

# Memorandum

**To :** Honorable Betty T. Yee, Interim Chairwoman  
Honorable Bill Leonard, Interim Vice-Chair  
Honorable Michelle Steel, Third District  
Honorable Judy Chu, Ph.D., Fourth District  
Honorable John Chiang, Controller

**Date :** January 18, 2007

**From :** Kristine Cazadd  
Chief Counsel 

**Subject:** **Board Meeting – February 1, 2007**  
**Chief Counsel Matters – Item J1**  
**Status Report on the Rules for Tax Appeals**

This memorandum provides a status report and overview of the project to replace the Board's current Rules of Practice<sup>1</sup> (Cal. Code Regs., tit. 18, § 5010 et seq.) with revised, updated, and more user-friendly *Rules for Tax Appeals*. The revision process began in July, 2005, and has included numerous interested parties and Board meetings, and comments by Board Members, staff, and interested parties from all of the tax programs for which the Board hears appeals.

## **I. Status of the Rules for Tax Appeals and Plans for Future Action**

On November 21, 2006, Board staff presented all five chapters of the Rules for Tax Appeals for the Board's authorization to begin the formal rulemaking process (Gov. Code, § 11346 et seq.). At that meeting, the Board authorized staff to begin the formal rulemaking process for four of the five chapters, but deferred consideration of Chapter 3, *Property Taxes*, until after the staff presents a status report on the 2006 state assess appeals conferences at the February 1, 2007 Board meeting. Staff plans to request the Board's authorization to begin the formal rulemaking process for Chapter 3 at the March 20-21, 2007 Board meeting. If the Board gives its approval at that time, staff will initiate the formal rulemaking process for all five chapters. The public hearing on all five chapters would be held at the May 31-June 1, 2007 Board meeting.

## **II. Overview/Highlights of the Rules for Tax Appeals**

Compared to the existing Rules of Practice, the Rules for Tax Appeals:

- **Are easier to use<sup>2</sup>** because they are organized by tax, type of review, and chronological order of the steps in the Board's review processes; and are not unnecessarily technical;

<sup>1</sup> The Rules of Practice contain the Board's current procedural regulations for hearing tax and fee payer appeals.

<sup>2</sup> The Board's project follows the spirit of the Judicial Council of California's recent adoption of comprehensive revisions to the procedural rules for state trial and appellate courts, which were "part of a larger, historic effort to make the law in California clearer and more accessible" and "improve public access to the judicial system." (Jud. Council of Cal., Admin. Off. of Cts., Rep. on Reorganization of the California Rules of Court (June 15, 2006) p. 2.)

- **Are more comprehensive** because they address all of the types and stages of review available in all of the Board's appeals processes;
- **Promote procedural uniformity** among all the tax and fee programs wherever uniformity is practicable;
- **Promote public confidence** in the Board's appellate process by creating a single source of information that will bolster the public nature and openness of the Board's operations and clarify everyone's right to equal access while maximizing the efficient use of the Board's resources;
- **Represent a general consensus** among interested parties, Board staff, and the Franchise Tax Board (FTB); and
- **Ensure that tax and fee payers have a plain, speedy and adequate remedy** available to challenge tax and fee determinations as guaranteed by state and federal law.<sup>3</sup>

### **III. Organization of the Rules for Tax Appeals**

The Rules for Tax Appeals are divided into five chapters. Chapters 1 and 5 address general issues and procedures pertaining to all the Board's tax and fee programs. The three remaining chapters contain procedures pertaining to specific tax and fee programs. The five chapters are:

Chapter 1, *Title*

Chapter 2, *Sales and Use Tax, Timber Yield Tax, and Special Taxes and Fees*

Chapter 3, *Property Taxes*

Chapter 4, *Appeals from Actions of the Franchise Tax Board*

Chapter 5, *General Board Hearing Procedures*

### **IV. History of the Project; Highlights and Timeline of Each Chapter**<sup>4</sup>

#### **A. Summary of Public Outreach and Media Coverage**

The November 20, 2006 draft of the Rules for Tax Appeals is the result of extensive communications on the part of Board Members, staff, and interested parties, which included:

- Eight interested parties meetings
- Hundreds of public comments from many interested parties

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<sup>3</sup> See the Harris-Katz Taxpayers' Bill of Rights (Rev. & Tax. Code, §§ 7080-7099.1) applicable to Sales and Use Tax appeals, the Katz-Harris Taxpayers' Bill of Rights Act (Rev. & Tax. Code, §§ 21001-21028) applicable to appeals from the FTB, the various California Taxpayers' Bills of Rights (Rev. & Tax. Code, §§ 8260-8277, 9260-9278, 30458-30459.8, 32460-32476, 40200-40216, 41160-41176, 43511-43527, 45856-45872, 50156-50156.18, 46611-46627, 55321-55337, 60621-60636) applicable to all business taxes and fees appeals other than Tax on Insurers appeals, and Multistate Tax Commission Resolution 01-03, Resolution Maintaining the Integrity of the State and Local Tax Appeals Processes (July 27, 2001).

