

AMENDED INITIAL STATEMENT OF REASONS
for
PROPOSALS TO AMEND REGULATIONS WITHIN
SUBCHAPTER 3, ARTICLE 6, AND SUBCHAPTER 4 OF
CHAPTER 8, TITLE 8, CALIFORNIA CODE OF REGU-
LATIONS, SECTIONS 16404 THROUGH 16439.

In formulating these proposals, the Director relied in part on an analysis of labor compliance programs prepared by the Legislative Analyst's Office in 2007. This analysis appears in two different reports issued by the Legislative Analyst's Office, although the text on labor compliance programs is identical in both reports: (1) Implementing the 2006 Bond Package: Increasing Effectiveness Through Legislative Oversight (January 22, 2007); and (2) Analysis of the 2007-08 Budget Bill, Capital Outlay Chapter (February 21, 2007). The excerpted portions on labor compliance programs are included in this rulemaking record, and the full reports are available for review and download from the Legislative Analyst's Office's website [www.lao.ca.gov] under the topic area "Capital Outlay."

Section 16404:

The purpose of proposed new *section 16404* is to expressly authorize the electronic maintenance and submission of certified payroll records, subject to specified requirements that (1) insure these records meet the same standards for content, legibility, reliability, and disclosure that govern paper forms, and (2) make this a reasonable option for parties who prepare, receive, and review certified payroll records. The reason for the new section is to clarify that electronic records are an acceptable alternative to paper forms provided that they have all the information that is required by statute (Labor Code Section 1776(a)) and include the certification required by Labor Code Section 1776(b) in a format that will be binding on the contractor. The necessity for the new section is to clarify that electronic reporting is an acceptable alternative and to validate an existing practice in response to concerns and the belief of some that only paper forms are acceptable under Labor Code Section 1776(c) and an existing regulatory section 16402. The reason and necessity for subpart (a) is to ensure conformity with the existing paper form reporting format and avoid customization of individual forms that would be unfamiliar to reviewers and may obscure or omit required data elements. The reason and necessity for subparts (b) is to preclude the use of customized or proprietary software that would impose an extra expense or require specialized training for persons who must use the forms. The specific reason and necessity for subpart (c) is to ensure that the preparers of reports are bound by the contents of those reports *when and as* submitted, consistent with the certification requirement in Labor Code Section 1776(b), and conversely so that certified electronic reports are not subject to unverifiable after-the-fact modification. The reason for subpart (d) is to provide a specific reminder that electronic reports are subject to same redaction requirements as paper reports; and the need for this reminder is due to the importance of privacy rights that are protected by redaction requirements and the possibility that these requirement may be overlooked when designing or disclosing electronic reporting forms. The reason for subpart (e) is to prevent users of electronic reporting forms from compelling others to invest in hardware or expensive software in order to use the same forms.

This subpart is needed in light of specific complaints about contractors being asked or required to invest in new computers in order to use specific software, which is an expense not contemplated by statutory certified payroll reporting requirements.

Section 16421:

The purposes of the proposed amendments to *section 16421* are to (1) establish a specific required frequency for the furnishing of certified payroll records and clarify language concerning the use of DIR forms [subpart (a)(3)]; (2) provide a specific statement of the overall policies that governing proper enforcement by labor compliance programs [proposed subpart (e)]; (3) specify that contractors cannot use a labor compliance program's failure to comply with the regulations as an excuse or defense for not paying the prevailing wage [proposed subpart (f)]; and (4) include the legal duty to provide workers with itemized wage stubs as a topic to be covered in pre-job conferences for public works contractors [Appendix A, proposed item (14)].

