

Memorandum 97-49

Administrative Rulemaking: Interpretive Guidelines

At the May meeting the Commission approved a staff draft of an “interpretive guideline” exception to existing rulemaking procedures, and instructed the staff to consider the following issues raised by the Office of Administrative Law (OAL) and by Professor Asimow:

- An interpretive guideline exception may not be necessary given existing methods for agency communication of interpretations of law.
- The definition of interpretive guideline should more clearly specify matters that an interpretive guideline may and may not convey.
- It should be clear that the “effective date” of an interpretive guideline does not affect the power of an agency to apply its interpretation in an adjudication.
- Post-adoption OAL review of an interpretive guideline should be available on request.
- The final text of an interpretive guideline should not be published in the California Regulatory Notice Register.

These issues are discussed below, and a draft tentative recommendation is attached for your consideration.

Need for Exception

Under current law an agency may validly communicate its interpretations of law by means other than adoption of a regulation. These means include the following:

- An individual advice letter.
- A precedent decision in an administrative adjudication. See Gov’t Code § 11425.60. Note that a person interested in clarifying an agency’s interpretation of law may seek an administrative declaratory decision, which can then serve as a precedent decision. See Gov’t Code § 11465.10-11465.70.
- A compilation or summary of advice letters or index of precedent decisions, so long as it does not include any generalizing commentary.

OAL suggests that these other means of communication are adequate in many cases, and therefore an interpretive guideline exception may not be necessary.

However, the staff believes that an interpretive guideline exception would be more reliable and efficient than these other methods as a means of communicating generally applicable interpretations. Communication of an interpretation by means of an advice letter or precedent decision requires that an agency be presented with a specific fact situation raising the issue the agency wants to address. While it may be true that the need for a clarifying interpretation is often triggered by a specific fact situation that exposes an ambiguity, this won't always be true. In some cases, an agency may recognize an ambiguity that requires clarification before any request for advice or adjudication presenting the issue arises. In these situations an agency could issue an interpretive guideline, but not an advice letter or precedent decision.

Furthermore, an interpretive guideline is probably fairer to regulated individuals than an interpretation announced in an adjudication. This is because the parties to an adjudication have no advance notice of the agency's interpretation. This is the problem that Professor Asimow has repeatedly pointed out — where an agency remains silent as to its interpretation of law until it is applied in an enforcement action.

Finally, the interpretive guideline exception provides an opportunity for public participation that the other methods lack. This allows those who will be affected by an agency's decision to have a say in its formulation, and provides a period during which the public can conform its behavior to the pending interpretation.

The staff believes that the interpretive guideline exception is justified as an efficient means of communicating generalized agency interpretations of law, while preserving the benefits of public participation.

Definition

The proposed law defines "interpretive guideline" as a written statement expressing an agency interpretation of law, properly adopted under the interpretive guideline procedures, and clearly labeled as such. A purported interpretive guideline that does not meet this definition is probably an underground regulation, subject to OAL and judicial review.

OAL suggests that the definition should more clearly limit the content of an interpretive guideline. Note that the definition already limits the content of an interpretive guideline to agency statements interpreting law. The fact that this excludes an agency statement that purports to do more than interpret can be made

clear in the comment, with a reference to the substantive provision limiting the effect of an interpretive guideline. OAL also suggests that the labeling requirement be made specific as to the language that must be used. The staff proposes the following language:

§ 11360. As used in this chapter, “interpretive guideline” means a written agency statement expressing a generally applicable interpretation of a statute, regulation, agency order, court decision, or other provision of law that the agency enforces or administers, that is adopted in substantial compliance with the requirements of this article, and that bears the following notice: “This is a non-binding, advisory agency interpretive guideline that has not been adopted under the full California APA rulemaking process and does not have force of law. Review by the Office of Administrative Law is available on request under Government Code Section 11367.”

Comment. Section 11360 defines an interpretive guideline. An “interpretive guideline” is a statement interpreting law and does not include an agency statement that prescribes a penalty or course of conduct, confers a right, privilege, authority, exemption, or immunity, imposes an obligation, or in any other way binds or compels. See Section 11365.

If an agency statement purports to be an interpretive guideline but does not satisfy this section, it may be a regulation. See Section 11342(g). The Office of Administrative Law may review a purported interpretive guideline to determine whether it is a regulation. See Sections 11340.5(b), 11367.

