities of awarding agencies that use labor compliance programs in lieu of paying fees are specified in section 16455 and differ depending on whether an awarding agency uses its program for all projects or only those projects subject to a fee. The amendment for subsection (a)(3)(F) suggested by the second commenter was not accepted because it includes information that is unnecessary to the Department and potentially cumbersome to assemble. C.A.S.H. requested this revision in connection with another proposed revision to section 16452(a)(1) that would reduce the fee on bond-funded projects. However, that other suggestion was not accepted for reasons discussed below in the response to comments on section 16452.*

Comments on section 16452:

C.A.S.H.: 1. The fee formulas, perhaps unintentionally, create inequities by requiring higher fees for financial hardship projects (where the state provides up to 100% of the funding) and locally-funded projects, in comparison to most state-bond funded projects, where the state covers only half the cost, and the fee under SBX2-9 will be based only on that half. Suggest reducing the fee for Financial Hardship projects to one-eighth of one percent (*see* specific language suggested by Association of California Construction Managers below) and for locally-funded projects to one-fourth of one percent of 50% of project costs. 2. The exclusion of land acquisition costs from “total project costs” under subsection (a)(3) should also apply to the calculation of the fee for bond-funded projects under subsection (a)(1).

Association of California Construction Managers: Add a subsection (a)(2)(C) as follows:

“(C) one-eighth of one percent of the proceeds of any state issued bond funds that have been provided for a financial hardship project in the School Facility Program (SFP).”

Public Agency Law Group and West Hills Community College District [late]: Modify subsection (a)(1) so that the fee calculation for bond-funded projects is based only on funds released for construction, exclusive of architectural/construction management oversight, project inspector services, special tests/inspections and other funds not specifically allocated for labor, materials or equipment for project.

South Orange County Community College District: In subsection (a)(1), make fee of one-fourth of one percent specific to the funds that are released during the construction phase. Attaching this fee to other unrelated aspects of the project, *i.e.* soft costs such as testing and inspection, inspector fees, etc., would not be appropriate.

Caltrans: 1. In reference to the definition of “total project costs” in subsections (a)(2)(B) and (a)(3), Caltrans considers its project costs to include acquiring properties, environmental studies and testing, design, clearance and demolition, and ultimately construction, with a majority of prevailing wage costs in demolition and construction and very little in design and environmental. Statute does not apply to those phases of project that are not subject to prevailing wages, and therefore fees should not be applied to those costs. Add language to tie fees to capital costs that require payment of prevailing wages. Additionally, it is assumed that the “total project costs” includes the total final cost that can only be determined after construction is completed. 2. Regulation is silent on changes in project costs. Should specify that costs are based on the awarded contract price, and DIR will neither add charges nor refund payments later.

Miller Brown Dannis: 1. Regulations include “soft costs” in total project costs upon which fees are based. Since architect, construction management, and other consultant costs are not subject to prevailing wage, these soft costs should not be included. Determination of the fee based on the contract price for all public works construction costs would be easier to determine than the proposed definition. 2. Regulations do not provide for refund or use of excess funds if the fees collected exceed DIR enforcement costs.

LAUSD: [Under section 16451 above, requested that notice requirement in that section be separated from fee requirement in this section and that fees only be required to be paid after funds are received.] The regulations are not clear as to the details of how the fee will be assessed and how that will impact LCPs subject to fee waiver.

Director’s Response: *The suggestions to reduce fees for hardship projects and what the first commenter referred to as “locally-funded” projects were not accepted. Suggestions to exclude more “soft costs” from the definition of “total project costs” or to exclude funding for land acquisition costs from the other fee formula also were not accepted. The regulatory fees in this section are based on the prescribed statutory formulas and were set in recognition of three significant factors. First, the aggregate income in fees needs to fully support the Department’s monitoring and enforcement responsibilities (which extend beyond the specific work of the Compliance Monitoring Unit) on all projects subject to the*

fee throughout the state. Second, there undoubtedly will be some projects that generate higher enforcement costs than other projects, irrespective of the individual fees collected from those projects, but high and low cost projects should balance each other out, and the Department should not be spending enforcement dollars on accounting and billing for costs on a project-by-project basis, nor requiring awarding agencies to incur their own related costs under such a system. Third, the total fee being made available to the Department for bond-funded projects (which should constitute the vast majority of projects monitored by the Department) is, on a percentage basis, only about half of what the State Allocation Board has provided to school districts to meet the labor compliance program requirement in Labor Code Section 1771.7. Eliminating more items from the fee calculation formulas or reducing maximum fees to address perceived inequities would require more accounting and give the Department fewer dollars to do its job. In addition, it is not clear that the higher fee that may be paid to the Department for hardship projects will reduce the funds provided for construction of those projects, since the State Allocation Board may decide to pay and account for the Department's fee separately from the construction grant, or it may simply increase the total grant amount to account for the higher fee. Similarly, it is not clear that the absence of state-bond funding for projects subject to the "total project costs" formula (principally design-build projects) means that no other form of state or federal support will be provided for construction or for related project costs, including for the Department's fee.

While the exclusion of land acquisition costs was retained in the definition of "total project costs" for the reasons stated in the Initial Statement of Reasons, the definition in subsection (a)(3) was expanded, based on Government Code Section 15802(e)'s definition of "cost of a public building," in order to make explicit that the statutory term "total project costs" necessarily includes what are sometimes referred to as "soft costs." Again, this should be understood in its context as a fee formula to raise funds to support labor compliance and enforcement and not as a measure of which specific project activities are subject to prevailing wages or can be expected to generate enforcement costs.

