

**STATE OF CALIFORNIA  
CALIFORNIA STATE AUDITOR'S OFFICE  
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**TITLE 2, DIVISION 10, CALIFORNIA CODE OF REGULATIONS  
ADOPT SECTIONS 61300 TO 61320, INCLUSIVE, REGARDING THE  
ALTERNATIVE WHISTLEBLOWER SYSTEM**

**INITIAL STATEMENT OF REASONS**

**INTRODUCTION**

The California State Auditor ("State Auditor") proposes to amend California Code of Regulations, title 2, division 10, to add regulations relating to the State Auditor's statutory mandate to establish an alternative whistleblower system.

The California Whistleblower Protection Act ("Act") [as set forth in Article 3 (commencing with Government Code section 8547) of Chapter 6.5 of Division 1 of Title 2 of the Government Code], requires the State Auditor to investigate and report on improper governmental activities by state agencies or their employees. In fulfilling this mandate, the State Auditor created the whistleblower program, which oversees the processing and investigation of whistleblower complaints and the appropriate reporting of any findings related to such complaints. Under the Act, the State Auditor may issue recommendations to prevent the continuation or recurrence of any improper governmental activities. Finally, the Act requires the State Auditor to keep confidential every investigation, including, but not limited to, all investigative files and work product, except that the State Auditor may issue a public report about a substantiated improper governmental activity when necessary to serve the state's interests. Even when issuing a public report, the State Auditor may not disclose the identity of the whistleblower or of any person providing information in confidence unless such persons expressly permit that disclosure or the State Auditor makes a disclosure to law enforcement that is conducting a criminal investigation.

In 2017, the Legislature amended the Act by enacting Government Code section 8547.5, subdivisions (c) and (d) ("amended statute"), which require the State Auditor to create an alternative whistleblower system for allegations of improper governmental activities by employees of the California State Auditor's Office ("State Auditor's Office"). The amended statute requires that any such allegations be transmitted to the Employment and Administrative Mandate Section of the California Department of Justice ("DOJ") so that they can transmit any such allegations to an independent investigator. The amended statute also requires that the independent investigator then investigate any such

allegations in a manner consistent with provisions of the Act relating to other civil service employees. In addition, the amended statute requires the independent investigator, subject to certain limitations, to report on such investigations and for the State Auditor's Office to reimburse the DOJ for the costs of retaining an independent investigator.

State law mandates that the State Auditor's Office be independent from other state agencies. Government Code sections 8546.1, subdivision (c), and 8546.4, subdivision (a), require the State Auditor to conduct all financial and performance audits pursuant to the Government Auditing Standards published by the Comptroller General of the United States ("auditing standards"). These auditing standards require the State Auditor's Office to be independent in all matters relating to audit work. To ensure that the State Auditor's Office maintains the independence necessary under audit standards, Government Code section 8543, subdivision (a), declares that the State Auditor's Office shall be independent of the executive branch and legislative control in order to be free of organizational impairments to independence. Further, Government Code section 8546 states that it is the Legislature's intent that the State Auditor's Office be free from influence of existing state control agencies that could be the subject of audits conducted by the State Auditor's Office.

In addition to mandating the State Auditor's Office independence, state law also has strict mandates imposed on employees of the State Auditor's Office regarding the confidentiality of the State Auditor's audits and investigations. Government Code sections 8545 and 8545.1 prohibit the State Auditor and her employees from disclosing to the public any record or substantive information about a pending audit. Government Code section 8545.1, subdivision (c) makes such a disclosure a misdemeanor. Government Code section 8547.5, subdivision (b), prohibits disclosure of the identity of a person who provides information that initiates an investigation, or of any person who provides information in confidence to further an investigation, without the express permission of the person. Government Code section 8547.7, subdivision (c), requires the State Auditor to keep confidential every investigation, including, but not limited to, all investigative files and work product unless the State Auditor issues a public report after determining that such issuance is in the best interest of the State.

