order, ruling, approval, interpretation, enforcement policy or practice, the employer must also prove that he actually relied upon it. 101

(b) Assume, for example, that an employer failed to pay his employees in accordance with the overtime provisions of the Fair Labor Standards Act. After an employee suit has been brought against him, another employer calls his attention to a letter that had been written by the Administrator of the Wage and Hour Division, in which the opinion was expressed that employees of the type employed by the defendant were exempt from the overtime provisions of the Fair Labor Standards Act. The defendant had no previous knowledge of this letter. In the pending employee suit, the court may decide that the opinion of the Administrator was erroneous and that the plaintiffs should have been paid in accordance with the overtime provisions of the Fair Labor Standards Act. Since the employer had no knowledge of the administrator’s interpretation at the time of his violations, his failure to comply with the overtime provisions could not have been “in reliance on” that interpretation; consequently, he has no defense under section 9 or section 10 of the Portal Act.

§ 790.17 “Administrative regulation, order, ruling, approval, or interpretation.”

(a) Administrative regulations, orders, rulings, approvals, and interpretations are all grouped together in sections 9 and 10, with no distinction being made in regard to their function under the “good faith” defense. Accordingly, no useful purpose would be served by an attempt to precisely define and distinguish each term from the others, especially since some of these terms are often employed interchangeably as having the same meaning.

(b) The terms “regulation” and “order” are variously used to connote the great variety of authoritative rules issued pursuant to statute by an administrative agency, which have the binding effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 102

(c) The term “interpretation” has been used to describe a statement “ordinarily of an advisory character, indicating merely the agency’s present belief concerning the meaning of applicable statutory language.” 103 This would include bulletins, releases, and other statements issued by an agency which indicate its interpretation of the provisions of a statute.

(d) The term “ruling” commonly refers to an interpretation made by an agency “as a consequence of individual requests for rulings upon particular questions.” 104 Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries fall within this description.

(e) The term “approval” includes the granting of licenses, permits, certificates or other forms of permission by an agency, pursuant to statutory authority. 105

(f) The terms “administrative regulation, order, ruling, approval, or interpretation” connote affirmative action on the part of an agency. 106 A failure

101 In a colloquy between Senators Thye and Cooper (93 Cong. Rec. 4681), Senator Cooper pointed out that the purpose of section 9 was to provide a defense for an employer who pleads and proves, among other things, that his failure to bring himself under the Act “grew out of reliance upon” the ruling of an agency. See also statement of Representative Keating, 93 Cong. Rec. 1512; colloquy between Representatives Keating and Devitt, 93 Cong. Rec. 1515; cf. colloquy between Senators Donnell and Ball, 93 Cong. Rec. 4272.


105 See see section 2(e) of the Administrative Procedure Act, 5 U.S.C.A. sec. 1001.

106 See Final Report of Attorney General’s Committee, p. 27; 1 Vom Baur, Federal Administrative Law, pp. 486, 492; Conference
to act or a failure to reply to an inquiry on the part of an administrative agency is not a "regulation, order, ruling, approval, or interpretation" within the meaning of sections 9 and 10.107 Thus, suppose that an employer writes a letter to the Administrator of the Wage and Hour Division, setting forth the facts concerning his business. He goes on to state in his letter that he believes his employees are not covered by the Fair Labor Standards Act, and that unless he hears to the contrary from the Administrator, he will not pay them in accordance with its provisions. When the employer does not receive a reply to his letter within what he regards as a reasonable time, he assumes that the Administrator agrees with his (the employer's) interpretation of the Act and he acts accordingly. The employer's reliance under such circumstances is not a reliance upon an administrative regulation, order, ruling, approval, or interpretation, within the meaning of sections 9 and 10.

(g) The affirmative action taken by the agency must be one which actually results in a "regulation, order, ruling, approval, or interpretation." If for example, the agency declines to express an opinion as to the application of the law in a particular fact situation, the agency is refraining from interpreting the law rather than giving an interpretation.108

(b) An employer does not have a defense under these two sections unless the regulation, order, ruling, approval, or interpretation, upon which he relies, is in effect and operation at the time of his reliance. To the extent that it has been rescinded, modified, or deter-

\( \text{Report, p. 16; statements of Representative Walter, 93 Cong. Rec. 4389; statements} \)
\( \text{of Representative Gwynne, 93 Cong. Rec. 1491; statements of Senator Donnell, 93 Cong.} \)
\( \text{Rec. 5281.} \)

\(^{107}\)That this is true on and after the effective date of the Act is clear from the requirement in section 10 that the regulation, order, ruling, approval or interpretation relied on must be that of the Administrator in writing. As to section 9, the terms appear to have no different meaning.


\(^{109}\)See House Report, p. 7, and statements of Representative Gwynne, 93 Cong. Rec. 1491, 1492, 1563. It will be noted that the provisions of section 12 of the Act, affording relief of employers who acted in conformity with the invalidated "area of production" regulations, would have been unnecessary if reliance could be placed on a regulation no longer in effect. See statement of Representative Gwynne, 93 Cong. Rec. 4388, and cf. remarks of Senator McCarran, discussing the bill before section 12 was added by the conference committee, 93 Cong. Rec. 2247.
§ 790.18 “Administrative practice or enforcement policy.”

(a) The terms “administrative practice or enforcement policy” refer to courses of conduct or policies which an agency has determined to follow in the administration and enforcement of a statute, either generally, or with respect to specific classes of situations. Administrative practices and enforcement policies may be set forth in statements addressed by the agency to the public. Although they may be, and frequently are, based upon decisions or views which the agency has set forth in its regulations, orders, rulings, approvals, or interpretations, nevertheless administrative practices and enforcement policies differ from these forms of agency action in that such practices or policies are not limited to matters concerned with the meaning or legal effect of the statutes administered by the agency and may be based wholly or in part on other considerations.

(b) To illustrate this distinction, suppose the Administrator of the Wage and Hour Division issues a general statement indicating that in his opinion a certain class of employees come within a specified exemption from provisions of the Fair Labor Standards Act in any workweek when they do not engage in a substantial amount of nonexempt work. Such a statement is an “interpretation” within the meaning of sections 9 and 10.


As to requirement that practice or policy be one with respect to a “class of employees,” see paragraph (g) of this section.

§ 790.18

letter; not learning of the Administrator’s subsequent published statement rescinding his contrary interpretations, continued to rely upon the Administrator’s letter after the effective date of the published statement. Under these circumstances, the employer would, from the date he received the Administrator’s letter to the effective date of the published statement rescinding the position expressed in the letter, have a defense under section 9 or 10, assuming he relied upon and conformed with that letter in good faith. However, in spite of the fact that this employer did not receive actual notice of the subsequent published statement, he has no defense for his reliance upon the letter during the period after the effective date of the public statement, because the letter, having been rescinded, was no longer an “administrative * * * ruling * * * or interpretation” within the meaning of sections 9 and 10.


As to requirement that practice or policy be one with respect to a “class of employees,” see paragraph (g) of this section.

Pursuant to section 3 of the Administrative Procedure Act, statements of general policy formulated and adopted by the agency for the guidance of the public are published in the Federal Register. An example is the statement of the Secretary of Labor and the Administrator of the Wage and Hour Division, dated June 16, 1947, published in 12 FR 3915.