

Study N-301

July 14, 1997

First Supplement to Memorandum 97-49**Administrative Rulemaking: Interpretive Guidelines**

The staff received the attached letter from Professor Gregory Ogden, a Commission consultant on administrative law. Professor Ogden agrees with the staff recommendations on each of the points raised in Memorandum 97-49.

Respectfully submitted,

Brian Hebert
Staff Counsel



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July 11, 1997

Law Revision Commission
RECEIVED

Executive Director Nat Sterling
California Law Revision Commission
4000 Middlefield Road, ROOM D-1
Palo Alto, CA 94303-4739

JUL 14 1997

File: _____

Re: Memorandum 97-49, Administrative Rulemaking: Interpretive Guidelines

Dear Nat:

I have read Memorandum 97-49, Administrative Rulemaking: Interpretive Guidelines, and have the following comment about the memorandum, and the draft tentative recommendation.

1. Need for interpretive guideline exception: I believe that an interpretive guideline exception is necessary, and support the staff memo reasoning as to why the interpretive guideline proposal is very valuable. Fairer notice, and public participation are strong reasons for this proposal. Providing generalized agency interpretations of law would be very useful to those persons or entities regulated by an agency, and that need is not always adequately addressed by the existing mechanisms of advice letters or precedent decisions, which may have too narrow of a focus, or raise notice issues. Furthermore, agencies that may not use the current alternatives of advice letters, or precedent decisions, might find using interpretive guideline procedures to be more efficient, or helpful because of the potential broader scope of the interpretive guideline and because of the public participation requirements. Larger groups of affected parties may prefer to request an interpretive guideline proceeding because it can lead to more generalized agency interpretations whereas the other methods, precedent decisions and advice letters usually involve more narrowly focused issues, or more limited party participation.

2. Definition of interpretive guideline: I support the staff recommendation as to the definition of an interpretive guideline including the labeling notice language, and the explanation in the comment. I do not believe that it is possible or desirable to have further limits on the content of an interpretive guideline. Proposed Gov. Code § 11360 is as clear as it can be in the abstract. Ambiguities in the scope of application of the interpretive guideline standards may have to be worked out on a case by case basis, as agencies, OAL, and the courts work with interpretive guideline issues as they arise in specific agency proceedings. Under analogous federal law defining interpretive regulations for purposes of the federal APA, § 553, the definition of interpretive regulation is even more general. See, e.g., Guardian Federal Savings and Loan Association v. FSLIC, 589 F.2d 658, 664, (D. C. Cir. 1978) ("an interpretive rule is merely a clarification or explanation of an existing statute or rule.").

PAGE TWO

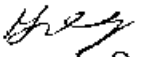
3. Effective date: I support the staff recommendation as to effective date, and I believe that the recommended comment to proposed § 11361(b) is necessary to preserve agency flexibility to choose various interpretive options, and to not have the case specific adjudication option limited by the agency's use of an interpretive guideline procedure. This would be consistent with agency flexibility to select between adjudication and rulemaking to make policy choices, or render interpretations of the law that the agency enforces.

4. Post-Adoption Review: I support the staff recommendation and reasoning as to post-adoption review. I support OAL invalidation being limited to the status of the interpretive guideline, because any broader binding effect would inhibit the agency's ability to use other interpretive options, and might discourage agencies from choosing the interpretive guideline alternative. I support the default operation proposal, and the staff recommendation as to criteria for OAL review. In my opinion, agencies possess inherent authority to interpret laws that the agency enforces or administers.

5. Publication: I support the staff recommendation as to publication, including proposed § 11366. As to Internet publication, I support making Internet publication mandatory for the reasons expressed in the memo. The increased public access is worth any additional cost, and I am not certain that requiring Internet publication would prove to be much of a barrier to agency use of the interpretive guideline process. Use of the Internet is spreading rapidly throughout our society, so any perceived barrier may not be relevant in a few short years.

I look forward to seeing you at the Commission meeting on July 21, 1997.

Very Truly Yours,


Gregory L. Ogden
Professor of Law