

Memorandum

To: Honorable Betty T. Yee, Chairwoman
Honorable Judy Chu, Ph.D., Vice Chairman
Honorable Bill Leonard
Honorable Michelle Steel
Honorable John Chung

Date: January 17, 2008

From: Kristine Cazadd
Chief Counsel 

Subject: **Item J - Chief Counsel Matters, January 30-31, February 1, 2008,
Board Meeting - Overview of the California Administrative Procedure Act's
Rulemaking Requirements**

Introduction

This memorandum is sent in response to the Board's request, made during the October 24, 2007, Board meeting, that the Legal Department provide it with a brief overview of the California Administrative Procedure Act's (APA) (Gov. Code, § 11340 et seq.) rulemaking requirements. Accordingly, this memorandum provides the requested background information on the APA, identifies the procedural requirements applicable to the promulgation of regulations, and highlights current Board policies and practices relevant to the promulgation of non-emergency regulations,¹ and specifically addresses Board staff's role in drafting and finalizing regulations. At this time, the Legal Department is not requesting that the Board take any action on any of the matters discussed in this memorandum, but is advising that Board staff will transmit any and all textual changes, including "nonsubstantial or solely grammatical" changes, to the Board Members.²

I. Background APA Information

The applicable portion of the APA is chapter 3.5, *Administrative Regulations and Rulemaking*, of part 1 of division 3 of title 2 of the Government Code, which contains the basic provisions governing the filing and publication of proposed regulatory actions. The purpose of chapter 3.5 is "to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations." (Gov. Code, § 11346, subd.

¹ The Board has not adopted any formal policies regarding the promulgation of other types of regulations.

² On November 28, 2007, Office of Administrative Law Reference Attorney, David Potter, reviewed the sections of this memorandum containing background information on the APA and the procedural requirements applicable to the promulgation of regulations and confirmed that the sections were accurate.

(a.) The procedures regarding public participation in rulemaking are detailed in article 5, *Public Participation: Procedure for Adoption of Regulations* (Gov. Code, §§ 11346-11348) of chapter 3.5. Article 5 provides for two types of rulemaking processes:

- The adoption, amendment, or repeal of emergency regulations (Gov. Code, § 11346.1);
- The adoption, amendment, or repeal of non-emergency regulations (Gov. Code, § 11346.2 et seq.).

California Code of Regulations, title 1, section 100 (Rule 100), which was promulgated by the Office of Administrative Law (OAL), also permits state agencies to “add to, revise or delete text published in the California Code of Regulations without complying with the rulemaking procedure specified in Article 5 of the APA only if the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.” These types of regulatory actions are often referred to as Rule 100 changes, nonsubstantive changes, or changes without regulatory effect.

II. APA Procedural Rulemaking Requirements

The APA sets forth the minimum required procedures agencies must follow to properly promulgate administrative regulations. The Board, of course, may employ additional procedures in the promulgation of its own regulations so long as they do not eliminate or abrogate the minimum requirements. For example, the Board can publish additional notices, conduct additional hearings, make additional determinations, etc., but it must at least publish the required notices and conduct the required hearings described in the APA.

A. General Rulemaking Requirements

General rulemaking steps. In order to promulgate a non-emergency regulation that cannot be promulgated as a Rule 100 change, the Board must:

- Prepare the proposed regulatory language, initial statement of reasons, notice of rulemaking, and fiscal impact statement (Gov. Code, §§ 11346.2, 11346.3, and 11346.5);
- Publish the notice of rulemaking in the California Regulatory Notice Register; mail the notice of rulemaking to each person who has requested notice at least 45 days prior to the close of the public comment period; post the proposed regulatory language, notice of rulemaking, and initial statement of reasons on the Board’s Web site; and make copies of the proposed regulatory language and initial statement of reasons available to the public upon request (Gov. Code, § 11346.4);
- Accept written comments during the 45-day comment period (Gov. Code, §§ 11346.4, subd. (a), and 11346.5, subd. (a)(15));

- Hold a public hearing on the proposed regulatory action if requested by an interested person at least 15 days before the close of the comment period (Gov. Code, §§ 11346.5, subd. (a)(17), and 11346.8, subd. (a));³
- Allow the public to orally comment on the proposed regulatory action at the public hearing, if required (Gov. Code, § 11346.8, subd. (a));
- Prepare the final rulemaking file, which must include a final statement of reasons summarizing and responding to all of the public comments received during the 45-day comment period and at the public hearing, and an updated informative digest (Gov. Code, §§ 11346.9 and 11347.3); and
- Transmit the final rulemaking file to OAL within one year after the date of the notice of rulemaking (Gov. Code, § 11346.4, subd., (b), and 11347.3, subd. (c)).