Effective Date

Professor Asimow suggests that the language regarding the effective date for an interpretive guideline should be clarified. Specifically, it should be clear that an agency need not wait until an interpretive guideline becomes effective to apply its interpretation in an adjudication. The Comment to proposed Section 11361(b) has been revised to make this clear:

Comment. Under subdivision (b), an interpretive guideline is effective on completion of the procedures specified in subdivision (a). An effective interpretive guideline has no legal effect but may bind the agency in certain circumstances. See Section 11365 and Comment. Note that adoption of an effective interpretive guideline is not the only means by which an agency may validly assert its interpretation of law. For example, an agency interpretation may arise in case-specific adjudication. However, an agency’s interpretation expressed in an adjudication may not be expressly relied on as a precedent

unless it has been designated a precedent decision by the agency. See Section 11425.60.

Post-Adoption Review

Both OAL and Professor Asimow suggest that post-adoption review of an interpretive guideline be available on request. This would permit OAL to review problematic interpretive guidelines, without delaying the adoption procedure and without requiring that OAL review all interpretive guidelines. Specific issues are discussed below and are implemented in the draft tentative recommendation (see proposed Sections 11367-11369):

(1) OAL's decision must be binding. OAL believes that its review of interpretive guidelines, like its substantive review of proposed regulations, should be binding. If so, the staff believes that it must be made clear that OAL invalidation of an interpretive guideline only affects the status of the interpretive guideline (i.e. it would not be entitled to judicial deference and would not bind the agency) and would not affect an agency's authority to express its interpretation by other valid means (such as in an individual advice letter or in case-specific adjudication).

(2) Criteria. In reviewing an interpretive guideline, OAL would determine whether it was properly adopted, whether it exceeds the substantive limits on what an interpretive guideline can properly convey, and whether the interpretation is consistent with the interpreted law.

OAL also believes that it should review whether an agency has authority to adopt an interpretive guideline. However, the staff believes that this authority is inherent when an agency interprets a law that it enforces or administers. While it makes sense that an agency should not be able to adopt binding regulations unless it has rulemaking authority, the authority to interpret a law that an agency administers or enforces is implied by necessity. This is consistent with OAL's regulatory elaboration of the definition of "authority," in which OAL recognizes that an agency may need to adopt a regulation in order to exercise a power granted by a statute or by the constitution, even if the agency has no express statutory authority to make rules. See 1 C.C.R. § 14 (a)(2).

(3) Default operation. If OAL does not disapprove an interpretive guideline within a specified time after a request for review then the interpretive guideline will be deemed approved by OAL by operation of law. This would minimize the additional burden on OAL, by allowing it to remain silent regarding interpretive guidelines that it considers unproblematic.

(4) Review of OAL decision. OAL's decision would be reviewable, by the Governor or the courts. This is consistent with review of other OAL determinations.

Publication

OAL suggests that the California Regulatory Notice Register (the Register) may not be the best location for publication of the final text of an interpretive guideline, given the Register's relatively short shelf-life. The staff agrees that this would be a problem if publication in the Register were the sole means of making interpretive guidelines publicly available. However, the proposal also requires that each agency maintain a complete and publicly accessible compilation of their interpretive guidelines. Publication of the final text in the Register is only intended to serve as public documentation of the final step of the interpretive guideline process. Still, it is probably correct that publication of the final text in the Register is not necessary for this purpose. Instead, the staff suggests that a brief notice be published in the Register, informing the public of the adoption of an interpretive guideline and providing information on how to obtain a copy from the adopting agency.

OAL is also concerned that agencies will not comply with the requirement that they publish their interpretive guidelines. Agency compliance could perhaps be improved by a more specific publication requirement. The "precedent decision" section of administrative adjudication law provides a possible model of this. See Gov't Code § 11425.60. It requires that an agency's index of precedent decisions be updated annually, be made available to the public through subscriptions, and that its availability be publicized annually in the Register. This is the approach taken in the attached staff draft. See proposed Section 11366.

A final issue is whether internet publication of interpretive guidelines should be mandatory. Mandatory internet publication would substantially increase the public's access to interpretive guidelines without imposing much cost on the adopting agency. However, any additional procedural costs may deter resource-strapped agencies from adopting interpretive guidelines. The question, therefore, is whether the increase in required public access outweighs the possible decrease in the utilization of the interpretive guideline exception.

