Study N-300 April 5, 1999

First Supplement to Memorandum 99-17

Legislative Program: Issues on AB 486 (Administrative Rulemaking)

We received a letter from the Office of Administrative Law (OAL) offering a number of suggestions regarding AB 486, which was introduced by Assembly Member Wayne to implement the Commission's recommendations relating to advisory interpretations and consent regulations. That letter is attached.

Respectfully submitted,

Brian Hebert
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STATE OF CALIFORNIA GRAY DAVIS, Governor

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April 2, 1999

Arthur K. Marshall, Chairperson
California Law Revision Commission
Att'n: Brian Hebert, Staff Counsel
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: **Administrative Rulemaking: Advisory Interpretations**--Final Recommendation dated September 1998

Commission Meeting of Thursday, April 8, 1999, 10:00 a.m.- 5:00 p.m., State Capitol Room 317, Sacramento--Agenda Item 3 on final agenda dated 3-26-99:

1999 Legislative Program

AB 486 (Wayne; 2-18-99)--**Advisory Interpretations** (set for April 6, 1999 hearing before Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development)

Dear Chairperson Marshall:

Thank you for opportunity to comment on the Commission's Advisory Interpretation proposal. Though the Office of Administrative Law ("OAL") does not have an approved, official position on AB 486, we would like to submit for your consideration several concrete suggestions for improving the proposal. We apologize for not getting these suggestions in sooner.

We appreciate the Commission's efforts to craft a prudent and balanced proposal permitting issuance of advisory interpretations. A previous Commission proposal (SB 523) created a new Administrative Procedure Act ("APA") exemption for precedent decisions, as well as creating a procedure for members of the regulated public to obtain declaratory decisions from regulatory agencies. As we understand it, the advisory interpretation proposal is intended to give state agencies an option

for communicating official but non-binding interpretations of laws enforced by the agency. Though we would have serious concerns about proposals to follow the federal model (which broadly exempts "interpretive guidelines" from notice and comment requirements of the federal APA), though it is true that the state has as yet had little experience with the operation of the precedent decision and declaratory decision procedures, and though some modifications are necessary, your current proposal nonetheless appears to be appropriately balanced, limited, and nuanced.

There are five issues we wish to call to your attention at this time: (1) policy manuals, (2) addition of an authority requirement, (3) relationship of article 10 to Government Code section 11340.5, (4) need to clarify the judicial review provision (section 11360.100), and (5) amendments to existing APA rulemaking petition provisions. Additional points (generally concerning more technical matters, such as whether the 45-day notice period begins with the mailing of notice or with publication of the notice in the Notice Register) will be made in a second letter.

Issue 1--policy manuals

Whether or not to recognize a broad, new APA "policy manual" exemption which could drastically curtail the public's right to meaningful participation in agency rulemaking

Enactment of AB 486 may be taken as legislative *acquiescence* in what arguably may be the judicial creation of a broad, new APA exemption authorizing state agencies to compile policy manuals consisting of interpretations of law originating in advisory statements and in quasi-judicial proceedings.

Solution: **amend AB 486 to make clear that such policy manuals are not exempt from public notice and comment and other APA requirements. Or, revise the official comment language to achieve the same result.**

The problem is that recent court decisions may arguably have created an APA exemption for agency "policy manuals." Prior to these decisions, Government Code section 11340.5 had made clear that "*no agency shall issue*, utilize, enforce, or attempt to enforce *any . . . manual . . . which is a regulation* as defined in subdivision (g) of Section 113242, unless the . . . manual . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]." (Emphasis added.) The court decisions muddy the waters.

The new "policy manual" exception appeared suddenly in a 1996 California Supreme Court opinion. This issue had not been briefed by the parties. The wide-ranging opinion stated in part that a state agency is *not* adopting regulations if it "prepares a *policy manual* that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters . . . ." *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557, 571, 59 Cal.Rptr.2d 186, 194 (holding that state agency manual provision violated Government Code section 11340.5) (emphasis added). This *Tidewater* principle was followed by the California Court of Appeal for the Sixth District in *Morillion v. Royal Packing Co.* (1998) 77 Cal.Rptr.2d 616, 619-20 (policy manual provision declared void for failure to comply with APA because it (1) interpreted law enforced by the agency, (2) applied generally to a class of similar cases, and (3) *did not merely restate or summarize prior decisions or advice letters*).

