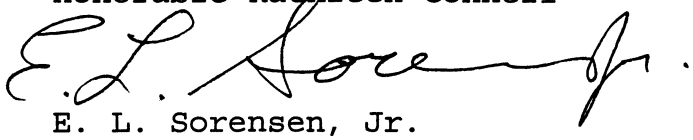
State of California

Board of Equalization
Legal Division

Memorandum

To: Honorable Johan Klehs
Honorable Ernest J. Dronenburg, Jr.
Honorable Dean F. Andal
Honorable Brad Sherman
Honorable Kathleen Connell

Date: March 31, 1995



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

Subject: **Contribution Disclosure Opinion 95-5**
Discussion of "contacted the staff or a party", participation, attempting to influence, the 30 day period for returning a contribution, and the Income and Franchise Tax Appeals calendar.

Questions Presented:

Chairman Klehs' staff has asked for legal opinions regarding the following questions about Government Code section 15626 (the Kopp Act):

1) When must contact by a board member or board member's staff cease in order to avoid making a consent matter adjudicatory?

2-a) What does the term "contacted the staff or a party" in subdivision (h) (5) of section 15626 mean?

2-b) Why has "or a party" been omitted from the end of the first sentence of Title 18, California Code of Regulations, section 7003, subdivision (b)(3)?

3) What constitutes participation or attempting to influence? And specifically:

a) When would a member's discussion of a matter constitute participation?

b) Is a request by a member for more information to help make a decision whether to return a contribution considered participation or attempting to influence?

c) Does looking at a file constitute participation by a member?

4) When does the 30 day period for returning contributions begin to run?

5-a) What items are on the non-appearance, non-adjudicatory Income and Franchise Tax Appeals calendar, and what items are on the adjudicatory calendar?

5-b) Does the fact that a taxpayer waives hearing make a Income or Franchise Tax appeal non-adjudicatory?

Conclusions:

1) In order to avoid making a consent matter adjudicatory, contact by a board member or a member's staff must cease when an Appeal, a Petition for Redetermination, a Petition for Reassessment, or a Claim for Refund for the matter is filed.

2-a) As discussed in the analysis below, subdivision (b) of regulation 7003 defines the term "contacted the staff or a party."

2-b) The term "or a party" was inadvertently omitted from the end of the first sentence of subdivision (b) (3) of regulation 7003.

3) Subdivision (b) of regulation 7008 defines participation. Title 2 California Code of Regulations, section 18700.1 provides guidance regarding what constitutes attempting to influence. The answers to the specific questions regarding participation and attempting to influence are discussed in the analysis below.

4) The 30 day period for returning a contribution begins to run when the board member knows or has reason to know about both the contribution and the adjudicatory proceeding pending before the board.

5-a) An Income or Franchise Tax appeal, which is not scheduled for hearing, will appear on the non-appearance, non-adjudicatory calendar unless, for one of the reasons set forth in subdivision (h) (5) of section 15626, the appeal is no longer a consent matter, in which case, the appeal will appear on an adjudicatory calendar.

5-b) A Income or Franchise Tax appeal is non-adjudicatory if a taxpayer waives hearing before the Income and Franchise Tax Appeals calendar is printed.

Analysis of Question 1:

Subdivision (h) (5) of section 15626 provides:

> "Adjudicatory proceeding pending before the board" means a matter for adjudication that has been scheduled and appears as an item on a meeting notice of the board as required by Section 11125 as a contested matter for administrative hearing before the board members. A consent calendar matter is not included unless the matter has previously appeared on the calendar as a nonconsent item, or has been removed from the consent calendar for separate discussion and vote, or the item is one about which the member has previously contacted the staff or a party.

By way of background, all matters subject to the Kopp Act will appear as items on a non-adjudicatory, non-appearance "consent calendar" unless: 1) the taxpayer has asked for a hearing, 2) the matter has previously appeared as an item on a nonconsent calendar, or 3) a member or a member's staff has previously contacted the board staff or a party. Based on our prior advice, and regulation 7003(b), previous contact by a board member's staff of the board staff or a party is attributed to the board member. Therefore, for ease of reading, the words "or a member's staff" will not be repeated in the analysis below, but should be understood.
Also, in addition to the situation listed above, a consent matter will also become an adjudicatory matter if it is removed from a consent calendar for separate discussion and vote.

With regard to the first question, neither the Kopp Act, nor its regulations, address at what point in time a previous contact by a member will cause an item that would otherwise appear on a consent calendar to become an adjudicatory matter subject to the disclosure and disqualification requirements of the Kopp Act. Since the language in subdivision (h) (5) regarding previous contact by a board member is unique to the Kopp Act, we look to our past advice for guidance.

