Study N-300 April 18, 1997

Memorandum 97-27

Administrative Rulemaking: Interpretive Guidelines (Staff Proposal)

INTRODUCTION

At its February 1997 meeting, the Commission began considering whether an exception to full rulemaking procedures is appropriate for a non-binding statement of an agency interpretation of law (an interpretive guideline). See Memorandum 97-12 and its First Supplement.

Public comment on the topic is summarized in the February 27, 1997 meeting Minutes, the relevant portion of which is attached as an Exhibit.

Two letters of comment received since the meeting are also attached, as is a revised proposal by Professors Asimow and Ogden.

This memorandum discusses the principal policy issues relating to an interpretive guideline exception. Staff recommendations on these issues are indicated in the text of the memorandum. Language to effect the staff's recommendations is attached as an Exhibit.

PUBLIC COMMENTARY

Those in favor of an exception argue that requiring full rulemaking procedures for adoption of an interpretive guideline is unduly burdensome and often results in an agency choosing to forego adopting a rule, instead adopting an interpretation in violation of the APA (as an underground regulation) or remaining silent. Neither alternative benefits the regulated public, who have an interest in receiving valid, timely information as to an agency's interpretations of

law. Furthermore, proponents believe that full rulemaking procedure is not justified when adopting a purely advisory guideline that lacks the force and effect of law.

Those opposing an exception doubt the possibility of adequately defining an interpretive guideline that lacks the force and effect of law. In particular, they feel that an interpretive guideline entitled to any measure of judicial deference in interpreting a statute is not entirely without legal effect. Furthermore, whether legally binding or not, opponents believe that an interpretive guideline will have considerable practical effect, as most members of the regulated public will conform their behavior to an agency guideline in order to avoid hassles. Therefore, because an interpretive guideline will have some legal and practical effect, adoption of an interpretive guideline should be subject to rulemaking procedures.

If an exception is made for interpretive guidelines, opponents would like to see it limited in the following manner:

(1) Interpretive guideline adoption procedures must provide for meaningful public participation. Public participation educates regulators who often lack current and accurate information on the matter to be regulated. Also, advance public notice provides a time period in which affected parties can conform their behavior to the pending guideline.

(2) Interpretive guidelines must be readily available to the public.

(3) Compliance with a properly adopted interpretive guideline should provide a safe harbor from actions enforcing the interpreted statute.

(4) An interpretive guideline exception should not preclude invalidation of an improperly adopted regulation.

GENERAL POLICY

Discussion

Rulemaking procedures are generally perceived to be burdensome. An agency with limited resources or time may find it difficult or impossible to adopt a particular interpretive guideline because of these procedural burdens. Mr. Ratliff provides several concrete examples of this. See Exhibit pp. 17-23.

The question, however, is not whether rulemaking is burdensome, but whether it is unduly burdensome in the specific context of interpretive guidelines.

The staff is persuaded that full rulemaking procedures are inappropriately burdensome in adopting an interpretive guideline, for two reasons:

(1) Because an interpretive guideline is advisory only and lacks the force and effect of law, the elaborate public participation and impact analysis mechanisms of rulemaking procedure are overly protective. The public needs little protection from nonbinding agency advice.

To the contrary, agency advice is generally beneficial. As the court in *Tidewater* acknowledged, the public benefits "if agencies can easily adopt interpretive regulations because interpretive regulations clarify ambiguities in the law and ensure agency-wide uniformity." Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 576, 927 P.2d 296, 307, 59 Cal. Rptr. 2d 186, 197 (1996).

There are, however, significant disagreements over what it means for an interpretive guideline to be advisory only and lack the force and effect of law. To the extent that an interpretive guideline does have effect, some public oversight of interpretive guideline adoption is appropriate.

(2) Unlike a binding regulation, an agency interpretation of law need not be formally adopted in order to affect the public. Instead, an agency may avoid rulemaking procedures by declining to adopt an interpretation of general applicability and applying its interpretation only in case-by-case adjudication. See *id.* at 571, 927 P.2d at 304, 59 Cal. Rptr. 2d 194 ("Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases.").

Therefore, when rulemaking procedures are so burdensome as to deter interpretive rulemaking entirely, the procedures have no beneficial effect. Instead, the agency makes its decision with no public input, and the public has no advance notice of the agency's interpretation.

Implementation Issues

In order to implement an interpretive guideline exception, three principal questions must be answered:

(1) What effect, if any, should an interpretive guideline have?

(2) What procedures, if any, should govern adoption of an interpretive guideline?

(3) How should the category of exempt matters be defined?

Note that the first two questions are interdependent — the greater the effect of an interpretive guideline, the greater the affected public's interest in having a voice in its creation.

There is consensus that an interpretive guideline, in order to be exempt from rulemaking procedures, should lack legal force and effect. This is what justifies circumventing the APA's procedural protections of the public interest — the public requires no protection from an agency statement that has no legal force or effect.

There is a difference of opinion, however, on what it means that an interpretive guideline has no legal force and effect. In particular, there is disagreement as to whether an interpretive guideline that is entitled to judicial deference in some circumstances therefore has the force and effect of law.

It was also suggested that a person complying with an interpretive guideline should enjoy a safe harbor from actions enforcing the interpreted law.

Judicial Deference

Mr. Livingston suggests that an agency interpretation entitled to any judicial deference necessarily has some legal effect. Therefore, in order for an interpretive guideline to lack the force and effect of law, it must not be entitled to any judicial deference.

In *Tidewater,* Professor Asimow argued that an agency interpretation lacks the force of law if it is not binding on the courts or the public. Instead, a court reviewing an agency interpretation of law exercises independent judgment, granting whatever deference is appropriate to the circumstances. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1195-98 (1995).

The court in *Tidewater* disagreed. "To the extent … courts must defer to agency interpretations found in these regulations, they are rules of law, and the public disregards them at its peril." Tidewater at 575, 927 P.2d at 307, 59 Cal. Rptr. 2d at 197.

While Professor Asimow may be correct that an agency interpretation of law generally lacks the formal force of law, it does appear to have much of the practical effect of law.

What's more, if an agency interpretation is entitled to deference, this reinforces the inclination of regulated parties to conform their behavior to the agency's interpretation, increasing the interpretation's practical effect.

Alternatives. The question then is whether some minimal legal and practical effect is inconsistent with an exception to full rulemaking procedures, or is

acceptable so long as applicable adoption procedures are adequate to protect affected parties.

Three alternative views of the appropriate degree of judicial deference to be accorded an interpretive guideline have been presented:

(1) No deference. Under a no deference approach, an agency could legally communicate its interpretation of law to the public without complying with full rulemaking procedures, but that interpretation would be entitled to no judicial deference whatsoever. This is the approach favored by Mr. Livingston.

One oddity of this approach derives from its consistency with the current treatment of underground regulations. Because underground regulations are entitled to no deference under existing law (See *id*. at 577, 927 P.2d at 308, 59 Cal. Rptr. 2d at 198), this means that an agency could choose between an illegally adopted underground interpretation of law, or a legally adopted interpretive guideline, with no practical difference in the result. While it is clearly preferable that an agency comply with the law, there would be no other incentive to do so.

Therefore, if the adoption procedures for an interpretive guideline impose any costs or delays, an agency would face the same quandary as under existing law. The only difference would be the threshold at which the burden imposed by compliance with procedures might lead an agency to view silence or an underground regulation as a necessary evil.

(2) Standard Deference. At the other extreme, an interpretive guideline could be entitled to the same deference due an agency interpretation of law properly adopted as a regulation. That is, a court reviewing an interpretive guideline would exercise its independent judgment but could grant whatever deference was appropriate to the circumstances. For example, where an agency interpretation addresses a highly technical subject, a generalist court might concede that an expert agency has an interpretive advantage and defer to that agency's interpretation.

This approach is consistent with Professor Asimow's argument that an agency interpretive statement is binding on no one, and therefore lacks the force of law and should not be subject to rulemaking procedures.

The principal shortcoming of this approach is its failure to distinguish between an agency interpretation adopted as a regulation and one adopted as an interpretive guideline. With one exception, an agency would have no incentive to follow the full rulemaking procedure when adopting a nonbinding interpretation.

The exception is where an agency has been expressly delegated authority to interpret a statute, and its properly adopted interpretation can therefore bind the courts. See discussion, Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1198-99 (1995). An agency exercising such delegated authority would need to adopt a regulation rather than an interpretive guideline. Of course, an agency could choose not to exercise its authority to issue a binding interpretation by adopting an interpretive guideline instead.

(3) Weakened Deference. The revised Asimow/Ogden proposal essentially recommends alternative two, but with an exception that would address the shortcoming discussed above:

> We recommend expanding the comment [to proposed California Civil Code Section 1123.420] so that less deference would be given to an interpretive statement than other interpretations because the interpretive statement was adopted without public participation, either in the form of notice and comment rulemaking or adjudicatory procedure.
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> See Exhibit p. 9.

In other words, in determining what deference an agency interpretation is due under the circumstances, the fact that the interpretation was adopted with limited public input would be taken into account.