Thus, there seems little alternative to obtaining a legislative clarification. Lower courts will hesitate to contradict our Supreme Court. Absent a legislative clarification, considerable resources--both public and private sector--will be expended struggling with this problem in administrative and judicial forums. Since the above-noted appellate decisions, state agencies have begun to argue in underground regulation proceedings before OAL that this new exemption frees them from the need to comply with the APA. See 1999 OAL Determination No. 6, notes 53 and 54 [copy attached as Appendix "A"]; 1999 OAL Determination No. 9, pp. 15-17 & note 40 [copy attached as Appendix ""B"].

OAL is troubled by the policy manual language in *Tidewater* because (1) it may encourage agencies to avoid adopting regulations per the APA, (2) it is inconsistent with Government Code section 11340.5, (3) it will be difficult in practice to administer this complex, conditional exemption, (3) it will take years of

litigation to resolve uncertainties created by the language, and (4) it may encourage lower courts to create even more new judge-made APA exemptions even though Government Code section 11346 provides that APA exemptions must be expressly stated *in statute*.

Earlier this year, Professor Michael Asimow (the Commission's administrative law consultant) proposed codification of the *Tidewater* policy manual language. See Memorandum 99-8 "Administrative Rulemaking: Draft Tentative Recommendation," pages 2, 5-6, Memo section headed "Agency Restatement of Individual Advice and Adjudicative Decisions." (In December 1996, Professor Asimow had urged the Commission to "codify" in SB 209 (a 1997-98 bill that died in the first policy committee) what he described as the *Tidewater* holding that courts were precluded from (1) enjoining agency use of underground regulations and (2) overturning agency decisions based on underground regulations. See OAL letters of Feb. 26, 1997 and March 28, 1997.)

Commission staff did *not* recommend approval of Professor Asimow's 1999 proposal to codify the *Tidewater* policy manual language. Staff noted in part that:

> "the Commission has recommended procedures that would serve much the same purpose as the exception announced in *Tidewater*. [Government Code] Section 11425.60, which was enacted at the Commission's recommendation [in SB 523 (Kopp)], permits an agency to designate an adjudicative decision as a 'precedent decision.' Precedent decisions may be relied upon by the agency in future adjudications and must be published in a publicly available compilation. This effectively codifies the *Tidewater* exception as it applies to the restatement of adjudicative interpretations, with the improvement that an agency must acknowledge the precedential value of a decision in order to publish it. This provides better guidance to the public than would an unadorned restatement of prior (and possibly contradictory) decisions. Similarly, the Commission's advisory interpretation proposal [AB 486] is intended to provide a streamlined procedure for the general distribution of nonbinding interpretive advice. It may be that these procedures provide adequate methods for an agency to publish its advice and adjudicative

> decisions. *Adding an express exception along the lines discussed above might encourage agencies to circumvent those procedures.*" (Memo 99-8, p. 6; emphasis added.)

As noted in the First Supplement to Memorandum 99-8 (February 4, 1999), several interested parties opposed codification of the policy manual exception:

- California State Employees Association
- Association of California State Attorneys and Administrative Law Judges
- Professional Engineers in California Government
- California Association of Professional Scientists.

The Commission followed the recommendation of staff and of the interested parties. The minutes of the meeting of February 4-5, 1999 state in part:

> "The Commission made the following decisions and requested that staff revise the draft recommendation [on Administrative Rulemaking] accordingly:
> . . .
>
> (2) The *APA should not include an express exception . . . for a policy manual* that is nothing more than a restatement or summary, without commentary, or the agency's prior decisions in specific cases and its prior advice letters." (pp. 12-13; emphasis added.)

In OAL's view, this was a good decision. However, as noted above (and as communicated to Commission staff this February), the decision *not* to codify does not fully address the problem created by the *Tidewater* language. It does not give clear guidance to the courts, to the public, or to state agencies.

If AB 486 is enacted without directly addressing this policy manual problem, state attorneys will very likely argue that agencies are authorized not only (1) to issue advisory interpretations pursuant to Article 10, but also (2) to issue wide-ranging

policy manuals containing regulatory material. AB 486 carefully balances the interests of agencies and the interests of the regulated public, requiring, for instance, streamlined public notice and comment procedures. The policy manual exception, in sharp contrast, invites abuse by giving agencies carte blanche.

If the Legislature enacts AB 486 without confronting the *Tidewater* problem, basic principles of statutory interpretation suggest that this will likely be deemed by the courts to have had the effect of incorporating the troubling *Tidewater* policy manual language into the APA.