Respectfully submitted,

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INTERPRETIVE GUIDELINES

The California Administrative Procedure Act (APA)¹ specifies the procedures a state agency must follow in order to adopt, amend, or repeal a regulation.² These procedures are generally beneficial in that they provide for meaningful public participation in agency rulemaking, but they are also time-consuming and costly to the rulemaking agency.³ The cost and delay can be a problem when it impedes an agency's ability to convey useful information to the regulated public in a timely fashion.

Requiring that an agency comply with full rulemaking procedures in order to provide nonbinding, generalized interpretive guidance to the regulated public is particularly problematic.⁴ Where an agency lacks the time or resources to comply with rulemaking procedures it must then choose between two equally undesirable alternatives — remaining silent despite the public's need for guidance,⁵ or providing information in violation of the rulemaking statute.⁶

What's more, the benefits of the full rulemaking procedure are less clear when an agency is providing nonbinding interpretive guidance. Rulemaking procedures were intended to lighten the regulatory burden on business by reducing the number and complexity of regulations.⁷ However, interpretive guidance does not increase the regulatory burden — it reduces it, by reducing ambiguity in the law and minimizing its inconsistent application.⁸ Another benefit of rulemaking procedure is the opportunity for the regulated public to have a say in the formulation of a

1. Gov't Code § 11340-11529.

2. Gov't Code §§ 11340-11359. Note that certain agencies are partially or entirely exempt from these requirements, either by the terms of the APA or by an exemption in the agency's authorizing statutes. See, e.g., Gov't Code §§ 11342(g) (legal rulings of Franchise Tax Board are not regulations subject to APA procedures), 19817.1 (Department of Personnel Administration exempt from APA rulemaking provisions). The proposed law would not affect these exemptions.

3. See Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43, 56-58 (Winter 1992) (discussing the cost and delay associated with rulemaking procedures).

4. The APA's definition of "regulation" is quite broad, and includes a generally applicable statement of an agency's interpretation of a law it enforces or administers. Gov't Code § 11342(g).

5. In which case the first indication of an agency's interpretation of law may be its application in an enforcement action.

6. There are other ways for an agency to communicate its interpretations of law, such as issuing individual advice letters, or relying on precedent decisions in individual adjudications, but these methods are reactive, limited to specific fact situations, and do not provide for public participation in formulating the agency's interpretation. See Gov't Code §§ 11343(a)(3), 11346.1(a). Presently, the only effective way for an agency to express a generally applicable interpretation, in advance of the public's need for information, is to adopt a regulation.

7. Gov't Code § 11340.1.

8. "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 ambiguities in the law and ensure agency-wide uniformity." *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 576, 927 P.2d 296, 59 Cal. Rptr. 2d 186 (1996).

1 regulation that affects it.⁹ This is less important where an agency is providing
2 advice that has no legally binding effect.¹⁰

3 The Law Revision Commission recommends that generally applicable agency
4 statements interpreting the law that they enforce or administer (“interpretive
5 guidelines”), be removed from regular rulemaking procedures and instead be
6 subject to simplified notice and comment procedures. This will expedite beneficial
7 communication between regulatory agencies and the regulated public while
8 preserving the benefits of public participation.

9 PROPOSED LAW

10 The proposed law has four principal elements: (1) a clear definition of
11 “interpretive guideline,” (2) statutory limits on the legal force and effect of an
12 interpretive guideline, (3) streamlined notice and comment procedures for the
13 adoption, amendment, or repeal of an interpretive guideline, and (4) procedures to
14 review whether a particular interpretive guideline satisfies the requirements of the
15 proposed law. In combination, these elements ensure that the special procedure is
16 properly targeted and limited in its effect.

17 Definition of “Interpretive Guideline”

18 In order to avoid agency abuse of the interpretive guideline procedure and to
19 provide certainty to the regulated public, the definition of an interpretive guideline
20 must be clear and enforceable. This is achieved by establishing three limiting
21 criteria: (1) nonbinding interpretive content, (2) clear labeling, and (3) substantial
22 procedural compliance. A purported interpretive guideline that does not satisfy
23 each of these criteria is not an interpretive guideline.¹¹

24 (1) *Interpretive content.* An interpretive guideline expresses an agency’s
25 interpretation of a statute, regulation, agency order, court decision, or other
26 provision of law that it enforces or administers. Agency statements that go beyond
27 interpreting law and purport to bind or compel do not satisfy the content limitation
28 and do not qualify for the special interpretive guideline procedure.