The reason for the amendments to subpart (a)(3) are to set a specific maximum interval for labor compliance programs to collect certified payroll records (based on the specific interval for reviewing certified payroll records that is imposed on the University of California and California State University by Labor Code Section 1771.7(c)) and to modify existing language which suggests that submission of the appropriate forms constitutes full compliance with reporting requirements irrespective of the contents of those forms. The necessity for a 30 day interval is to facilitate regular ongoing review of certified payroll records, which is a focal point of prevailing wage monitoring and enforcement; a shorter interval could impose unnecessary burdens on contractors who do not now submit records as frequently while a longer interval could delay the identification and rectification of prevailing wage errors that are detectable through payroll record review and thus delay the proper payment of wages to workers. The necessity for the other modifications is to foreclose the argument or perception, based on the existing language in this subpart, that labor compliance programs need only insure that the appropriate forms are submitted and need not be concerned with the contents of the forms.

The reason for new subpart (e) is to address recurring performance and enforcement problems based on the failure to understand and distinguish a labor compliance program's state law enforcement role from a public agency's other objectives on a public work construction project. This subpart is responsive to contentions by many programs that their primary mission is educational and that their primary goal and measure of success is in holding down costs for awarding bodies. At the other end of the spectrum, it also responds to anecdotal reports and complaints of overzealous enforcement or the use of contract payment withholding authority to place severe financial pressure on contractors (whether intended or not) and delay or even halt construction altogether while complaints and investigations remain unresolved. The necessity for such language in these regulations has been shown both through the Legislative Analyst Office's reports and individual complaints seeking revocation of approval or other forms of intervention by the Director. The specific language chosen reflects cited statutory standards, court opinion (*see Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976), and topics of recurring complaint.

The reason for new subpart (f) is to clarify that a labor compliance program's performance obligations under this subchapter are separate and distinct from a contractor's statutory obligation to pay prevailing wages, and the program's failures may not be used to defeat a worker's right to obtain proper wages. The necessity for this subpart is to foreclose recurring attempts to use labor compliance program performance standards as a source of substantive rights for contractors and workers, which is contrary to the intent of this subchapter on labor compliance programs and also disregards private enforcement rights that are not dependent on labor compliance program action.

The reason and necessity for adding the pay stub item to Appendix A is to call specific attention to a fundamental requirement applicable to all private employments that provides precise information about how a worker's paycheck was calculated. In the experience of the Department and others who suggested this addition, failure to provide itemized wage stubs, as required under Labor Code Section 226, goes hand-in-hand with other recordkeeping deficiencies, and makes the proper monitoring and enforcement of wage requirements immeasurably more difficult.

Section 16422:

The purposes of the proposed amendments to *section 16422* are to (1) change the title to clarify that it pertains to labor compliance programs rather than just awarding bodies; (2) delete the terms "initial" and "final" as modifiers of "approval" to conform to proposed changes in other regulations; (3) limit the notice requirement in subpart (d) to "in house" labor compliance programs operated by an awarding body; and (4) add three specific duties to be imposed on third party programs upon revocation. The reason and necessity for the first three items is to clarify language and applicability, including for purposes of consistency with other proposed amendments. The reason for the fourth item is to establish a means for ensuring that the revocation of a third party program does not compromise the rights of awarding bodies or workers on public works projects where that program was performing monitoring and enforcement. The duties stop a program from entering into new contracts that it will be unable to fulfill due to the imminent withdrawal approval, provide notice allowing awarding bodies with existing contracts to protect their rights, and require a cooperative transition so that loss of approval does not bring negative consequences to those awarding bodies or project workers. These duties have been imposed in prior revocation cases, and the recurring need for them in individual cases demonstrates the need for a set regulatory standard.

Section 16423:

The purposes of the proposed amendments to *section 16423* are to (1) change the title to more accurately reflect the breadth of current statutes requiring labor compliance programs and include an updated list of such statutes in a separate Appendix; (2) clarify when an awarding body must have an approval for its own labor compliance program; (3) limit the duty to communicate required notices to just the Director but require that the Director have notice before an awarding body certifies to another entity that it has contracted with an approved program; (4)

clarify that that the Director confers formal approval on sponsoring entities as labor compliance programs rather than on methodologies; and (5) clarify that multiple approvals are *not* needed for different types of projects that require a labor compliance program.

