

## Memorandum 97-68

### **Administrative Rulemaking: Interpretive Guidelines**

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At its July meeting the Commission considered a proposed exception to full rulemaking procedures for nonbinding agency statements interpreting law (“interpretive guidelines”). There was considerable public comment on the topic, with some commentators expressing concern that an interpretive guideline could be used by an agency to convey binding requirements. This memorandum discusses the concerns that were raised and proposes ways to further clarify the nonbinding nature of interpretive guidelines. Other minor points are addressed in Staff Notes in the Revised Staff Draft.

This memorandum also discusses two issues that were raised in Memorandum 97-49 but not considered by the Commission:

- Post-Adoption Review by the Office of Administrative Law (OAL).
- Publication Requirements.

Finally, the memorandum addresses concerns raised in two comment letters:

- Ms. Erin K. L. Mahaney writes on behalf of the California Pipe Trades Council to recommend that California Environmental Quality Act guidelines (CEQA guidelines) be exempted from the proposal.
- Mr. Jonathan Weissglass writes on behalf of the Union of Needletrades, Industrial & Textile Employees, AFL-CIO and the State Building and Construction Trades Council of California, AFL-CIO, to express concern over the reviewability of certain interpretive guidelines.

These letters are attached as exhibits.

#### ADVISORY INTERPRETATION

There has been some discussion of renaming “interpretive guidelines” to avoid the perception that they have legal effect. The staff suggests the term “advisory interpretation” as an alternative. This would clearly indicate the advisory nature of such statements and would avoid any confusion with other

existing “guidelines,” such as CEQA guidelines, discussed below, which may have legal effect. The attached draft and the remainder of this memorandum use the term “advisory interpretation.”

#### STATEMENT OF LEGISLATIVE PURPOSE

A section has been added to the Revised Staff Draft to state the purpose and scope of the proposed legislation. This section makes clear that the advisory interpretation procedure is not an alternative procedure for the adoption of binding regulations. See proposed Section 11360.010.

#### JUDICIAL DEFERENCE

The rationale for streamlined public participation in the adoption of an advisory interpretation depends on the fact that an advisory interpretation lacks the force and effect of law. Less stringent adoption procedures are adequate to protect the regulated public’s interests when an agency is adopting a nonbinding statement rather than a binding rule.

However, commentators have suggested that an advisory interpretation that is entitled to any measure of judicial deference has the practical effect of law. As the Supreme Court noted in *Tidewater*, “to the extent ... courts must defer to agency interpretations ..., they are rules of law, and the public disregards them at its peril.” *Tidewater Western Marine, Inc. v. Bradshaw*, 14 Cal. 4th 557, 575 (1996). The commentators are concerned that a rule allowing deference to an advisory interpretation could be used by agencies to adopt effectively binding statements without following the full rulemaking procedure. They therefore suggest that an advisory interpretation should be entitled to no judicial deference.

The staff believes that an advisory interpretation could provide useful guidance to courts interpreting ambiguous law. For example, a court might grant some deference to an agency advisory interpretation that was adopted contemporaneously with the law it interprets, or to an advisory interpretation that represents an agency’s long-standing and consistently held interpretation. A court granting such deference would not be bound by the agency’s view, it would simply use the agency’s expressed opinion as an aid in exercising its independent judgment.

Nonetheless, it seems likely that the possibility of any degree of judicial deference to an advisory interpretation will continue to raise serious concerns

about agency circumvention of the APA. Considering that judicial deference is not necessary to achieve the primary purpose of the proposed law — efficient communication between an agency, its staff, and the regulated public — it may make political sense to adopt a no deference rule. Such a rule would hopefully allay fears that an advisory interpretation could somehow be used by an agency to adopt binding requirements without following the APA rulemaking procedure.

A no deference rule can be implemented by amending Section 11360.030 as follows:

11360.030. (a) Except as provided in subdivision (b), an advisory interpretation has no legal effect and is entitled to no judicial deference. It cannot prescribe a penalty or course of conduct, confer a right, privilege, authority, exemption, or immunity, impose an obligation, or in any other way bind or compel.

...

This makes clear that an advisory interpretation is not entitled to any judicial deference, without substantively changing any other provisions of the proposed law.

#### THIRD PARTY ENFORCEMENT

The question arose whether an advisory interpretation could form the basis for a third party enforcement action, such as an action by the attorney general, a district attorney, or a private person under Section 17200 of the Business and Professions Code. It was also suggested that compliance with an advisory interpretation should provide a safe harbor against such third party enforcement actions, in addition to binding the adopting agency.

#### **Basis for Third Party Action**

An advisory interpretation could not form the basis of a third party enforcement action. A third party with standing to enforce a particular law may agree with an advisory interpretation and may assert the same interpretation in an action enforcing the law, but such an action would not be founded on the advisory interpretation (which has no legal effect and is entitled to no deference), but on the law it interprets. The merits of the enforcement action would be determined by reference to the interpreted law, without any consideration of the advisory interpretation.