With regard to changes in project costs and refunds, the Director gave serious consideration to adopting a provision that would have required awarding agencies to recalculate the fee at the conclusion of a project and then send an additional payment if costs exceeded the initial estimate (likely in most cases) or request a refund if the project was completed for less than the original estimate. The Director determined, however, that the supplemental fees that might be recovered through such a provision would not be worth the added administrative expense for the Department and awarding agencies in administering and enforcing such a provision. Instead, per Caltrans' suggestion, language was added to clarify that the fee calculated from estimated "total project costs" will constitute the entire fee and will be subject to enhancement only if miscalculated or if bond funds cause the fee formula to change, or to a refund if the Department receives duplicate payments. Since project cost estimates are prepared principally for other purposes, such as budgeting and funding requests, and since the compliance fee is a very small percentage of the overall project costs, the Director does not believe there will be any incentive for awarding agencies to underestimate costs in order to pay a smaller fee to the Department. However, this is something the Department will reassess after gaining some experience under these regulations.

The suggestion to make fees due after receipt rather than upon release of bond funding does not appear meaningful in terms of the difference in time, and the date of “release” is more readily ascertainable as well as consistent with the Department’s intent to negotiate agreements to obtain notices and fees directly from bond-funding agencies rather than from awarding agencies. With regard to LAUSD’s other comments, the regulation specifies how fees will be calculated and when they are due, and in response to this and related comments on multiple fund releases (see comments on section 16451 above), language was added at the end of subsection (b) to specify that the release of additional bond-funding after the initial notice will require an additional fee (if not already included in a prior payment). Fee waivers (which likely will apply to LAUSD) are addressed in section 16455, and a new subsection (e) was added to that section to specify that waivers will be automatic for eligible programs that have complied with specified notice requirements.

Comments on section 16452 after March revisions:

C.A.S.H.: Resubmitted initial comments together with suggested implementing language, as follows:

Add the following language at the end of subsection (a)(1):

“. . . exclusive of state-issued bond funds expended for purposes of acquiring land, including but not limited to costs associated with eminent domain proceedings.”

Amend subsection (a)(2)(B) as follows:

“(B) one-fourth of one percent of 50 percent of the total project costs.”

Add a new subsection (a)(2)(C) as follows:

“(C) For any school construction project that receives state-issued bond funds pursuant to Section 17075.10 of Chapter 12.5 of the Education Code, the fee shall be one-fourth of one percent of 50 percent of the total state-issued bond funds or total project costs, whichever is greater, exclusive of amounts released or paid for land acquisition, including but not limited to costs associated with eminent domain proceedings.”

Amend subsection (a)(3) as follows:

“(3) For purposes of this subchapter, the terms “total project costs” and “state-issued bond funds” shall include all costs that are incident to the construction of a public works project, including but not limited to financing, engineering, architecture, surveying, testing, legal, and construction management expenses, but shall not include amounts paid for land acquisition, including, but not limited to, costs associated with eminent domain proceedings.”

Amend subsection (b) as follows:

“(b) The fees required by this section shall be paid at the time the Awarding Body is required to provide the notice specified in section 16451(a) above and,

if applicable, at the time of each successive release of state-issued bond funding from which an additional fee is due, unless the state-issued bond funding is released solely for the purpose of land acquisition, including but not limited to costs associated with eminent domain proceedings.”

Association of California Construction Managers: Resubmitted initial comments, including proposal for new subsection (a)(2)(C).

Director’s Response: These suggestions were not accepted for the same reasons expressed above in response to earlier comments requesting modifications in the fee formulas and the exclusion of more items from the costs or funding use to calculate fees.

Comments on section 16453:

CS & Associates and The Solis Group: 1. Delete this section. DIR should stay out of the arena of competing with private entities for work which remains subject to LCP requirements. 2. Clarify what agency will be allowed to do if the Labor Commissioner declines to provide LCP services. [Comment is not specifically attached to this section, but this is the only section to which it might apply.]

Parsons Brinckerhoff: Remove from subsection (a) “or contracting with an approved third party program.”

Donald Carroll on behalf of SCLMOECCC: Delete second sentence of subsection (c) which gives Labor Commissioner discretion not to enter into agreements. This exception is not authorized by statute, and it is not jurisdictionally possible to create an exemption that the Legislature has not.

Director’s Response: The suggestions were not accepted. The Department does not intend to take over existing labor compliance program contracts and remains very uncertain whether it will have the resources to take on any such work on a voluntarily basis. Nevertheless, the Department has already seen some school districts placed in jeopardy of forfeiting bond funds due to third party programs having their approval revoked for failure to file reports or other causes. The Department has taken steps to ensure that the interests of awarding agencies and project workers are not harmed when this occurs, but ultimately compliance with any statutory obligation to have an approved labor compliance program as a condition for using bond funds is an issue for the state agency that administers the funds to which that obligation is attached. The second commenter’s suggested deletion of language in subsection (a) appears to refer to language in the Notice of Proposed Rule-making rather than the regulatory text and makes no logical sense, since the language simply iterates in part how a statutory labor compliance program requirement is expressed. The third commenter’s suggested deletion of language in subsection (c) and accompanying rationale reflect a misunderstanding of the purpose and scope of this particular section, which pertains to voluntary agreements for the Labor Commissioner to assume labor compliance program responsibilities on projects that remain subject to a labor com-

pliance program requirement under existing law rather than to fee-based monitoring and enforcement under SBX2-9. The new legislation neither confers nor withholds any discretion with respect to the Labor Commissioner's authority to monitor and enforce compliance on projects awarded prior to the effective date of these regulations.