In mandating that the State Auditor create an alternative whistleblower system that is consistent with investigations conducted by the State Auditor under the Act, Government Code section 8547.5, subdivisions (c) and (d) provide little guidance or clarity regarding the parameters of the alternative whistleblower system or how an independent investigator would ensure that his or her investigation would be conducted in a manner consistent with investigations conducted by the State Auditor. In addition, the amended statute does not address the interplay between the alternative whistleblower system and the State Auditor's duties regarding independence, confidentiality, and the State Auditor's duty to comply with auditing standards.

## Proposed Regulations

To address these issues, the State Auditor proposes this rulemaking to provide greater structure to the alternative whistleblower system and to interpret and make specific various terms set forth in Government Code section 8547.5, subdivisions (c) and (d) that pertain to the alternative whistleblower system. This proposed rulemaking harmonizes the alternative whistleblower system with the State Auditor's statutory duties regarding independence, confidentiality, and the State Auditor's duty to comply with auditing standards. Finally, this proposed rulemaking ensures that investigations conducted under the alternative whistleblower system are consistent with investigations conducted by the State Auditor under the Act.

This Initial Statement of Reasons provides specific information regarding each proposed regulation below. As an overview, however, the proposed regulations will implement the following subject areas of Government Code section 8547.5, subdivisions (c) and (d):

- The alternative whistleblower system for submission to an independent investigator of allegations of improper governmental activities engaged or participated in by employees of the State Auditor's Office.
- The prompt and direct delivery of all submissions to the DOJ without prior review by the State Auditor.
- The DOJ's review of submissions, determination of whether they constitute an allegation of improper governmental activity and, if so, the transmittal of them to an independent investigator for further action.
- The manner in which an independent investigator conducts investigations to ensure consistency with the Act as it pertains to other state civil service employees.
- The preparation of and transmittal of confidential reports pertaining to investigations conducted under the alternative whistleblower system.
- The responses to confidential reports pertaining to investigations conducted under the alternative whistleblower system.
- The reimbursement of costs associated with the alternative whistleblower system.
- The harmonization of the alternative whistleblower system with the State Auditor's statutory duties regarding independence, confidentiality, and the State Auditor's duty to comply with auditing standards.

## **SPECIFIC PURPOSE OF EACH SECTION<sup>1</sup> – GOVERNMENT CODE SECTION 11346.2, SUBDIVISION (b)(1)**

This proposed regulatory action would adopt the following sections in California Code of Regulations, title 2, division 10.

The specific purpose of each adoption, and the rationale for the determination that each adoption is reasonably necessary to carry out the purpose for which it is proposed, together with a description of the public problem, administrative requirement, or other condition or circumstance that each adoption or amendment is intended to address, is as follows:

**Proposed section 61300** sets forth a general statement regarding the purpose of Government Code section 8547.5, subdivisions (c) and (d) and clarifies that all the proposed regulations in California Code of Regulations, title 2, division 10, chapter 5 pertain to the alternative whistleblower system. This proposed regulation is necessary to inform the Legislature, the DOJ, any independent investigators, employees of the State Auditor’s Office, and the general public of the purpose of the proposed regulations and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61301** defines the term “Act” to mean the California Whistleblower Protection Act set forth in Article 3 (commencing with Government Code section 8547) of Chapter 6.5 of Division 1 of Title 2 of the Government Code. This section helps to ensure that the Act is not interpreted as only Government Code section 8547.5, subdivisions (c) and (d), and that the Act is not confused with other statutes applicable to the State Auditor or other statutes that refer to investigations. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61302** defines the term “alternative whistleblower system” and interprets and makes specific the use of this term as set forth in Government Code section 8547.5, subdivision (c). This term is defined to mean a process to receive, keep confidential, and investigate only those allegations of improper governmental activities made against the State Auditor’s Office or its employees under the Act and shall be limited to this purpose. The way this term is defined ensures that the term is used in reference to the alternative whistleblower system developed pursuant to Government Code section 8547.5, subdivisions (c) and (d), and is not confused with the whistleblower program operated by the State Auditor that pertains to allegations of improper governmental activities against other state entities or their employees. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

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<sup>1</sup> Unless otherwise indicated, such as by an express reference to the California Government Code, any use of the term “section” in this statement is a reference to a section or proposed section of the California Code of Regulations.