29 (2) *Clear Labeling.* Under the proposed law an interpretive guideline must be
30 clearly labeled as such. This avoids the need to consider agency intention in
31 determining whether a particular agency statement is an interpretive guideline and
32 provides a measure of certainty to the public.¹²

9. *Id.* at 568-69.

10. Of course, interpretive guidance may have a practical effect. See discussion *infra*. For this reason, the proposed law requires streamlined public participation.

11. A purported interpretive guideline that does not satisfy the definition of interpretive guideline is probably a regulation. See discussion of “underground regulations,” *infra*.

12. The labeling requirement is drawn from a Washington state statute, exempting “interpretive statements” from rulemaking procedures. See Wash. Rev. Code § 34.05.010(8) (Westlaw 1996). This avoids the uncertainty that has occurred under the Federal APA’s nonlegislative interpretive statement exception. See 5 U.S.C.A. § 533(b)(A); see also Asimow, *Nonlegislative Rulemaking and Regulatory*

(3) *Substantial procedural compliance.* In order to qualify as an interpretive guideline, an agency interpretation must be adopted, amended, or repealed in substantial compliance with specified procedures.

Limited Effect of Interpretive Guideline

Legal effect. An interpretive guideline is precluded from having legal force and effect in two ways. First an interpretive guideline may not include a statement that purports to bind or compel. Such a statement is not an interpretive guideline and is therefore subject to review by OAL and the courts as an “underground regulation.” Second, the proposed law prohibits an interpretive guideline being given any binding effect. Therefore, an agency may not rely solely on an interpretive guideline for authority to act.

Practical effect. Of course, an interpretive guideline will have some practical effect. For example, members of the regulated public may voluntarily conform their behavior to the agency’s view of the law in order to avoid a dispute with the agency. What’s more, a court might accord some deference to an agency’s interpretation of law as expressed in an interpretive guideline, just as it might to any other valid¹³ agency interpretation of law, whether expressed in an advice letter, an adjudicative decision, or otherwise.¹⁴

The proposed law mitigates these practical effects in two ways. First, it requires public participation when adopting an interpretive guideline. This allows those who may be affected by an interpretive guideline to have a say in its formulation and provides a notice period during which the public may conform their conduct to the pending interpretive guideline. Second, the proposed law provides a “safe harbor” for anyone who does conform their conduct to an interpretation expressed in an interpretive guideline. Under this provision, an agency must abide by its own interpretive guideline in enforcing the interpreted law.

Streamlined Adoption Procedures

Because interpretive guidelines will have some practical effect on the regulated public, the proposed law requires public input in their formulation. Public input is provided through a simplified notice and comment procedure that achieves the

Reform, 1985 Duke L. J. 381, 389-90 (discussing problems that arise under federal law when agencies do not clearly label their nonlegislative interpretive statements).

13. An agency interpretation expressed in an “underground regulation” is invalid and entitled to no judicial deference. *Tidewater*, 14 Cal. 4th at 576.

14. In reviewing a valid agency interpretation of law, a court exercises independent judgment, granting whatever deference to the agency’s interpretation is appropriate to the circumstances. Factors a court might consider in determining how much deference to accord an agency’s interpretation include the relative expertise of the agency, the technical complexity of the matter interpreted, and the care and formality with which the agency acted in adopting its interpretation. See discussion, Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 U.C.L.A. L. Rev. 1157, 1193-98 (1995). Because an interpretive guideline is adopted under less rigorous procedures than a regulation, a court may well grant less deference to an interpretive guideline than it would to an interpretive regulation.

benefits of public participation¹⁵ with less cost and delay than under existing rulemaking procedures.¹⁶

Review Procedures

As a check on agency error and abuse of the special procedure, the proposed law includes two methods for review of a problematic interpretive guideline: (1) post-adoption review by the Office of Administrative Law (OAL), and/or (2) “underground regulation” review.