The reason and necessity for deleting the existing language of subpart (a) and replacing it with different summary language and a new Appendix are (1) the fact that there are many more statutes that require the adoption of a labor compliance program than are listed in the current text, and (2) to focus on and respond to ongoing confusion over an awarding body's specific regulatory obligations in establishing a labor compliance program rather than on statutory obligations that are not enforced by the Department of Industrial Relations. The reason for the amendments to subpart (b) is to (1) make it easier to comply with existing notice requirements by having them go to the Director only, and (2) ensure that required findings are actually made and transmitted *before* an awarding body certifies that they have been made. The necessity for these amendments arises out of widespread neglect of these requirements which make it difficult for interested parties and the Department to track which program has enforcement responsibilities on a particular project. The added language is also the prior notice requirement needed to address a recurring problem discovered through State Allocations Board audits of school districts that had certified their compliance with the labor compliance program requirements of Labor Code section 1771.7 in order to obtain bond funds but in fact had neither established nor contracted with an approved labor compliance program, thereby placing the districts in jeopardy of having to repay millions in construction bond funds. The reason for new subparts (c) and (d) is to clear up ongoing confusion over when approvals are required by statute and what an approved program is. The necessity for these subparts arises out of misconceptions reflected in applications for approval, including redundant applications for approval based on a change in the funding source for public works, and the assumption that an "approved program" means the methodology or manual and thus entitles any user of that methodology or manual to approval. The proposed amendments to this section are largely based on a set of Frequently Asked Questions on the Department's website. The reason and necessity for deleting specified text from old subpart (c), which is now new subpart (e), is to bring it into conformity with the proposed revisions to subpart (a).

Section 16424:

The purposes of the proposed amendments to *section 16424* are to eliminate the word "initial" as a modifier of "approval" and make another minor grammatical change. The reason and necessity for deleting "initial" is to conform to proposed changes in other sections.

Section 16425:

The purposes of the proposed amendments to *section 16425* are to (1) eliminate the term "initial" as a modifier of the term "approval" to conform to other proposed changes; (2) improve the understandability of the introductory language concerning factors considered in an application for approval; (3) increase the Director's time to grant or deny approval from 30 to 60 days; (4) eliminate the prescribed automatic expiration of initial approvals; (5) expressly authorize the Director to grant interim or temporary approval, subject to reasonable conditions for removing

the interim or temporary designation, with conforming changes on program lists; and (6) specify that awarding bodies that intend to contract out their own labor compliance program services to other awarding bodies must seek and obtain approval as third party programs under section 16426. The reason for these amendments is to clarify approval requirements; to give the Director adequate time to fully and fairly evaluate applications; to revise and eliminate extension language in anticipation of eliminating the two-step initial and final approval process which is currently on hiatus; to expressly state the Director's authority to place conditions or limitations on approval status as warranted in individual circumstances; and to clarify when awarding body labor compliance programs must seek approval as third party programs (which requires additional information to address staffing capacity and potential conflicts of interest).

The necessity for the amendments to the introductory language in subpart (a) is due to confusion caused by the imprecision and redundancy of the existing language; the addition of "its own" helps clarify when an awarding body program must seek approval under section 16426, and redundant phraseology is being eliminated. The necessity for a change from 30 to 60 days in subpart (b) is based on experience showing that the Director does not consistently meet the 30 day deadline but should be able to meet a 60 day deadline; that allowing a longer period of consideration allows for more careful consideration and would reduce status inquiries; and that expediting review the applications of school districts in early 2003 so as not to delay their eligibility for school construction bond funds resulted in the improvident approval of numerous programs that turned out to be ill-equipped for labor compliance monitoring and enforcement.

The necessity for language on the Director's authority to impose specific conditions is to clear up a lingering misconception over whether the authority exists in the absence of express language and to retain the ability to put a new program into the initial probationary status that exists under the current two-step approval process. Conditions such as geographic restrictions, numbers or types of projects that may be monitored, and conflict of interest limitations are necessarily fact-specific, depending on the nature and qualifications of the applicant, and thus not susceptible to further specification in regulatory standards.

