

Memorandum

To: Mr. Steven Kamp, Legal Counsel
Second District

Date: March 7, 1995

From: E. L. Sorensen, Jr.
Chief Counsel

Subject: **Contribution Disclosure Opinion 95-3**

A request by a Board Member that the Income and Franchise Tax Appeals Section establish a standing procedure of marking certain cases on the non-adjudicatory consent calendar would not constitute a contact for purposes of section 15626(h)(5).

This is in response to your memorandum of February 23, 1995, in which you requested our opinion regarding the following:

whether otherwise non-adjudicatory franchise and personal income tax consent calendar items would become adjudicatory matters subject to Government Code section 15626 (the "Kopp Act") if, at the request of a Board Member, Assistant Chief Counsel Robert Brenner were to identify the items in the listing of consent cases which, in his opinion: (1) may set a precedent or which addresses legal issues which there is no existing BOE precedent ("*"); or (2) on the merits, present a close question ("check mark").

You note in your memorandum that the "purpose of this request is to facilitate the work of [your] office by assigning review of particular non-adjudicatory matters selected by [Mr.] Brenner's staff to [the] highest level staff members.... Under this procedure [board staff] would not communicate with [Mr.] Brenner's staff regarding any case, and, accordingly, would not be influencing them with regard to the case in any way."

Government Code section 15626(h)(5), in part, provides that a consent calendar matter is not an adjudicatory matter pending before the board unless the "item is one about which the member has previously contacted the staff or a party." As discussed below, we are of the opinion that, as long as the above requested information is supplied by the Income and Franchise Tax Appeals Section as a standard procedure when creating the non-adjudicatory consent calendar, this would not constitute a contact as specified by section 15626(h)(5).

Regulation 7003(2), in part, states that the term "contacted the board staff or a party" does not include procedural inquiries. Regulation 7003(3) states:

The term "contacted the board staff or a party" means and includes any substantive inquiries from a Board Member and/or his or her staff to the board staff. Substantive inquiries include inquiries which are not procedural inquiries and which request information or discussion of legal issues, staff positions, staff or taxpayer theories or other substantive issues concerning a matter on a non-appearance agenda.

We agree that a standing request that Mr. Brenner's staff highlight particular cases, as set forth above, does not constitute the type of contact contemplated by either section 15626(h)(5) or regulation 7003(3). We are of the opinion that this information, if provided as a standard practice rather than in response to a specific inquiry by a Board Member, is similar to the procedural inquiries allowed by regulation 7003(2).

We note also that Income and Franchise Tax Appeals Section already provides information regarding which cases "may set a precedent or which addresses [important] legal issues for which there is no existing BOE precedent." As Mr. Donald Buxton has explained, those are the cases for which proposed formal opinions have been written. Therefore, establishment of this procedure would only require a notation when a proposed summary decision presents a close question on the merits.

If you have any further questions, please contact Ani Kindall of my staff at 324-2195.



ELS:AAK
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cc: Mr. Burton W. Oliver
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