**Proposed section 61303** defines the term “appropriate to share” and interprets and makes specific the use of this term as set forth in Government Code section 8547.5, subdivision (c). This term is defined to mean that the independent investigator may report to entities or individuals outside the State Auditor’s Office when (1) the State Auditor’s Office does not provide an objectively reasonable explanation for not taking adverse action and implementing the independent investigator’s recommendation or (2) criminal or other activity poses an ongoing threat to the integrity of the State Auditor’s Office. This section helps to clarify when it is appropriate for the independent investigator to report to entities outside the State Auditor’s Office. This section is necessary to ensure that when the independent investigator determines it is appropriate to share an investigation report, such a determination is consistent with when the State Auditor makes determinations about when it is appropriate to similarly share reports outside the agency involved pursuant to Government Code section 8547.7, subdivision (a). By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61304** defines the term “consistent with the provisions of this article relating to other state civil service employees” as used in Government Code section 8547.5, subdivision (c), to mean that the independent investigator shall comply with these proposed regulations and provide State Auditor’s Office employees with the same rights and obligations as civil servants being investigated or interviewed by the State Auditor’s Office under the Act. This section helps to ensure that the independent investigator treats the State Auditor’s Office and its employees fairly and equitably and in substantially the same manner as other civil servants being investigated or interviewed by the State Auditor’s Office pursuant to the Act. This section also helps to ensure that the State Auditor’s Office and its employees are not afforded any preferential treatment. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in interpreting the statute and these regulations.

**Proposed section 61305** defines the terms “Department of Justice” or “DOJ” to mean the Employment and Administrative Mandate Section of the California Department of Justice, unless otherwise indicated. This helps to ensure that these terms are not confused with the California Department of Justice as a whole or the California Attorney General who acts through the California Department of Justice. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61306** defines the terms “employee” or “employees” and makes specific the use of this term as set forth in Government Code section 8547.5, subdivision (c). This term is defined to mean an employee or employees of the State Auditor’s Office. This section clarifies that this term includes any employee of the State Auditor’s Office but does not include any person or business entity that has contracted with the State Auditor’s Office. Defining this term also defines who is subject to the alternative

whistleblower system as opposed to the whistleblower program operated by the State Auditor. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61307** defines the term “final action” to mean the State Auditor’s written notification to the independent investigator regarding any recommendations the independent investigator has made or the State Auditor’s reasons for not taking adverse action pursuant to Government Code section 19570 in response to the independent investigator’s final written report. This clarifies that the term does not include oral statements, interim inquiries, or notifications that are not from the State Auditor or that are not regarding recommendations the independent investigator has made. This helps to ensure that the independent investigator does not conclude erroneously that the State Auditor has taken a final action. Defining this term also clarifies when the independent investigator can take subsequent steps in response to a final action issued by the State Auditor. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in interpreting the statute and these regulations.

**Proposed section 61308** defines the term “good faith” to mean that the individual providing the information or report of an improper governmental activity has a reasonable basis in fact for reporting or providing the information. This section helps to ensure that the DOJ does not engage independent investigators for lengthy or costly investigations into frivolous or meritless allegations. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61309** defines the terms “improper governmental activity” or “IGA” to have the same meaning as set forth in Government Code section 8547.5, subdivision (c)(5). This section eliminates ambiguity in the proposed regulations since “improper governmental activity” has two separate meanings under the Act. This section clarifies which term is applicable to the proposed regulations. This section ensures that this term has the same meaning as intended by Government Code section 8547.5, subdivision (c). Further, by establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61310** defines the term “independent investigator” to mean an individual who meets all of the requirements contained in proposed section 61318. This section makes specific the term “independent investigator” as used in Government Code section 8547.5, subdivisions (c) and (d). It also helps to ensure that the independent investigator is independent from other state and local agencies and, therefore, does not pose a threat to the State Auditor’s independence, or create a conflict of interest or perception of bias, which could violate both state law and the State Auditor’s statutory duty to follow auditing standards. This section also helps to ensure that the independent investigator’s conclusions and recommendations are reliable. By establishing this term

