

Memorandum 98-10**Administrative Rulemaking: Tentative Recommendation
Relating to Advisory Interpretations**

As a part of its general study of administrative rulemaking law, the Commission is proposing a streamlined procedure for the adoption of nonbinding statements expressing an agency's opinion as to the meaning of a law that the agency administers or enforces, or that governs the agency's procedures ("advisory interpretations"). A staff draft tentative recommendation relating to the proposed law is attached. This draft incorporates decisions made by the Commission at its October 1997 meeting. If the Commission approves this draft, a tentative recommendation will be distributed for a three-month comment period.

We have received a letter from Daniel Buntjer of the Department of Consumer Affairs relating to this proposal. This letter is attached. Mr. Buntjer's comments are discussed below.

SIGNIFICANT CHANGES

The attached draft incorporates minor technical and stylistic changes, which are not discussed in this memorandum, as well as the following significant changes.

Scope of Proposed Law

Prior drafts have limited the scope of the proposed law to the interpretation of laws that the agency enforces or administers. The Commission decided to expand the scope of the proposed law to permit the use of an advisory interpretation to interpret any law that is related to the agency's operations.

The current draft provides that an advisory interpretation can be used to interpret a law "that the agency enforces or administers, or that governs the agency's procedures." This language captures the substance of the Commission's decision and is similar to the language used in the existing definition of "regulation." See Gov't Code § 11342(g) ("regulation" means every rule, regulation, order, or standard of general application ... adopted by any state

agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure...”).

OAL Review and Judicial Review

This draft implements two Commission decisions relating to OAL review of an advisory interpretation.

(1) *Decline to review.* Under the previous draft, OAL is required to review an advisory interpretation on the request of any person. If OAL does not issue a disapproval within a specified period of time the advisory interpretation is “deemed approved.” This “deemed approval” has been dropped from the current draft — OAL may decline to review an advisory interpretation and this decision has no bearing on the validity or invalidity of the advisory interpretation.

The only effect of an OAL decision not to review an advisory interpretation is to satisfy the prerequisite for judicial review. Under proposed section 11360.110, an interested person may seek a judicial declaration of the validity or invalidity of an advisory interpretation after OAL has “reviewed or declined to review” the advisory interpretation.

(2) *Consistency review.* One criteria to be applied by OAL in reviewing an advisory interpretation is consistency with the law that is being interpreted. OAL suggested that we clarify the standard of review in order to make clear that OAL may not substitute its judgment for the adopting agency’s when reviewing the consistency of an advisory interpretation. In the current draft, an advisory interpretation is consistent with the law it interprets if it “states a rational interpretation” of the law that it interprets. See proposed Section 11360.090(e).

Publication

Under the previous draft, an advisory interpretation would be published by the adopting agency, in a comprehensive and publicly available compilation of that agency’s advisory interpretations. Commentators suggested that such a scheme would complicate legal research. A single, readily available, indexed compilation would be preferable. The draft now provides for publication of advisory interpretations in the California Code of Regulations.

Definition

For drafting convenience, the current draft separates the definition of “advisory interpretation” from certain substantive requirements that were formerly incorporated in the definition section. See proposed Section 11360.020.

The procedural compliance requirement is now embodied in the standards of review to be applied by OAL and the courts. See proposed Sections 11360.090, 11360.110. The labeling requirement is now part of the adoption procedure. See proposed Section 11360.050. These changes should not affect the substance of the proposed law.

COMMENTS FROM DEPARTMENT OF CONSUMER AFFAIRS

The Department of Consumer Affairs is concerned that the proposed law will impose burdensome new procedures on agency communication without any real benefit to the agency or the public. See Exhibit. The Department's concerns seem to be based on the belief that the proposed law would require an agency to adopt an advisory interpretation any time it communicates an interpretation of law. This is not the intent of the proposed law. The intent is to provide an optional procedure that an agency may use, in certain limited circumstances, as an alternative to adopting a regulation.

Minor changes have been made in the draft tentative recommendation to clarify the optional nature of the proposed procedure. In particular, see Proposed Section 11360.010 and Comment.