<sup>4</sup> More detailed information regarding the project, including timelines, meeting transcripts, and copies of the various drafts of the Rules for Tax Appeals may be viewed at <http://www.boe.ca.gov/regs/timelineCAtax.htm>.

- More than 25 drafts of various chapters
- Six Board meetings

Throughout this process, the Board has made extraordinary outreach efforts to involve interested parties. In addition to notifying all of the persons and entities on the Board's various interested parties' lists for all of its tax and fee programs, the Board notified statewide media, issued several press releases and placed prominent notice of the public review and comment process on its website. Professional videographers were used to record the first meeting for broadcast on the California Channel, a public affairs station out of Sacramento. The major issues of each chapter and overall progress on the project were covered by a nationwide tax publication<sup>5</sup> and were the topic of two Annual California Tax Policy Conferences (2005 and 2006) and several presentations to other tax professional groups (e.g., annual meeting of county assessors). In addition, drafts, comments, explanatory materials, transcripts of interested parties meetings, and meeting schedules were posted on a dedicated page on the Board's website (<http://www.boe.ca.gov/regst/timelineCAtax.htm>) for easy access to current and historical information.

Board staff's interaction with interested parties was extremely productive. Many longstanding and new issues were identified and resolved. While consensus was not reached on all major issues, all comments were thoughtfully considered and incorporated where appropriate.<sup>6</sup> Staff remains open to telephone calls, e-mails, and requests for additional meetings from the interested parties throughout the entire process.

## **B. Timeline and Highlights of Each Chapter**

Staff first provided the public with notice of the project in July 2005, released the first drafts of all five chapters of the Rules for Tax Appeals in mid-September 2005, and then discussed the drafts with the Board and the interested parties in detail at the September 28, 2005 Board meeting. Following that meeting, each chapter followed its own timeline, as detailed below, as follows:

### **Chapter 1, Title and Chapter 2, Sales and Use Tax, Timber Yield Tax, and Special Taxes and Fees**

#### Timeline:

- October 26, 2005: The first drafts of Chapter 1, *Title*, and Chapter 2, *Sales and Use Tax, Timber Yield Tax, and Special Taxes and Fees*, were discussed at an interested parties meeting.
- December 9, 2005: Staff revised and reissued second drafts; solicited additional written comments, and revised the chapters again.
- January 31, 2006: Staff submitted third drafts to the Board for approval at the January 31, 2006, Board meeting. The Board gave specific direction on how to best complete Chapter 2.
- April 18, 2006: The Board approved the concepts incorporated into the fourth drafts of Chapters 1 and 2, which contained revisions consistent with the directions given at the January 31 meeting.
- November 21, 2006: The Board approved initiation of the formal rulemaking process.

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<sup>5</sup> Copies of the Board's press releases and press coverage are included in Attachment A.

<sup>6</sup> A matrix of important formal comments received from the interested parties during the drafting process and staff's responses was prepared for the November 20, 2006, Board meeting and can be viewed on the Board's website.

Compared to the existing Rules of Practice, **Chapter 1, Title:**

- **Names the new rules of practice** the “Board of Equalization *Rules for Tax Appeals*,” and
- **States the purpose of the Rules for Tax Appeals** -- that the new rules are intended to improve the relationship between tax and fee payers and the Board.

Compared to the existing Rules of Practice, **Chapter 2, Sales and Use Tax, Timber Yield Tax, and Special Taxes and Fees:**

- **Puts all business taxes and fees procedures into a single chapter;**
- **Gives all tax and fee payers notice of important rights and policies** to ensure due process, such as:
  - The right to request an appeals conference with the Appeals Division and request reconsideration of Decisions and Recommendations issues by the Appeals Division;
  - The right to request an oral Board hearing;
  - The Board’s longstanding policy of accepting untimely petitions as late protests.
- **Gives tax and fee payers and the Department more time to file their opening briefs.**

### **Chapter 3, Property Taxes**

#### **Timeline:**

November 16, 2005: The first draft of Chapter 3, *Property Taxes*, was discussed at an interested parties meeting.

January 31, 2006: At the Legislative Committee, Mr. Leonard proposed a bill extending the time from December 31 to March 1 of the following year for the Board to hear and decide state assessee property tax appeals. Although the committee did not approve the proposal, it was agreed that staff would develop a process within one calendar year that allowed state assessees to have appeals conferences.

February 23, 2006: Staff issued a second draft and discussed it at a second interested parties meeting.

May 17, 2006: The Board approved the concepts incorporated into the third draft of Chapter 3.

November 20, 2006: The Board deferred consideration of Chapter 3 until after staff presents its report on the 2006 state assessee appeals conferences at the February 1, 2007 Board meeting.

February 1, 2007: Staff plans to present its report on the 2006 state assessee appeals conferences.

March 20, 2007: Staff plans to present revised Chapter 3 for Board approval.

