

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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 15, 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

In general, 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. This procedural requirement 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.

1 The Law Revision Commission recommends the creation of a simplified notice
2 and comment procedure an agency may use to issue generally applicable,
3 nonbinding, interpretive advice (hereinafter an “advisory interpretation”). This will
4 expedite beneficial communication between agencies and the public while
5 preserving the benefits of public participation in agency deliberations. Adoption of
6 an advisory interpretation is optional and does not preclude expression of an
7 agency’s interpretive opinion by other means. For example, an agency may
8 express its interpretation of law in a duly-adopted regulation, individual advice
9 letter, or in case-specific adjudication.

10 Proposed Law

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

18 **Limited Substance and Form**

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

22 *Interpretive content.* An advisory interpretation expresses an agency’s opinion as
23 to the meaning of a statute, regulation, agency order, court decision, or other
24 provision of law that the agency enforces or administers, or that governs the
25 agency’s procedures. An agency statement that goes beyond offering such advice
26 and purports to bind or compel is not an advisory interpretation.⁸

27 *Clear labeling.* An advisory interpretation must be clearly labeled as an advisory
28 interpretation. This avoids the need to consider agency intention in determining
29 whether a particular agency statement is an advisory interpretation.⁹

30 **Limited Effect**

31 *Legal effect.* The legal effect of an advisory interpretation is limited in two ways.
32 First, an advisory interpretation may not include a statement that purports to bind
33 or compel. Such a statement is not an advisory interpretation and is subject to

8. See proposed Gov’t Code § 11360.020 (“advisory interpretation” defined).

9. The labeling requirement is drawn from a Washington 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 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 interpretive statements).

1 review and disapproval by the Office of Administrative Law (OAL) and the
2 courts.¹⁰ Second, the proposed law expressly prohibits an advisory interpretation
3 being given any judicial deference or binding effect.¹¹

4 *Practical effect.* An advisory interpretation will have some practical effect, as
5 members of the regulated public may voluntarily conform their behavior to the
6 agency's view of the law in order to avoid a dispute with the agency. The proposed
7 law accounts for this in two ways. First, it requires public participation when
8 adopting an advisory interpretation. This allows those who may be affected by an
9 advisory interpretation to have a say in its formulation and provides a notice
10 period during which members of the public may conform their conduct to the
11 pending advisory interpretation. Second, the proposed law provides a "safe
12 harbor" for those who do conform their conduct to an interpretation expressed in
13 an advisory interpretation. Under this provision, an agency must abide by its own
14 advisory interpretation in enforcing the interpreted law.¹²

15 **Public Participation**

16 Because advisory interpretations will have some practical effect on the regulated
17 public, the proposed law requires public input in their formulation. Public input is
18 provided through a simplified notice and comment procedure that achieves the
19 benefits of public participation¹³ with less cost and delay than under existing
20 rulemaking procedures. These savings are achieved by limiting the analyses and
21 determinations an agency must conduct and limiting public input to written
22 comments that the agency must read and consider.

23 **Review Procedures**

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

26 *OAL review.* Any interested person may request that OAL review an existing
27 advisory interpretation to determine whether it satisfies the requirements of the
28 law and is consistent with the law it interprets. If OAL disapproves an advisory
29 interpretation as not satisfying the requirements of the law or as being inconsistent
30 with the law it interprets, then the advisory interpretation is invalid.

10. See proposed Gov't Code §§ 11360.090-11360.100.

11. Note, however, that an advisory interpretation is binding on the adopting agency in an enforcement action.

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

13. 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).

1 *Judicial review.* After OAL has had an opportunity to review an advisory
2 interpretation, an interested person may request a declaratory judgment as to the
3 validity or invalidity of the advisory interpretation by bringing an action in the
4 superior court.¹⁴

14. See proposed Gov't Code § 11360.100. Declaratory relief under this section is not the exclusive means by which a court may review an advisory interpretation. For example, where the validity of an advisory interpretation arises in an agency adjudication, the advisory interpretation may be subject to review by administrative mandamus. See Code Civ. Proc. § 1094.5.

Proposed Legislation

1 **Gov't Code §§ 11360.010-11360.100 (added). Advisory interpretations**

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

4 Article 10. Advisory Interpretations

5 **§ 11360.010. Purpose and application**

6 11360.010. (a) The purpose of this article is to provide an efficient procedure by
7 which a state agency may communicate, in a nonbinding, advisory form, the
8 agency's interpretation of a statute, regulation, agency order, court decision, or
9 other provision of law that the agency enforces or administers, or that governs the
10 agency's procedures. This procedure is intended as an alternative to the adoption
11 of a regulation.