Where a statute such as the APA has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves it. There is a strong presumption that when the Legislature reenacts or amends a statute which has been judicially construed, it adopts the construction placed on the statute by the courts. *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353, 211 Cal.Rptr. 742, 748; *Orange County Employees Association v. County of Orange* (1993) 14 Cal.App.4th 757, 582, 17 Cal.Rptr.2d 696, 699. These principles apply with special force in the case of legislation proposed by the California Law Revision Commission, which is typically charged with systematic review of the relevant subject area, in this case "advisory interpretations." *Estate of Wernicke* (1993) 16 Cal.App.4th 1069, 1076 Cal.Rptr.2d 481, 485. In such circumstances, a legislative decision *not* to contradict case law holdings within the scope of the inquiry, can be read as implied acceptance of those cases. *Id.* Based on past experience, it seems likely that Professor Asimow will write a law review article advocating that the courts take this approach. (He submitted a friend of the court brief in the *Tidewater* case, urging the court to create a broad "interpretive regulation" exemption from the APA.)

Accordingly, OAL recommends that one of two solutions be adopted. Our preference is to amend SB 486 to directly abrogate the troubling *Tidewater* language. (Appropriate comment language, not provided here, would also likely be needed.)

Arthur K. Marshall, Chair, Calif. Law Revision Commission, April 2, 1999, p. 7

Option One

Something like this:

"1. Section 11340.5 prohibits agencies from issuing policy manuals which contain "regulations" as defined in Government Code section 11342(g), even if the "regulations" were initially issued in the form of (1) a written statement directed to a specifically named person (or a group of specifically named persons) or (2) a quasi-judicial decision.

2. Courts may not authorize or legitimize agency issuance of underground regulations on the theory that the agency is not adopting regulations if it "prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters . . . ." *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557, 571, 59 Cal.Rptr.2d 186, 194

3. This provision is intended to abrogate the quoted holding in *Tidewater v. Bradshaw*."

Option Two

If option one is not acceptable, a second option would be to accomplish the same goal by revising the language of the official comment as follows. Suggested additions are shown below in italics, deletions in strikeout.

Comment to section 11360.010 (p. 668 of CLRC final recommendation)

Comment. Section 11360.010 states the purpose of this article and governs its application. Subdivision (a) provides that this article is intended as an optional procedure by which an agency can offer generally applicable advice, without adopting a regulation under Article 5 (commencing with Section 11346). 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 application of a highly technical law.

Although subdivision (b) generally provides that an advisory interpretation adopted under this article is not subject to other provisions of this chapter, there may be express exceptions. See, e.g., Sections 11340.6--11340.7 (governing petition for adoption, amendment, or repeal of regulation or advisory interpretation).

Subdivision (e) provides that adoption of an advisory interpretation is optional and does not preclude an agency from ~~expressing interpretive advice~~ *communicating official interpretations* by some other lawful means. *For example, an agency may (1) adopt a regulation after public notice and comment pursuant to Article 5, (2) adopt a regulation as an emergency pursuant to Sections 11346.1 and 11349.6, (3) issue a declaratory decision pursuant to Sections 11465.10-11465.70, or (4) designate an interpretation developed in an adjudicatory proceeding as precedential and use that interpretation in lieu of a duly adopted regulation. However, Government Code section 11340.5 prohibits agencies from issuing policy manuals which contain "regulations" as defined in Government Code section 11342(g), even if the "regulations" were initially issued in the form of (1) a written statement directed to a specifically named person (or a group of specifically named persons) or (2) a quasi-judicial decision. Courts may not authorize or legitimize agency issuance of underground regulations on the theory that the agency is not adopting regulations if it "prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters . . . ." Tidewater v. Bradshaw (1996) 14 Cal.4th 557, 571, 59 Cal.Rptr.2d 186, 194.* Note that an agency's interpretation expressed in an adjudication may not be expressly relied upon as a precedent unless it has been designated a precedent decision by the agency. See Section 11425.60 (use of precedent decisions). *An agency expressly relies upon such an interpretation if (among other things) the agency restates the interpretation in a policy manual.* Nothing in subdivision (e) affects the prohibition against the issuance or use of regulations that have not been properly adopted. See Section 11340.5 (prohibiting use of "underground regulations"); *Engelmann v. State Board of Education (1991) 2 Cal.App.3d 490.*

Issue 2-addition of an authority requirement

If a review request is made as specified in article 10, OAL should perform a review not only for consistency with statute, *but also to ensure that the advisory interpretations are within the agency's authority*. Article 10 should refer to the existing APA provisions concerning authority (section 11349(b)) and consistency (11349(d)). Appropriate language could include:

> "Each advisory interpretation adopted shall be within the scope of authority conferred by statute (Section 11342.1) and consistent with and not in conflict with the statute or other provision of law it purports to interpret (Section 11342.2)."