### **Safe Harbor from Third Party Suits**

Under the proposed law, an agency may not assert an interpretation of law different from an advisory interpretation adopted by that agency, when enforcing the interpreted law. This provides a safe harbor for a regulated party who complies with an agency view of the law as expressed in an advisory interpretation. However, this provision would not preclude a third party with standing to enforce the interpreted law from bringing an enforcement action against a person who has complied with the agency's view of the law.

It has been suggested that an advisory interpretation should also be binding on a third party with standing to enforce the interpreted law. The staff recommends against this. Allowing an agency's advisory interpretation to preclude otherwise permissible enforcement of the interpreted law by a district attorney, city attorney, or private citizen, goes beyond the estoppel-based provision in the proposed law. It is one thing to require, on grounds of fairness, that an agency abide by its own statements. It is quite another to allow an agency to interpret existing law in a manner binding on third parties. Such a rule would permit agencies to insulate regulated parties from any enforcement of a valid law simply by issuing an advisory interpretation.

The staff believes that the legal effect of an advisory interpretation that is binding on third parties would be substantial and is inconsistent with the policy of this proposal — to allow streamlined procedures for the adoption of purely advisory agency statements. This question was considered by the Commission at its May 1, 1997 meeting. At that time the Commission agreed that an advisory interpretation should not bind anyone other than the adopting agency.

## **POST-ADOPTION REVIEW**

### **Proposed Review**

Both OAL and Professor Asimow suggest that post-adoption review of an advisory interpretation be available on request. This would permit OAL to review problematic advisory interpretations, without delaying the adoption procedure and without requiring that OAL review all advisory interpretations. OAL's decision would be reviewable, by the Governor and the courts. This is consistent with the treatment of other OAL determinations.

## **Fiscal Impact**

One potential problem with creating a right of review of advisory interpretations is the possibility that the fiscal impact of the new procedure upon OAL would result in a legislative referral of the proposed legislation to fiscal committees, where the bill might become stalled. If OAL review is essential to the advisory interpretation proposal, then referral to fiscal committees is a necessary hurdle to be overcome. However, it is not clear that the proposed review procedures are necessary.

The purpose of post-adoption review is to provide a check on possible misuse of the advisory interpretation process. If an agency adopts a purported advisory interpretation without following the specified procedures, or if the contents of the purported advisory interpretation exceed the substantive scope of the definition of an advisory interpretation (e.g. by purporting to create a binding requirement) then OAL review could be invoked and the purported advisory interpretation declared invalid.

However, much the same effect can be had under existing law. OAL already has authority to review any agency statement to determine whether it is a regulation. See Gov't Code § 11340.5. If an advisory interpretation is not properly adopted, or exceeds the scope of the definition of an advisory interpretation, then it is not an advisory interpretation, and in almost every case will be a regulation. See proposed Section 11360.020 and Comment. OAL could review such an advisory interpretation and declare it to be an invalid underground regulation.

There are only two meaningful differences between the proposed review and existing underground regulation review:

- (1) Under the proposed review procedure, OAL's determination would be binding, rather than merely advisory as it is for underground regulation determinations.
- (2) Under the proposed procedure, the standard of review would be broadened beyond a determination of whether an agency statement is an underground regulation, to include a determination of whether the advisory interpretation is consistent with the law it interprets (see discussion of Standard of Review, below).

The staff recommends that the Commission consider whether these additional features of the proposed review are sufficiently important to offset any potential difficulty that might arise due to the possible fiscal impact of the procedures.

## **Standard of review**

OAL suggests that it should review a purported advisory interpretation to determine the following:

- (1) Whether an advisory interpretation was properly adopted.
- (2) Whether it exceeds the substantive limits on what an advisory interpretation can properly convey.
- (3) Whether the interpretation is consistent with the interpreted law.
- (4) Whether the agency has authority to adopt the advisory interpretation.

As discussed, the first two standards are the same as those OAL would apply in determining whether a purported advisory interpretation is an underground regulation. Reiterating those standards here should be uncontroversial. The latter two standards are discussed below.

**Consistency review.** When OAL reviews a proposed regulation, one standard of review it applies is consistency with existing law. In reviewing consistency, OAL may not substitute its judgment regarding the substance of the agency's regulation. So, when OAL reviews a regulatory interpretation of law, it determines whether the interpretation is a *possible* interpretation, not whether it is the best possible interpretation. If OAL is to review whether an agency's advisory interpretation is consistent with the law it interprets, the same limitation should apply. See proposed Section 11360.090(b).

**Authority review.** The staff believes that OAL review of an agency's authority to adopt an advisory interpretation is unnecessary because an agency has inherent authority to interpret a law that it enforces or administers. 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). The revised staff draft does not provide for authority review.