Comment/Inquiry from Mike Rainville of California Department of Public Health: The funding agreement for Safe Drinking Water program grants needs to inform the supplier which labor compliance law it should follow, *i.e.* Labor Code 1771.8 for Proposition 50 [which will require fee-based monitoring and enforcement by the Department after these regulations become effective] or Public Resources Code 75050 for Proposition 84 [which will continue to require use of a labor compliance program]. The program doesn't always know the source of state match funds; it could be either or both, and if both, would subject the project to inconsistent requirements.

Director's response: *The Director has no authority to modify the cited statutory requirements, nor does this Department enforce those requirements. However, to accommodate the mixed funding scenario, an additional subsection (d) was added to section 16453 to specify that Labor Commissioner will, upon request, enter into an agreement to provide labor compliance program services on any project that is subject both to the requirement to have a labor compliance program under Proposition 84 and the requirement to pay a fee for monitoring and enforcement by the Department under Labor Code Section 1771.85 or any other statute.*

Comments on section 16454:

LAUSD: This section makes no reference to fee waivers and perhaps should cross-reference section 16455 as follows: "Except as otherwise provided in Section 16455, . . ."

Parsons Brinckerhoff: Remove the following language from subsection (b): "sets forth the obligation to conduct a prejob conference and the requirement to keep a checklist of items discussed."

Director's Response: *The suggestions were not accepted. This section contains no fee waiver language or reference to the separate section on fee waivers because this section only applies to awarding agencies that intentionally pay the fee on all of their projects and meet certain other requirements in order to take advantage of higher prevailing wage exemptions under Labor Code Section 1771.55(a). The second commenter refers again to language that is not in the regulatory text but rather in the description of this section in the Notice of Proposed Rulemaking. Moreover it makes no sense to delete language pertaining to the prejob conference, because that requirement is in the statute, and the expanded regulatory definition (derived from 8 Cal.Code Reg. section 16421) is twenty years old.*

Comments on section 16455:

CS & Associates and The Solis Group: 1. Establish clear and objective criteria for fee waivers and an independent board for fee waiver requests by a neutral objective committee with no interest in the fees. 2. Loss of fee waiver for contracting out under this section is

inconsistent with contracting out authorized under section 16423 and section 16453. Change subsection (c) to clarify that an awarding body is allowed to obtain assistance from consultants as long as consultant is not operating on project as a third party LCP.

Golden State Labor Compliance and Association of Labor Compliance Professionals: Delete subsection (c) and allow agencies “to include qualified, experienced third-party consultant staff within the staffing resources of their proposed LCP without prejudice to approval . . . and without financial penalty with respect to waiver of DIR fees.” “[W]e ask that, where a commitment to quality exists, agencies have a choice as to how they ensure compliance on their jobsites.”

Moreno Valley Unified School District; Desert Sands Unified School District; Temple City Unified School District; Palo Verde College; Glendale Unified School District; Bonita Unified School District; Ventura Community College District; and Fontana Unified School District: [All sent a slightly revised version of Golden State’s comment above.]

Associated General Contractors of California: Clarify regulations to specify that awarding bodies are not eligible for waiver of the compliance monitoring fee if they contract with a third party to operate or enforce an agency-maintained labor compliance program.

Caltrans: The regulation is unclear as to whether existing programs will be required to submit confirmation asserting their continuing status as an approved program, or whether approval is automatic unless DIR is informed of a change in status. Suggests clarification similar to automatic conversion language in section 16427(e) related to extended authority.

LAUSD: Since Labor Code Section 1771.5 will no longer apply to contracts awarded after the regulations take effect, DIR should consider developing an on-line prejob seminar. Awarding bodies with exempt LCPs could include contract language requiring contractors to view seminar before commencing work on project rather than holding conferences pursuant to section 16421(a)(2).

Dante John Nomellini, Jr.: Please clarify the apparent inconsistency between the option of contracting out to a third party conferred by section 16423(a) and this section, which seems to take away that choice.

Parsons Brinckerhoff: Remove the language “provides that an awarding agency may lose the fee exemption in subparts (a) or (b) by contracting out its labor compliance responsibilities in whole or in part to a third party.”

Los Angeles Community College District: LACCD is concerned about subsection (c). It has been LACCD’s practice to use consultants to augment its staff for administration of its LCP. Although section 16421(b) supports the statutory right to augment staff in this manner, the LACCD is concerned about regulatory limitations which may appear to disallow it and would conflict with statutory authority, including Government Code Section 53060.

Sophia Espinoza of Center for Contract Compliance [oral]: Define the meaning of the contracting out restriction in subsection (c) a little more clearly, including who will be consi-

dered a third party.

Director's Response: In response to the comments regarding how the fee waiver would operate, an additional subsection (e) was added to specify that fee waivers would be automatic for awarding body labor compliance programs that have approved status under the labor compliance program regulations and have provided notice of the scope of their programs under one of the corresponding amendments being made to section 16423(b) of the labor compliance program regulations. Because waivers are automatic for programs with a defined status, there is no need for additional criteria or an independent board to determine fee waiver requests, as suggested by one commenter.

In response to the comments on contracting out and the use of third party consultants, the language of subsection (c) was redrafted to track the wording of the statutory restriction, and four subparts were added to set forth appropriate uses of consultant staff that would not be considered in violation of the statutory restriction. The Director believes that these revisions also clarify what constitutes improper contracting out of program authority or responsibilities that will result in loss of the fee waiver, and that the revisions address all of the concerns expressed above within the limits of SBX2-9 and related authorities.