The substantive reasons for changing the current two-step initial and final approval process are explained under section 16427 below. The necessity for the new subpart (e) is to address an ongoing lack of clarity about which approval process is required for awarding bodies that want to contract to provide labor compliance programs for other agencies, and the resulting failure of many such programs to seek approval and provide the additional information and disclosures required under section 16426.

Section 16426:

The purposes of the proposed amendments to *section 16426* are to: (1) delete the word "initial" as a modifier of the term "approval" to conform to other proposed changes; (2) improve the understandability of the introductory language concerning factors considered in an application for approval; (3) increase the Director's deadline to grant or deny approval from 30 to 60 days; (4) eliminate the automatic prescribed expiration of initial approvals; (5) require applicants to list individuals who will be subject to Political Reform Act requirements and identify where

those persons will be filing FPPC disclosure forms; and (5) expressly authorize the Director to grant interim or temporary approval, subject to reasonable conditions for removing the interim or temporary designation, with conforming changes on program lists. The reason for the amendments is to clarify approval requirements; to give the Director adequate time to fully and fairly evaluate applications; to revise and eliminate extension language in anticipation of eliminating the two-step initial and final approval process which is currently on hiatus; to require specific information about how the program intends to comply with FPPC requirements in light of widespread misunderstanding about the applicability of those requirements; and to expressly state the Director's authority to place conditions or limitations on approval status as warranted in individual situations.

The necessity for the amendments to the introductory language in subpart (a) is due to confusion caused by the redundancy in the existing language; the elimination of redundant phraseology parallels a proposed change in section 16425. The necessity for new subpart (a)(9) is to address and forestall, through direct language, the persistent misconception among private labor compliance programs that they are not subject to FPPC reporting requirements. The necessity for a change from 30 to 60 days in subpart (b) is based on experience showing that the Director does not consistently meet the 30 day deadline but should be able to meet a 60 day deadline; that allowing a longer period of consideration allows for more careful consideration and would reduce status inquiries; and that expediting review the applications in early 2003 so as not to delay the eligibility of school districts for school construction bond funds resulted in the improvident approval of numerous programs that turned out to be ill-equipped for labor compliance monitoring and enforcement.

The necessity for language on the Director's authority to impose specific conditions is to clear up a lingering misconception over whether the authority exists in the absence of express language and to retain the ability to put a new program into the initial probationary status that exists under the current two-step approval process. Conditions such as geographic restrictions, numbers or types of projects that may be monitored, and conflict of interest limitations are necessarily fact-specific, depending on the nature and qualifications of the applicant, and thus not susceptible to further specification in regulatory standards. The substantive reasons for changing the current two-step initial and final approval process are explained under section 16427 below.

Section 16427:

The purpose of the proposed amendments to *section 16427* is to eliminate the existing two-step approval process, in which programs are granted "initial" approval for eleven months and then reevaluated and granted "final" approval, and replace it with a single "approval" conferred on all programs and another optional status of "extended authority" for which a program may apply after three years of operation. The reason and necessity for the amendments is to bring the approval system more in line with current practice and reality. The original regulatory system was adopted in 1992, with the expectation that awarding bodies would adopt labor compliance programs to handle all prevailing wage responsibilities on an indefinite basis, and that the limited period of "initial" approval would serve as a probationary period, after which programs would be reevaluated for "final" approval. Following more recent legislation requiring

labor compliance programs for specific public works projects, the number of programs has grown dramatically (from about a dozen to over 400), but many operate only on a limited basis or for finite periods of time. Due in part to staffing limitations, the Director has accepted no new applications for final approval since 2003, and instead has been extending initial approvals en masse for six months at a time. The current benefits of “final approval” are automatic approval of forfeitures if not determined by the Labor Commissioner within 20 days and the possibility of agreeing to different procedures for securing approvals of forfeitures or submitting reports. These benefits can be conferred upon programs with “extended authority” while dispensing with the need for most other programs to seek approval a second time.