The issue of previous contact by a member was discussed in two prior Contribution Disclosure Opinions (CDO). In CDO 92-8, a taxpayer had a petition for reassessment scheduled as a consent matter. The petition was previously the subject of some settlement discussions. We stated that "[d]uring the course of the settlement discussions, it may be that a member contacted the staff or a party about the matter", and therefore, concluded that "there is a possibility a member

contacted the staff or a party, thus making the matter adjudicatory rather than a consent calendar matter."

In CDO 93-1, we opined that contact with the taxpayer would not cause the petition to become adjudicatory unless the discussion between the member and the taxpayer involved the same audit period as the petition before the board. The conclusion of this opinion was that contact by a member of a party regarding a particular petition caused only the petition that was discussed to become an adjudicatory matter.

Based on subdivision (h) (5) of section 15626, in order to prevent a consent matter from becoming an adjudicatory matter, contact by the member must cease when the discussion involves a particular "item" which may come before the Board for decision. As illustrated by the two opinions discussed above, a petition filed with the board involves such an item, and will be considered an adjudicatory matter if there has been previous contact by the member. Although not specifically discussed in a prior contribution disclosure opinion, the same is true of an appeal or a claim for refund since these, once filed, would also be items which may come before the board for decision. Therefore, we are of the opinion that a discussion is about a particular "item" if contact by the member occurs after the filing of an Appeal, a Petition for Redetermination, a Petition for Reassessment, or a Claim for Refund regarding the matter which was discussed.

The filing date of the appeal, petition, or claim establishes a date certain by which contact must cease in order to prevent a consent item from becoming an adjudicatory matter. Contribution disclosure and, if necessary, disqualification, is required only if the member has had a substantive discussion about the appeal, petition or claim, with a party or board staff, after the filing of that particular appeal, petition, or claim. Subdivision (b) (3) of regulation 7003, discussed in the analysis of Question 2a below, provides examples of a substantive inquiry or discussion.

We note that, although a matter becomes adjudicatory if contact occurs after the filing date of the appeal, petition, or claim, it is still not "pending before the board." In CDO 94-10, we said that "a matter that has not been scheduled or has not appeared as an agenda item is not an adjudicatory proceeding pending before the board. If a matter is not an adjudicatory proceeding pending before the board, the prohibitions [of the Kopp Act] do not apply." This is discussed further in Questions 3 & 4 below.

Analysis of Question 2a:

The term "contacted the board staff or a party" in subdivision (h) (5) of section 15626 is defined in subdivision (b) of regulation 7003. Regulation 7003, subdivision (b) (3) provides:

> 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.

Subdivision (b) (2) provides that the term "contacted the board staff or a party" does not include "procedural inquires" which include, but are not limited to, inquiries concerning:

> (A) when a case will be scheduled for Board consideration or decision;
>
> (B) status of a particular case;
>
> (C) whether the requirements of Government Code Section 15626 have been met.

Analysis of Question 2b:

Originally the first sentence of subdivision (b) (3) of regulation 7003 was drafted to read: "The term 'contacted the board staff' means and includes any substantive inquiries from a board member and/or his or her staff." The intent of the subdivision was primarily to clarify that a contact by a member's staff, as well as the member, constituted a contact for purposes of section 15626. In the course of implementing various suggestions regarding the drafting of the regulation, the words "or a party" were added after "contact the board staff" in the first line, but not after "to the board staff" in the second line. We are of the opinion that this was an inadvertent omission. We have continued to advise that any substantive contact by a member, or a member's staff, of either the board staff, or a party, will cause a consent matter to become an adjudicatory matter.

The omission of the words "or a party" will be corrected the next time it is otherwise necessary to make additions or amendments to the contribution disclosure regulations.

Analysis of Question 3:

Subdivision (c) of section 15626 provides that a board member may not participate in making, or in any way attempt to use his or her official position to influence, an adjudicatory proceeding pending before the board, if the member has received a disqualifying contribution. We note that, in the Kopp Act, the question of what constitutes participation or attempting to influence is only relevant in terms of an adjudicatory proceeding pending before the board.

Subdivision (b) of regulation 7008, which defines participation, states:

> A board member will be considered to have participated under Government Code section 15626 in a matter if he or she, acting within the authority of his or her office:
>
> (1) Votes on a matter.
>
> (2) Takes part in the discussion regarding the matter.
>
> (3) Urges other board members to reach a particular result in the matter.
>
> (4) Is present and determines not to act when a vote is called without disclosure of the reasons for the disqualifications.