The issue of prejob conferences is addressed under section 16461 below.

Comments on section 16455 following March revisions:

Golden State Labor Compliance: 1. Strike the word “licensed” from this subsection (c)(1). This limitation is unduly restrictive and clearly precludes the use of “qualified labor compliance professionals with long experience in LCP operations.” No license applies to such professionals and, aside from lawyers, it is unclear what other professional services would be covered. 2. Delete the following phrase from subsection (c)(2): “and are under the direct day to day control and supervision of Awarding Body employees who are principally and primarily engaged in performing duties on behalf of the labor compliance program.” This logistical “poison pill” would effectively make it impossible to efficiently use trained consultant personnel to perform routine functions.

Director's Response: No revisions were made in response to these comments. The term “licensed professional services” was chosen deliberately to cover the specific services of lawyers, and possibly accountants and engineers, who are licensed by the state and subject to professional competence and disciplinary standards under those licensing schemes. (See section 16421(b) of the labor compliance program regulations, which similarly acknowledges an awarding agency's right to contract for professional services for its own program.) Interpreting this exception to include “labor compliance professionals,” as sought by the commenter, would be contrary to the underlying statutory prohibition against contracting out enforcement responsibilities. Similarly, the suggested deletion for subsection (c)(2) would essentially recognize the authority of awarding agencies to contract out labor compliance program responsibilities, contrary to the prohibition on doing so found in the underlying statute.

Comments on section 16460:

Patricia Gates on behalf of NCCRC: NCCRC is concerned that the language of subsection (b)(1) is too limited and may be interpreted as superseding other statutes and regulations governing the responsibilities of awarding bodies with respect to prevailing wages. The language should be changed to read as follows:

“Nothing in this chapter shall be construed as (1) limiting the responsibility and authority of an Awarding Body to comply with and take any appropriate action to effectuate the provisions of the Labor Code, the Public Contracts Code and other applicable statutes and all regulations, ordinances and guidelines pertaining to public works or prevailing wages.”

Jeffrey VanderWal on behalf of ABC-CCC: This section is entitled “Establishment of Compliance and Monitoring Unit” but the body of text says “Compliance Monitoring Unit.” ABC-CCC recommends that the body of the text be revised so that all the regulations consistently refer to the new unit as the “Compliance and Monitoring Unit.”

Roger Miller on behalf of the Operating Engineers Contract Compliance [oral]: Concerned that by naming the new unit a “monitoring” unit, the Department is limiting its function, and that there will be no enforcement.

Juan Garza of the Joint Electrical Industry Fund [oral]: The implication of having a separate monitoring unit is that there is only going to be monitoring and not enforcement or that the baton will get dropped when cases are passed from monitoring to enforcement.

Director’s Response: In response to ABC-CCC’s suggestion, the name of the unit was made consistent in this and succeeding regulations, although not in the manner suggested. Instead the word “and” was deleted so that the formal title will be “Compliance Monitoring Unit” and so that compliance monitoring will be understood as a singular endeavor rather than possibly as two different things. The other comments express an unnecessary concern over whether the text of this single relatively limited and focused regulation reflects an unspoken intent to abandon other statutory responsibilities or authorize awarding agencies to abandon theirs. Nevertheless, to allay these concerns, subsection (a) was revised to indicate that the Unit is being established to carry out the “specific” functions set forth in these regulations and that these functions are in addition to rather than to limit or supplant the Division’s and Labor Commissioner’s other responsibilities and authorities with respect to public works. The revision recommended by NCCRC was not accepted because it likely would not pass the “necessity,” “authority,” and “nonduplication” standards of review found in Government Code Section 11349.1(a), and the Department is unaware of the comparable language found in 8 Cal. Code Reg. sections 16421(d) and 17201(c) being misinterpreted in the manner feared by NCCRC. Another subsection (c) was added to indicate that any failure by the Compliance Monitoring Unit, the Division, or the Department to comply with their regulatory responsibilities does not constitute a defense to the failure to pay prevailing wages. This new language also parallels language in section 16421(f) of the labor compliance program regulations.

Comments on section 16461:

Association of California Construction Managers: The current process ensures that general contractors and construction managers are informed if there are problems with certified payroll. To ensure that they get the same information at the same time it is electronically transmitted to DIR, add the following language at the end of subsection (b):

“ . . . If electronic submission is provided for or required, the submission should be simultaneously provided at a minimum to the general contractor or construction manager in the situation of a multiple-prime contract and access shall be provided to any response party.”

CS & Associates and The Solis Group: The standards for the new Unit are less stringent than for LCPs in that they do not strictly require corroboration of documents or conducting site visits. The DIR should implement and maintain the same standards and level of enforcement currently required by regulations applicable to third party LCPs.

CCMI: CCMI is greatly concerned with the inequity of LCP requirements when measured against DIR’s own commitment to monitor projects requiring an LCP. Agencies operating their own LCPs are required to conduct preconstruction conferences, but DIR will not perform this task. LCPs are also required to do weekly job walks and confirm proofs of payment, but these are discretionary tasks for DIR. To bring LCP and DIR requirements more into alignment, we recommend the following: 1. That DIR provide a preconstruction conference by webinar or DVD that all agencies can use for LCP purposes. 2. That DIR and agencies be required to conduct onsite visits and interviews once a month, and that interviews may be suspended under specified circumstances. 3. That DIR and agencies will request random verifications once a month and may suspend these under specified conditions. 4. Receipt of a timely complaint by DIR should compel a review of certified payrolls, fringe benefit statements, DAS-140, DAS-142, and training contributions verification, and onsite interview of affected workers, unless complaint is baseless or sent for harassment purposes.