and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61311** defines the term “pending matters liaison” to mean the State Auditor’s Office’s Chief Counsel unless the Chief Counsel is the subject of the submission, in which case it means the State Auditor’s Office’s Assistant Chief Counsel. If both are the subject of a submission, then it means the State Auditor’s Office’s Human Resources Manager. This section helps to ensure the availability of a pending matters liaison if the Chief Counsel or the Assistant Chief Counsel are effectively unavailable due to a conflict of interest. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61312** defines the term “promptly and directly delivered” and interprets and makes specific the use of this term as set forth in Government Code section 8547.5, subdivision (c). This term is defined to mean submitted by the State Auditor’s Office to the DOJ by website, email, U.S. Mail, or telephone, within three business days of receipt and without prior review by or disclosure to the State Auditor. This section identifies and clarifies the acceptable means of transmitting a submission. This section also clarifies that the term means not only the absence of a review by the State Auditor but also the absence of a disclosure to the State Auditor before delivery to the independent investigator. This helps to ensure that the State Auditor will not improperly review a submission before the State Auditor’s Office transmits it to the DOJ. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61313** defines the term “State Auditor” to mean the California State Auditor appointed by the governor pursuant to Government Code section 8543.2 or held over in that position, or the Chief Deputy State Auditor when the State Auditor position is vacant. This section helps to ensure that the term “State Auditor” is not confused with the term “State Auditor’s Office” and it clarifies which individuals and when such individuals might be acting in the capacity as State Auditor. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61314** defines the term “State Auditor’s Office” to mean the California State Auditor’s Office. This section helps to ensure that the term “State Auditor’s Office” is not confused with the term “State Auditor” or with State Auditor’s Office employees. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61315** defines the term “submission” to mean an allegation that the State Auditor’s Office or an employee engaged or participated in an improper governmental activity. This section helps to ensure that complaints that do not constitute allegations of improper governmental activities are handled under the proper legal

authority. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61316** defines the term “supports a conclusion” to mean that the “sufficient, reliable, and credible evidence” gathered by the independent investigator establishes that it is more likely than not that the State Auditor’s Office or an employee engaged or participated in a substantiated improper governmental activity. This section clarifies that the evidentiary standard is more likely than not rather than another standard, such as the clear and convincing standard or beyond a reasonable doubt standard. This is the same evidentiary standard that the State Auditor’s Office uses when it investigates allegations of improper governmental activities by other state civil service employees and that the State Personnel Board uses when it determines whether to impose discipline on civil servants. By establishing this term and giving it a particular meaning, the proposed section allows for easy reference and helps to avoid ambiguity in the proposed regulations.

**Proposed section 61317, subdivision (a)** requires the DOJ to review a submission and determine whether it constitutes a good faith allegation of an improper governmental activity. If the DOJ concludes that the submission contains sufficient factual information to warrant further investigation, then this section requires the DOJ to contract with an independent investigator. This proposed subdivision provides the DOJ with clear criteria for deciding whether to engage an independent investigator. Without this proposed subdivision, the DOJ would lack guidance and not know whether to engage an independent investigator for frivolous or meritless allegations. This proposed subdivision would also help to ensure that allegations of improper governmental activities made against the State Auditor’s Office or its employees are handled in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees.