## **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 advisory interpretation, given the Register's relatively short shelf-life. This is probably correct. As the purpose of publication of the final text is to provide public notice

of the final step of the advisory interpretation adoption process, publication of the text itself is unnecessary. Instead, the staff suggests that a brief notice be published in the Register, informing the public of the adoption of an advisory interpretation and providing information on how to obtain a copy from the adopting agency. See proposed Section 11360.070(b).

OAL is also concerned that agencies will not comply with the requirement that they publish their advisory interpretations. 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.

Another issue is whether internet publication of advisory interpretations should be mandatory. Mandatory internet publication would substantially increase the public’s access to advisory interpretations without imposing much cost on the adopting agency. However, any additional procedural costs may deter resource-strapped agencies from adopting advisory interpretations. The question, therefore, is whether the increase in required public access outweighs the possible decrease in the utilization of the advisory interpretation exception. The revised staff draft requires internet publication only if the adopting agency has a website, but does not require that the agency create a website in order to take advantage of the advisory interpretation procedures.

#### CEQA GUIDELINES

Ms. Mahaney writes to recommend that California Environmental Quality Act (CEQA) guidelines be exempted from the advisory interpretation proposal. The Pipe Trades Council is concerned that CEQA guidelines could be adopted as advisory interpretations, thus limiting opportunities for public input in their formulation. See Exhibit, pp. 1-2.

CEQA guidelines provide guidance to public agencies responsible for implementing CEQA. They are proposed by the Office of Planning and Research, and adopted as regulations by the Secretary of the Resources Agency. See Pub. Res. Code §§ 21083, 21087. It is not clear whether CEQA guidelines are binding or merely advisory. See *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 390 n.2 (1988) (declining to decide whether CEQA

Guidelines are binding and noting differing opinions in the appellate courts). While CEQA guidelines are adopted as regulations and therefore may be binding (and the guidelines themselves purport to be binding — see 14 CCR § 15000), the use of the term “guideline” has been interpreted by at least one court as indicating a conscious choice by the Legislature against a strict binding effect. See *Karlson v. City of Camarillo*, 100 Cal. App. 3d 789, 804-05 (1980).

Rather than draft an express exemption for CEQA guidelines, the staff recommends a general provision making clear that agency statements that are required by statute to be adopted as regulations may not be adopted as advisory interpretations. Language to this effect has been added to proposed section 11360.010. The Comment to that section cites CEQA guidelines as an example of an agency statement that is required to be adopted as a regulation and therefore may not be adopted as an advisory interpretation.

#### NONENFORCEMENT REVIEW

Mr. Weissglass writes to express his concern regarding the adequacy of the procedures for review of an advisory interpretation, where the advisory interpretation leads an agency to adopt a policy of *nonenforcement*. Judicial review of an advisory interpretation that is affirmatively relied on in an enforcement action is available via administrative mandamus. Where an advisory interpretation leads to a position of nonenforcement, on the other hand, there is no enforcement action to trigger administrative mandamus review. See Exhibit, pp. 3-4.

Of course, under the proposed law, any advisory interpretation is subject to review by OAL. However, as Mr. Weissglass points out, only a disapproval decision by OAL is then subject to judicial review. The staff agrees with Mr. Weissglass’ suggestion that judicial review of an OAL approval decision should also be available. This would provide for judicial review of any advisory interpretation after the OAL review remedy has been exhausted. Proposed Section 11360.110 has been amended to provide for such review.

Respectfully submitted,

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July 18, 1997

Law Revision Commission  
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Chairperson  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303

Re: Government Code §§ 11360-11365 (Interpretive Guidelines)

Dear Chairperson and Commission Members:

The California Pipe Trades Council requests the Law Revision Commission to explicitly exempt the California Environmental Quality Act (CEQA) Guidelines from its proposed amendment to the Government Code. This amendment would provide an "interpretive guideline" exception to existing rulemaking procedures. Under this exception, interpretive guidelines would be subject to simplified notice and comment procedures.

The Council is concerned because it is unclear whether the proposed interpretive guideline exception would apply to the CEQA Guidelines. There is some debate whether the Guidelines are regulations or interpretive aids. The California Supreme Court has specifically and repeatedly declined to determine whether the Guidelines should be considered duly-adopted regulations or merely interpretive aids. The courts of appeal have also differed in their characterization of the Guidelines.

If the Guidelines are considered to be interpretive guidelines, then the proposed exception would apply. This would dramatically restrict the ability of the public to participate in future amendments to the Guidelines.

The public, state agencies, and courts rely tremendously upon the Guidelines, which provide guidance for CEQA compliance. The public has demonstrated its

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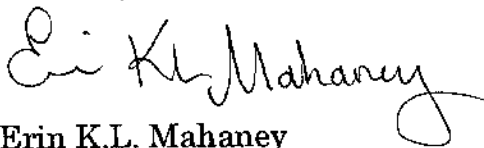
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overwhelming interest in revisions to the Guidelines. For example, the Resources Agency stated that it received over 1000 comments on the recent amendments to the Guidelines. The Office of Administrative Law (OAL) had an invaluable role in this process.