At least in theory, this would provide an incentive to agencies to adopt interpretations of law under full rulemaking procedure. To use the expedited interpretive guideline procedures would result in an interpretation entitled to less deference and therefore less likely to survive judicial review.

Recommendation. The staff's recommendation depends on the degree of procedural protection required in the adoption of an interpretive guideline (see Adoption Procedures, below).

If the Commission decides (as the staff recommends) that some public participation should be required in adopting an interpretive guideline, then an interpretive guideline should be entitled to weakened deference (alternative (3) above).

While the staff agrees that an interpretation entitled to weakened deference does have some practical and legal effect, that effect is substantially less than the effect of a regulation that binds or compels. The streamlined public notice and participation required under the staff proposal should be adequate to protect the public's interest in overseeing the adoption of an interpretive guideline entitled to weakened deference.

If, however, the Commission decides that no substantial public participation should be required for adoption of an interpretive guideline, the staff recommends that an interpretive guideline should be entitled to no judicial deference. The staff believes that the legal and practical effect of an interpretive guideline entitled to deference is substantial enough that affected parties should be provided with some notice and an opportunity to be heard.

Safe Harbor

Mr. Livingston suggests that a person acting in compliance with an interpretive guideline should have some measure of protection against an enforcement action for violation of the interpreted statute.

Agency Bound. As to an enforcement action by the agency that adopted the interpretive guideline, this makes sense. It would generally be unfair if an agency could bring an enforcement action against a person for conduct in conformity with the agency's own published interpretation of the law.

In order to avoid litigation over the extent to which conduct conformed to an agency interpretation, a safe harbor provision could be drafted simply to require an agency to apply their own interpretation in an enforcement action:

> In an enforcement action, an agency may not assert an interpretation of law contradicting an interpretive guideline, to the extent that the conduct complained of occurred while the interpretive guideline was in effect.

This approach has the advantage of predictability. If an agency issues an interpretive guideline defining "agricultural pumping" then the regulated community knows that the agency cannot assert any other meaning of the term in an enforcement action unless the interpretive guideline is amended or repealed. Nor can a new interpretation be applied retroactively.

A less predictable alternative would be to rely on the doctrine of equitable estoppel rather than codifying an absolute safe harbor rule. A primary concern justifying a safe harbor is the potential for unfairness to a party who relies on an agency interpretative guideline. Equitable estoppel would generally protect against such unfairness, but would permit a court to consider other factors, such as whether reliance was reasonable and in good faith, and whether operation of estoppel in a particular case would injure an important public interest.

> The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such

> an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.
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> Lentz v. McMahon, 49 Cal. 3d 393, 400, 777 P.2d 83, 86, 261 Cal. Rptr. 310, 313 (1989) (quoting City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970)).

Not only would equitable estoppel prove less reliable than an absolute rule, it could also lead to more litigation and consume more judicial resources.

The staff recommends codification of an absolute safe harbor rule using the language provided above. Such a rule would minimize litigation over whether a safe harbor is available in a particular action, would provide a predictable rule on which the regulated public can rely, and would provide an incentive to agencies to take care in adopting an interpretive guideline.

Third Parties Bound. Mr. Livingstone also suggests that a safe harbor should be extended to prevent enforcement actions by other agencies and by private individuals. However, such a rule would do more than simply require an agency to avoid unfairness by abiding by its own statements, it would bind third parties. This is contrary to the general policy that an interpretive guideline should have limited legal effect.

This rule would also allow an agency to insulate regulated parties from citizen suit challenges simply by adopting an interpretive guideline condoning their behavior.

The staff recommends against extending a safe harbor for actions by third parties.

Professors Asimow and Ogden propose that an interpretive guideline be entitled to no deference in an action between private parties.

The staff believes that the deference accorded an interpretive guideline should depend upon circumstances reflecting the reliability of the agency's interpretation, such as the degree of public input in its adoption, and not upon the identity of the parties to an action reviewing the interpretation.

Also, a rule that an interpretive guideline is entitled to no deference in an action between private parties would undermine the limited "safe harbor" that a party who relies upon an agency interpretive guideline would otherwise enjoy.

The staff recommends against limiting the deference of an interpretive guideline in actions between private parties.

ADOPTION PROCEDURES

The principal components of rulemaking procedure are public participation and OAL review.

The extent to which these procedures should be required when adopting an interpretive guideline is discussed below. Secondary procedural matters are addressed by staff notes in the proposed draft. See Exhibit pp. 25-32.

Public Participation

No one disputes that public participation in agency decisionmaking is generally beneficial. Public participation provides the regulated public with a voice in the creation of the rules to which it is subject, educates rulemakers and provides time for parties to conform their behavior to new rules before they take effect.

However, the public also has an interest in the efficient operation of government that is not served by unduly burdensome procedures. Procedures that serve little purpose but impede or prevent agency communication with the regulated public should be eliminated or minimized.

Alternative approaches to balancing the public's interest in efficient agency communication and the public's interest in participation in agency decisionmaking are discussed below.

(1) No public participation. One approach is to completely exempt an interpretive guideline from public participation requirements. This is the approach taken under the federal APA, the Model State APA, the Washington State APA, and the Asimow / Ogden proposal.

This has the advantage of greatly facilitating adoption of an interpretive guideline.

The obvious disadvantage is the complete absence of any public notice or opportunity to be heard in the process. As the court in *Tidewater* observed:

> One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation … as well as notice of the law's requirements so that they can conform their conduct accordingly. … [T]he party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny.

> Tidewater at 568-69, 927 P.2d at 303, 59 Cal. Rptr. 2d at 193 (citations omitted).

Even an interpretive guideline with no legal force or effect will have some practical effect that may justify giving affected parties a voice in its adoption. Also, as a general matter, agency decisions will likely be improved by public participation.

(2) Streamlined public participation. An alternative to completely exempting an interpretive guideline from public participation is to require streamlined public participation procedures. Only those procedures that provide for an essential minimum of public notice and participation would be retained.

This would reduce, but not eliminate, the cost and burden of public participation procedures, while preserving the core benefits of public notice and comment.

This approach poses an obvious line drawing problem — which public participation procedures should be retained as essential and which should not?

Professor Weber, who recommends this approach, would limit public participation to notice and a period of written comment, with agency certification that the written comments were read and considered.

Recommendation

The staff recommends Professor Weber's approach. Simplified notice and an opportunity to submit written comments that will be read and considered by the agency educates agency decision-makers, allows an affected person to have a say in the agency decision, allows time for compliance with that decision, and imposes only a minimal procedural burden on the adopting agency. See proposed language and staff notes, Exhibit pp. 25-28.

Pre-adoption OAL Review

Proposed regulatory actions are subject to review by OAL. "It is the intent of the Legislature that the purpose of such review shall be to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted." Gov't Code § 11340.1.

Necessity Review. Reducing the number of regulations binding the public makes sense, but nonbinding interpretive guidelines are a different matter. As the court in *Tidewater* noted:

> Though too many regulations may lead to confusing, conflicting, or unduly burdensome regulatory mandates that stifle individual initiative, this effect is less pronounced in the case of interpretive regulations. The public generally benefits if agencies can easily adopt interpretive regulations because interpretive regulations clarify the law and ensure agency-wide uniformity.
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> Tidewater at 576, 927 P.2d at 307, 59 Cal. Rptr. 2d at 197.

The staff believes that there is little need for necessity review of an interpretive guideline.

Qualitative Review. Under existing law, OAL reviews regulations for clarity, authority of the agency to act, consistency with other law, adequacy of reference to other affected law, and nonduplication of other law. See Gov't Code § 11349.1.

Such review makes sense for a binding regulation, where a defect in one of these areas could lead to ambiguous or conflicting legal requirements.

The potential consequence of such a defect in an interpretive guideline is much less serious. At worst, the value of the interpretive guideline as a communication of the agency's interpretation would be impaired.

Therefore, while it would undoubtedly be beneficial for OAL to review an interpretive guideline for qualitative defects, the staff believes the benefit would be minimal and probably isn't justified in light of the additional delay that would result.

Recommendation. *The staff recommends against pre-adoption OAL review of an interpretive guideline.*

Post-adoption OAL Review

At the request of a legislative committee, OAL reviews regulations after their adoption for compliance with the criteria discussed above. See Gov't Code § 11397.7. *For the same reasons discussed above, the staff recommends against post-adoption qualitative review of an interpretive guideline.*

OAL also reviews purported underground regulations. The interpretive guideline exception will not affect OAL's authority to conduct such reviews, except insofar as a properly adopted interpretive guideline is not an underground regulation. See staff note, Exhibit p. 25, line 17.

A clear definition of matters to be exempt from rulemaking procedures is necessary to clarify the scope of the exemption and thereby minimize litigation over whether a particular agency statement is an interpretive guideline.

Self-identification

Professors Asimow and Ogden propose a definition of interpretive guideline similar to that employed in the Washington State APA. This definition requires that an interpretive guideline be labeled as such. "This approach avoids the difficult definitional problem of identifying interpretive rules under the federal APA, an issue that has been litigated hundreds of times." See Exhibit p. 7.