Authority to make nonsubstantial or solely grammatical changes to proposed text. During the rulemaking process, the Board may make nonsubstantial or solely grammatical changes to proposed regulatory text without issuing any additional notices, receiving additional public comments, or conducting additional public hearings. (Gov. Code, § 11346.8, subd. (c)(1).) California Code of Regulations, title 1, section 40 explains that “[c]hanges to the original text of a regulation shall be deemed to be ‘nonsubstantial,’ as that term is used in Government Code Section 11346.8, if they clarify without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text.” (Italics added.)

Authority to make “sufficiently related” regulatory changes to proposed text. The Board may also make changes to proposed regulatory text that are “sufficiently related to the original text that the public was adequately placed on notice that the change[s] could result from the originally proposed regulatory action.” (Gov. Code, § 11346.8, subd. (c)(2).) “Changes to the original text of a regulation shall be deemed to be ‘sufficiently related,’ as that term is used in Government Code Section 11346.8, if a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted.” (Cal. Code Regs., tit. 1, § 42.) However, Government Code section 11346.8, subdivision (c)(2) requires the Board to specifically adopt “sufficiently related” changes, make the full text of the proposed regulation - with the “sufficiently related” changes clearly indicated - available to the public for an additional 15-day comment period, and address any comments that are received during the comment period in the final statement of reasons. Board staff often refers to this process as sending a regulation to the “15-day file.”⁴

³ “Under the APA, an agency has an option as to whether it wishes to hold a public hearing on a proposed rulemaking action. (An agency’s enabling statutes may eliminate this option by requiring a public hearing.) However, if an agency doesn’t schedule a public hearing, and any interested person submits a written request for one within 15 days prior to the close of the written comment period, the agency must give notice of, and hold a public hearing. Because of this requirement, a rulemaking agency usually schedules a public hearing unless it is confident that one will not be requested.” (OAL, *How to Participate in the Rulemaking Process* (April 25, 2006), p. 9, available at: <http://www.oal.ca.gov/pdfs/HowToParticipate.pdf>.)

⁴ Note: The Legal Department’s March 1, 2007, memorandum regarding the March 20, 2007, public hearing on proposed amendments to California Code of Regulations, title 18, section 1603, *Taxable Sales of Food Products*, recommended that the Board make “sufficiently related” changes to the original proposed text of the amendments and refer the changes to the 15-day file for public comment. The memorandum referred to the

Requirement to hold an additional public hearing for “sufficiently related” changes. The APA does not expressly require an agency to hold an additional public hearing to hear oral comments regarding “sufficiently related” changes. However, the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.) does require the Board to provide the public with notice and an opportunity to speak regarding any matter the Board will discuss or decide at a Board meeting. Since the Board must decide whether to adopt “sufficiently related” changes during a Board meeting, public notice is provided and the public is given an opportunity to speak. (Gov. Code, § 11125.7, subd. (a).)

Requirement that the Board consider all relevant matter before adopting, amending, or repealing a regulation. Government Code section 11346.8, subdivision (a) requires the Board to “consider all relevant matter presented to it before adopting, amending, or repealing any regulation.” If the Board adopts changes requiring a 15-day notice and then receives public comments, it is OAL’s informal position that, due to such public comments and their potential relevance to the proposed regulatory action, Government Code section 11346.8, subdivisions (a) and (c)(2) require the Board to expressly re-adopt such changes.⁵

Requirement to restart the rulemaking process. If the Board determines that proposed regulatory text requires changes that are (1) more than nonsubstantial or solely grammatical and (2) not sufficiently related to the originally proposed text of the regulation, then the Board must begin the rulemaking process over again. (Gov. Code, § 11346.8, subd. (c).) The Board cannot make changes that are not sufficiently related, nonsubstantial, or solely grammatical.