CCMI recommends that electronic payroll system selected by DIR have means to transmit redacted copies to “watch dog” groups and that fringe benefit statements also be provided. If the fringe benefit statement and the certified payroll were considered all part of the prevailing wage verification to be provided under 1776, this would greatly reduce the likelihood of meritless complaints and allow organizations under 1773.1(a) 7-9 to continue to assist the DIR in policing the industry. Ideally the system would also include a way to capture copies of DAS-140 and DAS-142 forms used by contractors.

Dusteen Ferguson of Team Labor Compliance [written and oral]: Proposals do not provide for preconstruction meetings nor for progress reports to local agencies. Questions how DIR will catch employees who aren’t on CPR without site monitoring. Estimates finding an employee who is not on CPR on 25% of site visits. A government agency in San Francisco cannot provide the personal service we provide locally in southern California counties and cannot catch violators based on review of certified payroll reports.

Labor Compliance Specialists, Inc.: The regulatory concepts in subsection (c)(3) are too simple and leave some common and complex areas of abuse undetectable. To reach these deeper and more sophisticated schemes, I recommend the following changes:

(c) Payroll records timely furnished by contractors and subcontractors in accordance with this section shall be reviewed by the Compliance and Monitoring Unit as promptly as practicable after receipt thereof, but in no event more than 30 days after such receipt. "Review" for this purpose means the inspection of the records furnished to determine whether (1) . . . ; (2) . . . ; ~~and (3) . . . ;~~ (4) the relationship between gross pay "this project" and gross pay "all projects" does not include a potentially unlawful payroll practice and/or process; and (5) contributions which are greater than those in the subject prevailing wage determination fringe benefit category have been annualized pursuant to Labor Code Section 1773.1(d).

LAUSD: LAUSD suggests the inclusion of stronger language to certify that the truth and accuracy of information being submitted by the contractor [with suggested revised certification language submitted in an attachment].

Jeffrey VanderWal on behalf of ABC-CCC: 1. Amend subsection (b) to enable fringe payment recipients, upon application evidencing good faith basis for request, to be able obtain electronic CPRs from CMU for life of project. 2. Amend subsection (d) to specify that fringe benefit contribution information included in payroll records. 3. Programs that accept employer contributions under Labor Code Section 1773.1(a)(7),(9), should be able to assist in confirmation and audit processes. 4. Subsections (d) and (e) should contain specified minimum time frames for random verifications and site visits. 5. Entities like ABC-CCC should be enumerated as independent sources for confirmation, and should, on written application, be authorized to provide affirmative assistance. 6. Good faith complaint should trigger record confirmation and site visit within prescribed limits. 7. Entities like ABC-CCC should be deputized to perform confirmation and on-site visits subject to limitations. 8. Including language in the regulations that specifically provides that interested parties are entitled to appropriately redacted payroll records without the need for a formal Public Records Act [request] will permit timely and efficient access to and review of the records.

Parsons Brinckerhoff: From subsection (d) remove the language "of this section provides for on site inspection by representatives of the Compliance and Monitoring Unit, to be undertaken randomly or whenever deemed necessary."

Juan Garza of the Joint Electrical Industry Fund [oral]: Department staff should take the preemptive measure of attending pre-bid conferences, where they could remove people who have no idea about prevailing wage requirements by informing them about those requirements. The Department could learn about almost all upcoming projects by subscribing to McGraw-Hill.

Doug Nareau [oral]: There should be an articulated number of required site visits. Most cases require witness interviews and site visitations, while staffing issues (including turnover) result in tendency to keep deputies in office. Failure to visit jobsites to interview wit-

nesses causes deputies to misperceive facts which results in cases dragging out rather than getting resolved more quickly. Another self-funded regulatory scheme in Labor Code §§ 1020-24 [citation for improper employment by or use of unlicensed contractors] has gone into disuse due to having no dedicated deputy.

Robert Hansen on behalf of Sheet Metal Workers Local 104 [oral]: “I have a lot of concerns about the site visit issue.” Cannot catch criminal activity, especially kickbacks, through CPR review. Look at LCPs for staffing guidance; need to hire support staff for deputies.

Diane Ravnik [oral]: 1. The earlier that prevailing wage enforcement gets out the better compliance you get; was going to stress prejob conferences but pre-bid conferences are where some early notification could really pay off. It could be the awarding agency’s responsibility to do this. 2. It may not be necessary, but it would be very helpful to include language about how the public may obtain copies of certified payroll records in accordance with Labor Code Section 1776. 3. Site visits should be mandatory rather than permissive; best evidence comes from site visits, and most egregious violators are expert in hiding violations in paperwork. At least one visit per project is doable and need not be by a Deputy Labor Commissioner.

Jay Hanson of State Building Trades [oral]: “We also believe site visits are critical. The legislature and the governor’s office assume that the division will fulfill the duties of labor compliance programs as they’re done now. [¶] I think Diane [Ravnik] had an excellent suggestion to say that allowing site visits by staff other than deputies would be something that would be cost effective and be able to give you, once again, more bang for the buck.”

Patricia Gates [supplemental written]: 1. Require involvement of Labor Commissioner staff in the pre-bid stages of public works projects. 2. Require on-site monitoring rather than making it permissive.

Director’s Response: The Director understands the concerns of the public and will attempt to address the issue of a model pre-job conference presentation that could assist awarding bodies to ensure that contractors on their projects understand the provisions of the prevailing wage statutes. None of the other recommendations were accepted for reasons that are set forth by subject matter below.