Self-identification would clarify that an unlabeled agency statement should not be treated as an interpretive guideline, but would not avoid litigation over whether an agency statement labeled and adopted as an interpretive guideline is in fact a regulation with the force and effect of law.

This remaining problem can be avoided by statutorily limiting the legal effect of an interpretive guideline. A properly labeled and adopted interpretive guideline would then have the legal effect defined by statute, regardless of any purported legal effect. See Exhibit, p. 27, line 30.

Policy Statements

A policy statement is a statement of an agency's approach to the exercise of the agency's discretion under the law. Under existing law a policy statement is a regulation subject to rulemaking procedures. See Gov't Code § 11342(g).

The federal APA and Washington State APA exempt both interpretive statements and policy statements from rulemaking procedure. The Asimow / Ogden proposal does not.

While it would undoubtedly be useful for an agency to communicate some informally adopted policies to the regulated public, implementing a policy statement exception would be problematic.

While a relatively clear distinction can be drawn between an interpretation of law that is legally binding and one that is not, it is much less clear how to distinguish a "nonbinding" policy statement from a binding expression of agency policy.

For example, if the Department of Health Services issues a "nonbinding" statement to all of its employees and to the public explaining that all Medi-Cal

claims will be audited using a particular method, how is this to be distinguished from a regulation requiring that a particular auditing method be used?

Under federal law, courts have developed a "definitiveness" test to distinguish between nonlegislative and legislative policy statements. A nonlegislative policy statement is one that imposes a tentative rather than definitive restriction on agency discretion, and is therefore not subject to rulemaking procedures. A statement imposing a definitive limitation on agency discretion is a legislative rule and must be adopted through rulemaking procedures. This distinction has been difficult to apply and has generated a great deal of litigation. See Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 390-93.

Because this distinction depends on the post-adoption conduct of the agency, it is not sufficient to simply label a policy statement as advisory only. Determining whether a policy statement should be exempt from rulemaking procedure would require a fact-specific examination of how the statement is actually employed by the agency. See discussion, *id.*

The staff believes a definition based on such a distinction would invite litigation and abuse.

Recommendation

The staff recommends that the definition of interpretive guideline be limited to properly adopted, self-identifying expressions of an agency interpretation of law, thus:

> "Interpretive guideline" means a written statement adopted by an agency under this article, expressing the opinion of the agency as to the meaning of a statute, regulation, agency order, court decision, or other provision of law. An interpretive guideline must clearly indicate that it is advisory only and must be titled an interpretive guideline adopted under this article.

Combined with a clear statutory limit on the effect of an interpretive guideline such a definition provides a bright line distinction between agency statements eligible for an exemption to rulemaking procedures and regulations subject to full rulemaking procedures.

Respectfully submitted,

Brian Hebert
Staff Counsel

Excerpted from Minutes of February 27, 1997

STUDY N-300 – ADMINISTRATIVE RULEMAKING

The Commission considered Memorandum 97-12 and its First Supplement concerning interpretive guidelines. The Commission heard public comment on the issues raised by the memorandums, the substance of which is summarized below.

Professor Michael Asimow, Commission Consultant

Professor Asimow spoke on his own behalf. He noted that his views have been stated at length and in detail in articles and memoranda that are before the Commission.

In summary, agencies frequently must interpret the meaning of governing statutes or regulations in order to implement them. Everyone agrees that public participation is important, but agencies typically lack the resources to adopt interpretations through formal rulemaking procedures. It would be better for the regulated community to know an agency's interpretation than for the agency to keep that interpretation a secret. Therefore it makes sense to create an exception to detailed rulemaking procedures for purely interpretive agency guidelines. An interpretive guideline would have no force or effect of law.

Dugald Gillies, Sacramento Nexus

Mr. Gillies has experience as a lobbyist representing clients before administrative agencies. Mr. Gillies spoke on his own behalf.

Practical Effect. Interpretive guidelines have great practical effect, even if they have no legal effect, and should therefore be subject to adoption through formal rulemaking procedures.

An example of an interpretive guideline that has practical effect are the Guidelines for Unlicensed Assistants, distributed by the Department of Real Estate (Exhibit pp. 7-8). Despite their apparent invalidity as underground regulations, many in the regulated community rely on these guidelines in conducting their business.

The guidelines adopted were contrary to those recommended by the committee that heard public comment on the matter. Compliance with formal rulemaking procedure would have improved the result by requiring that the decision to adopt guidelines different from those recommended be explained.

Minor Matters. Some exception to rulemaking procedures might be useful for "minutiae," but should still be subject to public notice, followed by full rulemaking procedures if substantial public interest is expressed.

Any simplified procedures for interpretive guidelines should include a clear definition of matters that may not be adopted as interpretive guidelines (the approach taken in Washington state). Proposed draft language for such a definition was distributed (Exhibit p. 9).

Herb Bolz, Office of Administrative Law

Mr. Bolz spoke on behalf of the Office of Administrative Law.

Agency Adoption of Interpretive Guidelines. Each year more than 10,000 interpretive guidelines are adopted through formal rulemaking procedures as part of an integrated regulatory scheme. As a regulation requires additional interpretation over time an agency can revise its regulation through the rulemaking process.

Judicial Review. One critical feature of any exception for interpretive guidelines is the availability of judicial review to invalidate a rule that was improperly adopted as an interpretive guideline.

Gene Livingston, Livingston & Mattesich

Mr. Livingston has experience in rulemaking as the former head of the Employment Development Department and as the first director of the Office of Administrative Law. He currently represents private clients before regulatory agencies and assists agencies in compliance with rulemaking procedure. Mr. Livingston spoke on his own behalf.

Importance of Rulemaking Procedure. Historically, strict rulemaking procedures were adopted in reaction to a demonstrated tendency on the part of agencies to take the easiest path, to the detriment of public participation and rationalized process.

The regulated community in California is subject to enforcement by agencies and by the public through statutory private rights of action, such as action under Business & Professions Code Section 17200.

Despite agency claims to the contrary, rulemaking procedures are not unduly burdensome. Necessity review helps avoid arbitrary agency action and public participation legitimates the resulting rule, increasing voluntary compliance.

The Commission's experience with the public participation process demonstrates the value of public comment in agency decisionmaking.

No Bright Line Exists. All regulations are interpretations of law. For example, the statutory guidance to Cal-OSHA simply directs the standards board to adopt standards to protect the health and safety of workers. The standards board has adopted thousands of regulations interpreting that general instruction.

No bright line can be established between "big interpretations" and "little interpretations" for which full rulemaking procedures are unnecessary.

Force and Effect of Law. For two reasons, interpretive statements cannot be distinguished from rules simply by declaring that they have no force and effect of law.

First, because the regulated community will often comply with an interpretive statement out of fear that the agency or a member of the public will attempt to enforce the statement despite its nominal lack of legal force and effect. An interpretive statement therefore has de facto force and effect of law.

Second, because courts may defer to an agency interpretive statement despite its lack of legal force and effect. The Asimow-Ogden proposal suggests that courts give an interpretive statement deference in appropriate circumstances (e.g., where an interpretation is long standing or was adopted after careful consideration.) Courts may also use an interpretive statement to construe a statute to counter a defense of vagueness in a criminal prosecution. If a court may grant deference to an interpretive statement then the interpretive statement has actual legal force and effect.

Any proposed simplification of procedures for interpretive statements should expressly prohibit any enforcement of or deference to an interpretive statement.

Safe Harbor. A party who complies with an interpretive statement should not be subject to enforcement for violation of the statute that statement interprets. Many existing interpretive statements expressly declare that the agency is not bound by their terms, providing no estoppel against subsequent agency enforcement. Any proposal permitting interpretive statements should include a safe harbor provision preventing enforcement against those who comply with the interpretive statement.

Alternatives. The choice is not between simplified procedures for interpretive guidelines and agency secrecy as to its interpretations of law. A better alternative is to continue to require that agency interpretive statements be adopted through full rulemaking procedures.

Shannon Sutherland, California Nurses Association

Ms. Sutherland spoke on behalf of the California Nurses Association.

Practical Effect. Interpretive guidelines can be likened to "mom rules." Just as most teenage children comply with parental rules regardless of whether they are actually enforceable, members of the regulated community will often comply with unenforceable interpretive guidelines because of their apparent authority. Interpretive guidelines therefore have great practical effect even if technically invalid.

Importance of Procedures. Agency expertise is often overstated. For example, health care regulators often have no current practical experience in the field. Health care is rapidly changing and practitioners are more aware than regulators of these changes. Education of the regulators is an important consequence of public participation.

Alternatives. The choice between agency secrecy and an exception to rulemaking procedures for interpretive guidelines is a false one. A third alternative is for agencies to adopt interpretive guidelines through the existing rulemaking procedure. Noncontroversial interpretations will receive little comment and the process will not be burdensome. Controversial interpretations will properly receive extensive public input, as they should.