Since the Guidelines are critically important to the implementation of the CEQA, and the public has demonstrated overwhelming interest in amendments to the Guidelines, the Commission should ensure that the public's right to comment on future amendments is preserved.

Accordingly, the Council respectfully requests the Commission to expressly exempt the Guidelines from the proposed exception and to ensure that any revisions be subject to the OAL's full review.

Sincerely,

A handwritten signature in cursive script, reading "Erin K.L. Mahaney". The signature is written in dark ink and is positioned above the printed name.

Erin K.L. Mahaney

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[1093-001]

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September 15, 1997

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Attn: Brian Hebert, Staff Counsel

**Re: Interpretive Guidelines Proposal**

Dear Members of the Commission:

I am writing to express the concerns of the Union of Needletrades, Industrial & Textile Employees, AFL-CIO ("UNITE") and the State Building and Construction Trades Council of California, AFL-CIO, with regard to the proposed "interpretive guideline" exception to rulemaking procedures currently under consideration by the Commission. These comments will focus on a major concern with the proposal as it now exists: the absence of judicial review of agency interpretive guidelines that incorrectly interpret a statute in a manner resulting in non-enforcement.

Pursuant to current law, a regulation must be consistent with the statute it interprets. Gov't Code § 11342.2. This principle is a fundamental constraint on agency discretion. Courts have often reviewed agency actions for such consistency. E.g., Association for Retarded Citizens v. Dep't of Developmental Services, 38 Cal.3d 384, 392 (1985).

Under the current proposal, an agency could issue an interpretive guideline to express a generally applicable interpretation of the law, including a statute. Proposed Gov't Code § 11360. Such an interpretation could presumably include both an agency's interpretation as to when a statute requires enforcement action and when it does not. The ramifications of agency interpretations of non-enforcement are cause for concern.

Although the proposal contemplates judicial review of an Office of Administrative Law disapproval of an interpretive guideline, there is no provision for judicial review upon an

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approval. This asymmetry is not reflected in the current judicial review procedures of the California Administrative Procedure Act, which allow for judicial review both if a regulation is approved and if it is disapproved. Gov't Code §§ 11350, 11350.3. The current proposal could result in an interpretive guideline not being challengeable in court as inconsistent with the statute it interprets.

The discussion in the proposal focuses on the effects of an interpretive guideline that requires agency action, not one that causes agency inaction. Thus, the proposal specifically notes that enforcement of an interpretive guideline can be challenged via administrative mandamus. Comment to Proposed Gov't Code § 11369. If there is never an enforcement action to challenge, however, court review of the consistency of an interpretive guideline with the underlying statute may be precluded.

The potential effect of the inability to obtain judicial review in such a situation is enormous. Once an interpretive guideline is sent to agency staff, it will become a general policy. Because the policy is one of non-enforcement, it will likely not be the subject of a mandamus proceeding. An inconsistent application of a statute by an agency calling for non-enforcement, then, will remain in effect.

UNITE and the State Building and Construction Trades Council therefore strongly oppose the current proposal unless it is modified to ensure judicial review of any interpretive guidelines.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jonathan Weissglass".

Jonathan Weissglass

cc: Herb Bolz, Office of Administrative Law

## ADVISORY INTERPRETATIONS

The California Administrative Procedure Act (APA)<sup>1</sup> specifies the procedures a state agency must follow in order to adopt a regulation.<sup>2</sup> 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.<sup>3</sup> The delay and cost 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 express its opinion as to the meaning of a law that it enforces or administers is particularly problematic.<sup>4</sup> 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 advice,<sup>5</sup> or providing information in violation of the rulemaking statute.<sup>6</sup>

Furthermore, the benefits of the full rulemaking procedure are less clear when an agency is providing nonbinding interpretive advice. Rulemaking procedures were intended to lighten the regulatory burden on business by reducing the number and complexity of regulations.<sup>7</sup> However, interpretive advice does not increase the regulatory burden — it reduces it, by reducing ambiguity in the law and minimizing its inconsistent application.<sup>8</sup>

The Law Revision Commission recommends that a nonbinding statement expressing an agency's opinion as to the meaning of a law that the agency enforces

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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 in an advice letter or individual enforcement action, 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 or administers (an “advisory interpretation”) be removed from regular rulemaking  
2 procedures and instead be subject to simplified notice and comment procedures.  
3 This will expedite beneficial communication between regulatory agencies and the  
4 regulated public while preserving the benefits of public participation.

## 5 PROPOSED LAW

6 The proposed law has four principal elements: (1) a clear definition of “advisory  
7 interpretation,” (2) statutory limits on the legal force and effect of an advisory  
8 interpretation, (3) streamlined notice and comment procedures for the adoption of  
9 an advisory interpretation, and (4) procedures to review whether a particular  
10 advisory interpretation satisfies the requirements of the proposed law. In  
11 combination, these elements ensure that the special procedure is properly targeted  
12 and limited in its effect.