SUGGESTED LIMITATION ON SCOPE OF PROPOSED LAW

Commentators at the July 1997 Commission meeting suggested that the proposed law be introduced as a pilot project — initially applicable to a limited number of agencies, and subject to a sunset provision. This suggestion was based on a concern that the proposed law might have unforeseen and undesirable consequences. The staff opposes limiting the scope of the proposed law in response to such general and speculative concerns. What's more, the suggestion is premature. A tentative recommendation has not yet been circulated for comment.

Respectfully submitted,

Brian Hebert
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STATE OF CALIFORNIA

Memorandum

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Law Revision Commission
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From: **Department of Consumer Affairs
Legal Office**

DEC 23 1997

File: _____

Subject: **Administrative Rulemaking: Interpretive Guidelines**

This memorandum is to provide input of the Legal Office of the Department of Consumer Affairs (DCA) regarding the California Law Revision Commission's pending proposal regarding the above-noted subject. The attorneys in the Legal Office serve as assigned legal counsel to the some-35 licensing bureaus, programs, boards, committees, and commissions under the DCA organizational umbrella.

We offer the following observations on the proposal. Our comments are directed to the specific text in the Revised Staff Draft of September 16, 1997. We assume this is the latest proposal as it is the most recent proposal set forth on the Commission's website.

Our primary concern is that the licensing boards and programs in the Department of Consumer Affairs, and other state agencies for that matter, would be required to spend precious time and limited resources adopting advisory interpretations, which by proposed statutory definition have extremely limited legal and practical meaning. We seriously question whether the time and resources involved justify any benefit which might be derived.

Under proposed Government Code sections 11360.010, 11360.020, and 11360.030, an "advisory interpretation" is "nonbinding," "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," and must contain the label that it "... has no legal effect, other than to bind the adopting agency,"

However, an agency is required to adopt this advisory interpretation, by:

- (1) Preparing a preliminary text of the proposed advisory interpretation, clearly identifying the provision of law that is being interpreted.
- (2) Providing public notice of it proposed adoption.
- (3) Accepting written public comment for at least 30 days.
- (4) Certifying in writing to the Office of Administrative law (OAL) that all written comments received were read and considered.
- (5) Preparing the final text of the advisory interpretation.
- (6) Submitting the final text and the certification under (4) to OAL.
- (7) Publishing and compiling the final text of the advisory interpretation in a compilation, or posted on the internet if the agency has an internet website. (Proposed Government Code §11360.040.)

The proposal goes on to provide that, upon written request, any person can request OAL to review an agency's advisory interpretation to determine whether it satisfies the requirements of Article 10 and whether it is consistent with the law it purports to interpret. (Proposed Government Code §11360.090(a).) If disapproved by OAL, after certain other procedural events, the agency must remove the disapproved advisory interpretation from its compilation of advisory interpretations. Thus, the advisory interpretation gets purged from the books. However, the Commission's comment to this section is most interesting. It states in part that:

"Disapproval of an advisory interpretation only affects the status of the advisory interpretation and does not preclude expression of the agency's interpretation by other valid means. 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."

In effect, the agency may resort to some other valid means to express its advisory interpretation.

We would also note that the proposal severely frustrates the purpose of state government, that is to serve the people and businesses of the State of California. The effect is to cut off meaningful communication and response as state employees conscientiously wonder whether their statement to a member of the public somehow might be interpreted to "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," and therefore be in violation of these provisions.

We note several situations to illustrate our point.

There exists a rather unique situation with the licensing boards in the Department of Consumer Affairs. The licensing boards consist of members appointed by the Governor and the Legislative leadership. The day-to-day operations of the boards are directed by an Executive Officer, and the boards meet only on a periodic basis, typically 4 to 6 times per year. The adoption process proposed for advisory interpretations seems to contemplate each interpretation being formally adopted by the board itself. (Proposed Government Code §11360.040.) This would put tremendous strain on the workload of the boards given their typical 1-2 day meetings, since the boards receive numerous inquiries. Given the periodic meetings, it would also seriously delay responding to inquiries received.