Parity of standards governing labor compliance programs and Compliance Monitoring Unit: The legislation does not require or contemplate parallel treatment of labor compliance programs and the Compliance Monitoring Unit (see footnote 7 above). The reasons for the variances in standards are discussed at length in the responses to the General and Uncategorized Comments above and incorporated here by reference.

Pre-bid and prejob conferences: Beyond the development and dissemination of a model prejob conference, there are legal as well as major practical impediments to having the Compliance Monitoring Unit participate in these conferences. First, the one new statute that requires prejob conferences, Labor Code Section 1771.55(a)(2), assigns that responsibility to awarding agencies, even though they are paying a fee for monitoring and enforcement by the Department. More significantly, the various statutes which impose

the new fee also limit its use to monitoring and enforcement on projects subject to the fee. This means no project will be subject to fee-based monitoring and enforcement until it is awarded, which automatically precludes involvement in any pre-bid conference and limits the notice and available time frame for conducting a prejob conference to whatever time is built in between bid opening and the intended start of construction. However, in many more cases, the state bond-funding that makes a project subject to a fee may not be awarded until a project is well underway (or even completed, as some commenters have noted), making participation in the prejob conference impossible. From a practical standpoint, substantial personnel and resources would be required to go into the field to conduct a conference on every one of the thousands of projects statewide that may be subject to a fee. Providing a model conference online at least potentially makes the Division's expertise available to all these projects and contractors.

Certified payroll records: Requests to include regulatory language regarding the access of awarding bodies, prime contractors, fringe payment recipients, monitoring groups, and the public to these records were not incorporated because they are outside the scope of this regulation, which pertains to the specific authority and responsibility of the Compliance Monitoring Unit. Certified payroll report requirements and rights of access are set forth generally in Labor Code Section 1776 and 8 Cal.Code Reg. sections 16400 – 16404. Submission requirements or rights of access as between awarding agencies and contractors or between prime contractors and subcontractors may also be established by contract without need for regulatory language. The Director also wishes to note that although it would be inappropriate to include regulatory language on outside access rights in this regulation, the Department's planned electronic payroll reporting system is being designed to provide immediate access to awarding agencies and prime contractors who are entitled to see those reports, and it should also be able to provide others with access to unredacted parts of the reports.

LAUSD's suggested stronger certification language would conflict directly with the language of 8 Cal.Code Reg. section 16401 and therefore require amendment of that section in order to be implemented. However, the Director believes the suggestion has merit and will consider it for future regulatory action.

Labor Compliance Specialists' suggestion to add two additional review items in subsection (c) also has merit, but not in the context of the regulatory text. The "review" task in this subsection is required by statute for all payroll reports and matches the "review" requirement in section 16432(b) of the labor compliance program regulations. The three items in the subsection address whether the report is complete and accurate on its face. The additional items suggested by the commenter are not factors that make a report incomplete or inaccurate on its face, but rather they are "red flags" that will invite further inquiry and use of the "confirmation" process in subsection (d) to determine whether violations are present.⁸

Mandated confirmations and site visits: The Director agrees with the views expressed regarding the importance of these activities and is committed to using these tools. The

⁸ There likely will be dozens of "red flags" that will trigger some level of further review in addition to the random confirmations that will be undertaken pursuant to subsection (c). Per Government Code Section 11340.9(e), internal criteria for audits, investigations, and enforcement are not a necessary or appropriate subject for a regulation.

reasons for not absolutely mandating them by regulation have been set forth in the Initial Statement of Reasons and in the responses to General and Uncategorized Comments above. There are two additional points to note. First, when a regulation says that the Department shall do something, it can lead to a tangential debate over whether the agency performed specified tasks rather than whether the agency did what it needed to do under the circumstances to ensure and enforce compliance. There are, for example, two comments above which suggest that a complaint should automatically trigger confirmations and site visits, although, as others note, complaints are typically submitted after a subcontractor has concluded work (and left the site), and the issue raised in a complaint may be unrelated to the accuracy of a contractor's payroll reports. Second, the Department will not be able to hire most of the staff needed for the Compliance Monitoring Unit until it begins to receive fees after these regulations become effective, which means that the Unit's functionality will be very limited to begin with. Once the Unit has been in operation for several months, it will be appropriate to look at whether it is adequately staffed and engaged in the right range of functions to fulfill its purpose.

Use of outside groups: ABC-CCC offered several recommendations on the role it might play as a recipient of employer payments. With regard to the confirmation process, investigators may go to any outside source that may have relevant information pertaining to compliance with prevailing wage requirements. However, SBX2-9 did not authorize the Director to deputize outside individuals or groups to perform confirmations, site monitoring, or complaint investigation on the Department's behalf. If anything, the intent of SBX2-9 was to move away from contracting out these responsibilities to third parties. Outside monitoring groups historically have played a significant role in monitoring projects on behalf of their constituencies and bringing evidence of suspected violations to the Division's attention for investigation and potential enforcement; and we expect that role to continue.

Comments on section 16461 after March revisions:

CCMI: [Repeats prior comments and arguments for putting LCPs on same standards as CMU or in alternative relaxing LCP performance requirements.]

LAUSD: We request that LCPs be included in subsection (g) provision which allows Compliance Monitoring Unit to institute online prejob conferences.

Director's Response: CCMI's comments do not pertain to the text of the revisions and therefore do not require further response. They have also been responded to fully above. We understand LAUSD's comment as a request for labor compliance programs to be given the authority to conduct electronic prejob conferences. This request is outside the scope of the regulation, which concerns the authority of the Division and the Compliance Monitoring Unit. However, as was pointed out when the most recent amendments to the labor compliance program regulations were adopted in 2008, the requested regulatory authorization is unnecessary as there is no express requirement to conduct prejob conferences in person or prohibition against conducting them online.