### 13 Definition of “Advisory Interpretation”

14 In order to avoid possible agency misuse of the advisory interpretation procedure  
15 and to provide certainty to the regulated public, the definition of an advisory  
16 interpretation must be clear and enforceable. This is achieved by establishing three  
17 limiting criteria: (1) nonbinding interpretive content, (2) clear labeling, and (3)  
18 substantial procedural compliance. A purported advisory interpretation that does  
19 not satisfy each of these criteria is not an advisory interpretation.<sup>9</sup>

20 (1) *Interpretive content.* An advisory interpretation expresses an agency’s  
21 opinion as to the meaning of a statute, regulation, agency order, court decision, or  
22 other provision of law that it enforces or administers. Agency statements that go  
23 beyond offering such advice and purport to bind or compel do not qualify for the  
24 special advisory interpretation procedure.

25 (2) *Clear Labeling.* Under the proposed law an advisory interpretation must be  
26 clearly labeled as such. This avoids the need to consider agency intention in  
27 determining whether a particular agency statement is an advisory interpretation  
28 and provides a measure of certainty to the public.<sup>10</sup>

29 (3) *Substantial procedural compliance.* In order to qualify as an advisory  
30 interpretation, an agency statement must be adopted in substantial compliance with  
31 specified procedures.

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9. A purported advisory interpretation that does not satisfy the definition of advisory interpretation is probably a regulation. See *infra* notes 15-17, and accompanying text.

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

1 **Limited Effect of Advisory Interpretation**

2 *Legal effect.* An advisory interpretation is precluded from having legal force and  
3 effect in two ways. First an advisory interpretation may not include a statement  
4 that purports to bind or compel. Such a statement is not an advisory interpretation  
5 and is therefore subject to review by OAL and the courts as an “underground  
6 regulation.” Second, the proposed law prohibits an advisory interpretation being  
7 given any binding effect.<sup>11</sup> Therefore, an agency may not rely on an advisory  
8 interpretation for authority to act, and an agency’s opinion as to the meaning of a  
9 law that it enforces or administers that is expressed in an advisory interpretation  
10 will receive no judicial deference.

11 *Practical effect.* An advisory interpretation will have some practical effect, as  
12 some members of the regulated public will voluntarily conform their behavior to  
13 the agency’s view of the law in order to avoid a dispute with the agency.

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

22 **Streamlined Adoption Procedures**

23 Because advisory interpretations will have some practical effect on the regulated  
24 public, the proposed law requires public input in their formulation. Public input is  
25 provided through a simplified notice and comment procedure that achieves the  
26 benefits of public participation<sup>12</sup> with less cost and delay than under existing  
27 rulemaking procedures.<sup>13</sup>

28 **Review Procedures**

29 As a check on agency error and misuse of the special procedure, the proposed  
30 law includes two methods for review of a problematic advisory interpretation: (1)

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11. Note, however, that the agency itself will be bound by its interpretation in an action enforcing the interpreted law. See proposed Section 11360.030

12. 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).

13. 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.

1 post-adoption review by the Office of Administrative Law (OAL), and (2)  
2 “underground regulation” review.

3 (1) *Post-adoption review*. On the request of any person, OAL will review an  
4 existing advisory interpretation to determine whether it satisfies the requirements  
5 of the advisory interpretation procedure, and whether it is consistent with the law it  
6 interprets. If OAL determines that the statement is not an advisory interpretation or  
7 is inconsistent with the law it interprets, then the statement is invalid and  
8 ineffective as an advisory interpretation.<sup>14</sup> OAL’s determination is subject to  
9 judicial review.

10 (2) *“Underground regulation” review*. A purported advisory interpretation is  
11 subject to review by OAL to determine whether it is an invalid “underground  
12 regulation,” that is, a regulation that was not properly adopted under rulemaking  
13 procedures.<sup>15</sup> An “underground regulation” is also subject to judicial review and  
14 invalidation, either before the regulation has been enforced,<sup>16</sup> or after an action  
15 enforcing the regulation.<sup>17</sup>

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

15. Gov’t Code § 11340.5.

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

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



## PROPOSED LEGISLATION

Gov't Code §§ 11360.010 - 11360.110 (added). Advisory interpretations.

SECTION 1. Article 10 (commencing with Section 11360.010) is added to Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

### Article 10. Advisory Interpretations

#### § 11360.010. Purpose and scope

11360.010. (a) The purpose of this article is to provide an efficient means by which a state agency may communicate, in a nonbinding, advisory form, its interpretation of an ambiguous law that it enforces or administers.

(b) This article does not provide an alternative means of adopting binding regulations. An agency statement that is required by statute to be adopted as a regulation may not be adopted as an advisory interpretation

(c) An advisory interpretation is not the exclusive means by which an agency may express its interpretation of an ambiguous law that it implements or administers.