12 (b) Except as otherwise provided in this article, an advisory interpretation
13 adopted pursuant to this article is not subject to the requirements of the other
14 provisions of this chapter.

15 (c) This article does not provide an alternative means of adopting binding
16 regulations.

17 (d) Where a statute or other provision of law requires an agency to act pursuant
18 to this chapter or pursuant to other specified procedures, the agency shall not act
19 pursuant to this article unless the statute or other provision of law expressly
20 requires or authorizes the agency to act pursuant to this article.

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

26 **Comment.** Section 11360.010 states the purpose of this article and governs its application.
27 Subdivision (a) provides that this article is intended as an optional procedure by which an agency
28 can offer generally applicable interpretive advice, without adopting a regulation. For example, an
29 agency may wish to adopt an advisory interpretation to clarify the meaning of an ambiguous law
30 or to provide examples illustrating the operation of a highly technical law.

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

35 Subdivision (d) limits the use of this article where an agency is required to proceed pursuant to
36 this chapter or other specified procedure. For example, a California Environmental Quality Act
37 (CEQA) guideline must be adopted pursuant to specified provisions of Article 5 (commencing
38 with Section 11346). See Pub. Res. Code §§ 21083, 20187. Therefore, the Resources Agency
39 may not adopt a CEQA guideline under this article. As another example, there are special
40 procedural requirements governing the adoption of regulations by the Department of Personnel

1 Administration (DPA). See Gov't Code §§ 19817-19817.20. A DPA statement that is subject to
2 those procedures may not be adopted under this article.

3 Subdivision (e) provides that adoption of an advisory interpretation is optional. An agency may
4 choose to adopt an advisory interpretation or may express the agency's interpretation in some
5 other form. For example, an agency may express its interpretation of law in a duly-adopted
6 regulation, an individual advice letter, or in case-specific adjudication. Note that an agency's
7 interpretation expressed in an adjudication may not be expressly relied on as a precedent unless it
8 has been designated a precedent decision by the agency. See Section 11425.60 (use of precedent
9 decisions). Nothing in subdivision (e) affects the prohibition against the issuance or use of
10 regulations that have not been properly adopted. See Section 11340.5 (prohibiting use of
11 "underground regulations").

12 **§ 11360.020. Definition of "advisory interpretation"**

13 11360.020. As used in this article "advisory interpretation" means a written
14 agency statement, adopted pursuant to this article, that expresses the agency's
15 opinion as to the meaning of a statute, regulation, agency order, court decision, or
16 other provision of law that the agency enforces or administers, or that governs the
17 agency's procedures.

18 **Comment.** Section 11360.020 defines "advisory interpretation." An advisory interpretation is a
19 statement of an agency's opinion, and does not include a statement that purports to bind or
20 compel. For example, the State Department of Education could adopt an advisory interpretation
21 expressing its opinion that the term "education activities," as used in Education Code Section
22 46300(a), does not include time spent watching television commercials. However a statement
23 prohibiting the watching of television commercials in school would not be an advisory
24 interpretation. A binding rule of this type could only be adopted as a regulation under Article 5
25 (commencing with Section 11346).

26 **§ 11360.030. Effect of advisory interpretation**

27 11360.030. (a) Except as provided in subdivision (b), an advisory interpretation
28 has no legal effect and is entitled to no judicial deference. An advisory
29 interpretation cannot prescribe a penalty or course of conduct, confer a right,
30 privilege, authority, exemption, or immunity, impose an obligation, or in any way
31 bind or compel.

32 (b) In an enforcement action, an agency may not assert an interpretation of law
33 contradicting an advisory interpretation adopted by the agency to the extent that
34 the conduct complained of occurred while the advisory interpretation was in effect
35 under Section 11360.040.

36 **Comment.** Section 11360.030 provides that an advisory interpretation has no legal effect other
37 than to bind the agency that adopted the advisory interpretation. While an advisory interpretation
38 should not be accorded any deference by a court in interpreting a provision of law that is the
39 subject of the advisory interpretation, this does not preclude a court from independently reaching
40 the same interpretive conclusion. Nor is the adopting agency precluded from advancing the same
41 interpretation in an adjudication, on its own merits.