**Proposed section 61317, subdivision (b)** establishes the procedures necessary to ensure that an independent investigator, when conducting an investigation, does not violate or cause any employee of the State Auditor’s Office to violate state law with respect to any pending audit, assessment, or investigation. As noted in the Introduction, state law has strict mandates imposed on employees of the State Auditor’s Office regarding the confidentiality of the State Auditor’s audits and investigations. Government Code sections 8545 and 8545.1 prohibit the State Auditor and her employees from disclosing to the public any record or substantive information about a pending audit, which includes audit assessments. Government Code section 8547.5, subdivision (b), prohibits the disclosure of the identity of a person who provides information that initiates an investigation, or of any person who provides information in confidence to further an investigation, without the express permission of the person. Government Code section 8547.7, subdivision (c), requires the State Auditor to keep confidential every investigation, including, but not limited to, all investigative files and work product unless the State

Auditor issues a public report after determining that such issuance is in the best interest of the State. Government Code section 8545.1, subdivision (c) makes these disclosures a crime.

In addition, Government Code sections 8546.1, subdivision (c), and 8546.4, subdivision (a), require the State Auditor to conduct all financial and performance audits pursuant to the Government Auditing Standards published by the Comptroller General of the United States (“auditing standards”). These auditing standards require the State Auditor’s Office to be independent in all matters relating to audit work and require that outside parties not interfere with the State Auditor’s work.

Therefore, this proposed subdivision sets forth a procedure to enable an independent investigator to know whether a particular investigation would improperly relate to a pending audit, assessment, or investigation, and, if so, places a hold on such investigation until that pending audit, assessment, or investigation is completed. To protect the integrity of the independent investigator’s investigation, this proposed subdivision requires that the pending matters liaison place a litigation hold on the applicable pending audit, assessment, or investigation so that materials related to the independent investigator’s investigation are preserved until the independent investigator completes his or her investigation. This proposed subdivision clarifies that “relating to a pending audit, assessment or investigation” includes the various phases, elements and staff pertaining or assigned to an audit, assessment or investigation.

This proposed subdivision is necessary to preserve the State Auditor’s independence, avoid interference with on-going audits, assessments, and investigations, and avoid the disclosure of records and information that are confidential by law, the disclosure of which would constitute a crime. It also eliminates ambiguity about whether an audit, assessment or investigation is pending while ensuring that a complete investigatory record is preserved for the independent investigator if he or she must defer the investigation.

Finally, this proposed subdivision allows the independent investigator to refer an allegation to the appropriate criminal or administrative law enforcement agency in lieu of conducting an investigation of the matter when the independent investigator determines that there is reasonable cause to believe that an employee is engaging in ongoing criminal activity or fraud subject to certain limitations. This proposed subdivision clarifies when an independent investigator may make reports to law enforcement. Without this regulation, an independent investigator could be left wondering whether he or she could report to law enforcement and, if so, under what circumstances.

**Proposed section 61317, subdivision (c)** clarifies that the State Auditor’s Office may conduct its own workplace investigation of allegations even if they are the same or similar to those that the independent investigator is investigating. This resolves any ambiguity over whether Government Code 8547.5, subdivision (c) preempts the State Auditor’s Office from investigating the same or similar matters that the independent investigator is investigating.

**Proposed section 61317, subdivision (d)** requires any final report written by the independent investigator to set forth the information that the State Auditor needs to evaluate the independent investigator's findings and recommendations and to decide whether to take adverse action. Without this subdivision, an independent investigator could submit a final written report that is inadequate for the State Auditor to act upon.

**Proposed section 61317, subdivision (e)** helps to ensure that the State Auditor and her office's executive staff receive a copy of the independent investigator's report and supporting evidence securely and timely whenever the independent investigator reaches a conclusion. It also helps to ensure that all records relating to an investigation are returned to the State Auditor's Office and that all copies are destroyed. This proposed subdivision is necessary to help ensure that confidential records are not disclosed to the public inadvertently.

**Proposed section 61317, subdivision (f)** requires the State Auditor's office either to serve a notice of adverse action or notify the independent investigator in writing of the reasons for not doing so within 60 days of receiving a final written report from the independent investigator supporting a conclusion that an employee engaged in an improper governmental activity. This helps to ensure that the State Auditor's Office considers the independent investigator's report and takes appropriate action based upon it or provides an explanation as to why the State Auditor's Office has declined to do so.