Secondly, all licensing boards receive inquiries to the effect that "I intend to engage in these functions. Do I need a license?" While the Law Revision Commission comments that "an agency may express its interpretation of law in a duly adopted regulation, in an individual advice letter, or in a case-specific adjudication," a "yes" answer to the question posed certainly seems to "prescribe a ... course of conduct," and to "compel" a certain action. (Comments to proposed Government Code §§11360.010, 11360.090.) If the person engages in a function requiring licensure without being duly licensed, the licensing board may well seek to enforce the law.

The operations of several licensing boards indicate the potential impact of the proposed legislative changes.

The Respiratory Care Board licenses and regulates respiratory care practitioners. Regularly scheduled board meetings are held approximately four times per year. At each meeting, the board considers responses to 15-20 written inquiries it has received between meetings regarding the authorized scope of practice of respiratory care. Should the board be required to go through the advisory interpretation adoption process

prior to responding to these inquiries? It would seem an immense disservice to the persons inquiring and to the public to preclude a response until an interpretive opinion has been adopted.

On a much larger scale, the Contractors' State License Board receives approximately 100 written inquiries per month and 20 verbal inquiries per day on licensing issues, such as "Do I need a license?" and "If so, what classification of license do I need?" Should the CSLB be required to go through the advisory interpretation adoption process prior to responding to these inquiries? We would contend this is not an appropriate or necessary requirement for a state that is striving to be more responsive and "business friendly."

We note another problematic concern with the proposed statutes. Suppose a contractor licensed in another state comes to California wishing to rebuild a freeway destroyed by an earthquake. The contractor calls the Contractors' Board and asks if a California license is necessary. Board licensing staff responds "yes," is absolutely legally correct in its interpretation, and adopts an advisory interpretation as required. However, the proposed statutes say that the advisory interpretation is "nonbinding," "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," and must contain the label that it "... has no legal effect, other than to bind the adopting agency." Does this mean that the out-of-state contractor may ignore California's licensing laws and the CSLB's interpretation? Has the CSLB simply wasted its time and resources issuing the advisory interpretation?

It also seems to us that if an advisory interpretation is formally proposed, noticed, comments solicited, formally adopted, reviewed by OAL, potentially reviewed by the Governor's Office or the courts, that we have certainly elevated an unenforceable opinion to regulation, or at least quasi-regulation, status.

A conforming legislative amendment would amend Government Code §11340.7 to allow any person to petition a state agency to adopt, amend or repeal an advisory interpretation. Again, we see no value in this other than to unnecessarily increase the workload of the state agencies for very little apparent benefit.

In summary, we do not see a demonstrated need for state agencies to expend valuable time and resources to formally adopt an advisory opinion, which, by proposed statutory definition, has no meaningful legal or practical effect.

Brian Hebert
December 19, 1997
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We would offer several alternatives to the proposed legislation regarding advisory interpretations.

1. Simply repeal Government Code §11340.5, which is the section causing the current controversy.

2. Amend proposed Government Code §11360.010(c) to include the Law Revision Commission's comment in the statute. The subdivision would then read: "(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. An agency may express its interpretation of law in a duly adopted regulation, in an individual advice letter, or in a case-specific adjudication."

Thank you for consideration of our input.

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CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Advisory Interpretations

March 1998

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN June 19, 1998.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

A state agency must adopt a regulation in order to provide the public with generally applicable written advice as to the agency's interpretation of a law that it enforces or administers, or of a law that governs the agency's procedures. This can impede useful communication between state agencies and the public. The Commission recommends a streamlined procedure that a state agency may use to communicate generally applicable, nonbinding, interpretive advice. This procedure could not be used to adopt binding regulations.

This recommendation was prepared pursuant to Resolution Chapter 102 of the Statutes of 1997.