It should be made clear in a comment that OAL is directed to perform an *independent* legal review for authority and consistency, citing *Stoneham v. Rushen* (1984) 156 Cal.App.3d 302, 308, 203 Cal.Rptr. 20, 23.

It should be made clear that in determining whether specified advisory interpretations satisfy the authority and consistency requirements, OAL is to use the approach of published appellate opinions (cf. Title 1, California Code of Regulations ("CCR"), section 14(c), which applies to OAL's "authority" review of proposed regulations).

With respect to OAL review of advisory interpretations for consistency, the following should be made clear: if OAL independently concludes: (1) that there are two or more reasonable interpretations of a provision of law, both of which are consistent with the provision, and (2) that one of the two interpretations has been selected by the agency as a matter of policy, then (3) OAL may not dispute the decision of the agency (cf. 1 CCR 10(a), which applies to OAL review of proposed regulations) in selecting one of the two consistent interpretations. Policy choices, so long as not inconsistent with the underlying statute, are within the discretion of the adopting agency.

Issue 3--relationship of article 10 to Government Code section 11340.5.

Add a new subdivision (f) to section 11360:

> "(f) Nothing in this article affects the prohibition in Section 11340.5 against the issuance or use of regulations that have not been properly adopted."

This textual addition would replace the final sentence in the last paragraph of the existing comment to section 11360.010.

Issue 4--need to clarify judicial review provision (section 11360.100)

An OAL *decision to deny a request to review* an advisory interpretation should not be subject to judicial review. If an interested party has a legal complaint about an advisory interpretation, any lawsuit should be between that party and the issuing agency. No purpose would be served by permitting litigation of OAL's decision to stay out of the dispute.

Review by OAL should *not* be an administrative remedy that must be exhausted. Interested parties opposed to an advisory interpretation should have the options of either (1) complaining to OAL or (2) going directly to court.

If OAL elects to review an advisory interpretation, *an OAL decision to approve* the interpretation should not be subject to judicial review (compare Government Code section 11350(c) (court shall not consider *OAL approval* of proposed regulation in declaratory relief action concerning that regulation). Of course, the advisory interpretation itself should be subject to judicial review, with the issuing agency (not OAL) as the defendant in any action.

If OAL *disapproves* an advisory interpretation, and the adopting agency desires to appeal that decision, article 10 should be amended to set out a procedure for the adopting agency to appeal to the Governor, similar to that outlined in existing law governing OAL repeal of invalid existing regulations (Government Code section 11349.9). Adopting agencies should only be able to seek judicial review of an OAL disapproval decision after they have first pursued an appeal to the Governor.

If an adopting agency fails to persuade the Governor to overrule the OAL disapproval decision, and does not desire to seek judicial review, that should be the end of the matter. Third parties should not be able to seek judicial review of an OAL *disapproval* decision. The adopting agency should be permitted to exercise its discretion and let the matter die, or to pursue another method of resolving the policy issue. Cf. proposed section 11360.010(e), which provides in part: "Nothing in this article requires an agency to adopt an advisory interpretation."

Issue 5-- amendments to existing APA rulemaking petition provisions (Government Code section 11340.6 & 11340.7)

It is probably best not to amend these two existing code sections, but rather to draft freestanding sections (for inclusion in article 2) that spell out how to file a petition for adoption of an advisory interpretation.

Some APA users find the two rulemaking petition code sections confusing. Amending these sections to encompass petitions for advisory interpretations may have the effect of further confusing users.

If you have questions or thoughts about these improvement suggestions, please contact me at **(916) 323-6814 (voice)**; (916) 323-6826 (FAX); e-mail... hbolz@oal.ca.gov.

Sincerely,

Herb Bolz

Herbert F. Bolz

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53. In dictum, *Tidewater* states that "[i]nterpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as *precedents* in similar subsequent cases." (59 Cal.Rptr.2d at 194; emphasis added.) *OAL has serious concerns about the correctness of the statement of law contained in this quotation*, for the reasons stated in the following excerpt from 1998 OAL Determination No. 4 (Department of Fish and Game, Docket No. 90-049), May 22, 1998), endnote 1, CRNR 98, No. 26-Z, June 26, 1998, p. 1197, at p. 1203, endnote 1.