**Comment.** Section 11360.010 makes clear that the provisions of Article 10 are intended only as an alternative procedure by which an agency may express its opinion as to the meaning of a law that the agency enforces or administers.

Subdivision (b) makes clear that an agency statement that is required by statute to be adopted as a regulation may not be adopted as an advisory interpretation. For example, a California Environmental Quality Act (CEQA) guideline must be adopted pursuant to specified provisions of Article 5. See Pub. Res. Code §§ 21083, 21087. Therefore, if the Resources Agency were to adopt an advisory interpretation, it would not be a CEQA guideline within the meaning of Sections 21083 and 21087 of the Public Resources Code.

Subdivision (c) makes clear that an advisory interpretation is not the exclusive means by which an agency may express its interpretation of an ambiguous law that it implements or administers. For example, an agency may express its interpretation of law in a duly adopted regulation, in an individual advice letter, or in a case-specific adjudication. Note, however, that 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.

#### § 11360.020. "Advisory interpretation" defined

11360.020. As used in this chapter, "advisory interpretation" means a written agency statement expressing the agency's opinion as to the meaning 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, prominently displayed on the first page of the agency statement: "This is an advisory interpretation adopted pursuant to Government Code Sections 11360.010-11360.110. It has no legal effect, other than to bind the adopting agency. Review

by the Office of Administrative Law is available on request under Government Code Section 11360.090.”

**Comment.** Section 11360.020 defines an “advisory interpretation”. An advisory interpretation is a statement expressing an agency’s opinion 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 way binds or compels. See Section 11360.030. For example, the State Department of Education could adopt an advisory interpretation expressing its opinion that the term “education activities,” as used in subdivision (a) of Section 46300 of the Education Code, does not include time spent watching television commercials. See 1994 OAL Determination 1 (State Department of Education bulletin interpreting “educational activity” to exclude time spent watching television commercials was a regulation). However, the State Department of Education could not adopt an advisory interpretation prohibiting the watching of television commercials in school. This would be a binding prohibition and could only be adopted as a regulation.

If an agency statement purports to be an advisory interpretation but does more than express the agency’s opinion as to the meaning of a law that the agency enforces or administers, it may be an improperly adopted regulation. See Section 11342(g). The Office of Administrative Law may review a purported advisory interpretation to determine whether it is a regulation. See Section 11340.5(b).

#### § 11360.030. Effect of advisory interpretation

11360.030. (a) Except as provided in subdivision (b), an advisory interpretation has no legal effect and is entitled to no judicial deference. It cannot prescribe a penalty or course of conduct, confer a right, privilege, authority, exemption, or immunity, impose an obligation, or in any way bind or compel.

(b) In an enforcement action, an agency may not assert an interpretation of law contradicting an advisory interpretation adopted by that agency to the extent that the conduct complained of occurred while the advisory interpretation was in effect as described in subdivision (c).

(c) An advisory interpretation is effective on adoption and remains effective until one of the following occur:


(1) The advisory interpretation is expressly superseded by a subsequent advisory interpretation.

(2) The advisory interpretation is expressly or implicitly superseded by a statute, regulation, court decision, or other provision of law.

(3) The advisory interpretation is finally disapproved by the office pursuant to Section 11360.090.

**Comment.** Section 11360.030 makes clear that an advisory interpretation has no legal effect other than to bind the agency that adopted the advisory interpretation. While an advisory interpretation is entitled to no judicial deference, this does not preclude a court from independently reaching the same interpretive conclusion as expressed in an advisory interpretation.

“Office” means the Office of Administrative Law. See Section 11342(b).

 **Staff Note.** At the July meeting, the question arose whether an advisory interpretation could affect collective bargaining rights under the Ralph C. Dills Act. See Gov’t Code §§ 3512-3524. The staff can find no way in which the proposed law would affect such rights. Of course, the Public Employment Relations Board or employer agencies might well adopt advisory

1 interpretations of laws that they administer under the Dills Act, but such advisory interpretations  
2 would have no legal effect other than to bind the adopting agency.

3 **§ 11360.040. Adoption of advisory interpretation**

4 11360.040. (a) To adopt an advisory interpretation, an agency shall complete all  
5 of the following procedures:

6 (1) Prepare a preliminary text of the proposed advisory interpretation. The  
7 preliminary text shall clearly identify the provision of law that is being interpreted.  
8 The preliminary text shall be provided to any person requesting a copy.

9 (2) Provide public notice of the proposed adoption of an advisory interpretation,  
10 as provided in Section 11360.050.

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

13 (4) Certify in writing to the office that all written public comments received in  
14 the period provided in paragraph (3) were read and considered by the agency.


15 (5) Prepare the final text of the proposed advisory interpretation, subject to the  
16 limitations of Section 11360.060. The final text shall clearly identify the provision  
17 of law that is being interpreted.

18 (6) Submit the final text of the proposed advisory interpretation and the  
19 certification required by paragraph (4) to the office.