ADVISORY INTERPRETATIONS

The California Administrative Procedure Act (APA) specifies the procedures a state agency must follow in order to adopt a regulation.¹ These procedures are beneficial in that they provide for public participation in agency rulemaking, but they are also time-consuming and costly to the rulemaking agency.²

The delay and cost associated with rulemaking procedures can be a problem where it impedes an agency's ability to convey useful information to the public in a timely fashion. If, for example, an agency wishes to provide generally applicable advice to the public regarding the agency's opinion as to the meaning of a provision of law, it must adopt a regulation in order to do so.³ Where the agency lacks the time or resources to adopt a regulation, it must then choose between two undesirable alternatives — remain silent despite the public's need for the advice,⁴ or provide the advice in violation of the rulemaking statute.⁵

Furthermore, the benefits of the APA's rulemaking procedures, which are clear when an agency is adopting a binding regulation, are less clear when an agency is offering nonbinding advice to the public. Rulemaking procedures are intended, in part, to lighten the regulatory burden on business by reducing the number and complexity of binding regulations.⁶ However, nonbinding interpretive advice does not increase the regulatory burden — it lightens it, by reducing ambiguity in the law and minimizing its inconsistent application.⁷

The Law Revision Commission recommends the creation of a simplified notice and comment procedure that an agency may follow, as an alternative to adopting a

1. 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 (partial exemption of Department of Personnel Administration from APA rulemaking provisions). The proposed law would not affect these exemptions.

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

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

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

5. 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.

6. Gov't Code § 11340.1.

7. "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, when expressing a generally applicable, nonbinding opinion as to the
2 meaning of a law that the agency enforces or administers, or that governs the
3 agency's procedures (hereinafter an “advisory interpretation”). This will expedite
4 beneficial communication between agencies and the public while preserving the
5 benefits of public participation in agency deliberations. Adoption of an advisory
6 interpretation is optional and does not preclude expression of an agency’s
7 interpretive opinion by other authorized means.⁸

8 PROPOSED LAW

9 The proposed law has four principal elements: (1) limitations on the substance
10 and form of an advisory interpretation, (2) statutory limits on the legal force and
11 effect of an advisory interpretation, (3) streamlined notice and comment
12 procedures for the adoption of an advisory interpretation, and (4) procedures to
13 review whether a particular advisory interpretation is valid. In combination, these
14 elements ensure that the special procedures for adoption of an advisory
15 interpretation are properly targeted and limited in their effect.

16 **Limited Substance and Form**

17 In order to avoid possible agency misuse of the advisory interpretation procedure
18 and to provide certainty to the regulated public, an advisory interpretation must
19 satisfy both of the following requirements:

20 *Interpretive content.* An advisory interpretation expresses an agency’s opinion as
21 to the meaning of a statute, regulation, agency order, court decision, or other
22 provision of law that the agency enforces or administers, or that governs the
23 agency's procedures. An agency statement that goes beyond offering such advice
24 and purports to bind or compel is not an advisory interpretation.⁹

25 *Clear labeling.* An advisory interpretation must be clearly labeled as such. This
26 avoids the need to consider agency intention in determining whether a particular
27 agency statement is an advisory interpretation and provides a greater measure of
28 certainty to the public.¹⁰

29 **Limited Effect**

30 *Legal effect.* The legal force and effect of an advisory interpretation is limited in
31 two ways. First an advisory interpretation may not include a statement that

8. For example, where otherwise authorized, an agency may express its interpretation of law in a duly-adopted regulation, individual advice letter, or in case-specific adjudication.

9. See proposed Gov’t Code § 11360.020.

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) (Westlaw 1996); 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).

purports to bind or compel. Such a statement is not an advisory interpretation and is subject to review and disapproval by the Office of Administrative Law (OAL) and the courts.¹¹ Second, the proposed law expressly prohibits an advisory interpretation being given any judicial deference or binding effect.¹² That is, an agency may not rely on an advisory interpretation for authority to act, and an agency's opinion as to the meaning of a law that is expressed in an advisory interpretation will receive no judicial deference.

Practical effect. An advisory interpretation will have some practical effect, as 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.

The proposed law mitigates this practical effect in two ways. First, it requires public participation when adopting an advisory interpretation. This allows those who may be affected by an advisory interpretation to have a say in its formulation and provides a notice period during which the public may conform their conduct to the pending advisory interpretation. Second, the proposed law provides a "safe harbor" for anyone who does conform their conduct to an interpretation expressed in an advisory interpretation. Under this provision, an agency must abide by its own advisory interpretation in enforcing the interpreted law.¹³

Public Participation

Because advisory interpretations 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 benefits of public participation¹⁴ with less cost and delay than under existing rulemaking procedures.¹⁵

Review Procedures

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

11. See proposed Gov't Code §§ 11360.090-11360.110.

12. Note however, that an advisory interpretation is binding on the adopting agency in an enforcement action. See *infra* note 13 and accompanying text.