Comments on section 16462:

CS & Associates and The Solis Group: 1. The discretion not to investigate complaint received more than 90 days after project completion is a deviation from current statutes of limitations. 2. The state should adhere to notice provisions currently applicable to third party LCPs.

Scott Kronland on behalf of SBCTC: Section 16462 should be amended as follows:

(a) The Compliance and Monitoring Unit shall accept complaints from workers or members of the public alleging nonpayment of the required minimum rates of pay to workers or other violations of the prevailing wage laws on projects that are subject to this subchapter. Complaints shall be filed in writing with the Division of Labor Standards Enforcement as soon as the alleged violation is known. ~~The Division may, in its discretion, determine not to investigate claims filed more than 90 days after the completion of the project.~~ Complaints may be filed electronically and need not conform to any formal requirements.

(b) [no change]

[New] (c) The Compliance and Monitoring Unit may, in its discretion, request that a contractor or subcontractor provide a written response to the Division concerning a complaint filed by a worker or a member of the public when such a response would assist in the Division's investigation. A request for a response is not a determination that a complaint has merit.

Because of the limitations in its other activities, the Department should encourage complaints. The 90-day cutoff does not make sense; it implies that Division has no discretion not to investigate other claims, and it may wrongly discourage complaints from workers. The regulation should also be amended to explicitly grant the Division discretion to seek a written response from a contractor or contractor if that will aid an investigation

CCMI: 1. DIR should find a way to submit complaints electronically and forward copies to affected contractor. 2. DIR should also be required to report to complaining party within a reasonable time in the same manner specified in 8 CCR 16434.

Patricia Gates on behalf of NCCRC: 1. Remove 90 day time limit in subsection (a) and replace it with a 180 day limit, because statute of limitations in Labor Code Section 1741 is 180 or 360 days. 2. Subsection (b) does not relate to the filing of complaints and therefore should be removed. It will also cause confusion give rise to affirmative defenses by contractors who are not notified.

Jeffrey VanderWal on behalf of ABC-CCC: 1. Complainant should be authorized to assist with investigation and enforcement. 2. Allow complaints submitted electronically with electronic signatures. 3. Reference to DLSE and CMU within regulation will confuse public (although commenter recognizes that CMU is within DLSE). Clarify regulation to state that in addition to DLSE, CMU may accept complaints and assist in enforcement responsibilities. 4. Require DLSE to investigate all complaints submitted prior to 90 days

after completion of project and describe scope and basic standards of investigation. 5. Give the complainant the option of notifying the contractor and give contractor the option of obtain complaint on request so that remedial measures may be taken. There should also be time limits for follow up and status report on a specified periodic basis as in 16434. 6. Provide guidance on remedies in the event that CMU/DLSE fails to act.

Crescencio Garcia [oral]: Delete regulatory limitation on time for worker complaint.

Juan Garza of the Joint Electrical Industry Fund [oral]: Questions limitation on taking cases which looks like a management tool to avoid taking action. States that as a public works deputy [at DLSE] once received a worker complaint in the mail in the morning, was able to review the certified payrolls and other project records, ascertain that the statute of limitations would run that day, and then get a hold of a Division attorney and get a case on file by the end of the day [referring to the enforcement system prior to July 1, 2001].

Diane Ravnik [oral]: Delete early notice to contractors under subsection (b), which seems unnecessary. If a deputy labor commissioner has ascertained that there has been an underpayment, they should let the contractor know a.s.a.p., but with a calculation and calculation of what's owed.

Jay Hanson of State Building Trades [oral]: 1. Believe the regulation should welcome complaints from labor management compliance programs and allow the public to transmit complaints to the unit; and that there should be an ability to do that through an electric submission. 2. Recommend deleting the reference to the 90 day deadline, which is unclear and appears unnecessary. 3. Think the Division should have authority to request a contractor or subcontractor to provide a written response to a complaint, which by itself will spur a lot of enforcement and allow staff to focus on more egregious problems.

Director's Response: In response to these comments, subsection (a) was revised to allow for electronic filing of complaints and to specify that complaints need not conform to any technical requirements as long as they provide sufficient information to enable the Division to investigate the complaint. The sentence specifying that the Division has discretion not to investigate complaints filed more than 90 days after completion of a project was deleted. The recommendation to delete subsection (b) was not accepted. The Director notes that this language was suggested originally by the State Building Trades, who continued to support its inclusion in the regulations as a vehicle to encourage early correction of unintentional and correctable violations so workers can get paid properly and the Division can focus its energy elsewhere. The notice required by this subsection does not permit the disclosure of worker names in violation of Labor Code Section 1736, nor does it require the disclosure of other evidence that might help a violator evade enforcement. ABC-CCC's suggestion that complaints be made available to contractors on request was not accepted inasmuch as it could require the Division to do both.

The State Building Trades' suggestion to include additional language giving the Compliance Monitoring Unit discretion to request a written response to a complaint is unnecessary, as making such requests is already well within the Division's investigative authority under Labor Code Section 92 and something public works investigators already do.