Julie Miller, Southern California Edison

Ms. Miller spoke on behalf of Southern California Edison.

Brush-back Letters. An agency can often be dissuaded from attempting to enforce a harmful underground regulation by means of a "brush-back letter." A brush-back letter is a letter threatening to challenge the validity of an underground regulation in court.

Public Comment Period. Provision of a public comment period in rulemaking is not only important for the information it provides to the rulemaking agency. It also provides the regulated community with time to conform their practice to the pending regulation or to challenge its adoption before it becomes effective.

Publication of Interpretive Guidelines. Any proposed exception to rulemaking procedure for interpretive guidelines should require that interpretive guidelines be published electronically and through the Office of Administrative Law. Existing underground regulations of the Public Utilities Commission are distributed to the legislature only and are not generally available to the public.

Lucy Quacinella, Western Center on Law and Poverty

Ms. Quacinella spoke on behalf of the Western Center on Law and Poverty.

Importance of Public Participation. Public input is important because it educates regulators who may otherwise lack expertise in the subject to be regulated. For example, the Department of Health Services must implement the transition from MediCal to managed care. The Department has little experience with managed care and can learn much through public comment by health care experts.

Dick Ratliff, California Energy Commission

Mr. Ratliff spoke on behalf of the California Energy Commission.

Scope of Underground Regulations. Underground regulations include a broad range of communications, including phone responses to a request for interpretation of a statute or regulation, formal and informal advice letters, and written interpretive guidelines. It is ironic that these are perceived as problematic because they are often in response to requests from regulated businesses seeking clarification of the law. An agency facing such a request must either adopt an underground regulation or remain silent.

Rulemaking Procedures Cumbersome. Formal rulemaking procedures are very cumbersome. To adopt a new building standard, unopposed by anyone, takes over three years. Non-building standard regulations don't take as long but the process is still slow. A recent statute provided the Energy Commission five months in which to implement the restructuring of the electrical industry. The Commission did so without regulations because regulations could not be adopted in the five-month statutory time frame.

Supports Proposal. Agencies must interpret the meaning of statutes and regulations on a regular basis. Regulatory language inevitably requires reinterpretation in the context of new facts and unforeseen circumstances. Agencies need to be able to communicate their interpretations to the regulated public.

Proposal for an interpretive statement exception to the rulemaking provisions of the California APA

Michael Asimow
Greg Ogden

1. Problems with existing law: There should be an exception to the APA's notice and comment procedure for interpretive statements. All agencies constantly interpret their statute and regulations. It is in the public interest that these interpretations be driven above ground and made available to the public. Such interpretations are extremely valuable to the public which must make decisions in light of the agency's views. Unfortunately, present law encourages agencies to keep their interpretations secret. As a result, persons with close ties to the agency may know about the interpretation but the general public has no way to access the information.

In the Tidewater case, discussed immediately below, the Supreme Court stated that agencies could provide interpretive advice in response to specific requests for advice without going through rulemaking procedures. Then the agency could publish restatements of these specific advice letters, again without going through rulemaking. Our proposal would allow the agency to issue generally applicable interpretive advice without first having issuing specific advice letters. But our proposal provides far more safeguards to the public than the restatements of specific advice provided for in the Tidewater case.

Some of the problems with existing law were highlighted in the Supreme Court's recent opinion in Tidewater Marine Western, Inc. v. Bradshaw, 59 Cal.Rptr.2d 186, 197-98 (1996), which challenged the Legislature to solve those problems:

> Professor Asimow asserts that full APA compliance [for adoption of interpretive rules] entails impractical costs and delays. The agency must devote significant resources to building an agency file that will satisfy the Office of Administrative Law...Among other things, the agency must establish the necessity of the proposed rule...In addition, opponents of a proposed rule may file long and complex comments, which the agency must address point by point...Professor Asimow argues that, because of the burden of full APA compliance, agencies do not adopt regulations. Instead, they resort to case-by-case adjudication, and they use informal oral communications to direct agency staff. Sometimes, agencies seek statutory amendments, in lieu of adopting regulations, or they simply ignore the APA, issuing and enforcing regulations without regard to its provisions.

> Professor Asimow identifies serious concerns. Though too many regulations may lead to confusing, conflicting, or unduly burdensome regulatory mandates that stifle individual initiative, this effect is less pronounced in the case of interpretive regulations. The public generally benefits if agencies can easily adopt interpretive regulations because interpretive regulations clarity ambiguities in the law and ensure agency-wide uniformity. In addition, agencies cannot always respond to changing circumstances promptly if they must ask the Legislature for a statutory amendment or resort to a regulatory process fraught with delays. Finally, if an agency simply ignores the APA, it ceases to be responsive to the public, and its regulations are vulnerable to attack in the courts.
>
> Of course, the ability of agencies to issue restatements or summaries of their prior decisions and prior advice letters [exceptions to the APA which the Supreme Court articulated in the Tidewater case] mitigates these concerns to some extent...If in some circumstances agencies should also be free to adopt regulations informally and without following the APA's elaborate procedures, then the Legislature should state what those circumstances are and what lesser procedural protections are appropriate. Until it does, we decline to carve out an exception for interpretive regulations that we do not believe the language of the APA adequately supports.

2. Definition of interpretive statements: An interpretive statement would be defined as "a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or regulation or other provision of law, or a court decision, or an agency order." See Wash. Rev. Code §34.05.010(8). Thus this definition requires that the interpretive statement be properly labelled as such. It allows statements interpreting any of the legal texts the agency is responsible for implementing--statutes, regulations, court decisions, or agency adjudicatory decisions.

This approach avoids the difficult definitional problem of identifying interpretive rules under federal law, an issue that has been litigated hundreds of times. Interpretive statements under this proposal are self-identifying; they are labelled and, as explained in paragraph 4, by definition they lack the force of law.

3. Publication: Interpretive statements must be filed with OAL within ten days of adoption and would be published each week in a separate section of the California Regulatory Notice Register. We leave to OAL the details of working out the most

appropriate form of publication.

4. Interpretive statements do not have the force of law: The statute should provide that a document labelled as an interpretive statement does not have the force of law. This means that nobody has to follow it if they disagree with it, even though most people will probably decide to follow it to avoid hassles.

What do we mean by "force of law?" A rule or order has the force of law if people are bound by it (unless, of course, a court later sets it aside). A rule or order has the force of law if the agency that adopts it is acting pursuant to a power delegated to it by the legislature to bind parties. Thus a rule or order has the force of law if i) a statute has delegated power to the agency to make rules or orders and ii) the agency intends to use that power. The APA appropriately provides various safeguards, including elaborate notice and comment procedure and mandatory OAL scrutiny, when agencies adopt regulations that have the force of law. Similarly, due process and the APA provide elaborate safeguards when agencies adopt adjudicatory orders that have the force of law.

Most but not all agencies have delegated power to make law and bind private parties through regulations. Most but not all agencies also have power to make law and bind private parties through adjudication. Regulations that have the force of law should only be adopted by agencies after proper notice and comment procedure and OAL scrutiny. A regulation that is labelled as an interpretive statement, by definition, does not have the force of law. The adopting agency has declined to use its delegated power to make law (assuming it has such delegated power), because it has adopted its statement in a form which the APA explicitly will provide lacks the force of law.

Of course, an agency might apply a previously-adopted interpretive statement to a private party in the course of an adjudicatory decision against the party. In that situation, the adjudicatory decision has the force of law and parties must abide by it (unless it is set aside by a court). However, the interpretive statement, and the agency precedent applying it, would not be binding on any other party until the agency applied the precedent to them. In short, the fact that an interpretive statement might achieve the force of law through being applied by an agency in a subsequent adjudicative decision does not, in itself, give the interpretive statement the force of law.

5. Interpretive statements and judicial review: Normally the ripeness requirement would preclude judicial review of an interpretive statement before it is applied by the agency to a party. In unusual circumstances, however, the statement could be challenged under the exception to the ripeness requirement.

Proposed judicial review statute CCP §1123.140; National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C.Cir. 1971). This exception calls for a showing that "postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement."

If an interpretive statement is challenged in court (either before or after it is applied to a private party), the court would exercise independent judgment about whether the statement had been properly adopted (i.e. properly labelled and published). If the statement had not properly been adopted, the court should issue a declaratory judgment or injunction that invalidates the rule. Thereafter, it would be treated as if it did not exist. No deference whatsoever would be given to the interpretive statement in that situation. See Tidewater at 198 (no deference given to improperly adopted interpretation but the agency's action is not automatically invalidated).

If the interpretive statement was validly adopted, a court would exercise independent judgment about whether the statement correctly interpreted the legal text. In the vast majority of cases, the interpretive statement would come before the court in the form of agency action that applies the interpretive statement to the party seeking review, such as an adjudicatory decision that contains the same interpretation as the interpretive statement.