(1) *Post-adoption review*. On the request of any person, OAL will review an existing interpretive guideline to determine whether it satisfies the requirements of the interpretive guideline procedure, and whether it is consistent with the law it interprets. If OAL determines that the statement is not an interpretive guideline or is inconsistent with the law it interprets, then the statement is invalid and ineffective as an interpretive guideline.¹⁷

(2) *“Underground regulation” review*. A purported interpretive guideline is subject to review by OAL to determine whether it is an invalid “underground regulation,” that is, a regulation that was not properly adopted under rulemaking procedures.¹⁸ An “underground regulation” is also subject to judicial review and invalidation, either before the regulation has been enforced,¹⁹ or after an action enforcing the regulation.²⁰

15. Public participation serves many purposes. It provides the regulated public with a say in the formulation and interpretation of rules that affect them, and provides a notice period during which affected parties may conform their affairs to the new interpretation. It also benefits the agency by providing useful information and perspectives that might not otherwise have been considered. Furthermore, agency openness enhances the perceived legitimacy of the agency’s action, increasing the likelihood of voluntary compliance by the public. See *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 568-69, 927 P.2d 296, 59 Cal. Rptr. 2d 186 (1996); *Chamber of Commerce of United States v. O.S.H.A.*, 636 F.2d 464, 470-71 (D.C. Cir. 1980).

16. These savings are achieved by limiting the required analyses and determinations an agency must conduct, limiting public input to written comments that the agency must read and consider, and requiring OAL review and approval only on the request of a member of the public.

17. As with other OAL determinations, this determination is subject to review by the Governor’s office and the courts. See, e.g. Gov’t Code §§ 11349.5 (review by Governor of OAL disapproval of proposed regulation), 11350.3 (judicial review of OAL disapproval).

18. Gov’t Code § 11340.5.

19. Gov’t Code § 11350 (declaratory judgment of a regulation’s invalidity).

20. Code Civ. Proc. § 1094.5 (administrative mandamus).

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

§ 11360. Definition

11360. As used in this chapter, “interpretive guideline” means a written agency statement expressing a generally applicable interpretation of a statute, regulation, agency order, court decision, or other provision of law that the agency enforces or administers, that is adopted in substantial compliance with the requirements of this article, and that bears the following notice: “This is a non-binding, advisory agency interpretive guideline that has not been adopted under the full California APA rulemaking process and does not have force of law. Review by the Office of Administrative Law is available on request under Government Code Section 11367.”

Comment. Section 11360 defines an interpretive guideline. An “interpretive guideline” is a statement interpreting law and does not include an agency statement that prescribes a penalty or course of conduct, confers a right, privilege, authority, exemption, or immunity, imposes an obligation, or in any other way binds or compels. See Section 11365.

If an agency statement purports to be an interpretive guideline but does not satisfy this section, it may be a regulation. See Section 11342(g). The Office of Administrative Law may review a purported interpretive guideline to determine whether it is a regulation. See Sections 11340.5(b), 11367.

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

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

(3) Accept written public comment for 30 calendar days after providing the notice required in paragraph (2).

(4) Certify in writing that all written public comments received in the period provided in paragraph (3) were 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 as specified in section 11366.

(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 specifies the procedures to be followed in adopting, amending, or repealing an interpretive guideline. “Office” means the Office of Administrative Law. See Section 11342(b).

Under subdivision (b), an interpretive guideline is effective on completion of the procedures specified in subdivision (a). An effective interpretive guideline has no legal effect but may bind the agency in certain circumstances. See Section 11365 and Comment. Note that adoption of an effective interpretive guideline is not the only means by which an agency may validly assert its interpretation of law. For example, an agency interpretation may arise in case-specific adjudication. However, an agency’s interpretation expressed in an adjudication may not be expressly relied on as a precedent unless it has been designated a precedent decision by the agency. See Section 11425.60.

§ 11362. Notice

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

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

(1) A clear overview explaining the proposed action.

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

Comment. Section 11362 specifies the content and delivery requirements of the notice required under Section 11361(a)(2). “Office” means the Office of Administrative Law. See section 11342(b).

§ 11363. Limitation on final text

11363. An agency may not adopt a final text unless the final text is sufficiently related to the preliminary text provided to the public pursuant to Section 11362 that the public could reasonably have anticipated adoption of the final text.

Comment. 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 adopts some of the substance of subdivision (c) of Section 11346.8 relating to the adoption, amendment, or repeal of a regulation.

1 **§ 11364. Responsibilities of the office**

2 11364. (a) On receiving a notice pursuant to subdivision (a) of Section 11362,
3 the office shall publish the contents of the notice in the California Regulatory
4 Notice Register.