Prescribed time periods for seeking approval and for reviewing applications have been lengthened under this revised system. Since extended authority will no longer be sought or granted to all programs (as final approval is designed to operate under the existing regulations) a three year record of active enforcement (rather than 11 months) is believed necessary to get a more accurate picture of a program’s understanding and ability to monitor compliance, and 90 (rather than 30) days is needed to allow sufficient time to consider any such application carefully, including reviewing the program’s reports and enforcement records. Language has also been added to subpart (e) to automatically “grandfather” any program with “final approval” into this “extended authority” status, since they are functional equivalents and grandfathering will spare programs that already have an established track record as well as the Department from going through another approval process.

Section 16428:

The purposes of the proposed amendments to *section 16428* are to: (1) expressly state that approval may be revoked for non-compliance with governing statutes, regulations, or specific conditions of approval; (2) expressly authorize the Labor Commissioner to conduct prevailing wage law enforcement investigations and to serve as prosecutor in revocation proceedings; and (3) specify that the revocation provisions may not be read as affecting temporary or interim approval or as restricting the Director’s authority to impose conditions or restrictions in lieu of revocation. The reason for these amendments is to clarify and eliminate confusion over the existence of these authorities by setting them forth in express terms. The reason for the Labor Commissioner’s involvement in revocation proceedings is because of that office’s special expertise in prevailing wage enforcement and its roles in establishing enforcement practices for labor compliance programs (section 16434) and approving requests for approval of forfeiture (section 16437).

The necessity for express language on non-compliance with statutes, regulations, or special conditions, is to forestall arguments made in response to revocation complaints, which suggest that the Director may only revoke approval for the specific items listed in subparts (a)(1)-(4), and, in particular, that the enumeration of those specific types of violations precludes finding cause for revocation based on violations of other non-enumerated laws, regulations, or conditions of approval. The necessity for clarifying the potential roles of the Labor Commissioner in revocation proceedings arises out of confusion over the Labor Commissioner’s status when asked to participate on an ad hoc basis in prior revocation cases. The necessity for special conditions lan-

guage is to allow expressly for a penalty less than complete revocation when a program has demonstrated that it can perform properly going forward, and allowing it to continue under supervision or other conditions better serves the public interest than revoking approval and requiring affected awarded bodies to find other approved programs to take over existing contracts for labor compliance services. Such conditions and restrictions are necessarily fact-specific, developed in response to serious concerns raised during revocation proceedings, and thus are not susceptible to further specification in regulatory standards.

Section 16429:

The purpose, reason, and necessity of the proposed amendments to *section 16429* is to delete the words “initial or final” to conform to proposed changes in other regulations that would eliminate the two-step approval process for most programs.

Section 16430:

The purpose of the new proposed *section 16430* is to require awarding bodies to take cognizance of and comply with requirements of the Political Reform Act as they pertain to labor compliance program personnel. The reason and necessity for this proposal is to address widespread misunderstanding and noncompliance with these requirements, including and especially the failure of awarding bodies to require contract senior level compliance officers to file FPPC conflict of interest disclosure forms. In subpart (b), the Director is proposing, but has not yet implemented, the possibility of providing an alternative filing location for these forms so that compliance officers in private programs can file in one place rather than with every local agency or district for which they provide services.

Section 16431:

The purpose of the proposed amendments to *section 16431* is to clarify and make more specific what is required to be reported in annual reports. Although the current requirements call for descriptions and summaries, many programs provide one-word answers for each of the enumerated items, making the reports essentially meaningless. The principal difference between the two proposed options is that Option A encourages programs to use suggested report forms on the Department’s web site (as many now do), while Option B would make the use of those forms mandatory unless a program has final approval or extended authority and the Director has agreed to a different reporting format. The reason and necessity for the proposals is stated in new proposed subpart (c), which is to provide information “in sufficient detail to afford a basis for evaluating the scope and level of enforcement activity of the Labor Compliance Program.” The need for better and more consistent data has been impressed upon the Department by inquiries from other agencies and branches of government as well as by the Department’s own experience. A specific reason and necessity for having mandatory forms is to assure that all necessary information is uniformly reported, facilitating understanding and consistent evaluation of all reports.