When the court exercises independent judgment about the correctness of an interpretation, it often accords some deference to the agency's interpretive view. The amount of deference given, if any, depends on the circumstances, such as whether the interpretation is of long standing, whether the agency has held it consistently, whether it was adopted contemporaneously with adoption of the text being interpreted, whether the material being interpreted is technical or complex, whether the interpretation received careful consideration, etc. See proposed CCP §1123.420 and the comment to that section. We suggest expanding the comment so that less deference would be given to an interpretive statement than other interpretations because the interpretive statement was adopted without public participation, either in the form of notice and comment rulemaking or adjudicatory procedure. Moreover, we would also suggest a provision specifying that a court should give no deference at all to an interpretive statement if it is introduced in litigation between two private parties (as opposed to litigation between a party and an agency).

6. Challenges before OAL: The statute would provide that any person could challenge an interpretive statement before OAL. The person could challenge the statement on the ground of consistency with the legal text being interpreted or on the

grounds that the agency had failed to follow appropriate procedure (i.e. proper labelling or publication). If OAL failed to dispose of the challenge within 30 days after it is filed [perhaps this should be 60 days] the challenge would be deemed rejected.

7. Right to petition. The right to petition an agency to amend or repeal a regulation should apply to interpretive statements. GC §11340.7. This provision requires the agency to explain its decision on the petition in writing within 30 days, or schedule the matter for a public hearing. The agency's decision on a petition shall be transmitted to OAL for publication. The right to petition and receive a reasoned response is an important protection for persons who disagree with an interpretive statement.

8. Estoppel. A private party who reasonably relies on an interpretive statement should be protected against retroactive repeal of the statement. If the statement is repealed, the repeal should be prospective only. This provision for a "safe harbor" is consistent with existing California law that allows the state to be equitably estopped in appropriate situations. Lentz v. McMahon, 49 Cal.3d 406, 261 Cal.Rptr. 310 (1989).

9. Direct final rules. Commission Memorandum 97-12 refers to "direct final rules" at p. 9. A direct final rule is one that has a trivial impact; the agency thinks that nobody will complain about it. However, in many cases, the rule will have the force of law.

Under an exception for direct-final rules, the agency first publishes the direct final rule and informs the public that if nobody objects within a set period (say 60 days) the rule will be adopted without further formalities. If someone objects, the rule is then subjected to normal notice and comment procedure. Direct-final rulemaking is a definite time-saver. The Commission should recommend that direct-final rules be permitted under a new rulemaking exception.

The rationale for the two exceptions is entirely different. Direct-final rules, by definition, have trivial impact (and if the agency is wrong about the impact, any person can compel the agency to go through the normal rulemaking process). The triviality of the impact suggests that it is inefficient and a waste of resources to go through any rulemaking procedure at all (other than publication).

Interpretive statements, in contrast, may well have a substantial practical impact and people may object to them. Nevertheless, as Tidewater recognized, imposing the APA process on the adoption of interpretative statements produces results that are bad for the public and the agencies. The interpretive

statement exception suggested in this memo has several provisions that are designed to protect the public: i) the statement must be labelled, ii) the statement necessarily lacks the force of law, iii) the statement must be published, iv) the statement can be challenged before OAL, and v) if the procedural requirements are not followed, a reviewing court can give no deference to the statement.

Revised 3/4/97
file apa\ir.oal

STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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H. THOMAS CADELL, JR., *Chief Counsel*

March 24, 1997

Hon. Allen Fink, Chairman
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: **Proposal For Interpretive Statement Exception To The Rulemaking Provisions Of The California APA**

Dear Chairman Fink:

The Division of Labor Standards Enforcement wishes to take this opportunity to support the position that a "properly labeled" interpretive statement exception should be incorporated into the Administrative Procedure Act.

As you may know, this agency was involved in the case of *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, wherein the California Supreme Court held that the Division's policy and procedure manual was an underground regulation.

The Supreme Court in the *Tidewater Marine* case distinguished regulatory procedural mandates imposed by administrative agencies on the regulated public from interpretive regulations which describe the legal position the agency will take in enforcement actions. While recognizing the evils of "too many regulations" which may lead to "confusing, conflicting, or unduly burdensome regulatory mandates that stifle individual initiative" the court noted that "this effect is less pronounced in the case of interpretive regulations." The obvious reason for this differentiation, of course, is that "interpretive" regulations are based on an analysis of the law based on the usual rules of statutory construction. Thus, while input from the regulated public can effectively point out errors in agency analysis dealing with language which places added burdens on the public affected, lay interpretation of the applicable law for purposes of its enforcement is less apt to be helpful.

The *Tidewater* court noted, as did Professor Asimow at the February 27th meeting of the Commission, "[T]he public generally benefits if agencies can easily adopt interpretive regulations because interpretive regulations clarify ambiguities in the law and ensure agency-wide uniformity." "In addition," the Court added, "agencies cannot always respond to changing circumstances promptly if they must ask the Legislature for a statutory amendment or resort to a regulatory process fraught with delays." The Court endorsed the ability of administrative agencies to issue restatements or summaries of their prior decisions and prior advice letters as a means of mitigating the concerns it had noted. As the Court viewed the method it was endorsing, the restatements or summaries of the law would elaborate on important issues which come before the agency either as a result of its quasi-adjudicative process or in a request for advice from the public.

Contrary to the assertions made by some speakers at the February 27th hearing of the Commission, the Supreme Court may, in fact, be read to suggest that the Legislature should amend or clarify the rulemaking procedure. At page 576 of the official reports, the Court states:

> "If in some circumstances agencies should also be free to adopt regulations informally and without following the APA's elaborate procedures, then the Legislature should state what those circumstances are and what lesser procedural protections are appropriate." (Emphasis added)

Clearly, the Supreme Court's holding in its *Tidewater* decision allows agency use of opinion letters and decisions to skirt the burdensome requirements of the APA. However, the Court just as clearly stated that these letters and decisions, while expressing the views of the agency concerning the law it is enforcing, are not binding on the courts.

The Court's decision, then, allows agencies an exception to the APA which, in fact, is less restrictive on the agencies than is The Interpretive Statement Exception to Rulemaking proposed in Memorandum 97-12. The only different requirement is that the opinion or advice letters referred to by the Court must be in response to a specific question and the decisions must be in response to case-specific adjudications while there is no such specific requirement for the Interpretive Statement Exception.

The proposal before the Commission would define an interpretive statement as "a written expression of the opinion of an agency...as to the meaning of a statute or regulation or other provision of law, or a court decision, or an agency order." The *Tidewater* Court noted that agencies may prepare a policy manual

that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters without running afoul of the APA requirements. Thus, for all practical purposes, such restatements or summaries would have exactly the same effect as the "interpretive statements" proposed in Memorandum 97-12. However, the proposal contained in Memorandum 97-12 contains safeguards not required by the *Tidewater* decision. The interpretive statement must be labeled as such; the statement would, by statute, lack the force of law; the statement must be published (a provision not now required by the *Tidewater* decision); the statement may be challenged before OAL (again, not a requirement of the Court's decision), and, most important, if the procedural requirements are not followed, a reviewing court can give no deference to the statement and that no deference rule is provided by statute.

The Court in *Tidewater* recognized the truism that it is better government which is done openly than that which operates in secret. As Professor Asimow very eloquently pointed out in his questions to some of the speakers at the February 27th hearing, it is better for the regulated public to be aware of the action that an enforcement agency will take under given circumstances than to be ignorant of the posture which the agency will take until after action has been taken which is irrevocable.

What many of the speakers did not realize is that the failure of the agency to publicize its enforcement position does not preclude the agency from urging that position in a court proceeding. As the *Tidewater* case illustrates, simply because the agency has not met the requirements of the APA does not negate the position advocated by the agency. The Court in *Tidewater* invalidated the DLSE written policy, but the Court agreed that the policy was correct and adopted that position as its own. It seems basic common sense would conclude that it is far better for the regulated public to be informed and prepared, than to be uninformed and surprised.

From personal experience as the Chief Counsel for the State Labor Commissioner, I can assure the Commission that there are many members of the labor law bar in California who call and write on a regular basis to ascertain the enforcement position of the Labor Commissioner. They would be remiss in their duty to their client if they did not consider the position of the enforcement agency before presenting their advice. Most of these interested professionals appreciate receiving the information we are able to provide as it gives them the opportunity to read and analyze the Division's position to better understand the position which their client should take.

The Division of Labor Standards Enforcement, with our limited resources, engages in rulemaking on a regular basis. Our first priority in rulemaking are those situations which set out procedural requirements which must be met by regulated entities. With our limited staff of attorneys it would be impossible to meet the requirements of the APA in order to explain the Division's enforcement position in every context it arises[1]. Time and money are not available for most enforcement agencies such as ours to allow full compliance with the APA. Indeed, even the Office of Administrative Law in an *amicus curiae* brief filed in the *Tidewater* case, recognized that this agency, which "faces unique obstacles in issuing interpretations of Industrial Welfare Commission wage orders" should be granted relief from the APA requirements. The Division suggests that there are probably many enforcement agencies throughout the State of California which require such relief.