20 (7) Publish and compile the final text of the advisory interpretation as specified  
21 in section 11360.080.

22 (b) If the advisory interpretation expressly supersedes an existing advisory  
23 interpretation, the superseded advisory interpretation becomes ineffective and shall  
24 be removed from the agency compilation of advisory interpretations.

25 **Comment.** Section 11360.040 specifies the procedures to be followed in adopting an advisory  
26 interpretation. “Office” means the Office of Administrative Law. See Section 11342(b).

27  **Staff Note.** Paragraphs (a)(1) and (a)(5) have been amended to require that the text of an  
28 advisory interpretation identify the provision of law being interpreted.

29 **§ 11360.050. Notice**

30 11360.050. (a) The agency shall mail notice of the proposed adoption of an  
31 advisory interpretation to the office and to any person who has requested notice of  
32 agency regulatory actions. If the agency is within a state department, the agency  
33 shall also mail or deliver notice to the director of the department.

34 (b) Notice of the proposed adoption of an advisory interpretation shall include  
35 both of the following:

36 (1) A clear overview explaining the proposed advisory interpretation.

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

1     **Comment.** Section 11360.050 specifies the content and delivery requirements of the notice  
2 required under Section 11360.040(a)(2). “Office” means the Office of Administrative Law. See  
3 section 11342(b).

4     **§ 11360.060. Limitation on final text**

5     11360.060. An agency may not adopt a final text unless the final text is  
6 sufficiently related to the preliminary text provided to the public pursuant to  
7 paragraph (1) of subdivision (a) of Section 11360.040 that the public could  
8 reasonably have anticipated adoption of the final text.

9     **Comment.** Nothing in Section 11360.060 prevents an agency from reinitiating the procedures  
10 in this article, with a former final text as a preliminary text. This section adopts part of the  
11 substance of subdivision (c) of Section 11346.8 relating to the adoption, amendment, or repeal of  
12 a regulation.

13     **§ 11360.070. Responsibilities of the Office of Administrative Law**

14     11360.070. (a) On receiving a notice pursuant to subdivision (a) of Section  
15 11360.050, the office shall publish the contents of the notice in the California  
16 Regulatory Notice Register.

17     (b) On receiving the final text of an agency advisory interpretation and  
18 certification that all timely public comment was read and considered, pursuant to  
19 paragraph (6) of subdivision (a) of Section 11360.040, the office shall file the final  
20 text of the advisory interpretation with the Secretary of State and publish a notice  
21 in the California Regulatory Notice Register, indicating that the agency adoption  
22 of the advisory interpretation is complete, and providing information on how to  
23 contact the adopting agency to obtain a copy of the final text.

24     **Comment.** As used in Section 11360.060, “office” means the Office of Administrative Law.  
25 See Section 11342(b).

26     **§ 11360.080. Agency publication of advisory interpretations**

27     11360.080. (a) An agency shall publish the final text of an advisory  
28 interpretation in a printed compilation of that agency’s advisory interpretations.  
29 The compilation shall be updated not less frequently than annually, unless no  
30 action relating to an advisory interpretation has been undertaken by the agency  
31 since the last preceding update. The compilation shall be made available to the  
32 public by subscription, and its availability shall be publicized annually in the  
33 California Regulatory Notice Register.

34     (b) If the agency has an internet website, the compilation required under  
35 subdivision (a) shall also be made available to the public on the agency’s internet  
36 website.

37     **Comment.** Section 11360.080 details the advisory interpretation publication requirement  
38 established in Section 11360.040(a)(7).

39     ☞ **Staff Note.** In addition to requiring paper publication, Section 11360.08(b) requires an agency  
40 that has a website to publish an advisory interpretation on its website as well. The question of  
41 whether to require internet publication was presented at the July 1997 Commission meeting, but  
42 was not discussed at that time.

1   **§ 11360.090. Post-adoption review**

2       11360.090. (a) On written request of any person, the office shall review a  
3       purported advisory interpretation to determine whether it meets both of the  
4       following criteria:

5       (1) The purported advisory interpretation satisfies the requirements of this  
6       article.

7       (2) The purported advisory interpretation is consistent with the law it purports to  
8       interpret.

9       (b) In determining whether an advisory interpretation is consistent with the law it  
10       purports to interpret the office shall not substitute its judgment for that of the  
11       adopting agency.

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

18       (d) If the office does not issue a tentative disapproval within 15 days after  
19       receiving a written request to review a purported advisory interpretation, the  
20       advisory interpretation shall be deemed approved and shall not be subject to  
21       further review by the office.

22       (e) If the adopting agency does not request review of a tentative disapproval  
23       under section 11360.100, or if the tentative disapproval is reviewed but not  
24       overruled by the Governor, the disapproval immediately becomes final. The office  
25       shall file the final disapproval with the Secretary of State. The adopting agency  
26       shall remove the disapproved advisory interpretation from the agency's  
27       compilation of advisory interpretations.