13. See proposed Gov't Code § 11360.030(b).

14. 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 discussion, *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. OSHA*, 636 F.2d 464, 470-71 (D.C. Cir. 1980).

15. These savings are achieved by limiting the 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 *OAL review.* Any interested person may request that OAL review an existing
2 advisory interpretation to determine whether it satisfies the requirements of the
3 law and is consistent with the law it interprets. If OAL disapproves an advisory
4 interpretation as not satisfying the requirements of the law or as being inconsistent
5 with the law it interprets, then the advisory interpretation is invalid.¹⁶ An
6 improperly adopted advisory interpretation may also be subject to review by OAL
7 to determine whether it is an “underground regulation,” that is, a regulation that is
8 invalid because it was not adopted under the rulemaking procedures.¹⁷

9 *Judicial review.* After OAL has had an opportunity to review an advisory
10 interpretation, an interested person may request a declaratory judgment as to the
11 validity or invalidity of the advisory interpretation, by bringing an action in the
12 superior court.¹⁸ An advisory interpretation may also be subject to judicial review
13 to determine whether it is in fact an improperly adopted regulation.¹⁹

16. As with other forms of OAL review, an OAL disapproval under the proposed law may be reviewed and overruled by the Governor. See proposed Gov’t Code § 11360.100.

17. Gov’t Code § 11340.5.

18. See proposed Gov’t Code § 11360.110.

19. See Code Civ. Proc. § 1094.5 (administrative mandamus); Gov’t Code § 11350 (declaratory judgment of a regulation’s invalidity).

PROPOSED LEGISLATION

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

SECTION _____. 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 procedure by which a state agency may communicate, in a nonbinding, advisory form, its interpretation of a statute, regulation, agency order, court decision, or other provision of law that it enforces or administers, or that governs the agency's procedures. This procedure is intended as an alternative to the adoption of a regulation.

(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) Nothing in this article requires an agency to adopt an advisory interpretation. An advisory interpretation is not the exclusive means by which an agency may express its interpretation of a statute, regulation, agency order, court decision, or other provision of law that it enforces or administers, or that governs the agency's procedures.

Comment. Section 11360.010 makes clear that the provisions of Article 10 are intended only as an optional procedure by which an agency may express a nonbinding opinion as to the meaning of a provision of law that it enforces or administers, or that governs the agency's procedures. For example, an agency may wish to adopt an advisory interpretation to clarify the meaning of an ambiguous law or to provide examples illustrating the operation of a highly technical law.

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. Thus, an agency statement that is required to be adopted pursuant to Article 5 of this chapter or pursuant to non-APA rulemaking procedures 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, the Resources Agency may not adopt a CEQA guideline under this article. As another example, there are special procedural requirements governing the adoption of regulations by the Department of Personnel Administration (DPA). See Gov't Code §§ 19817-19817.20. A DPA statement that is subject to those procedures may not be adopted under this article.

Subdivision (c) makes clear that adoption of an advisory interpretation is optional. An agency may choose to adopt an advisory interpretation or may express its interpretation in some other authorized form. For example, where otherwise authorized, an agency may express its interpretation of law in a duly-adopted regulation, an individual advice letter, or in case-specific adjudication. Note 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.

1 **§ 11360.020. Definition of “Advisory Interpretation”**

2 11360.020. As used in this article “advisory interpretation” means a written
3 agency statement, adopted pursuant to this article, that expresses the agency’s
4 opinion as to the meaning of a statute, regulation, agency order, court decision, or
5 other provision of law that the agency enforces or administers, or that governs the
6 agency's procedures.