In summary, good government -- government which operates in the open -- is best served by allowing enforcement agencies to promulgate their enforcement policies. Promulgation of those policies through the burdensome process required under the APA is impossible given the cost in both time and money involved. The adoption of the Interpretive Statement Exception to the rulemaking provisions of the California APA would be a wise and prudent undertaking.

The Division thanks you and the Commission members for your consideration in this matter.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

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[1]As an example of the magnitude of the problem faced by the Division of Labor Standards Enforcement, it should be noted that the Code of Federal Regulations found at 29 C.F.R. § 515, *et seq.*, which define and delineate the enforcement position of the United States Department of Labor, Division of Wage and Hour Enforcement for purposes of the Fair Labor Standards Act (29 U.S.C. § 200), *et seq.*, occupies eight hundred and seventy-four six inch by nine-inch pages of eight-point type. The Fair Labor Standards Act (FLSA) is equivalent to the California Industrial Welfare Commission Order, though the FLSA is not quite so broad in its scope as are the IWC Orders. If the DLSE were to adopt such a difinitive set of regulations for purposes of enforcement of the IWC Orders, it would, of course, require many man-years of work to accomplish. The enforcement of the IWC Orders only covers minimum wage, overtime and some other minimum standards. However, the DLSE's mandate under California law requires that the agency also enforce all provisions of the Labor Code which are not specifically given to some other officer to enforce.

c.c. John Duncan, Chief Deputy Director
Nance Steffen, Assistant Labor Commissioner
Greg Rupp, Assistant Labor Commissioner
Tom Grogan, Assistant Labor Commissioner
Abagail Calva, Assistant Labor Commissioner
John Rea, Chair, Labor and Employment Law Section
San Francisco Bar Association
Pamela L. Hemminger, Chair, Labor and Employment Law Section
Los Angeles Bar Association
Bonnie G. Bogue, Labor and Employment Law Section
State Bar Association
Leslie L. Van Houten, Labor and Employment Law Section
State Bar Association

STATE OF CALIFORNIA—THE RESOURCES AGENCY

PETE WILSON, Governor

CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814-5512

April 4, 1997

Nathaniel Sterling, Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Underground Regulations; Agency Flexibility to Give Useful Advice to the Regulated Public

Dear Mr. Sterling:

I was in attendance at the February 27, 1997, Commission meeting at which there was extensive discussion of "underground regulations." In a well-orchestrated production, the Office of Administrative Law (OAL) presented former director Gene Livingston and several other representatives of the "general public" to decry the menace of "underground regulations." The statements made were very general in nature, and in at least one instance (Southern California Edison's unhappiness with the Public Utilities Commission) were directed to an agency outside the purview of the relevant statute.

While I agree with OAL that there must be restrictions on unadopted agency rules, OAL and its supporters have staked out a position that is so overly simplistic that it inhibits intelligent discussion regarding real problems with the current statute.

Other than my lone voice, you did not hear at your February 27 meeting from lawyers for state agencies that do extensive rulemaking and are responsible for complex regulatory programs. Had such lawyers been present, I think they would have spoken in agreement that the current Government Code provisions (1) require extensive government resources for rulemaking, (2) ensure a process that is time-consuming and laborious, and (3) provide an encompassing definition of "regulation" that is a serious barrier to providing the regulated public with the information it needs regarding agency enforcement of state law and regulation.

Professor Asimov has elaborated on the consequences: five page rulemaking notices, four pages of which are boilerplate; agencies that proceed without regulations because of shortage of time or lack of resources; failure to provide guidance to the regulated public even when such guidance is requested and needed. In my own

agency, when I advise staff and commissioners of the law regarding underground regulations, particularly as it relates to guidance documents or direction to the regulated public, such advice is almost always met with undisguised incredulity. As one Commissioner (who shall remain unnamed) responded: "If that's what the law says, the law is an ass!" I could only provide sympathetic agreement.

It would be most unfortunate if the Law Revision Commission is deterred from attempting to address at least some of these problems. I have provided below some concrete, varied examples of issues that have arisen in my own work that pertain to the issue of underground regulations.

Example 1: The California Energy Commission (CEC) adopts a performance standard for energy efficiency in buildings, and these standards must be approved and published by the California Building Standards Commission (CBSC). Some years ago, as a result of public comment, the CEC adopted into these standards a provision allowing the use of lighting occupancy sensor devices to receive compliance credit under the performance standard. The standard included several criteria for occupancy sensor devices that had to be met for the devices to qualify for credit. Only after the standards had been through public comment, review, adoption, CBSC approval, and publication was it brought to the CEC's attention that one of the criterion for eligible use of occupancy sensor devices was impossible to satisfy.

A manufacturer of the devices filed a rulemaking petition to correct the mistake. However, pursuant to CBSC's implementation of the State Building Standards Law, the process for proposing, adopting, approving, and publishing regulations occurs according to a schedule that typically requires approximately three years to effectuate even a minor change. The manufacturer therefore asked the CEC whether devices could be installed with credit despite their failure to comply with the faulty criterion. Absent an answer that could be passed on to building officials (who enforce the standards), the marketing of this new product would have been severely hampered. The CEC informally, through its staff, answered that the incorrect criterion did not apply, and that the standard would be corrected as quickly as the Building Code adoption process allowed (which in fact turned out to be in excess of three years).

This was what OAL would call an "underground regulation," in that it informally repealed a regulation requirement. However, given the stringent statutory criteria for a finding of "emergency," no formal course of relief was available to the CEC and the manufacturers of occupant sensors. Denial of informal

relief would have had grave economic consequence to several new small California businesses. The informal "underground" guidance avoided this result.

Example 2: In a power plant siting proceeding, the applicant and air district asked the CEC whether the statutory requirement that air quality offsets be "obtained" prior to licensing could be fulfilled by obtaining the option to purchase such offsets, as opposed to going through with the actual purchase. The applicant did not want to actually purchase millions of dollars worth of NOx offsets prior to obtaining a license, as it was unclear whether it would in fact ultimately succeed in getting the license, and there was the possibility that litigation could stop the project even if the license were obtained.

No applicable regulation addressed this issue. Should the CEC remain silent in the face of this question? How would California business, the air districts, intervenors, or the greater public benefit from such silence? Obviously, answering the question through formal rulemaking was not an option, as the answer had to be made, if at all, within weeks.

The issue was addressed informally. First, agency staff (an independent party to the proceeding) gave its legal opinion that the statutory requirement that offsets be obtained prior to the decision could be met with option contracts. The CEC standing committee hearing the case subsequently concurred in this interpretation.

No one questioned the reasonableness of the interpretation. But was the opinion of the staff (here acting as an independent party separate from the decision maker) an underground regulation? Was the interpretation of the (non-quorum) CEC siting committee an underground regulation? Should the solution have been subject to being set aside by a court as an unadopted "standard of general application"? Would California business or the regulated public have benefitted had the CEC staff and CEC siting committee merely stated: This issue has not yet been addressed by regulation; we can say nothing and you may proceed at your own risk to the Commission Final Decision?

Example 3: The site orientation of a building affects its energy use. The building efficiency standards allow builders to use a "multiple orientation approach" to demonstrate compliance for subdivisions by averaging the efficiency of the homes within a subdivision. Recently a builder inquired whether his proposed subdivision design would comply with the multiple orientation

approach using a different modeling technique than that ever previously used or contemplated by the adopted standard. The compliance issue was highly technical. The builder provided extensive computer documentation indicating that his approach, though different, produced a like compliance result.

The staff explored the proposal and could find nothing in the language of the building standards either allowing or disallowing the proposed method. The local building official said he would defer to whatever the CEC decided on this very technical compliance issue. The CEC staff issued an "advice letter," which is generally understood to have no legal binding power on anyone, advising the builder that the CEC staff believes the approach is in compliance with the standards. The builder got his permit. Was the advice letter an underground regulation? Would California small business have been better served if the CEC had responded that it could only address this issue in the next rulemaking proceeding--with clarification becoming effective about three years hence? Would the local building official have been better served had the CEC merely shrugged off the question with a "Don't know and can't say" answer?

Example 4: The CEC powerplant siting staff, responding to suggestions that applicants would benefit from more precise information about what to expect in an application proceeding than is provided by the CEC's extensive regulations, has written a series of guidance documents explaining how the CEC staff, as an independent party to the proceeding, approaches each technical area of its analysis with a view to informing applicants and interested parties about what to expect. The documents, which in no way purport to be 1) legally binding or 2) the voice of the Commissioners, as distinct from its independent siting staff,[1] provide the CEC staff's view with regard to the various subject areas in which the CEC, in its Final Decision, makes findings: air quality, biological impacts, water quality and availability, health and electromagnetic fields, traffic, and so forth.

The staff document on biological impacts, for example, informs potential applicants of California Environmental Quality

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[1] The CEC siting staff acts as an independent party in powerplant siting application cases, which are adjudicatory proceedings. The CEC staff is thus subject to the "separation of function" requirements of the Administrative Procedure Act, including the restrictions on ex parte communications. The CEC itself is, in such a proceeding, free to accept or reject the position of any party, including that of the CEC siting staff.