5 (b) On receiving the final text of an agency action and certification that all
6 timely public comment was read and considered, pursuant to paragraph (6) of
7 subdivision (a) of Section 11361, the office shall file the final text of the action
8 with the Secretary of State and publish a notice in the California Regulatory
9 Notice Register, indicating that the agency action is complete, and providing
10 information on how to contact the agency to obtain a copy of the final text.

11 **Comment.** As used in Section 11364, “office” means the Office of Administrative Law. See
12 Section 11342(b).

13 **§ 11365. Effect of an interpretive guideline**

14 11365. (a) Except as provided in subdivision (b), an interpretive guideline is
15 advisory only and has no legal effect. It cannot prescribe a penalty or course of
16 conduct, confer a right, privilege, authority, exemption, or immunity, impose an
17 obligation, or in any other way bind or compel.

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

21 **Comment.** Nothing in Section 11365 affects the deference a court may accord an agency
22 interpretation of law expressed in an interpretive guideline. In reviewing a valid agency
23 interpretation of law, a court exercises independent judgment, granting whatever deference to the
24 agency’s interpretation is appropriate to the circumstances. Factors a court might consider in
25 determining how much deference to accord an agency’s interpretation include the relative
26 expertise of the agency, the technical complexity of the matter interpreted, and the care and
27 formality with which the agency acted in adopting its interpretation. See discussion, Asimow, *The*
28 *Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 U.C.L.A. L.
29 Rev. 1157, 1193-98 (1995). Because an interpretive guideline is adopted under less rigorous
30 procedures than a regulation, a court may well grant less deference to an interpretive guideline
31 than it would to an interpretive regulation.

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

35 **§ 11366. Agency publication of interpretive guidelines**

36 11366. (a) An agency shall publish the final text of an interpretive guideline, as
37 adopted, amended, or repealed, in a printed compilation of that agency’s
38 interpretive guidelines. The compilation shall be updated not less frequently than
39 annually, unless no action relating to an interpretive guideline has been undertaken
40 by the agency since the last preceding update. The compilation shall be made
41 available to the public by subscription, and its availability shall be publicized
42 annually in the California Regulatory Notice Register.

43 (b) The compilation required under subdivision (a) shall also be made available
44 to the public on the internet.

1 **Comment.** Section 11366 details the interpretive guideline publication requirement established
2 in Section 11361(a)(7). An interpretive guideline is a public record and must be available to the
3 public for inspection.

4 **§ 11367. Post-adoption review**

5 11367. (a) On written request of any person, the office shall review a purported
6 interpretive guideline to determine whether it meets both of the following criteria:

7 (1) The purported interpretive guideline satisfies the requirements of this article.

8 (2) The purported interpretive guideline is consistent with the law it purports to
9 interpret.

10 (b) If the office determines that a purported interpretive guideline does not
11 satisfy the criteria specified in subdivision (a) it shall issue a tentative disapproval
12 by mailing written notice and an explanation of its disapproval to the person who
13 requested the review and to the agency that adopted the purported interpretive
14 guideline. The office shall also publish the notice and explanation of its tentative
15 disapproval in the California Regulatory Notice Register.

16 (c) If the office does not issue a tentative disapproval within 15 days after
17 receiving a written request to review a purported interpretive guideline, the
18 interpretive guideline shall be deemed approved and shall not be subject to further
19 review by the office unless the interpretive guideline is subsequently amended.

20 (d) If the adopting agency does not request review of a tentative disapproval
21 under section 11368, or if the tentative disapproval is reviewed but not overruled
22 by the Governor, the disapproval immediately becomes final. The office shall file
23 the final disapproval with the Secretary of State. The adopting agency shall
24 publish the final disapproval in the agency's compilation of interpretive
25 guidelines.

26 (e) Final disapproval of a purported interpretive guideline has the following
27 effects:

28 (1) The purported interpretive guideline is void and entitled to no judicial
29 deference.

30 (2) The adopting agency is no longer bound by the purported interpretive
31 guideline under subdivision (b) of section 11365. This does not affect the binding
32 effect of the purported interpretive guideline prior to the office's disapproval
33 becoming final.

34 **Comment.** Section 11367 provides for post-adoption review of an interpretive guideline, on the
35 request of any person. Upon final disapproval, a purported interpretive guideline is a nullity,
36 entitled to no judicial deference. This parallels the treatment of improperly adopted regulations.
37 See *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 576-77, 927 P.2d 296, 59 Cal.
38 Rptr. 2d 186 (1996).