B. Emergency Rulemaking Requirements

The emergency rulemaking process provided by Government Code section 11346.1 allows the Board to quickly promulgate regulations in order to avoid serious harm to the public peace, health, safety, or general welfare. Government Code section 11346.1, subdivision (a) requires the Board to take two actions to promulgate an emergency regulation. First, the Board must send notice of the proposed emergency rulemaking action to every person who has requested such notice at least five days before the Board submits the emergency rulemaking action to OAL, unless “the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest.” (Gov. Code, § 11346.1, subd. (a)(3).) Second, the Board must find that “the adoption of a regulation or order of repeal is necessary to address an emergency”⁶ and provide a written statement containing a “description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency.” (Gov. Code, § 11346.1, subd. (b).) Otherwise, the Legislature must enact legislation declaring the existence of such an emergency.

“sufficiently related” changes as being “nonsubstantive.” However, this reference was not intended to indicate that the changes were considered to be in the “nonsubstantial or solely grammatical” category.

⁵ The Legal Department is not aware of any published guidance regarding OAL’s position. The position was explained to the Legal Department in an October 17, 2007, conversation with OAL Reference Attorney Peggy Gibson and in a November 28, 2007, email from OAL Reference Attorney David Potter.

⁶ An emergency is “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” (Gov. Code, § 11342.545.)

Emergency regulations are promulgated by forwarding the following documents to OAL (Gov. Code, 11346.1, subd. (b), and 11346.5, subd. (a)(2)-(6)):

- The proposed regulatory language, along with a citation to the authority under which the regulation is proposed and a reference to the statutory provision(s) being implemented, interpreted, or made specific by the proposed regulatory language;
- The finding of emergency;
- The statement of facts demonstrating emergency;
- An informative digest explaining the proposed regulatory language;
- A determination as to whether the proposed regulatory language imposes a mandate on local agencies or school districts; and
- A fiscal impact estimate.

OAL will post a notice on its Web site when the emergency rulemaking package is received and provide the public with a 5-day comment period in which to submit comments to OAL. Then, OAL either will approve or reject the regulation. Rejections may be based upon any one of the following circumstances: the situation being addressed is not an emergency; the regulation does not satisfy the necessity, authority, clarity, consistency, reference, and non-duplication standards set forth in Government Code section 11349.1; or the Board did not comply with the requirements of Government Code section 11346.1. (Gov. Code, §§ 11349.1 and 11349.6.)

Approved emergency regulations are effective on the date they are initially filed with OAL (or a later date if specified in the regulation). Approved emergency regulations remain effective for 180 days, unless they are re-promulgated under the non-emergency rulemaking process prior to the expiration of the 180-day period. (Gov. Code, § 11346.1, subd. (e).) Also, OAL may approve two emergency re-adoptions of the same emergency regulation and each re-adoption may extend the emergency regulation's effective period for up to 90 days. (Gov. Code, § 11346.1, subd. (h).) Finally, emergency regulations are automatically deemed to be repealed when their effective periods expire. (Gov. Code, § 11346.1, subs. (f) and (g).)

C. Requirements for Rule 100 Changes

Rule 100 changes include renumbering, reordering, or relocating regulatory provisions; deleting regulatory language for which the constitutional and statutory authority has been repealed; deleting regulatory provisions held invalid by a California or federal court of competent jurisdiction; revising the structure, syntax, cross-referencing, grammar, or punctuation in the regulatory language; revising the authority or reference sections; and making regulatory language consistent with changes in a California statute (under certain circumstances). (Cal. Code Regs., tit 1, § 100, subd. (a).)

Procedurally, Rule 100 changes are made by:

- Submitting seven copies of the revised regulation to OAL showing the additions and deletions;
- Completing Form 400, Notice Publication/Regulations Submission, attaching the original Form 400 to one copy of the revised regulation, and attaching copies of the Form 400 to the other six copies of the revised regulation; and
- Submitting a written statement explaining why the Rule 100 change does not materially alter any requirement, right, responsibility, condition, prescription, or other regulatory element of any California Code of Regulations provision. (Cal. Code. Regs., tit. 1, § 100, subd. (b).)

