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The Advisability of Agency Advisory Opinions

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THE ADVISABILITY OF AGENCY ADVISORY OPINIONS

I. What are Advisory Opinions (i.e., what is the scope of this paper)?

An administrative agency, of course, has only those powers that are expressly conferred upon it by the Legislature, together with implied powers "that are reasonably necessary to carry out the express responsibilities given to it by the Legislature." *Pub. Util. Comm'n. v. City Pub. Srv. Bd.,* 53 S.W.3d 310, 315 (Tex. 2001). While courts have no authority or jurisdiction to issue advisory opinions whatsoever, the Legislature may grant state agencies the authority to do just that. This paper focuses on examples of when the Legislature has expressly done so, and the reference to "Advisory Opinions" is to an agency opinion issued pursuant to that authority (there are examples at the end of the paper). A discussion of other instances where agencies issue informal advice is helpful to distinguish statutorily-authorized Advisory Opinions from those less formal agency statements.

In *Fin. Comm'n. of Tex. v. Norwood,* 418 S.W.3d 566 (Tex. 2013), the Court addressed the separation of powers doctrine as it related to the delegation of authority to administrative agencies. At issue in *Norwood* was a Constitutional provision governing home equity loans (Article XVI, § 50). After § 50 took effect, four state regulatory agencies with authority over lenders issued a document intending to provide guidance to lenders and consumers. In response, the Attorney General opined that "the Legislature has no authority to interpret or declare a matter of constitutional construction, nor may it delegate such authority to an administrative agency." TEX. ATT'Y GEN. OP. No. DM-495 (1998). To solve this problem, the Legislature proposed, and the citizens adopted, a constitutional amendment to § 50, which expressly authorized the Legislature to delegate to one or more state agencies the power to interpret that section. The Legislature delegated this interpretative authority to the Finance Commission and the Credit Union Commission, subject to the Texas Administrative Procedures Act ("APA"). After public comment and hearing, these Commissions issued final interpretations of § 50.

A group of homeowners then brought a lawsuit seeking declaratory relief under the APA and the UDJA, seeking to invalidate several of the interpretations. What is interesting about this case, for purposes of this paper, is not the holding on the merits, but the Court's conclusion that the Commissions' interpretations were subject to judicial review. *Norwood*, 418 S.W.3d at 579. Though not expressly stated in either the statute or the Constitution, the Court recognized that "every implication of § 50(u) is that judicial review is not foreclosed."

That type of legislative delegation of interpretative authority regarding a Constitutional provision, however, is an anomaly. Most interpretive opinions are less formal (i.e., not expressly authorized by statute, though part of an agency's implied powers), not binding, and not reviewable. The type of reviewable interpretative opinion in *Norwood* is not the subject of this paper. Neither, at the other end of the spectrum, are informal statements by an administrative agency contained in letters, guidelines, reports, or court briefs, that contain statements regarding the implementation or interpretation of law, policy, or internal procedures or practices. *See, Brinkley v. Tex. Lottery Comm'n*, 986 S.W.2d 764 (Tex. App.—Austin 1999, no pet.); *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 443 (Tex. 1994) ("Not every statement by an administrative agency is a rule … and the [APA] defines 'rule' in a way that will exclude a considerable range of unofficial, individually directed, tentative or other non-proscriptive agency or staff issuances concerning law or policy"). The APA specifically excludes from the definition of a "rule," "a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures." TEX. GOV'T CODE § 2001.003(6).

Also not the subject of this paper are informal agency interpretations that go too far and ultimately amount to a new rule or an amendment of an existing rule. *See, e.g., Teladoc, Inc. v. Tex. Med. Bd.,* 453 S.W.3d 606 (Tex. App.—Austin 2014, pet. denied) (agency's pronouncement in a letter to an industry association went beyond merely restating an existing rule and was therefore an improper rule adopted without the notice and comment requirements of the APA).

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