7 **Comment.** Section 11360.020 defines an “advisory interpretation.” An advisory interpretation
8 is a statement expressing an agency’s opinion and does not include an agency statement that
9 prescribes a penalty or course of conduct, confers a right, privilege, authority, exemption, or
10 immunity, imposes an obligation, or in any way binds or compels. See Section 11360.030. For
11 example, the State Department of Education could adopt an advisory interpretation expressing its
12 opinion that the term “education activities,” as used in Education Code Section 46300(a), does
13 not include time spent watching television commercials. If not properly adopted as an advisory
14 interpretation, such a statement would probably be a regulation. See 1994 OAL Determination 1
15 (State Department of Education bulletin interpreting “educational activity” to exclude time spent
16 watching television commercials was a regulation). However, the State Department of Education
17 could not adopt an advisory interpretation prohibiting the watching of television commercials in
18 school. A binding prohibition of this type could only be adopted as a regulation.

19 **§ 11360.030. Effect of advisory interpretation**

20 11360.030. (a) Except as provided in subdivision (b), an advisory interpretation
21 has no legal effect and is entitled to no judicial deference. An advisory
22 interpretation cannot prescribe a penalty or course of conduct, confer a right,
23 privilege, authority, exemption, or immunity, impose an obligation, or in any way
24 bind or compel.

25 (b) In an enforcement action, an agency may not assert an interpretation of law
26 contradicting an advisory interpretation adopted by the agency to the extent that
27 the conduct complained of occurred while the advisory interpretation was effective
28 under Section 11360.040.

29 **Comment.** Section 11360.030 makes clear that an advisory interpretation has no legal effect
30 other than to bind the agency that adopted the advisory interpretation. While an advisory
31 interpretation should not be accorded any deference by a court in interpreting a provision of law
32 that is the subject of the advisory interpretation, this does not preclude a court from independently
33 reaching the same interpretive conclusion. Nor is the adopting agency precluded from advancing
34 the same interpretation in an adjudication, on its own merits. “Office” means the Office of
35 Administrative Law. See Section 11342(b).

36 **§ 11360.040. Effective dates**

37 11360.040. (a) The adoption, amendment, or repeal of an advisory interpretation
38 is effective on publication of a notice of completed adoption, amendment, or
39 repeal in the California Regulatory Notice Register.

40 (b) An advisory interpretation remains effective until one of the following
41 occurs:

42 (1) The advisory interpretation is repealed.

43 (2) The advisory interpretation is expressly or implicitly disapproved or
44 superseded by a statute, regulation, or court decision.

(3) The advisory interpretation is disapproved by the office, and the disapproval is final.

Comment. Section 11360.040 governs the effectiveness of an advisory interpretation. See Sections 11360.080(b)(2) (publication of notice of completed adoption, amendment, or repeal), 11360.090(d) (final disapproval by Office of Administrative Law). An effective advisory interpretation binds the adopting agency in an enforcement action. See Section 11360.030. “Office” means the Office of Administrative Law. See Section 11342(b).

§ 11360.050. Adoption, amendment, or repeal of advisory interpretation

11360.050. An agency may adopt, amend, or repeal an advisory interpretation, by completing all of the following procedures:

(a) Prepare a preliminary text of the proposed action. The preliminary text shall clearly identify the provision of law that the advisory interpretation interprets and shall include the following notice, prominently displayed on its first page: “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.”

(b) Provide public notice of the proposed action, as provided in Section 11360.060.

(c) Accept written public comment for at least 30 calendar days after providing the notice required in subdivision (b).

(d) Certify in writing to the office that all written public comments received in the period provided in subdivision (c) were read and considered by the agency.

(e) Prepare the final text of the proposed action, subject to the limitations of Section 11360.070. The final text shall clearly identify the provision of law that the advisory interpretation interprets and shall include the following notice, prominently displayed on its first page: “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.”

(f) Submit the final text of the proposed action and the certification required by subdivision (d) to the office.

Comment. Section 11360.050 specifies the procedures to be followed in adopting, amending, or repealing an advisory interpretation. “Office” means the Office of Administrative Law. See Section 11342(b).

§ 11360.060. Notice

11360.060. (a) The agency shall mail notice of the proposed action 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 action 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 11360.060 specifies the content and delivery requirements of the notice required under Section 11360.050(b). “Office” means the Office of Administrative Law. See Section 11342(b).