42 **§ 11360.040. Effective dates of advisory interpretation**

43 11360.040. (a) The adoption, amendment, or repeal of an advisory interpretation
44 is effective on publication of a notice of completed adoption, amendment, or
45 repeal in the California Regulatory Notice Register.

1 (b) An advisory interpretation remains in effect until one of the following
2 occurs:

3 (1) The advisory interpretation is repealed.

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

6 (3) The advisory interpretation is disapproved by the office and notice of the
7 disapproval is published in the California Regulatory Notice Register.

8 **Comment.** Section 11360.040 governs the effectiveness of an advisory interpretation. See also
9 Sections 11360.080(b)(2) (publication of notice of completed adoption, amendment, or repeal),
10 11360.090(c) (publication of notice of disapproval by Office of Administrative Law). An
11 effective advisory interpretation binds the adopting agency in an enforcement action. See Section
12 11360.030(b). See also Section 11342(b) (“office” means Office of Administrative Law).

13 **§ 11360.050. Adoption, amendment, or repeal of advisory interpretation**

14 11360.050. An agency may adopt, amend, or repeal an advisory interpretation,
15 by completing all of the following procedures:

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

19 “This is an advisory interpretation adopted pursuant to Government Code
20 Sections 11360.010-11360.100. It has no legal effect, other than to bind the
21 adopting agency. Review by the Office of Administrative Law is available on
22 request under Government Code Section 11360.090.”

23 (b) Provide public notice of the proposed action, as provided in Section
24 11360.060.

25 (c) Accept written public comment for at least 45 calendar days after providing
26 the notice required in subdivision (b).

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

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

33 “This is an advisory interpretation adopted pursuant to Government Code
34 Sections 11360.010-11360.100. It has no legal effect, other than to bind the
35 adopting agency. Review by the Office of Administrative Law is available on
36 request under Government Code Section 11360.090.”

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

39 **Comment.** Section 11360.050 specifies the procedures that must be followed in adopting,
40 amending, or repealing an advisory interpretation. See also Section 11342(b) (“office” means
41 Office of Administrative Law).

1 **§ 11360.060. Notice**

2 11360.060. (a) The agency shall mail notice of the proposed action to the office
3 and to any person who has requested notice of agency regulatory actions. If the
4 agency is within a state department, the agency shall also mail or deliver notice to
5 the director of the department.

6 (b) Notice of the proposed action shall include both of the following:

7 (1) A clear overview explaining the purpose of the proposed action.

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

11 **Comment.** Section 11360.060 specifies the content and delivery requirements of the notice
12 required under Section 11360.050(b). See also Section 11342(b) (“office” means Office of
13 Administrative Law).

14 **§ 11360.070. Limitation on final text of proposed action**

15 11360.070. An agency may not adopt the final text of a proposed action unless
16 the final text is sufficiently related to the preliminary text provided to the public
17 pursuant to subdivision (a) of Section 11360.050 that the public could reasonably
18 have anticipated adoption of the final text.

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

22 **§ 11360.080. Publication and filing**

23 11360.080. (a) On receiving a notice pursuant to Section 11360.060, the office
24 shall publish the contents of the notice in the California Regulatory Notice
25 Register.

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

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

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

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

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

36 **§ 11360.090. Review by Office of Administrative Law**

37 11360.090. (a) Any interested person may request in writing that the office
38 review an advisory interpretation.

39 (b) Within 15 days of receipt of a written request pursuant to subdivision (a), the
40 office shall either deny the request, approve the advisory interpretation, or
41 disapprove the advisory interpretation.

1 (c) On reaching a decision pursuant to subdivision (b), the office shall do all of
2 the following:

3 (1) Mail notice explaining its decision to the person who made the request and to
4 the agency that adopted the advisory interpretation.

5 (2) If the office approves or disapproves the advisory interpretation, it shall
6 publish a notice explaining its decision in the California Regulatory Notice
7 Register.

8 (3) If the office disapproves an advisory interpretation, the office shall file its
9 decision with the Secretary of State and remove the disapproved advisory
10 interpretation from the California Code of Regulations.

11 (d) In reviewing an advisory interpretation, the office shall approve the advisory
12 interpretation if it satisfies the requirements of this article and is consistent with
13 the provision of law it interprets. The office shall disapprove an advisory
14 interpretation if it does not satisfy the requirements of this article or is inconsistent
15 with the provision of law it interprets.