Section 16432:

The purpose of the proposed amendments to *section 16432* is to set forth specific mini-

minimum standards governing the monitoring of payroll records, investigations of complaints and potential violations, and audits to determine the extent of violations. Option A was developed in the context of the existing regulatory framework, while Option B restates these requirements in greater detail in a manner that more closely reflects the Labor Commissioner's terminology and approach to investigations and audits. Option B would require more frequent reviews of payroll records (applying the minimum monthly review requirement found in Labor Code section 1771.7(c) to all labor compliance programs), and would require weekly site visits. The purpose of the last subpart in both options is to (1) provide contractors with notice and an opportunity to respond if appropriate before requesting the Labor Commissioner to approve a forfeiture, and (2) specify the circumstances under which a labor compliance program may resolve a prevailing wage violation without first requesting approval from the Labor Commissioner.

The reason and necessity for most of the proposed amendments to *section 16432* is to (1) provide minimum standards so that programs do not devote bond money to unnecessary activities; and (2) address the lack of meaningful enforcement reflected in annual reports by outlining the specific techniques that are necessary for effective enforcement of the prevailing wage laws. Some programs seem to believe that their principal duty is to verify the use of the correct rates for reported work (which can be accomplished with software) without considering whether the work is classified or reported properly, although the Department's own experience shows that most significant violations arise out of improper classification of workers or misreporting of hours worked and wages paid. Some programs are also invisible to workers or indistinguishable from construction managers or other job-site personnel, which results in prevailing wage complaints continuing to come in to the Labor Commissioner despite the existence of a labor compliance program. On-site visit and interviewing requirements are needed to make program personnel visible and accessible to workers and also to perform certain kinds of monitoring, including ensuring that required notices are posted and that the work being performed matches what the contractor is reporting. The reason and necessity for a new subpart regarding notice to contractors and settlement authority is to clarify the appropriateness of giving contractors notice to allow for early resolution of violations where appropriate, and also to clarify the widely ignored need to request the Labor Commissioner's approval when assessing wages and penalties, while allowing for settlement of certain kinds of cases without seeking the Labor Commissioner's approval, provided the labor compliance program documents its action.

The theory behind the inspection standard in subpart (b) of Option A is that certified payroll records should be cross-checked for accuracy in the first quarter of work, and that this check may be used as a predictor of past or future compliance. While more random cross-checks are not precluded, they would not be required unless the program had cause to suspect potential violations. An "audit" under subpart (d) of Option A would have the same meaning as under the existing language and would track the elements of existing Appendix B, following this section.

The reason and necessity for the Option B proposals arises out an alternative view that more aggressive monitoring standards are required to address the performance deficiencies identified in the Legislative Analyst's Office reports. Proposed subpart (a) provides a direct explanation within the regulation of its purpose. The necessity for monthly review of all payroll records (subpart (b)) is to ensure regular ongoing review of certified payroll records, which is a focal

point of prevailing wage monitoring and enforcement; a shorter interval would impose added and possibly unnecessary burdens on program personnel while a longer interval could delay the identification and rectification of prevailing wage errors that are detectable through payroll record review and thus delay the proper payment of wages to workers. The necessity for random confirmation (subpart (c)) is to identify errors that are not detectable from reviewing the certified payroll records, including the misclassification of workers or misrepresentations of the number of hours worked or the amount of wages actually paid. Monthly random confirmation is a minimum necessary interval in light of the varying ranges of time spent by contractors and subcontractors on a construction project, which may be from only a few days to several months. Monthly confirmation would result in more contemporaneous identification and correction of violations, while the quarterly inspections contemplated in Option A could lead to other enforcement problems, including the inability to track down subcontractors and workers who have long since left the work site or the accumulation and delayed correction of underpayments that are not detected until well after the violation begins.