**Proposed section 61317, subdivision (g)** clarifies that the 60-day timeframe specified in subdivision (f) does not commence until the State Auditor's Office receives the independent investigator's final written report and all evidence gathered by the independent investigator during the investigation. This proposed subdivision defines "receipt" of the final written report as when the State Auditor's Chief Counsel, Chief of Investigations, or Human Resources Manager takes possession of the report. This helps to avoid ambiguity about when the 60-day timeframe commences and ensures that the regulation is not interpreted as requiring the State Auditor to act prematurely.

**Proposed section 61317, subdivision (h)** requires that the identity of the person providing the information that initiated an investigation must not be disclosed by anyone without the express permission of the person. This helps to ensure that persons who make allegations of improper governmental activities do so confidentially and that fear of disclosure of one's identity does not dissuade a prospective whistleblower from making an allegation. This proposed subdivision would also help to ensure that allegations of improper governmental activities made against the State Auditor's Office and its employees are handled in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees. Accordingly, this regulation would help to ensure consistency of care and diligence in handling investigations of allegations of improper governmental activities regardless of which state entity's employee is the subject of the allegation.

**Proposed section 61317, subdivision (i)** clarifies that the independent investigator may disclose the name of the subject employee if the independent investigator refers a matter to law enforcement or files a request to file charges before the State Personnel Board. This eliminates any ambiguity about whether the independent investigator could disclose the identity of the subject employee in these two limited circumstances and helps to ensure that these processes are able to function. This proposed subdivision would also help to ensure that allegations of improper governmental activities made against the State Auditor's Office or its employees are handled in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees.

**Proposed section 61318, subdivision (a)** is necessary to ensure that independent investigators retained by the DOJ have the proficiency, experience, and knowledge necessary to conduct an investigation of an alleged improper governmental activity by an employee of the State Auditor's Office. Without this section, independent investigators retained by the DOJ could be unqualified to conduct an investigation. This subdivision also helps to ensure that investigations of alleged improper governmental activities by employees of the State Auditor's Office are performed by independent investigators who meet the same minimum qualifications that the State Auditor requires of independent investigators who perform investigations of alleged improper governmental activities by all other state employees. Accordingly, this regulation would help to ensure consistency of care and diligence in handling investigations of allegations of improper governmental activities regardless of which state entity's employee is the subject of the allegation.

**Proposed section 61318, subdivision (b)** requires the DOJ to retain independent investigators who are independent from the State Auditor's Office, the executive branch, and legislative control. This proposed subdivision clarifies that independent means never having been employed by or contracted with the State Auditor's Office, and not having been employed by or contracted with the executive, legislative, or judicial branches of government, except to conduct independent workplace investigations, or any entity the State Auditor's Office has or could audit, within the preceding ten years. Ten years is a reasonable timeframe that helps to ensure independent investigators are not financially interested in or biased by their former employers or contractors but it allows for retaining independent investigators whose interests and relationships are so remote that they would not affect the investigation. It also helps to ensure that the independent investigator has no duties or incentives to attempt to exert influence over the California State Auditor's Office and thereby threaten its independence and objectivity. This proposed subdivision is necessary to preserve the State Auditor's independence while still ensuring that there remains a sufficiently large enough pool of potential investigators available who are not agents of, financially interested in, or biased by any entity that could be the subject of an audit by the State Auditor's office.

**Proposed section 61318, subdivision (c)** specifies that an independent investigator is a "consultant" as defined under the Political Reform Act of 1974 (Commencing with

section 81000 of Title 9 of the Government Code) and must file a statement of economic interests. This eliminates any ambiguity about whether the independent investigator is a consultant and helps to ensure that the independent investigator discloses any potential conflict of interest.

**Proposed section 61318, subdivision (d)** requires an independent investigator to maintain errors and omissions insurance of at least \$1 million. This helps to ensure an independent investigator could cover the losses that could result from the negligent performance of an investigation. This requirement is consistent with requirements for legal services contracts for state agencies, as well as a requirement in Business and Professions Code section 7520.3, for private investigators organized as limited liability companies.