Thus, when an adjudicatory proceeding is pending before the board, a member with a disqualifying contribution may not take part in the discussion or urge other members to reach a particular decision. We are of the opinion that asking for additional information would constitute discussion and is therefore prohibited. However, the regulation does not appear to limit the ability of a member to independently review the file. Also, since the matter is not an adjudicatory proceeding pending before the board, a discussion between a member and the board staff or a party prior to the time when the adjudicatory proceeding is scheduled and noticed would not constitute participation.

The board has not adopted a regulation defining attempting to influence. The language used in subdivision (c) of section 15626, "[n]o member shall ...in any way attempt to use his or her official position to influence ... the decision", is the same language used in Government Code section 87100. Title 2, California Code of Regulations, section 18700.1, was adopted by the Fair Political Practices Commission ("FPPC") to interpret

this part of section 87100. Although not controlling, the board often uses the regulations adopted by the FPPC for guidance in interpreting the Kopp Act. In pertinent part, section 18700.1 states:

> With regard to a governmental decision which is within or before an official's agency ... the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency.

This regulation provides a subjective standard, since it requires that the contact be "for the purpose of influencing the decision." However, from a practical standpoint, we are of the opinion that a member should not substantively discuss the matter with other members or the board staff if he or she is disqualified from participation in a matter pending for the board.

Analysis of Question 4

Subdivision (d) of section 15626, in pertinent part, states:

> if a member receives a contribution which would otherwise require disqualification under subdivision (c), and he or she returns the contribution within 30 days from the time he or she knows, or has reason to know, about the contribution <u>and</u> the adjudicatory proceeding pending before the board, his or her participation in the proceeding shall be deemed lawful. (Emphasis added.)

(See also, subdivision (a) of regulation 7010 which restates this provision of the Kopp Act.)

Subdivisions (a) (2) and (a) (3) of regulation 7008 provide:

> (2) A board member knows, or should have known, about an adjudicatory proceeding pending before the board if either:
>
> > (A) The member has received notice of the pending adjudicatory proceeding. Notice includes receipt of an agenda or other

written document from the staff identifying the proceeding and the party by name; or

(B) The board member has actual knowledge of the proceeding."

(3) A board member knows, or has reason to know about a contribution if:

(A) The contribution has been disclosed by the party or participant or agent pursuant to Section 15626; or

(B) The board member has actual knowledge of the contribution.

"Pursuant to subdivision (h) (5) of section 15626, a matter is an 'adjudicatory proceeding pending before the board' when it has been 'scheduled and appears as an item on a meeting notice of the board as required by Section 11125 [of the Bagley-Keene Open Meeting Act] as a contested matter for administrative hearing before the board.' Thus, with regard to knowledge of the adjudicatory proceeding, the time does not begin to run until after the matter is noticed 'at least 10 days in advance of the [board] meeting.' (Gov. Code § 11125, subd. (a).)" (CDO 95-4.)

"We have advised that the member must know about <u>both</u> the contribution and the pending adjudicatory proceeding before the 30-day period for returning a contribution begins to run. Therefore, the 30-day period begins to run only after the later of these two events. (See also, CDO 94-4 and 94-13.)" (CDO 95-4.)

Analysis of Question 5:

The items on the non-appearance, non-adjudicatory Income and Franchise Tax Appeals calendar are those items which are not scheduled for hearing, and which continue to be consent items for purposes of the Kopp Act. The items on the adjudicatory Income and Franchise Tax Appeals calendar are those which are not scheduled for hearing, but which are no longer consent items for purposes of the Kopp Act. A matter is no longer a consent item if: "the matter has previously appeared on the calendar as a nonconsent item, or has been removed from the consent calendar for separate discussion and vote, or the item is one about which the member has previously contacted the staff or a party." (Section 15626, subdivision (h) (5).)

In practice, if a taxpayer waives hearing before the Income and Franchise Tax Appeals calendar is printed, the matter will be placed on the non-appearance, non-adjudicatory calendar. This usually happens approximately 2 1/2 weeks before the board meeting. If the taxpayer waives hearing after the calendar is printed, the matter is considered adjudicatory.

If you have any further questions regarding these matters, please contact Staff Counsel Ani Kindall at 324-2195.

ELS:AAK

cc: Mr. Burton W. Oliver
Contribution Disclosure Binder Distribution List