Weekly on-site visits under subpart (d) of Option B are the necessary interval to make this an effective monitor tool, particularly since some types of subcontracting work, such as installation of flooring, may be accomplished in a few days and thus never come to the direct attention of site monitors who visit less frequently. On the other hand, there is no clear need for a minimum requirement of every other day site visits that has been proposed in legislation. The necessity for a redefined “audit” in subpart (e) of Option B is to address ongoing confusion over different inconsistent meanings of that term, depending on the context and identity of the person conducting or preparing the audit. Under Option B, labor compliance program audits would be the same as Labor Commissioner audits, including through use of the same forms (proposed as a new Appendix in lieu of the existing Appendix B), which show how back wages and penalties are calculated for each worker covered in the determination.

While both Options propose giving prior notice and an opportunity to respond to contractors before requesting approval of a forfeiture, Option B differs from Option A in making the required notice period 10 days rather than 30. Either one is a minimum notice period, but the reason and necessity for a shorter period is to limit further delays in enforcing and correcting violations, once they have been detected; such delays allow ongoing violations to accumulate, delay the process of getting back pay into the hands of workers, and in some cases may jeopardize enforcement through the running of a statute of limitations. This notice requirement is not intended to create an enforceable substantive right in contractors (*see* section 16421, proposed new subpart (f), discussed above), but it does prescribe a proper enforcement practice for labor compliance programs to ensure both sides are considered before enforcement proceeds.

Section 16434:

The purposes of the proposed amendments to *section 16434* are to clarify the role of public works coverage determinations in providing guidance for enforcement decisions, to elaborate upon and clarify specific enforcement duties with respect to apprentices employed on public works, and to require enforcement records to be maintained that will enable the Department to evaluate the program’s enforcement activities and will also be available in the event of related legal action. The purposes for additional and more specific proposals in Option B are to (1) pro-

vide a specific procedure for handling complaints based on the practice of the Labor Commissioner; (2) require enforcement records to be maintained for each public work project on which the program has enforcement responsibilities, with a suggested reporting format (Appendix D); and (3) specify that the Labor Commissioner may provide, sponsor, or endorse training for labor compliance programs with specified components. The reason and necessity for all of the amendments is to add clarity and specificity on matters for which programs and other interested persons have complained there currently is a lack of guidance (or inaccurate guidance with respect to public works coverage determinations).

The reason and necessity for addressing apprenticeship responsibilities (subpart (b) in Option A and subpart (c) in Option B) is to clarify what issues remain within the prevailing wage enforcement responsibilities of a labor compliance program as distinct from other kinds of suspected violations which awarding bodies, and by extension labor compliance programs, must refer to the Division of Apprenticeship Standards for investigation and enforcement. These regulatory guidelines have been sought by many programs going back to the previous rulemaking in 2003-4.

The reason and necessity for a complaint procedure (subpart (b) in Option B only) is that no written standards presently exist, and many programs do not recognize a responsibility to respond to complaints, which results in those complaints being redirected to the Department, other agencies, and the Legislature. Recent legislation has also proposed a related set of procedures for private labor compliance programs. The specific time limits in this proposal track the existing practice of the Labor Commissioner in responding to the same kinds of complaints with respect to public works cases enforced by that office. The specified reporting intervals are necessary to insure prompt notification and in turn limit status inquiries or attempts to seek redress through other agencies when there is no communication.

The reason and necessity for a rule requiring the maintenance of enforcement records is so a program can demonstrate, and the Department can evaluate, compliance with the duty to enforce the prevailing wage law in a manner consistent with the practice of the Labor Commissioner (subpart (a)), and to preserve pertinent records for so long as they may be relevant to a wage claim within any applicable statute of limitation. The reason and necessity for the proposal on training is to provide assurance to programs and the public that training will be made available and will address specified subjects, thus enabling program personnel to acquire and maintain necessary levels of expertise.