§ 11360.070. Limitation on final text of proposed action

11360.070. An agency may not adopt a final text of a proposed action unless the final text is sufficiently related to the preliminary text provided to the public pursuant to subdivision (a) of Section 11360.050 that the public could reasonably have anticipated adoption of the final text.

Comment. Section 11360.070 adopts part of the substance of Section 11346.8(c) relating to the adoption, amendment, or repeal of a regulation. Nothing in this section prevents an agency from reinitiating the procedures in this article, with a former final text as a preliminary text.

§ 11360.080. Publication and filing

11360.080. (a) On receiving a notice pursuant to subdivision (a) of Section 11360.060, the office shall publish the contents of the notice in the California Regulatory Notice Register.

(b) On receiving the final text of a proposed action and certification that all timely public comment was read and considered, pursuant to subdivision (f) of Section 11360.050, the office shall do each of the following:

(1) File the final text of the proposed action with the Secretary of State.

(2) Publish a notice of the completed action in the California Regulatory Notice Register.

(3) Publish the completed action in the California Code of Regulations.

Comment. Section 11360.080 specifies the publication and filing responsibilities of the Office of Administrative Law when an agency adopts, amends, or repeals an advisory interpretation. “Office” means the Office of Administrative Law. See Section 11342(b).

§ 11360.090. Review by Office of Administrative Law

11360.090. (a) Any interested person may request, in writing, that the office review an advisory interpretation to determine whether it satisfies the requirements of this article and is consistent with the law that it interprets.

(b) Within 15 days of receipt of a written request pursuant to subdivision (a), the office shall do one of the following:

(1) If the office decides not to review the advisory interpretation, the office shall mail a notice of its decision to the person who made the request.

(2) If the office determines that the advisory interpretation satisfies the requirements of this article and is consistent with the law it interprets, the office shall approve the advisory interpretation.

(3) If the office determines that the advisory interpretation does not satisfy the requirements of this article or is inconsistent with the law it interprets, the office shall tentatively disapprove the advisory interpretation.

(c) When approving or tentatively disapproving an advisory interpretation under subdivision (b), the office shall do each of the following:

(1) Mail a notice explaining its decision to the person who requested review of the advisory interpretation.

(2) Mail a notice explaining its decision to the agency that adopted the advisory interpretation.

(3) Publish a notice explaining its decision in the California Regulatory Notice Register.

(d) If the adopting agency does not request review of a tentative disapproval under section 11360.100, or if the tentative disapproval is reviewed but not overruled by the Governor, the disapproval immediately becomes final. The office shall file the final disapproval with the Secretary of State, publish notice of the final disapproval in the California Regulatory Notice Register, and remove the disapproved advisory interpretation from the California Code of Regulations.

(e) For the purposes of this section, an advisory interpretation is consistent with the law it interprets if it states a rational interpretation of that law.

(f) An advisory interpretation that has been approved or disapproved by the office under this section is not subject to further review by the office.

Comment. Section 11360.090 provides for post-adoption review of an advisory interpretation by the Office of Administrative Law (OAL). Disapproval of an advisory interpretation affects only the effectiveness of the advisory interpretation as an advisory interpretation and does not preclude expression of the agency's interpretation by other valid means. For example, where otherwise authorized, an agency may express its interpretation of law in a duly adopted regulation, in an individual advice letter, or in 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.

Subdivision (d) provides that a tentative disapproval of an advisory interpretation becomes final if the adopting agency does not request review by the Governor, or if the Governor reviews the tentative disapproval but does not overrule it. Upon final disapproval of an advisory interpretation the disapproved advisory interpretation becomes ineffective. See Section 11360.040(c). Note that an agency is only bound by its advisory interpretation in enforcement actions that complain of conduct occurring while the advisory interpretation is effective. See Section 11360.030(b).

Subdivision (e) provides that OAL must find an advisory interpretation consistent with the law it interprets if the advisory interpretation states a rational interpretation of that law. This makes clear that OAL may not substitute its judgment as to the merits of an advisory interpretation in assessing the advisory interpretation's consistency with the law it interprets.