Act and state and federal endangered species act requirements, and then describes what staff believes the regulations require for 1) data adequacy of the application, 2) how and when biological surveys should be performed, 3) the kinds of mitigation that Staff would propose when there are impacts to wildlife habitat, and other information useful to discerning what CEC siting staff thinks an applicant should expect in the context of a siting case. Needless to say, the value of this information to applicants and the interested public is that it goes beyond the actual CEC regulations in suggesting what the technical experts on the CEC staff believe is appropriate application information, impact mitigation, and so forth. In this respect the staff's biological impact document is similar to the other guidance documents for other subject areas.

To their amazement and consternation, I tell the siting staff that OAL will consider their documents to be full of underground regulations. More important, any disgruntled party in an application proceeding could go to OAL or to the courts and assert that any CEC decision consistent with the guidance document was invalid as being based on staff's underground regulations. I tell them that it is likely that OAL would support this legal position with an amicus brief. I tell staff that it would be better, or at least legally safer, to put out no guidance document. Better instead to merely state Staff's view in its formal proceeding testimony, and let the CEC decide.

Staff is incredulous. Why, they ask, should the law inhibit an agency, or at least its staff, from telling applicants and the regulated public exactly what they should expect the staff's view on issues to be when an application is filed? Why, for instance, shouldn't the applicant and environmental groups be made aware of how staff believes off-site biological mitigation requirements should be handled? Would not all persons benefit from knowing staff's <u>general</u> position on these matters? I can only tell them that the current law on underground regulations, as enunciated by OAL and the courts, does not distinguish between the agency and its staff, and places no value on (or distinction for) non-binding general guidance.

The result is that the guidance documents will either be shelved forever or released in a highly edited form that removes useful guidance information that the documents could have provided. Is California business and its citizenry better off without such guidance information?

Example 5: The Legislature recently (September 1996) enacted legislation to restructure the electricity industry, delegating several implementing tasks to the CEC that are to be performed in

the first months of 1997. One such task is the allocation of competitive transition charge (or "CTC") exemptions to competing irrigation districts to facilitate their entry (or competitiveness within) the electrical service industry. The allocation among the competing districts is to be based on the "viability" of their service proposals and a few other general criteria, such as the requirement that at least half of all customer load proposed for service be "agricultural pumping."

The CEC initiated a proceeding to make its allocations. It quickly became apparent that some terms used in the statute, such as "agricultural pumping," were terms about which there was much dispute. Some irrigation districts favored a very broad interpretation of the term, while other districts and the private utilities wanted the term to be more restrictive. Whether the term was interpreted broadly to include mechanical hydraulic pumping clearly had the potential to determine which districts received the CTC exemptions.

In October 1996 both the staff and the Commissioners suggested a rulemaking to define "agricultural pumping" and other statutory terms. I had to inform them that this was not possible in the time frame available, as the district applications were required by statute to be filed by January 31, 1997, with the decision following shortly thereafter. Even assuming the Commission initiated the rulemaking in late October, the rules could not have been adopted, approved by OAL, and effective by the time the exemption applications had to be filed.

The irrigation districts wanted to know what qualified as "agricultural pumping" for the purpose of their applications. How they framed their competitive applications might determine whether they were successful in receiving exemptions. Therefore, after hearing all points of view, the CEC standing committee responsible for the proceeding issued instructions for the exemption applications which stated that the standing committee did not believe that hydraulic pumping should be counted as agricultural pumping, and that the applications should indicate sufficient agricultural pumping without including hydraulics.

Was this instruction for the application concerning what constitutes "agricultural pumping" an underground regulation? Would it have been better for the CEC to have said: We can't tell you what we think agricultural pumping is because that would require a regulation that we don't have time to adopt; you'll find out what we think when we issue our adjudicatory decision? How would the irrigation districts or any member of the public have benefitted from such indecision?

As the above examples suggest, agency activity that is currently considered by OAL (and in some cases the courts) to comprise underground regulations covers a broad range, even within a single agency. The activities persist in the face of OAL disapproval because the regulated public reasonably demands agency information and advice as well as periodic relief from regulations that could not have foreseen the particular enforcement circumstances involved. Even the best regulations are frequently ambiguous within a given context, and the regulated public wants and deserves to know what kind of enforcement to expect.

The above comments are not intended to refute OAL's position that agencies must be prevented from expanding their authority and basing their actions on underground regulations. Agency abuse is a real problem and OAL's policing role is critical. At the same time, the current law, as interpreted by OAL and the courts, is highly problematic for both agencies and the regulated public. Certainly guidance documents and non-binding advice letters should not be prohibited. Rather than defending the status quo, OAL should provide constructive suggestions for addressing problems with the existing law.

Likewise, given the current amount of time and resources that even simple regulatory amendments entail, agencies need some limited scope within which they can interpret their regulations. The CBSC seems at least cognizant of this need. Rather than trying to prohibit agency interpretations, it has in the past considered requiring agencies to systematically publish their interpretations of the building code to make them more readily available to the regulated public.

Thank you for considering our comments.

Yours truly,

Dick Ratliff

DICK RATLIFF
Senior Staff Counsel

PROPOSED LEGISLATION

Gov't Code §§ 11360-11365 (added). Interpretive Guidelines.

SECTION. 1. Article 10 (commencing with Section 11360) is added to Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

Article 10. Interpretive Guidelines

Section 11360. Definition

11360. As used in this chapter, "interpretive guideline" means a written statement adopted by an agency in compliance with the requirements of this article, expressing the opinion of the agency as to the meaning of a statute, regulation, agency order, court decision, or other provision of law. An interpretive guideline shall clearly indicate that it is advisory only and shall be titled an interpretive guideline adopted under this article.

Comment. Section 11360 defines an interpretive guideline. An agency statement is not an interpretive guideline unless adopted in compliance with the requirements of this article. If an agency statement purports to be an interpretive guideline but was not adopted in compliance with the provisions of this article, it may be a regulation. See Gov't Code § 11342(g). A regulation that is not properly adopted under this chapter is invalid. See Gov't Code § 11340.5.

☞ **Staff Note.** The Comment to this section addresses the relationship between interpretive guidelines and underground regulations.

An interpretive guideline is not a regulation. However, as the Comment makes clear, the definition of interpretive guideline includes a requirement that the statement be adopted in compliance with the requirements of this article. Therefore, a procedural defect in adopting an interpretive guideline will take the adopted statement out of the definition of interpretive guideline. In most cases the statement will then be an improperly adopted underground regulation.

Therefore, under existing law, an improperly adopted interpretive guideline would be subject to OAL and judicial review and invalidation as an underground regulation. See Gov't Code §§ 11340.5, 11350. As an underground regulation, it would be entitled to no judicial deference. See Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 577, 927 P.2d 296, 308, 59 Cal. Rptr. 2d 186, 198 (1996).

Section 11361. Procedures for adoption, amendment, or repeal of an interpretive guideline

11361. (a) To adopt, amend, or repeal an interpretive guideline, an agency shall complete all of the following procedures:

(1) Provide public notice of the proposed action, as provided in Section 11362.

(2) Prepare a preliminary text of the proposed action. The preliminary text shall be provided to any person requesting a copy.

(3) Accept written public comment for 30 calendar days after providing the notice required in paragraph (1).

(4) Certify in writing that all written public comment received in the period provided in paragraph (3) was read and considered by the agency.

(5) Prepare the final text of the proposed action, subject to the limitations of Section 11363.

(6) Submit the final text of the proposed action and the certification required by paragraph (4) to the office.

(7) Publish the final text of the adoption, amendment, or repeal of an interpretive guideline in a comprehensive and publicly available compilation of interpretive guidelines maintained by the agency, and if feasible, publish the final text electronically.

(b) The adoption, amendment, or repeal of an interpretive guideline is effective immediately when the agency satisfies all of the requirements of this section.

Comment. Section 11361 catalogs the procedures to be followed in adopting, amending, or repealing an interpretive guideline. Compare Article 5 of this chapter (procedures for adopting, amending, or repealing a regulation).

Section 11362. Notice

11362. (a) The agency shall mail notice of a proposed adoption, amendment, or repeal of an interpretive guideline to the office and to any person who has requested notice of agency regulatory actions. In cases in which the agency is within a state department, the agency shall also mail or deliver notice to the director of the department.

(b) Notice of a proposed adoption, amendment, or repeal of an interpretive guideline shall include both of the following:

(1) A clear overview explaining the purpose and effect of the proposed action.

(2) Instructions on how to receive a copy of the preliminary text of the proposed action and on how to submit a written comment relating to the proposed action. Instructions shall specify the deadline for submission of a written comment.

Comment. Section 11362 specifies the content and delivery requirements of the notice required under chapter (1) of subdivision (a) of Section 11361. Compare Gov't Code §§ 11346.4 & 11346.5 (notice requirements for adopting, amending, or repealing a regulation).