28       **Comment.** Section 11360.090 provides for post-adoption review of an advisory interpretation,  
29       on the request of any person. Subdivision (b) makes clear that the Office of Administrative Law  
30       (OAL) may not substitute its judgment In determining whether an advisory interpretation is  
31       consistent with the law it interprets,

32       Upon final disapproval of an advisory interpretation an agency is no longer bound by the  
33       advisory interpretation in enforcing the interpreted law. Note that this effect is prospective only,  
34       and an agency will continue to be bound by its advisory interpretation in enforcement actions that  
35       complain of conduct occurring prior to the final disapproval. See Section 11360.030.

36       Disapproval of an advisory interpretation only affects the status of the advisory interpretation  
37       and does not preclude expression of the agency's interpretation by other valid means. For  
38       example, an agency may express its interpretation of law in a duly adopted regulation, in an  
39       individual advice letter, or in a case-specific adjudication. Note, however, that an agency's  
40       interpretation expressed in an adjudication may not be expressly relied on as a precedent unless it  
41       has been designated a precedent decision by the agency. See Section 11425.60.

42       Disapproval by the office under this section is subject to review by the Governor's office and  
43       by the courts. See Sections 11360.100, 11360.110.

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



1   ☞ **Staff Note.** Sections 11360.090-11360.110 provide for elective post-adoption OAL review of  
2   advisory interpretations. These sections were presented at the July 1997 Commission meeting, but  
3   were not discussed at that time.

4   **§ 11360.100. Review by Governor of disapproval by Office of Administrative Law**

5   11360.100. (a) An adopting agency may request that the Governor's office  
6   review a tentative disapproval issued by the office pursuant to section 11360.090.

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 the disapproved advisory interpretation, including public comment  
13   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 advisory interpretation satisfies the criteria specified in  
24   subdivision (a) of Section 11360.090.

25   **Comment.** As used in Section 11360.100, "office" means the Office of Administrative Law.  
26   See Section 11342(b).

27   **§ 11360.110. Judicial review of disapproval by Office of Administrative Law**

28   11360.110. (a) Any interested person may obtain a judicial declaration as to the  
29   validity or invalidity of an advisory interpretation that the office has reviewed  
30   pursuant to Section 11360.090 by bringing an action for declaratory relief in the  
31   superior court in accordance with the Code of Civil Procedure.

32   (b) A declaration of the validity or invalidity of an advisory interpretation under  
33   this section is binding and precludes further review of the advisory interpretation  
34   by the office.

35   **Comment.** Section 11360.110 provides for judicial review of a decision by the Office of  
36   Administrative Law to approve or disapprove an advisory interpretation under Section 11360.090.  
37   This is not the exclusive means by which a court may review an advisory interpretation. For  
38   example, preenforcement judicial review of a purported advisory interpretation to determine  
39   whether it is in fact an invalid regulation is available under Section 11350. Post-enforcement  
40   review of a purported advisory interpretation can be obtained by filing a petition for  
41   administrative mandamus. Code Civ. Proc § 1094.5.

42   "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 advisory interpretation 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 advisory interpretation as provided in Article 10 (commencing with Section 11360.010). This petition shall state the following clearly and concisely:

(a) The substance or nature of the regulation, advisory interpretation, 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 advisory interpretation. See Article 10 (commencing with Section 11360.010).

**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 advisory interpretation pursuant to Article 10 (commencing with Section 11360.010), 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

1 advisory interpretation pursuant to Article 10 (commencing with Section  
2 11360.010), shall be in writing and shall be transmitted to the Office of  
3 Administrative Law for publication in the California Regulatory Notice Register at  
4 the earliest practicable date. The decision shall identify the agency, the party  
5 submitting the petition, the provisions of the California Code of Regulations or the  
6 agency's advisory interpretations requested to be affected, reference to authority to  
7 take the action requested, the reasons supporting the agency determination, an  
8 agency contact person, and the right of interested persons to obtain a copy of the  
9 petition from the agency.

10 **Comment:** Section 11340.7 is amended to permit a petition to an agency relating to an  
11 advisory interpretation. See Article 10 (commencing with Section 11360.010). "Office" means  
12 the Office of Administrative Law. See Section 11342(b).

### 13 **Section 11342 (amended). Definitions**

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

15 11342. In this chapter, unless otherwise specifically indicated, the following  
16 definitions apply:

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

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

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

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

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

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

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

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



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

5     (3) An advisory interpretation as defined in Section 11360.020.

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

11    (A) Independently owned and operated.

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

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

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

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

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

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

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

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

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

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

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

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

31    (ii) General construction, nine million five hundred thousand dollars  
32    (\$9,500,000).

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

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

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

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

37    (vii) Transportation and warehousing, one million five hundred thousand dollars  
38    (\$1,500,000).

39    (J) A manufacturing enterprise exceeding 250 employees.

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

42    **Comment.** Section 11342 is amended to make clear that an advisory interpretation is not a  
43    regulation.