If OAL agrees that the changes are without regulatory effect, OAL will send the Rule 100 changes to the Secretary of State for Publication.

III. Board Policies Regarding Staff's Role in Drafting and Finalizing Regulations

Pages 10-1 through 10-3 of the *Board Meeting Reference 2007*⁷ discuss the Board's rulemaking processes and set forth the following Board policies with regard to Board staff's role in the process:

- The Sales and Use Tax Department or the Property and Special Taxes Department, in conjunction with the Legal Department, identifies the potential need for the Board to adopt, amend, or repeal a regulation, and then presents the proposed regulatory changes to the Board Members;
- The Board Members will hear public comments regarding the proposed regulatory changes and decide whether or not to begin the APA rulemaking process by authorizing Board staff to publish a notice of rulemaking;
- The Board will always schedule public hearings to receive public comments at the end of 45-day comment periods and the Board Members will vote on whether to adopt the proposed regulatory actions at the conclusion of such public hearings;
- The Board Members must approve "sufficiently related" changes to proposed regulations before Board staff provides the revised text containing the changes

⁷ Available on the Board's Web site at: www.boe.ca.gov/meetings/pdf/BMeetingReferenceBook2007.pdf.

to the interested parties for the additional 15-day comment period required by Government Code section 11346.8, subdivision (c)(2); and

- Board staff must report the interested parties' comments that are received during the 15-day comment period and make a recommendation to the Board Members regarding the adoption of the "sufficiently related" changes at the first Board meeting following the close of the 15-day comment period.

The *Board Meeting Reference 2007* does not contain any procedures for Board staff to follow in making "nonsubstantial or solely grammatical changes" under Government Code section 11346.8, subdivision (c)(1) or adopting emergency regulations under Government Code section 11346.1. However, in order to carry out the Board's direction and complete the rulemaking process, there has been a longstanding practice for Board staff itself to make, certain minor and noncontroversial "nonsubstantial or solely grammatical changes" to the final text of any given regulation.

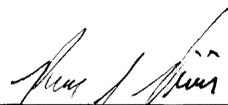
This practice appears to be authorized in part, by the Board's delegation of authority to the Executive Director via the Board resolution described on pages 1-2 and 1-3 of the *Board Meeting Reference 2007* and in section 0108 of the Board of Equalization Administrative Manual (BEAM)⁸, and in part by specific assignments of rulemaking responsibilities to designated Board staff, including the Chief Counsel⁹ and the Chief of Board Proceedings.¹⁰ The Executive Director expressly delegated his role in the rulemaking process by filing OAL Form 400, Delegation of Authority for Adoption of Regulations. (See Exhibit A, the most recent Form 400 executed by the Executive Director on November 6, 2007.) BEAM section 0330 assigns the responsibility to draft, review, and edit regulations to the Tax and Fee Programs Division, under the direction of the Chief Counsel. And BEAM section 0351 assigns the Board Proceedings Division with the management of the rulemaking activities, including coordinating with the Office of Administrative Law. Board staff insures however, that any changes made, including these "nonsubstantial or solely grammatical changes", will be highlighted and transmitted to the Members, and should the Members wish to discuss and approve the changes, staff will of course, present the changes for the Board's decision at the next available Board Meeting. This practice may be terminated or modified in the Board's discretion.

⁸ BEAM section 0108 explains that the Executive Director "shall have full authority to exercise, perform, and discharge any and all duties, powers, and functions vested in or imposed upon the Board by any provision of law or otherwise, unless (1) the duty, power, or function is one that can only be exercised, performed, or discharged by the Board in session expressly for that purpose, or (2) the Board expressly reserves the delegation of the duty, power, or function subject to the approval of the Board" and that such authority is "to be exercised under the general direction of the Board and in accordance with policies enunciated by the Board, and that such delegation shall not constitute the relinquishment of any power, jurisdiction or responsibility of the Board."