A tentative disapproval under this section is subject to review by the Governor. See Section 11360.100. A decision under this section is subject to judicial review. See Section 11360.110. "Office" means the Office of Administrative Law. See Section 11342(b).

§ 11360.100. Review by Governor

11360.100. (a) An agency may request review by the Governor of a tentative disapproval of an advisory interpretation under Section 11360.090 by delivering the following materials to the Governor's office and to the Office of

Administrative Law, within 10 days after receiving notice of the tentative disapproval:

(1) A request for review stating why the agency believes the tentative disapproval is incorrect and should be overruled.

(2) Copies of all materials used by the agency in adopting the tentatively disapproved advisory interpretation. These materials shall include all public comment received in the adoption process.

(b) The Office of Administrative Law's written response to the agency's request shall be delivered to the Governor's office and to the requesting agency within 10 days after receiving a copy of the request for review pursuant to subdivision (a).

(c) If the Governor determines that the advisory interpretation satisfies the requirements of this article and is consistent with the law that it interprets, the Governor shall overrule the tentative disapproval.

(d) The Governor shall provide the requesting agency and the Office of Administrative Law with a written decision within 15 days of receipt of the Office of Administrative Law's response pursuant to subdivision (b). The Office of Administrative Law shall publish the Governor's decision and the reasons for it in the California Regulatory Notice Register.

Comment. Section 11360.100 provides for review by the Governor of a decision of the Office of Administrative Law to tentatively disapprove an advisory interpretation. See Section 11360.090 (OAL review of an advisory interpretation). The provisions of this section are similar to those of Section 11349.5, which provides for review by the Governor of a decision of the Office of Administrative Law to disapprove proposed regulatory action. See Section 11349.3 (OAL review of proposed regulatory action).

§ 11360.110. Judicial review

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

(b) For the purposes of this section, review by the office is complete when notice of any of the following events is published in the California Regulatory Notice Register:

(1) Approval of the advisory interpretation.

(2) Final disapproval of the advisory interpretation.

(3) A decision by the Governor to overrule a tentative disapproval of the advisory interpretation.

(c) An advisory interpretation may be declared invalid for failure to satisfy the requirements of this article or for inconsistency with the provision of law it interprets.

(d) A declaration of the validity or invalidity of an advisory interpretation under this section precludes further review of the advisory interpretation by the office.

Comment. Section 11360.110 provides for a declaratory judgment as to the validity of an advisory interpretation. Before bringing an action under this section, the Office of Administrative Law must have either reviewed or declined to review the advisory interpretation in question under

1 Section 11360.090. Review under this section is not the exclusive means by which a court may
2 review an advisory interpretation. For example, where the validity of an advisory interpretation
3 arises in an agency adjudication, the advisory interpretation may be subject to review by
4 administrative mandamus. See Code Civ. Proc § 1094.5. “Office” means the Office of
5 Administrative Law. See Section 11342(b).

CONFORMING REVISIONS

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

SEC. _____. 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. _____. 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
6 requested to be affected, reference to authority to take the action requested, the
7 reasons supporting the agency determination, an agency contact person, and the
8 right of interested persons to obtain a copy of the petition from the agency.

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

12 **Gov’t Code § 11342 (amended). Definitions**

13 SEC. _____. Section 11342 of the Government Code is amended to read:

14 11342. In this chapter, unless otherwise specifically indicated, the following
15 definitions apply:

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

18 (b) “Office” means the Office of Administrative Law.

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

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

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

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

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

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

41 (2) Any form prescribed by a state agency or any instructions relating to the use
42 of the form, but this provision is not a limitation upon any requirement that a

1 regulation be adopted pursuant to this part when one is needed to implement the
2 law under which the form is issued.

3 (3) An advisory interpretation, if properly adopted pursuant to Article 10
4 (commencing with Section 11360.010).

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

10 (A) Independently owned and operated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38 (J) A manufacturing enterprise exceeding 250 employees.

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

41 **Comment.** Subdivision (g) of Section 11342 is amended to make clear that an advisory
42 interpretation is not a regulation.