39 Upon final disapproval of an interpretive guideline an agency is no longer bound by the
40 interpretive guideline in enforcing the interpreted law. See subdivision (e)(2). However, this
41 effect is prospective only, and an agency will continue to be bound by its interpretive guideline in
42 enforcement actions that complain of conduct occurring prior to the final disapproval. See Section
43 11365(b).

44 Disapproval of an interpretive guideline does not affect an agency's authority to apply its
45 interpretation in case-by-case adjudication.

1 Disapproval by the office under this section is subject to review by the Governor's office and
2 by the courts. See Sections 11368, 11369.

3 "Office" means the Office of Administrative Law. See Section 11342(b).

4 **§ 11368. Review by the Governor of a disapproval by the office**

5 11368. (a) An adopting agency may request that the Governor's office review a
6 tentative disapproval under section 11367.

7 (b) A request for review of a disapproval shall be filed with the Governor's
8 office within 10 days of the agency receiving written notice of the office's
9 tentative disapproval. This request shall include a complete statement as to why
10 the agency believes the disapproval is incorrect and should be overruled. The
11 agency shall provide the Governor with copies of all materials used in the process
12 of adopting, amending, or repealing the disapproved interpretive guideline,
13 including public comment received by the agency.

14 (c) A copy of the request for review shall be delivered to the office on the same
15 day the original is filed with the Governor's office. The office shall file its written
16 response to the agency's request with the Governor's Legal Affairs Secretary
17 within 10 days and deliver a copy of its response to the agency on the same day.

18 (d) The Governor's office shall provide the requesting agency and the office
19 with a written decision within 15 days of receipt of the office's response. The
20 office shall publish the Governor's decision and the reasons therefor in the
21 California Regulatory Notice Register.

22 (e) The Governor may overrule a tentative disapproval if the Governor
23 determines that the interpretive guideline satisfies the criteria specified in
24 subdivision (a) of section 11367.

25 **Comment.** As used in section 11368 "office" means the Office of Administrative Law. See
26 Section 11342(b).

27 **§ 11369. Judicial review of a disapproval by the office**

28 11369. (a) Any interested person may obtain a judicial declaration as to the
29 validity of an interpretive guideline that the office has disapproved pursuant to
30 Section 11367 by bringing an action for declaratory relief in the superior court in
31 accordance with the Code of Civil Procedure.

32 (b) The court may invalidate a final disapproval under Section 11367 if it
33 determines that the interpretive guideline satisfies the criteria specified in
34 subdivision (a) of section 11367. This restores the interpretive guideline to the
35 status it enjoyed prior to disapproval by the office and precludes further review by
36 the office unless the interpretive guideline is subsequently amended.

37 **Comment.** Section 11369 provides for judicial review of a decision by the office to disapprove
38 an interpretive guideline. This is not the exclusive means by which a court may review an
39 interpretive guideline. For example, preenforcement judicial review of a purported interpretive
40 guideline to determine whether it is in fact an invalid regulation is available under Section 11350.
41 Post-enforcement review can be obtained by filing a petition for administrative mandamus. Code
42 Civ. Proc § 1094.5.

43 "Office" means the Office of Administrative Law. See Section 11342(b).

CONFORMING REVISIONS

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 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).

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 of an interpretive guideline pursuant to 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 of an interpretive guideline pursuant to 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 provisions of the California Code of Regulations or the agency's interpretive guidelines 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). "Office" means the Office of Administrative Law. See Section 11342(b).

Gov't Code § 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 (1) Legal rulings of counsel issued by the Franchise Tax Board or State Board of
2 Equalization.

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

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

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

13 (A) Independently owned and operated.

14 (B) Not dominant in its field of operation.

15 (2) “Small business” does not include the following professional and business
16 activities:

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

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

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

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

24 (E) An entity organized as a nonprofit institution.

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

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

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

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

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

33 (ii) General construction, nine million five hundred thousand dollars
34 (\$9,500,000).

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

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

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

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

39 (vii) Transportation and warehousing, one million five hundred thousand dollars
40 (\$1,500,000).

41 (J) A manufacturing enterprise exceeding 250 employees.

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

- 1 **Comment.** Section 11342 is amended to make clear that an interpretive guideline is not
2 governed by the general provisions of this chapter otherwise applicable to regulations.
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