⁹ BEAM section 0330 explains that it is the Tax and Fee Programs Division's responsibility to draft, review, and edit regulations, under the general direction of the Chief Counsel. Further, the Chief Counsel and Tax and Fee Programs Division attorneys' professional responsibility to competently represent the Board requires the Chief Counsel and attorneys to use reasonable diligence and their best judgment in an effort to accomplish, with reasonable speed, the purposes for which they are employed, including the promulgation of regulations. (See former California Rule of Professional Conduct 6-101(C)(2) (operative 1975-1985), which is now incorporated into current California Rule of Professional Conduct 3-101 (operative since 1992)), which requires attorneys to act competently and diligently in the representation of their clients.)

¹⁰ BEAM section 0351 explains that the Board Proceedings Division "[m]anages the BOE rulemaking activities including coordinating the regulation's approval with the Office of Administrative Law."

If you have any questions regarding this memorandum, please call Tax Counsel III (Specialist) Bradley Heller at 916-324-2657.

Approved: 
Ramon J. Hirsig
Executive Director

KC/BH/ef

J:\Chief Counsel\FINALS\CC Memo Regarding Rulemaking Process 182008

cc: Mr. Ramon J. Hirsig MIC:73
Mr. Todd Gillman MIC:70

bc: Mr. Alan LoFaso MIC:71
Mr. Mark Ibele MIC:71
Mr. Steve Shea MIC:72
Ms. Barbara Alby MIC:78
Mr. Erik Caldwell MIC:77
Ms. Marcy Jo Mandel (Controller's Office)
Mr. Stanley Siu MIC:61
Mr. Jefferson Vest MIC:85
Mr. Robert Lambert MIC:82
Mr. Gary Evans MIC:80
Ms. Carole Ruwart MIC:82
Mr. Bradley Heller MIC:82



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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Second District, Ontario/Sacramento
MICHELLE STEEL
Third District, Rolling Hills Estates
JUDY CHU, Ph.D.
Fourth District, Los Angeles
JOHN CHIANG
State Controller, Sacramento

November 13, 2007

RAMON J. HIRSIG
Executive Director

Ms. Susan Lapsley
Director
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Re: Delegation of Authority – Authorized Signatures

Dear Ms. Lapsley:

I hereby withdraw the Delegation of Authority for adoption of regulations that was filed with your office on May 12, 2005. Please find attached the revised delegation order for the State Board of Equalization.

Sincerely,

Ramon J. Hirsig
Executive Director

RJH:mt
Enclosure

cc: Mr. David Gau, MIC:63
Ms. Randie Henry, MIC:43
Ms. Kristine Cazadd, MIC:83
Ms. Diane Olson, MIC:81

EXHIBIT A
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**DELEGATION OF AUTHORITY
FOR
ADOPTION OF REGULATIONS**

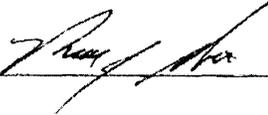
I, Ramon J. Hirsig, am Executive Director of the State Board of Equalization and am thereby empowered and required to review and adopt regulations and approve rulemaking calendars.

I hereby delegate my authority and responsibilities for these matters to the following individuals:

David Gau Randie Henry Kristine Cazadd Diane G. Olson

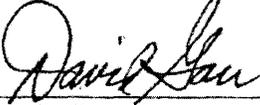
This delegation shall be effective during my term as Executive Director or until withdrawn by me in writing.

In witness of this delegation, I hereby affix my signature to this delegation order.



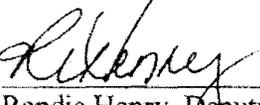
Date 11-6-07

We fully understand and accept this delegation.



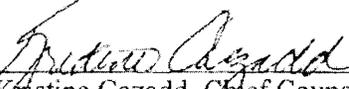
Date 11-7-07

David Gau, Deputy Director
Property and Special Taxes Department



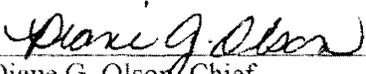
Date 11-8-07

Randie Henry, Deputy Director
Sales and Use Tax Department



Date 11/7/07

Kristine Cazadd, Chief Counsel
Legal Department



Date 11/9/07

Diane G. Olson, Chief
Board Proceedings Division