> "The *Tidewater* opinion contains a significant discussion of quasi-judicial precedent decisions. Also, several months after the opinion was filed, an express statutory exemption covering precedent decisions became effective.
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> "OAL's position since 1986 has been that, absent an express statutory exemption from the APA, agency precedent decision systems violate the APA. Government Code section 11346; **1993 OAL Det. No. 1** (California Energy Commission, April 6, 1993, Docket No. 90-015), CRNR 93, NO. 16-Z, April 16, 1993, p. 413), [determination] cited in official comment to Gov. Code sec. 11425.60; *California Public Agency Practice*, sec. 20.06, esp. [4]. Under the law as it existed until July 1, 1997, a general rule developed in a quasi-judicial proceeding could not be used from that point on in similar factual settings in lieu of a duly adopted regulation unless the rule had first been adopted as a regulation. The new statutory provision, Government Code section 11425.60, took effect on July 1, 1997. (The *Tidewater* opinion was filed December 19, 1996, over six months before the new provision went into effect.)
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> "Government Code section 11425.60 had the effect of legalizing the use of precedent decisions, if certain conditions were met. The *Tidewater* court does not cite section 11425.60. Several portions of *Tidewater* might well have been drafted differently, had the court taken enactment of section 11425.60 into account. For instance, the following passage must be read with the knowledge that it appears to have been written without considering the significance of section 11425.60:
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> > '[i]nterpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as *precedents* in similar subsequent cases. [citations] . . . Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases, . . ., the agency is not adopting regulations.' (59 Cal.Rptr.2d at 194; emphasis added.)
>
> The quoted passage likely cannot be reconciled with Government Code section 11425.60. This statute creates an express APA exemption. It supersedes prior statutory and decisional law. Looking at an example of how the new statute

might apply, let us consider a policy manual containing the following sort of rule: decision 89-1 (a spouse who resigns a job in order to move to another city with the other spouse is not entitled to unemployment benefits). An issuance [in a policy manual] of a rule first developed in a quasi-judicial proceeding would violate Government Code section 11340.5. It would not matter if the decision were restated without commentary: the statement of the decision by itself contains a prospectively applicable standard of general application. However, the issuing agency could under section 11425.60 elect to designate it as a precedent decision. If this were done, the decision could be freely written up in departmental publications and could be used in lieu of a duly adopted regulation."

54. Citing Government Code section 11343, *Tidewater* contains sweeping language in the nature of dicta indicating that regulatory material contained in letters directed to a specifically person or persons is not subject to the APA. Indeed, *Tidewater* then goes on to state that even compilations of such regulatory material in policy manuals are not subject to the APA if restated "without commentary." The court stated:

> " . . . if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations." (59 Cal.Rptr.2d at 194.)

As noted in endnote 53, it is probably not possible to reconcile the proposition that agencies should gather quasi-judicial interpretations of precedential value into manuals with a statutory change concerning precedent decisions that subsequently took effect. Similarly, OAL has serious concerns about the portion of the quotation addressing what it characterizes as "advice letters." The phrase "advice letter" does not appear in the APA.

The applicability of Government Code section 11343 was an issue in 1998 OAL Determination No. 29, which in part concerned a "regulation" issued in the form of a letter by the State Personnel Board. This determination was published in the California Regulatory Notice Register, 98, No. 46-Z, November 13, 1998, p. 2286. The following excerpt is taken from this 1998 determination (pp. 17-21 of the typewritten version). Nearly all endnotes are omitted.

The quoted material begins here:

B. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Government Code 11343, subdivision (a) (3).)

The Board's response states that the 1990 SPB letter "merely responds to a letter from an employee representative who was seeking an *advisory opinion* on behalf of a specific

client . . . ."(Emphasis added.) When read in light of dicta concerning "advice letters" in a 1996 California Supreme Court case, this statement may be read to raise the issue of whether the regulatory material in the 1990 letter is exempt from the requirements of the APA pursuant to Government Code 11343 (a) (3), which states in part:

> "Every state agency shall:
>
> (a) Transmit to the office [of Administrative Law] for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which:
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> . . . (3) Is directed to a specifically named person or to a group of persons *and does not apply generally throughout the state*." (Emphasis added.)

In 1996, the California Supreme Court, in *Tidewater Marine Western v Bradshaw* in *dicta*, spoke to the practice of some agencies with respect to advisory opinions. Speaking to the practice, the court stated:

> "Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases. [citations] Similarly, agencies may provide private parties with *advice letters*, which are not subject to the rulemaking provisions of the APA. (Gov. Code §§ 11343, subd. (a) (3), 11346.1, subd. (a).) (Emphasis added.)

