INITIAL STATEMENT OF REASONS

The California Prison Industry Authority (CALPIA) and the Prison Industry Board (PIB) pursuant to the authority granted by Penal Code (PC) Sections 2800, 2802, 2807, 2808, and 2809 in order to implement, interpret and make specific Penal Code 2808, propose to add Section 8003, Article 3, of the California Code of Regulations (CCR), Title 15, Division 8, concerning severability.

Problem Addressed:
Severability in regulatory language is necessary to ensure that the portion of CALPIA's regulations affected by a successful and final legal challenge does not affect the validity of the remaining regulations. The benefit of severability language is to avoid this type of problem in advance. In the 2018 case of *MJ Masters v. CDCR*, No. 1800580, Superior Court, County of Marin, a regulation was subject to challenge and remaining provisions did not survive challenge due to the lack of a severability clause. Implementing a severability regulation will address this potential risk for CALPIA.

Necessity:
This provision is necessary to make clear CALPIA's intention that if one or more provisions of these regulations is invalidated, either facially or as applied in a specific context, the remaining provisions shall continue in full force and effect to the extent possible without the severed provision(s). Although courts generally presume that statutes and regulations are severable – particularly where the scheme involved is long and complex – the severability statement here is intended to resolve any doubt as to the drafters' intent in this regard.

The doctrine of severability holds that upon finding an application or textual component of a regulation, statute, or provision to be unenforceable, inapplicable, or unconstitutional, a court may, in appropriate circumstances, excise the unenforceable, inapplicable, or unconstitutional part rather than declare the entire regulation, statute, or provisional framework invalid. The rationales for severance are that it can minimize judicial interference with administrative regulation making, legislative lawmaking, honor legislative and administrative intent. The doctrine is relevant because any holding that CALPIA regulations are partially invalid will give rise to questions concerning what to do with the valid remainder. And the doctrine is powerful because the viability of CALPIA's regulatory scheme should not hinge entirely on whether an unenforceable, inapplicable, or unconstitutional component is severable.

Authority and Reference:

The California Prison Industry Authority (CALPIA) and the California Prison Industry Board (PIB) propose to add Section 8003. In Penal Code (PC) section 2808 the California Legislature provided the PIB with *"all powers to do all of the things that the board of directors of a private corporation would do . . ."* including approving CALPIA's rulemaking proposals. According to Government Code section 11342.2, the proposed regulation is consistent and not in conflict with PC sections 2801 through 2808 (Prison Industry Authority) and is reasonably necessary to effectuate the purpose of PC sections 2801 through 2808. New Section 8003 provides for severability of regulatory provisions in the face of a successful challenge.

The proposed amended regulation will be vetted through the public process of the PIB and promulgated through the regulatory process as specified in the Administrative Procedures Act (APA). All rulemaking documents will be filed with the Office of Administrative Law (OAL) and are all available to the public on CALPIA's website.

Penal Code Section 2800: In 1982, the California Legislature restructured the Department of Corrections' industries and vocational training program for incarcerated individuals abolishing the Correctional Industries Commission and replacing it with the newly created Prison Industry Authority (PIA) (subsequently renamed CALPIA) under the direction of the Prison Industry Board.

Penal Code Section 2807(a): Section 2807(a) provides that CALPIA is authorized and empowered to operate industrial, agricultural, and service enterprises which provide products and services needed by the state, or any political subdivision thereof, or by the federal government, or any department, agency, or corporation thereof, or for any other public use. By giving CALPIA these duties and power by statute, the Legislature implicitly delegated rulemaking authority to CALPIA to adopt those rules and regulations necessary for the exercise of powers expressly granted to CALPIA.

Penal Code Section 2802: Section 2802 provides for the existence and powers of a Prison Industry Board (PIB).

Penal Code Section 2808: Section 2808 provides the PIB, in the exercise of its duties, all of the powers and do all of the things that the board of directors of a private corporation would do.

Background and CALPIA's Operations:

CALPIA was created by Chapter 1549, Statutes of 1982 as a semiautonomous state agency to operate California's prison industries in a manner similar to private industry. CALPIA was established to:

- Develop and operate manufacturing, agricultural, and service enterprises that provide work opportunities for incarcerated individuals.
- Operate working conditions similar to private industry providing experience, earnings, and opportunities for developing good work habits and occupational skills.
- Operate work programs for incarcerated individuals that are self-supporting through the generation of sufficient funds from the sale of products and services to pay all its expenses.