Section 11363. Limitation on Final Text

11363. (a) The final text of the adoption, amendment, or repeal of an interpretive guideline shall be sufficiently related to the preliminary text provided to the public pursuant to paragraph (2) of subdivision (a) of Section 11361 that the public had adequate notice that the change could reasonably result from the originally proposed action.

(b) An agency may not adopt a final text that does not satisfy subdivision (a).

Comment. Section 11363 provides that a final text may not differ from a preliminary text to the extent that the public could not reasonably have predicted adoption of the final text. However, nothing in Section 11363 prevents an agency from reinitiating the procedures in this article, with

a former final text as a preliminary text. This section incorporates the substance of subdivision (c) of Section 11346.8 relating to the adoption, amendment, or repeal of a regulation.

☞ **Staff Note.** The limitation expressed in Section 11363 is necessary to safeguard the integrity of public participation. If the final text is so different from the preliminary text that the public could not reasonably have foreseen the outcome of the process, then public comment is meaningless.

In the best case, an agency may realize, as a consequence of public input, that a proposed text is substantially defective and must be revised so extensively that the public could not reasonably have predicted the agency's final decision. In such a case, there has been no public comment on the interpretive guideline in its final form. It is therefore appropriate to begin the process again.

In the worst case, an agency could abuse the process by proposing a token preliminary text in order to start the procedural clock ticking. Once public comment on the token proposal was read and considered, the agency would be free to adopt any final text it wishes, at any later time, without any additional public notice or comment.

This is not a burdensome requirement. It only requires reasonableness on the part of the agency. The staff believes that it will be a very rare case that an agency, in good faith, produces a final text that could not reasonably have been predicted based on the preliminary text.

Section 11364. Responsibilities of the Office

11364. (a) On receiving a notice pursuant to paragraph (1) of subdivision (a) of Section 11361, the office shall publish the contents of the notice in the California Regulatory Notice Register.

(b) On receiving the final text of an agency action and certification that all timely public comment was read and considered, pursuant to paragraph (6) of subdivision (a) of Section 11361, the office shall file the final text of the action with the Secretary of State and publish the final text of the action in the California Regulatory Notice Register.

Comment. Nothing in Section 11364 limits the authority of the office relating to a purported interpretive guideline that is in fact a regulation. See Section 11360 (interpretive guideline defined).

Section 11365. Effect of an Interpretive Guideline

11365. (a) An interpretive guideline is advisory only and has no legal effect. It cannot prescribe a penalty or course of conduct, confer a right, privilege, authority, or immunity, impose an obligation, or in any other way bind or compel.

(b) In an enforcement action, an agency may not assert an interpretation of law contradicting an interpretive guideline, to the extent that the conduct complained of occurred while the interpretive guideline was in effect.

Comment. Nothing in Section 11365 affects the deference a court may accord an agency interpretation of law. However, in determining what deference is appropriate, a court should take into account the fact that an interpretive guideline is adopted with a lower degree of public input than is an interpretive regulation, and may therefore be less reliable than an agency interpretation adopted as a regulation.

Subdivision (b) makes clear that, in an enforcement action, an agency is bound by its own interpretation of law, as expressed in an interpretive guideline effective at the time of the conduct complained of.

☞ **Staff Note.** Comments relating to the deference accorded an interpretive guideline should probably also be appended to proposed Code Civ. Proc. § 1123.420, relating to Judicial Review of Agency Action, in S.B. 209.

Gov't Code § 11340.6 (amended). Petition for adoption or repeal

SEC. 2. Section 11340.6 of the Government Code is amended, to read:

11340.6. Except where the right to petition for adoption of a regulation or interpretive guideline is restricted by statute to a designated group or where the form of procedure for such a petition is otherwise prescribed by statute, any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation as provided in Article 5 (commencing with Section 11346), or requesting the adoption, amendment, or repeal of an interpretive guideline as provided in Article 10 (commencing with Section 11360). This petition shall state the following clearly and concisely:

(a) The substance or nature of the regulation, interpretive guideline, amendment, or repeal requested.

(b) The reason for the request.

(c) Reference to the authority of the state agency to take the action requested.

Comment: Section 11340.6 is amended to permit a petition to an agency relating to an interpretive guideline. See Article 10 (commencing with Section 11360).

☞ **Staff Note.** Sections 11340.6 and 11340.7 provide for a public right to petition an agency to adopt, amend, or repeal a regulation. While an agency is not required to grant a petition, it must reply and explain its decision to grant or deny the petition.

Because a petition of this kind has no effect on adoption procedures and provides for a useful means of public input regarding agency decisions, it should also apply to an interpretive guideline.

Gov't Code § 11340.7 (amended). Agency response to petition for adoption, amendment or repeal

SEC. 3. Section 11340.7 of the Government Code is amended, to read:

11340.7. (a) Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346), or requesting the adoption, amendment, or repeal of an interpretive guideline as provided in Article 10 (commencing with Section 11360), a state agency shall notify the petitioner in writing of the receipt and shall within 30 days deny the petition indicating why the agency has reached its decision on the merits of the petition in writing or schedule the matter for public ~~hearing~~ comment in accordance with ~~the~~ applicable notice and hearing requirements ~~of that article~~.

(b) A state agency may grant or deny the petition in part, and may grant any other relief or take any other action as it may determine to be warranted by the petition and shall notify the petitioner in writing of this action.

(c) Any interested person may request a reconsideration of any part or all of a decision of any agency on any petition submitted. The request shall be submitted in accordance with Section 11340.6 and include the reason or reasons why an

agency should reconsider its previous decision no later than 60 days after the date of the decision involved. The agency's reconsideration of any matter relating to a petition shall be subject to subdivision (a).

(d) Any decision of a state agency denying in whole or in part or granting in whole or in part a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346), or requesting the adoption, amendment, or repeal of an interpretive guideline as provided in Article 10 (commencing with Section 11360), shall be in writing and shall be transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register at the earliest practicable date. The decision shall identify the agency, the party submitting the petition, ~~the~~ any provisions of the California Code of Regulations requested to be affected, reference to authority to take the action requested, the reasons supporting the agency determination, an agency contact person, and the right of interested persons to obtain a copy of the petition from the agency.

Comment: Section 11340.7 is amended to permit a petition to an agency relating to an interpretive guideline. See Article 10 (commencing with Section 11360).

Section 11342 (amended). Definitions

SEC. 4. Section 11342 of the Government Code is amended, to read:

11342. In this chapter, unless otherwise specifically indicated, the following definitions apply:

(a) "Agency" and "state agency" do not include an agency in the judicial or legislative departments of the state government.

(b) "Office" means the Office of Administrative Law.

(c) "Order of repeal" means any resolution, order or other official act of a state agency that expressly repeals a regulation in whole or in part.

(d) "Performance standard" means a regulation that describes an objective with the criteria stated for achieving the objective.

(e) "Plain English" means language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English.

(f) "Prescriptive standard" means a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means.

(g) "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency. ~~"Regulation" does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization., any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part~~

~~when one is needed to implement the law under which the form is issued.~~ "Regulation" does not mean or include the following:

(1) Legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization.

(2) Any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

(3) An interpretive guideline as defined in Section 11360.

(h)(1) "Small business" means a business activity in agriculture, general construction, special trade construction, retail trade, wholesale trade, services, transportation and warehousing, manufacturing, generation and transmission of electric power, or a health care facility, unless excluded in paragraph (2), that is both of the following:

(A) Independently owned and operated.

(B) Not dominant in its field of operation.

(2) "Small business" does not include the following professional and business activities:

(A) A financial institution including a bank, a trust, a savings and loan association, a thrift institution, a consumer finance company, a commercial finance company, an industrial finance company, a credit union, a mortgage and investment banker, a securities broker-dealer, or an investment adviser.

(B) An insurance company, either stock or mutual.

(C) A mineral, oil, or gas broker; a subdivider or developer.

(D) A landscape architect, an architect, or a building designer.

(E) An entity organized as a nonprofit institution.

(F) An entertainment activity or production, including a motion picture, a stage performance, a television or radio station, or a production company.

(G) A utility, a water company, or a power transmission company generating and transmitting more than 4.5 million kilowatt hours annually.

(H) A petroleum producer, a natural gas producer, a refiner, or a pipeline.

(I) A business activity exceeding the following annual gross receipts in the categories of:

(i) Agriculture, one million dollars ($1,000,000).

(ii) General construction, nine million five hundred thousand dollars ($9,500,000).

(iii) Special trade construction, five million dollars ($5,000,000).

(iv) Retail trade, two million dollars ($2,000,000).

(v) Wholesale trade, nine million five hundred thousand dollars ($9,500,000).

(vi) Services, two million dollars ($2,000,000).

(vii) Transportation and warehousing, one million five hundred thousand dollars ($1,500,000).

(J) A manufacturing enterprise exceeding 250 employees.

(K) A health care facility exceeding 150 beds or one million five hundred thousand dollars ($1,500,000) in annual gross receipts.

Comment. Section 11342 is amended to make clear that an interpretive guideline is not a regulation.