16 (e) For the purposes of this section, an advisory interpretation is consistent with
17 the provision of law it interprets if it is any one of several reasonable
18 interpretations of the provision of law.

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

21 **Comment.** Section 11360.090 provides for post-adoption review of an advisory interpretation
22 by the Office of Administrative Law (OAL). Disapproval of an advisory interpretation is effective
23 on publication of the notice of disapproval in the California Regulatory Notice Register. See
24 Section 11360.040(b)(3).

25 Disapproval of an advisory interpretation does not preclude expression of the agency's
26 interpretation by other means. For example, an agency may express its interpretation of law in a
27 duly-adopted regulation, in an individual advice letter, or in case-specific adjudication. Note,
28 however, that an agency's interpretation expressed in an adjudication may not be expressly relied
29 on as a precedent unless it has been designated a precedent decision by the agency. See Section
30 11425.60 (designation of precedent decisions).

31 A decision under this section is subject to judicial review. See Section 11360.100 & Comment.
32 See also Section 11342(b) ("office" means Office of Administrative Law).

33 **§ 11360.100. Judicial review**

34 11360.100. (a) Any interested person may obtain a judicial declaration as to the
35 validity or invalidity of an advisory interpretation that the office has reviewed or
36 declined to review under Section 11360.090, by bringing an action for declaratory
37 relief in the superior court in accordance with the Code of Civil Procedure.

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

41 **Comment.** Section 11360.100 is drawn from Section 11350.3 (declaratory review of a
42 regulation disapproved by the Office of Administrative Law). Review under this section is not the
43 exclusive means by which a court may review an advisory interpretation. For example, where the
44 validity of an advisory interpretation arises in an agency adjudication, the advisory interpretation
45 may be subject to review by administrative mandamus. See Code Civ. Proc. § 1094.5. See also
46 Section 11342(b) ("office" means Office of Administrative Law).

Conforming Revisions

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

2 SEC. _____. Section 11340.6 of the Government Code is amended to read:

3 11340.6. Except where the right to petition for adoption of a regulation or
4 advisory interpretation is restricted by statute to a designated group or where the
5 form of procedure for such a petition is otherwise prescribed by statute, any
6 interested person may petition a state agency requesting the adoption, amendment,
7 or repeal of a regulation as provided in Article 5 (commencing with Section
8 11346) or of an advisory interpretation as provided in Article 10 (commencing
9 with Section 11360.010). This petition shall state the following clearly and
10 concisely:

11 (a) The substance or nature of the regulation, advisory interpretation,
12 amendment, or repeal requested.

13 (b) The reason for the request.

14 (c) Reference to the authority of the state agency to take the action requested.

15 **Comment.** Section 11340.6 is amended to permit a petition to an agency to adopt, amend, or
16 repeal an advisory interpretation. See Article 10 (commencing with Section 11360.010).

17 **Gov't Code § 11340.7 (amended). Agency response to petition for adoption, amendment, or**
18 **repeal**

19 SEC. _____. Section 11340.7 of the Government Code is amended to read:

20 11340.7. (a) Upon receipt of a petition requesting the adoption, amendment, or
21 repeal of a regulation pursuant to Article 5 (commencing with Section 11346) or
22 of an advisory interpretation pursuant to Article 10 (commencing with Section
23 11360.010), a state agency shall notify the petitioner in writing of the receipt and
24 shall within 30 days deny the petition indicating why the agency has reached its
25 decision on the merits of the petition in writing or schedule the matter for public
26 hearing comment in accordance with the applicable notice and hearing
27 requirements ~~of that article~~.

28 (b) A state agency may grant or deny the petition in part, and may grant any
29 other relief or take any other action as it may determine to be warranted by the
30 petition and shall notify the petitioner in writing of this action.

31 (c) Any interested person may request a reconsideration of any part or all of a
32 decision of any agency on any petition submitted. The request shall be submitted
33 in accordance with Section 11340.6 and include the reason or reasons why an
34 agency should reconsider its previous decision no later than 60 days after the date
35 of the decision involved. The agency's reconsideration of any matter relating to a
36 petition shall be subject to subdivision (a).

37 (d) Any decision of a state agency denying in whole or in part or granting in
38 whole or in part a petition requesting the adoption, amendment, or repeal of a
39 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 to adopt, amend, or
10 repeal an advisory interpretation. See Article 10 (commencing with Section 11360.010).

11