**Proposed section 61319, subdivision (a)** establishes reasonable limits with adjustments for inflation for the hourly rate and total cost per completed investigation. Based on the State Auditor's vast experience in performing investigations, the State Auditor has determined that these limits will allow for the performance of a full and fair investigation while guarding against runaway and surprise costs the payment of which could impede the ability of the State Auditor's Office to meet its statutory mandates or be deemed an impairment or external control on our audit function. In the exceptional instance in which a completed investigation might exceed these reasonable limits, this proposed subdivision allows the State Auditor to defer payments of any amount exceeding the limit to the next fiscal year. This proposed subdivision is necessary as an investigation could impose unbudgeted costs on the State Auditor's Office for which there is no contingency appropriation available and, therefore, that would compromise its ability to perform other statutorily mandated activities that are critical to the state. For example, Government Code sections 8543.1 and 8546.3 require the State Auditor's Office to perform performance audits, to examine and report annually upon the financial statements prepared by the executive branch, and to perform all procedures necessary for proper reporting in accordance with the federal Single Audit Act of 1984 (31 U.S.C. Sec. 7501 et seq.). Failure to perform these activities could enable fraud, waste, and abuse of state funds, and result in the loss of substantial federal funding. The proposed subdivision ensures that the State Auditor can fulfill her mandate, while providing a reasonable mechanism to ensure payment to an independent investigator.

**Proposed section 61319, subdivision (b)** limits the obligation of the State Auditor to reimburse only for actual, reasonable and direct costs of the independent investigator's services that are supported by detailed itemized invoices. This helps to ensure that the State Auditor is not obligated to reimburse for costs that were not incurred, that are not reasonable, or that could be allocated to cost drivers other than the subject investigation.

**Proposed section 61319, subdivision (c)** specifies that certain listed costs are not reimbursable by the State Auditor's Office. The listed costs are fairly excluded because they are unreasonable, duplicative, allocable to other cost drivers, and/or discretionary and unnecessary. This subdivision eliminates any ambiguity about whether these costs

are reimbursable and allows the DOJ and the independent investigator to plan accordingly.

**Proposed section 61320, subdivision (a)** clarifies that the independent investigator may make a disclosure to a law enforcement agency in the same way that Government Code section 8547.5, subdivision (b) allows the State Auditor to make a disclosure to a law enforcement agency to conduct a criminal investigation. This clarifies that such a disclosure is permissible regardless of whether the State Auditor or another state entity is the subject of the investigation. It also helps ensure that allegations of improper governmental activities made against the State Auditor's Office and its employees are handled fairly, competently and in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees.

**Proposed section 61320, subdivision (b)** requires that all investigative records released to entities other than the State Auditor's Office be redacted to protect the identity of the whistleblower, witnesses and employees. This protects these parties and helps ensure that fear of disclosure does not dissuade whistleblowers from reporting improper governmental activities. It also ensures that allegations of improper governmental activities made against the State Auditor's Office and its employees are handled fairly, competently and in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees.

**Proposed section 61320, subdivision (c)** makes all records and similar evidence gathered in the course of an investigation confidential in the same way that Government Code section 8547.7, subdivision (c) makes them confidential when the State Auditor conducts an investigation. This helps to ensure that the same standards of confidentiality apply regardless of whether the State Auditor or any other state entity is the subject of the investigation. It helps to ensure that fear of disclosure does not dissuade whistleblowers from reporting improper governmental activities.

**Proposed section 61320, subdivision (d)** requires the independent investigator and the DOJ to keep every investigation confidential the same way that Government Code section 8547.7, subdivision (c) requires the State Auditor to keep every investigation confidential. This helps to ensure that the same standards of confidentiality apply regardless of whether the State Auditor or any other state entity is the subject of the investigation. It also helps to ensure that fear of disclosure does not dissuade whistleblowers from reporting improper governmental activities.