The issues before the court did not include the validity of an "advice letter." The applicability of section 11343 to "advice letters" was not briefed. The court opinion does not fully develop the assertion that advice letters are not subject to the rulemaking part of the APA. It refers to Government Code section 11343, but does not quote the statutory language containing the two-part test that a regulation must meet in order to qualify for the exemption set forth therein. The opinion does not discuss the significance of Government Code section 11342, subdivision (g), which expressly exempts from the APA "legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization," which are advice letters on tax issues. If the Legislature had intended that advice letters in general be exempt from the APA pursuant to Government Code section 11343, there would seem little need for the exemption language in section 11342, subdivision (g).

Nor does the *Tidewater* opinion discuss *Winzler* (cited above in the analysis of the 1990 letter as a standard of general application). *Winzler* refers to Government Code section 11380, from which Government Code 11343 is derived, as making clear that the test for exemption from APA requirements includes the two prong test now set forth in Government Code 11343, that is, the regulation must (1) be directed to a specifically named person or to a group of persons *and* (2) not apply generally throughout the state.

Since 1986, OAL has consistently taken the position that there is no "automatic" APA

exemption for "regulations" directed to specifically named persons or group of persons. [*Omitted endnote 44 lists 14 determinations issued between 1986 and 1998.*] Some have argued that any "regulation" directed toward a specifically named person in response to a request for advice should be deemed exempt from the APA pursuant to section 11343(a)(3).

In order to qualify for an APA exemption pursuant to Government Code section 11343, subdivision (a) (3), however, state agency communications (including "advisory opinions") must meet both parts of the two prong test, that is, the regulation must be directed to a specific person or group of persons *and* not apply generally throughout the state.

Review of the legislative history of the APA indicates that the Legislature has strictly limited APA exemptions, with an eye toward making a much greater proportion of *state* agency rules subject to public notice and comment requirements than Congress sought to achieve in the federal APA regarding *federal* agency rules.

Though "interpretive guidelines" are expressly exempt from notice and comment requirements under the federal APA, the California Legislature has not enacted a parallel provision in the California APA.

It appears the Legislature intended that there be no exemption for "interpretive rules." Exempting interpretive guidelines was--and is--a clear policy alternative. The federal APA, first enacted in 1946, exempts "interpretive rules" "policy statements" from notice and comment requirements. In enacting the California APA in 1947, the Legislature rejected a proposal to exempt "*any interpretative rule* or any rule relating to public property, public loans, public grants or public contracts" (emphasis added) from APA notice and hearing requirements. It, therefore, seems that the 1947 Legislature considered and rejected the idea of following the federal example of exempting "interpretive rules" (including "advisory letters" or "advice letters") from notice and comment requirements.

In recent years, however, the Legislature has enacted several significant APA provisions that address the issue of agency communications regarding application of law within the agency's jurisdiction. These amendments were enacted on the recommendation of the California Law Revision Commission, which will shortly be forwarding to the Legislature an additional Commission recommendation on a similar topic.

In 1995, the Legislature enacted a major revision of the adjudication portion of the Administrative Procedure Act, developed over a period of years by the Law Revision Commission. Among other things, the legislation authorizes a state agency to issue a "declaratory decision" in response to an application to the agency for a decision as to the applicability to *specified* circumstances of a statute, regulation or decision within the jurisdiction of the agency, in other words, to issue an "advisory opinion." Article 14 of Chapter 4.5 Division 3 of Title 2 of the Government Code (commencing with section 11465.10). The Commission's commentary to section 11465.10, the introductory section

Article 14, states the following.

> "Article 14 . . . creates, and establishes all of the requirements for, a special proceeding to be known as a 'declaratory decision' proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances.
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> "The declaratory decision procedure is thus quasi-adjudicative in nature, enabling an agency to issue in effect an *advisory opinion* concerning assumed facts submitted by a person. The procedure does not authorize an agency 'declaration' of a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is an 'underground regulation . . . .
>
> "The declaratory decision procedure provided in this article applies only to decisions subject to this chapter . . . ." (Emphasis added.)

The Law Revision Commission and the Legislature both recognized that there would be cases in which an agency, having issued an advisory opinion to one person based on specific facts, would want to utilize the opinion in situations where similar facts exist, in other words, utilize the opinion as a standard of general application. Consequently, the 1995 legislation provides that a "declaratory decision" can be given "precedential effect," according to procedures specified in the legislation. Under these procedures, an agency "may designate as a *precedent decision* a decision . . . that contains a significant legal or policy determination of general application that is likely to recur." (Emphasis added.) [*Endnote 49: Government Code section 11425.60.*] The official Law Revision Commission comment states that the legislation "recognizes the need of agencies to be able to make law and policy though adjudication as well as though rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential . . ." and applies notwithstanding APA provisions prohibiting "underground regulations." In other words, the Legislature expressly exempted "precedent decisions" from the requirements of the APA, proving once again that the Legislature knows how to grant an express exemption when it makes a policy decision to do so.