Section 16435:

The purposes of the amendments to *section 16435* are to (1) remove and separate withholding for wage underpayments into a separate regulation to avoid confusion between the two different authorities for contract withholding and the differing requirements for each; (2) make grammatical changes to add clarity to existing language; (3) specify that withholding due to delinquent or inadequate payroll records does not require the Labor Commissioner's approval and place limits on the amount of contract payments that should be withheld due to delinquent or inadequate payroll records; (5) require that the contractor and subcontractor, if applicable, get

written notice, with prescribed contents, when contract payments are withheld for this reason; (6) specify that withholding for this reason must cease when the proper records are supplied; and (7) specify that any assessment of penalties under Labor Code Section 1776(g) for inadequate or delinquent records does require the Labor Commissioner's approval. The reason and necessity for the amendments are to address areas of ongoing confusion over program responsibilities, as well as to address complaints concerning potentially excessive and disruptive use of withholding authority that may be disproportionate to the violation and may place undue financial hardship on contractors while leaving them with no practical means of recourse.

Section 16435.5:

The purposes of the new *section 16435.5* are to (1) remove and separate withholding for wage underpayments into a separate regulation to avoid confusion between the two different authorities for contract withholding and the differing requirements for each; and (2) specify that withholdings due to wage underpayments and other violations do require the Labor Commissioner's approval. The reason and necessity for the amendments are to address ongoing confusion over the two different authorities for contract withholding and clarify that there must be Labor Commissioner approval for contract withholding due to prevailing wage underpayments and penalties.

Section 16436:

The purposes of the amendments to *section 16436* are to (1) restate the definition of "forfeitures;" (2) delete an unnecessary enumeration of statutory violations that cause wage underpayments; (3) allow for automatic Labor Commissioner approval of small forfeitures (less than \$1,000); and (4) specify that all other forfeitures require the Labor Commissioner's approval as specified in section 16437. The reason for the amendments is to address confusion over what constitutes a forfeiture requiring the Labor Commissioner's approval. The necessity to do so arises out the widespread failure of most programs to pursue formal enforcement through the procedures required by these regulations. In recognition that many violations involve small dollar amounts and do not warrant scrutiny by the Labor Commissioner, a \$1,000 automatic approval threshold has been proposed to streamline the paperwork and lower the enforcement cost for such cases, and hopefully making programs more willing to comply with required procedures for higher value cases.

Section 16437:

The purposes of the amendments to *section 16437* are to: (1) include with a request for approval of forfeiture the amount of funds being held in retention, which may be relevant to statute of limitations issues, an audit summary or audit enumerating amounts of wages and penalties due, and revised information regarding the program's approval status; (2) make non-substantive grammatical corrections to subpart (d); and (3) make revisions in subpart (a)(9) and subpart (e) to conform with other proposals to change from "initial" and "final" approvals to "approval" and extended authority. The reason and necessity for the amendments are to provide additional information that is required for the Labor Commissioner to approve, and for the program to be able

to enforce, a prevailing wage violation, and to provide other clarifying and conforming changes in the regulatory language.

Section 16439:

The purpose of the amendments to *section 16439* is to specify and clarify that the labor compliance program has full authority to settle the wage and penalty assessment and any resulting enforcement proceeding once a forfeiture has been approved by the Labor Commissioner, unless the Labor Commissioner has intervened into the enforcement proceeding. The reason for the amendments is to address ongoing confusion that has arisen in individual enforcement cases (under Labor Code Section 1742) over whether programs can settle those cases for a lesser amount once the amount of the forfeiture has been approved by the Labor Commissioner or whether they must return to the Labor Commissioner for authority to settle for a lesser amount. The necessity for a regulation acknowledging the program's independent settlement authority is to forestall a conflicting interpretation that might otherwise arise through a strict reading and application of the other forfeiture regulations. Giving the Labor Commissioner an ongoing role in monitoring and approving all settlements is impractical in terms of the investment of time and attention that would be required as well as contrary to the one of the fundamental purposes for labor compliance programs, which is to remove some of the prevailing wage enforcement responsibilities from the Labor Commissioner. The necessity for documenting the basis for settlement is to have a record that would be available in the case of a complaint against the program, a performance review by the Labor Commissioner (or some other entity), or a private enforcement case involving the same wage entitlements.