**Proposed section 61320, subdivision (e)** clarifies that notices of adverse action become public records after their effective dates when filed with the State Personnel Board, or when appealed, consistent with the California Constitution; Article 1, Section 1, the California Public Records Act as set forth in Article 1 (commencing with section 6250) of Chapter 3.1 of Division 7 of Title 1 of the Government Code; and principles of due

process. This clarifies that the presence of an investigation does not invoke greater protections from disclosure for these records than existing law affords.

**Proposed section 61320, subdivision (f)** clarifies that investigations remain confidential even if the independent investigator determines that a disclosure is appropriate under this regulation. This clarifies that a disclosure to law enforcement, the Attorney General, or a committee of the Legislature, if appropriate, is allowable while still ensuring the investigation remains confidential from third parties. This proposed subdivision ensures that allegations of improper governmental activities made against the State Auditor's Office and its employees are handled in a manner that is substantially similar to the manner in which the State Auditor handles allegations of improper governmental activities against other state entities and their employees. Accordingly, these regulations would help to ensure consistency in the handling of investigations of allegations of improper governmental activities regardless of which state entity is the subject of the allegation.

#### **OTHER REQUIRED SHOWINGS – GOVERNMENT CODE SECTIONS 11346.2, SUBDIVISIONS (b)(2)-(5) AND 11346.45, SUBDIVISION (a)**

**Economic Impact Assessment – Government Code section 11346.2, subdivision (b)(2):** This proposed regulatory action will not have an economic impact on California business enterprises or individuals as the regulatory action relates entirely to investigations of allegations of improper governmental activities engaged or participated in by employees of the State Auditor's Office. Accordingly, the proposed regulatory action will not affect:

- The creation or elimination of jobs within the state;
- The creation of new businesses or the elimination of existing businesses within the state;
- The expansion of businesses currently doing business within the state; or
- The health and welfare of California residents, worker safety, and the state's environment.

**Studies, Reports, or Documents Relied Upon – Government Code section 11346.2, subdivision (b)(3):** In proposing this regulatory action, the State Auditor was informed by past experience investigating complaints under the California Whistleblower Protection Act, past experience auditing state and local government agencies in California, and the following publications:

- *Government Auditing Standards (The Yellow Book)*, 2011 Revision, United States Government Accountability Office (<https://www.gao.gov/yellowbook/overview> as of April 10, 2019).

- *Government Auditing Standards (The Yellow Book)*, 2018 Revision, United States Government Accountability Office (<https://www.gao.gov/yellowbook/overview> as of April 10, 2019).
- *Appeals Resource Guide* (January 2019), California State Personnel Board Appeals Division ([http://spb.ca.gov/content/appeals/Appeals\\_Resource\\_Guide.pdf](http://spb.ca.gov/content/appeals/Appeals_Resource_Guide.pdf) as of April 10, 2019).

**Reasonable Alternatives to the Regulation – Government Code section 11346.2, subdivision (b)(4)(A):** The State Auditor considered alternatives when drafting these proposed regulations, and was open to considering any reasonable alternatives suggested. However, no reasonable alternatives were suggested or available. The State Auditor encourages interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period.

**Reasonable Alternatives that Would Lessen the Impact on Small Businesses – Government Code section 11346.2, subdivision (b)(4)(B):** This proposed regulatory action will not impact small business as it relates entirely to investigations of allegations of improper governmental activities engaged or participated in by employees of the State Auditor’s Office. Therefore, no reasonable alternatives were suggested or available regarding lessening the impact on small businesses.

**Facts Relied On to Support an Initial Determination That the Regulatory Action Will Not Have a Significant Adverse Economic Impact on Business – Government Code section 11346.2, subdivision (b)(5):** This proposed regulatory action will not have an economic impact on business as it relates entirely to investigations of allegations of improper governmental activities engaged or participated in by employees of the State Auditor’s Office.

**Public Discussions of Proposed Regulations – Government Code section 11346.45, subdivision (a):** This proposed regulatory action does not involve complex proposals or a large number of proposals that cannot easily be reviewed during the public comment period prescribed by Government Code section 11346.4. The State Auditor therefore encourages the submission of written comments to improve the quality of the proposed regulations from interested persons and the public during the comment period.