The exemption for "precedent decisions" draws attention to the fact that *no* express exemption was enacted with respect to "declaratory decisions." Thus, the Legislature specifically authorized agencies to issue advisory opinions that apply the law to specific, not general, circumstances. The opinions may not apply *statewide*. They are not to be used as standards of general application in lieu of duly adopted regulations or without the formality of designation as "precedent" decisions.

As part of its ongoing study of the APA, the Law Revision Commission is currently drafting a final recommendation setting forth an APA procedure for issuance of "advisory

interpretations" by state agencies. The recommendation would create a simplified notice and comment procedure an agency may use to issue generally applicable, nonbinding, interpretive advice, another form of an advisory opinion. The purpose is to "expedite beneficial communication between agencies and the public while preserving the benefits of public participation in agency deliberations." Under the Law Revision Commission's proposal, an advisory interpretation: 1) is an expression of an agency's opinion regarding the meaning of a provision of law that the agency administers; 2) cannot purport to bind or compel; 3) is not to be given any judicial deference or binding effect; and 4) provides a "safe harbor" for those who conform their conduct to the interpretation.

In summary, OAL concludes that though the SPB policy that persons answering question 2E are expected to disclose all dismissals, including those set aside by court action, was directed to a specifically named person, it is nonetheless a standard of general application: it applies generally throughout the state to all persons who have experienced a dismissal set aside by court action. (See part II.A of this determination.) Because this policy applies generally throughout the state, it thus fails to satisfy the second part of the two-part test contained in Government Code section 11343, subdivision (a)(3).

The material quoted from 1998 OAL Determination No. 29 ends here.

55. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 573, 59 Cal.Rptr.2d 186, 196.

56. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574; 59 Cal.Rptr.2d 186, 197.

57. 59 Cal.Rptr. at 196. The *Tidewater* court disapproved the approach of the lower court in *Bono Enterprises*, which had reasoned that "DLSE had to have *discretion* to interpret the IWC regulation in particular factual contexts" (Id.; emphasis added), and then concluded that because of this need to have discretion, that DLSE interpretations of duly adopted regulations were not subject to the APA. The *Tidewater* court made clear that an agency need for interpretive discretion did not mean the agency could memorialize a blanket interpretation in a document such as a policy manual, intending to apply it in all cases of a particular class or kind. Such "blanket interpretations" are subject to the APA. Government Code sections 11342, subdivision (g), 11340.5.

B. DOES THE CHALLENGED POLICY DECISION FALL WITHIN ANY *GENERAL* EXPRESS APA EXEMPTION?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.[36] Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.[37]

The Board states in its response that:

> "[It has] issued a Sales and Use Tax Memorandum Opinion that contained a thorough discussion of the legal basis for holding corporate officer-stockholders of suspended corporations liable. (Sales & Use Tax Memo. Op., *Jack Donald Freels*, Sept. 10, 1997.) The Supreme Court in *Tidewater Marine Western, Inc., supra*, while noting that a policy manual summarizing such decisions would not be binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings, nonetheless held that 'interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases.' (14 Cal.4th at 571.)"

OAL interprets this statement by the Board as arguing that the challenged policy, holding corporate officer-stockholders of suspended corporations personally liable, is not a "regulation" because it arose as an interpretation in the course of case-specific adjudication, i.e., Sales and Use Tax Memo. Op., *Jack Donald Freels*, Sept. 10. 1997. The Board's argument fails for the following reasons.

The *Memorandum Opinion* was issued in 1997 in response to a specific taxpayer case (in the matter of a claim for refund). The challenged *policy*, however, was *not* issued in response to a specific taxpayer case, i.e., it was not an interpretation arising in the course of a case-specific adjudication. The policy was adopted in 1980 by the Board during a Board hearing pursuant to Board vote. It is clear from the hearing transcript that the Board intended the policy to be a rule of general application.