CALPIA manages over 100 manufacturing, service, and consumable operations in CDCR institutions throughout California. CALPIA's goal is to train incarcerated individuals with job skills, good work habits, education, and job support in the community so that when they parole, they never return to prison.

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made more specific.

ECONOMIC IMPACT ASSESSMENT:
Per Government Code Section 11346.3(b), CALPIA has made the following assessments regarding the proposed regulations:

Significant Statewide Adverse Economic Impact on Business:
The proposed regulation will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by a severability clause which affects CALPIA's operations and incarcerated workers. There is no actual change expected to current operations. As a result, there will be no significant adverse statewide adverse economic impact on businesses.

Creation or Elimination of Jobs within the State of California:
The proposed regulation will have no impact on the creation or elimination of existing jobs or businesses within California because those jobs or businesses are not affected by a severability clause. There is no actual change expected to operations. As a result, there will be no creation or elimination of jobs within the State of California as a result of these regulatory changes.

Creation of New Businesses or Elimination of Existing Businesses within the State of California:
The proposed regulation will have no effect on the creation of new or elimination of existing businesses with the State of California because those businesses are not affected by a severability clause. No actual change is expected to operations. As a result, there will be no creation or elimination of existing businesses within the State of California as a result of these regulatory changes.

Expansion of Businesses Currently Doing Business within the State of California:
The proposed regulation will not affect the expansion of businesses currently doing business within the State of California because they are not affected by a severability clause. As a result, there will be no anticipated expansion of businesses currently doing business within the State of California as a result of these regulatory changes.

Benefits of the Regulations:
Severability clauses can help administrative agencies minimize the damage caused by judicial review and can make the regulatory environment more efficient, participatory, and predictable. Greater predictability in the law allows agencies to determine how to use rulemaking resources most efficiently. Without severability, the probability that a court will set aside any particular provision is partly a function of the probability that a court will set aside any other provision in the same rule. Thus, the assessment of how best to regulate or how best to comply is to some extent a function of how likely a court is to find potentially unlawful provisions severable.

The benefit of a severability clause is to ensure that the portion of CALPIA's regulations affected by a successful and final legal challenge is severed and does not affect the validity of the remaining portions of regulations. In the 2018 case of *MJ Masters v. CDCR*, No. 1800580, Superior Court, County of Marin, a regulation was subject to challenge and remaining provisions did not survive challenge due to the lack of a severability clause.

As noted by Charles W. Tyler & E. Donald Elliott, in "Administrative Severability Clauses", The Yale Law Journal, 124: 2286-2352 (2015) citing Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards,* 54 ADMIN. L. REV. 807, 822-23 (2002):

> "Judicial deference to administrative severability clauses also promotes greater stability in regulatory schemes. A "remand-and-repromulgation cycle," . . . occurs when a regulation passes back and forth between an agency and the courts. If an agency could reliably influence how a reviewing court would make the severability decision by including a severability clause in a rule, then it could reduce the number of times it must re-promulgate a regulatory remainder that a court has erroneously invalidated."

Statement of Purpose and Issues Being Addressed:
New Section 8003 provides for severability of regulatory provisions in the face of a successful challenge. This section establishes a severability clause for CALPIA's regulations and sets forth that if any portion or provisions of the regulation are held invalid, unconstitutional, or unenforceable by any court of competent jurisdiction, then that specific portion or portions shall be deemed as separate, distinct, and independent provision(s) and will not affect the validity of the remaining portions of the regulations.

Specific Purpose and Rationale, Per Government Code 11346.2(b)(1):

Specific Regulatory Actions and Reasons:

Section 8003 is added:
A severability clause is necessary to ensure that portions of CALPIA's regulations affected by a successful and final legal challenge is severed and does not affect the validity of the remaining portions of CALPIA's regulations.

Duplication or Conflicts with Federal Regulations:
The proposed regulation does not conflict with any federal standards.

Technical, Theoretical, or Empirical Studies, Reports and Documents Relied Upon:

None.