ABC-CCC's suggestions that complainants be authorized to assist with investigations and enforcement was not accepted because SBX2-9 does not contemplate granting enforcement authority to private monitoring groups, and deputizing complainants to investigate their own complaints on behalf of the state would effectively undermine the independence and integrity of the state's own investigative process. Private monitoring groups have the right to pursue private actions, and section 16460(b) specifies that nothing in these regulations precludes the use of other available legal remedies to enforce prevailing wage requirements. There is no demonstrable need to provide a further enumeration of private rights within the context of these regulations, nor is there any apparent need for regulatory language that would authorize complaints voluntarily to share their complaints and documentation with the subject contractor.

ABC-CCC may be correct in saying that some may be confused by the differing references to the Division and the Compliance Monitoring Unit; however, as noted elsewhere, the Unit is part of the Division, as will be apparent to anyone seeing the job site Notice prescribed by section 16451(d). These regulations refer to the Division where the action would not necessarily go through the Compliance Monitoring Unit, as is the case with the filing of a complaint.

The Director does not believe that the scope and standards of investigation used by the Division are the appropriate subject of a regulation for reasons noted in footnote 8 above. The Director also does not believe it is necessary to establish response time limits for complaints filed with the Division. As was indicated when the most recent amendments to the labor compliance program regulations were adopted in 2008, the complaint handling procedures in section 16434(b) were based on the established practice of the Division in handling public works complaints.

Comments on section 16462 after March revisions:

CCMI: [Comment under this section number clearly pertains to section 16463 and is addressed under that section below.]

Carpenters/Contractors Cooperation Committee: Based on extensive labor compliance experience, believe the language of subsection (b) will augment non-compliance with labor laws by allowing contractors simply to fix the problem and go on about their business whenever caught and making workers more hesitant to complain if their names will be exposed by DLSE early.

LAUSD: Language should be inserted into subsection (b) to extend option of using web-based complaint filing to LCPs.

Patricia Gates on behalf of NCCRC: [Reiterates prior comments on this section.]

Director's Response: *The NCCRC's and Carpenters/Contractors Cooperation Committee's comments do not pertain to the text of the revisions and therefore do not require a response. They have also been addressed fully in the responses to the initial comments on this section above. LAUSD's request is outside the scope of the regulation, which concerns complaints made to the Division. There also is no need for the requested regulatory*

authority since nothing precludes labor compliance programs from taking online complaints.

Comments on section 16463:

Association of California Construction Managers: Amend language of subsection (c) by changing the word “cease” to “reduce to the undisputed amount” and by adding the following sentence at the end. “Payments will not cease if that act could damage the project owner or other workers.” The intent of this modification is to allow a targeted response so a problem with one subcontractor does not harm employees of an unrelated subcontractor or the owner.

Patricia Gates on behalf of NCCRC [written and oral]: 1. This section goes beyond the authority of the authorizing legislation by placing significant restrictions on the Labor Commissioner’s authority to withhold contract payments when there are underpayments. Delete all limiting or qualifying language [with suggestions specified] to bring this regulation into conformity with section 16464 and Labor Code Section 1741. 2. Clarify that this section does not apply to withholding for underpayments.

Ollie Bradshaw [oral]: Change the regulation to protect everybody and not just the top 50% [refers to definition of “inadequate payroll records” in subsection (d)].

Diane Ravnik [oral]: The meaning or applicability of this section should be clarified.

Director’s Response: In response to these comments, a new subsection (i) was added to specify that the regulation does not apply to withholding for underpayments or penalties under the relevant statutes, which is how it had been misconstrued by two of the commenters. The amendments suggested by the Association of California Construction Managers were not accepted because the existing language provides adequate protection against improper or excessive withholdings, and continuing payments to avoid harm to the project or other workers sometimes serves as a rationale for simply not addressing compliance issues or for subordinating the interests of unpaid workers to all other interests on the project.

Comments on section 16463 after March revisions:

CCMI: [Listed as a comment on section 16462 but clearly applies to this section.] To foreclose argument that awarding agency lacks withholding authority if not ordered by DIR, additional language should be included which states as follows:

“Nothing in this regulation shall prevent the Awarding Body from withholding contract payments on its own accord if payroll records and related prevailing wage documentation is deemed to be delinquent or inadequate.”

Golden State Labor Compliance: The definition of “contract” in subsection (b) tends to convey the idea that other contracting arrangements, such as multi-primers, would be exempt from withholding for delinquent or inadequate payrolls unless the language was incorporated into the prevailing wage contract.

Patricia Gates on behalf of NCCRC: [Reiterates prior comments on this section.]

Director's Response: CCMI's recommended amendment was not accepted as it does not meet the "necessity" standard of Government Code section 11349(a) and 11349.1(a)(1) and is outside the scope of the regulation, which concerns the statutory and regulatory authority of the Labor Commissioner and not the entirely distinct legal and contractual authority of awarding agencies. The Director further notes that awarding agencies have not only the independent authority to enforce prevailing wage requirements but also a duty to do so under Labor Code Section 1726.

The other comments did not pertain to the revisions and therefore do not require a further response. The Director notes that the "contract" definition in subsection (b) has been in section 16435 of the labor compliance programs since its initial adoption in 1992 and was not commented upon during two subsequent rulemakings (in 2003-4 and 2007-8) that modified that section. Nevertheless, the definition is confusing and susceptible to misinterpretation, and the Director will consider amending the language in a future rulemaking.

FIFTEEN DAY MODIFICATION CHANGES

During the fifteen day public comment period the Director included provisions to post notices, lists, reports and other information on the Department's website. The Director has determined that these posting provisions are not regulatory and therefore, has deleted the provisions for such postings from these regulations. The Department recognizes the public's need for information and will post documents on its website as appropriate.

ALTERNATIVES DETERMINATION

The Director has determined that no alternative would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective as and less burdensome to affected private persons than these regulations.