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The ruling of the Memorandum Opinion is stated as follows:

> "When a closely held corporation is suspended by the Secretary of State, the officers-shareholders will be held personally liable for sales taxes incurred by the business during the period of the suspension if they continue to conduct selling activities and collect sales tax reimbursement from customers. The reason for the corporate suspension will not affect this conclusion. When the officers-shareholders of a suspended corporation continue to do business, they do so as individuals. As such, if they continue the selling activities of the suspended corporation, they are themselves sellers required to obtain a seller's permit and to report and remit sales tax to the State."[38]

At the end of the opinion, the Board states:

> ". . . To the effect that any Board publication, policies, or annotations are inconsistent with this Memorandum Opinion, we further conclude that this Memorandum Opinion *will have precedence*. [Emphasis added.]"[39]

The Board does not argue that the challenged policy is not a "regulation," and therefore exempt from the APA pursuant to Government Code section 11425.60, which establishes a procedure for designating decisions as precedent decisions that are expressly exempt from the APA, but instead appears to rely solely upon the quoted language of *Tidewater*. Unless the Board is in full compliance with section 11425.60 with respect to the Memorandum Opinion, the express exemption afforded under section 11425.60 does not apply.

OAL finds, however, that even if the Board properly designated the opinion as a "precedent decision," in full compliance with section 11425.60, it would not cause OAL to reach a different conclusion in this determination.[40] The June 30, 1980 policy is the subject of this request for determination, not the rule stated in the Memorandum Opinion that was issued on September 10, 1997. It is important to keep in mind that the rule in the Memorandum Opinion is a modification of the challenged policy; it is substantively different from the policy that is at issue in this determination. (See difference noted above under heading II., B.)

When analyzing a request for determination, OAL considers the law as it existed

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at the time the request for determination was filed with OAL (in this case, the request was received by OAL on March 11, 1996), as well as the law as it exists when the determination is issued. If a state agency subsequently codifies a challenged rule, or there is a change in statutory or case law, or a "precedent decision" issued pursuant to Government Code section 11425.60, then OAL will note this change in the law in its determination.

OAL also considered whether the challenged policy was "directed to a specifically named person or to a group of persons and [did] not apply generally throughout the state" (Gov. Code sec. 11343, subd. (a)(3)), and therefore was exempt from the APA. Such a rule may be exempt in case-specific circumstances, but not when applied generally throughout the state as the Board voted to do. OAL finds that the challenged policy does not fall within the "specifically named person" exemption.

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the form is issued. (Gov. Code, sec.11342, subd. (g).)

c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342. subd. (g).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, pp. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63); complete determination published belatedly on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea that *City of San Joaquin* (cited above) was still good law.

38. Sales & Use Tax Memo. Opn., *Jack Donald Freels*, Sept. 10, 1997, *Business Taxes Law Guide,* p. 5584, M99-1.

39. *Id.*, at p. 5588, M99-1.

40. Furthermore, though the *Tidewater* opinion does contain a significant discussion of quasi-judicial precedent decisions, this discussion appears to have been superseded by a subsequent statutory change. Several months after the opinion was filed, an express statutory exemption covering precedent decisions became effective.

OAL's position since 1986 has been that, absent an express statutory exemption from the APA, agency precedent decision systems violate the APA. Under the law as it existed until July 1, 1997, a general rule developed in a quasi-judicial proceeding could not be used from that point on in similar factual settings in lieu of a duly adopted regulation unless the rule had first been adopted as a regulation. The new statutory provision, Government Code section 11425.60, took effect on July 1, 1997. (The *Tidewater* opinion was filed December 19, 1996, over six months before the new provision went into

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effect.)

Government Code section 11425.60 has the effect of legalizing the use of precedent decisions, if certain conditions are met. Had precedent decisions been exempt from the APA prior to the enactment of section 11425.60, there would have been no need for enactment of this express statutory exemption.

The *Tidewater* court does not cite section 11425.60. Several portions of *Tidewater* might well have been drafted differently had the court taken the enactment of section 11425.60 into account. For instance, the following passage must be read with the knowledge that it appears to have been written *without* considering the significance of section 11425.60:

> ". . . [I]nterpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as *precedents* in similar subsequent cases. [citations] . . . Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases, . . . the agency is not adopting regulations. [Emphasis added.]"

The quoted passage likely cannot be reconciled with Government Code section 11425.60. This statute creates an express APA exemption. It supersedes prior statutory and decisional law.

Looking at an example of how the new statute might apply, let us consider a policy manual containing the following sort of rule: Decision 89-1 (a spouse who resigns a job in order to move to another city with the other spouse is not entitled to unemployment benefits). An issuance of a rule of general application, first developed in a quasi-judicial proceeding, would violate Government Code section 11340.5. It would not matter if the decision were restated without commentary: the statement of the decision by itself contains a prospectively applicable standard of general application. However, the issuing agency could under section 11425.60 elect to designate it as a precedent decision. If this were done, the decision could be freely written up in departmental publications and could be used in lieu of a duly adopted regulation.

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