Compared to the existing Rules of Practice, **Chapter 3, Property Taxes:**

- **Combines into one chapter all procedural rules** related to the four types of property tax appeals heard by the Board:
  1. State assesses and private railroad cars;
  2. Review of assessments of publicly-owned property pursuant to article XIII, section 11, subdivision (g) of the California Constitution (section 11);
  3. Review of claims for organizational clearance certificates and supplemental clearance certificates for the welfare exemption; and
  4. Petitions filed with the Board by county assessors pursuant to Government Code section 15640 et seq. (property tax sampling program).
- **Codifies existing procedures for Appeals Division review of all property tax appeals, and appeals conferences for all non-state assessee petitions.** The purpose of providing Appeals Division review, including appeals conferences for all non-state assessee petitions, is to assist the Board in its consideration of property tax appeals and achieve consistency with other tax and fee programs.
- **In the November 20, 2006 draft, requires appeals conferences for state assessee and private railroad car petitions that have requested an oral Board hearing.** This procedure was implemented for the first time during 2006. Appeals conferences could be requested for state assesses that did not request an oral hearing, but were not required. Staff plans to present the status report on this new procedure as part of this Chief Counsel Item.
- **Minimizes duplication between chapters** by moving some general provisions to Chapter 5, General Board Hearing Procedures (e.g., provisions on consolidation of petitions and finality of property tax decisions).
- **Identified a statutory inconsistency that was resolved through legislation**<sup>7</sup> changing the filing due date for section 11 applications from the “third Monday in July” to “July 20,” so that both section 11 applications and state assessee petitions are due on the same day.

#### **Chapter 4, Appeals From Actions of the Franchise Tax Board**

##### Timeline:

December 9, 2005: Staff issued a second draft of Chapter 4.

December 14, 2005: The second draft of Chapter 4 was discussed at an interested parties meeting.

January 19, 2006: Staff issued a third draft to solicit additional comments.

March 15, 2006: A fourth draft that was discussed at a second interested parties meeting.

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<sup>7</sup> Sen. Bill No. 1607 (Machado) (2005-2006 Reg. Sess.) (enacted by Stats. 2006, ch. 224, § 5).

May 17, 2006: A fifth draft of Chapter 4 was discussed at the Board meeting. Staff received direction from the Board on how to best complete Chapter 4.

August 29, 2006: The fifth draft of Chapter 4 was presented to the Board for discussion. Staff prepared a sixth draft.

November 21, 2006: The Board approved initiation of the formal rulemaking process.

Compared to the existing Rules of Practice, **Chapter 4, *Appeals From Actions of the Franchise Tax Board***:

- **Codifies the best of the Board's longstanding internal administrative practices**, thereby providing notice to taxpayers of what is required and ensuring that people are treated equally;
- **Provides for better jurisdictional review** before expending valuable resources in the briefing and hearing process;
- **Adds a new briefing schedule for innocent spouse appeals** that allows for the participation of both spouses and coordination with federal determinations;
- **Allows the Appeals Division to request amicus briefing, as well as additional briefing** from the parties, in order to more fully develop the record;
- **Creates a procedure for conducting discretionary pre-hearing conferences**, which will be informal and non-adversarial meetings where an Appeals Division attorney and the parties can attempt to narrow the issues and develop the record; and
- **Adopts uniform and widely-accepted criteria for the adoption of Formal Opinions and the imposition of frivolous appeal penalties.**

### **Chapter 5, General Board Hearing Procedures**

#### Timeline:

December 14, 2005: The first draft of Chapter 5, *General Board Hearing Procedures*, was discussed at an interested parties meeting.

April 5, 2006: The second draft of Chapter 5 was discussed at a second interested parties meeting.

September 27, 2006: The third draft of Chapter 5 was presented to the Board. At that meeting, the Board directed staff to hold an additional interested parties meeting.

October 15, 2006: An additional interested parties meeting was held regarding communications with Board Members, the disclosure of confidential tax and fee payer information relevant to Board hearings, and other issues.

November 21, 2006: At the Board meeting, additional public comments regarding several alternatives were heard by the Board. The Board approved initiation of formal rulemaking for Chapter 5, including the staff-recommended alternatives.

Compared to the existing Rules of Practice, **Chapter 5, General Board Hearing Procedures**, clarifies the **right of due process for all tax and fee payers** by:

- **Expressly providing every tax and fee payer the right to request an oral hearing before the Board**, and creating a policy favoring the granting of oral hearings;
- **Creating for tax and fee payers the right to participate in deciding whether to consolidate appeals for oral hearing**, and creating a policy respecting tax and fee payers' preferences regarding consolidation;
- **Expressly requiring the Appeals Division to prepare "objective" hearing summaries** that fairly represent tax and fee payers' positions;
- **Providing a specific procedure for tax and fee payers to request additional time to make their presentations** at oral hearings; and
- **Codifying the Board's longstanding policy permitting tax and fee payers, other departments, and constituents to contact their Board Members at any time.**

*Chapter 5 also:*

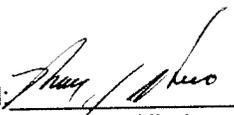
- **Creates procedures that encourage the use of electronic means for the filing of documents;**
- **Ensures that the Board properly recognizes tax and fee payer representatives;**
- **Makes the Board's hearings more effective** by clarifying that the Board Members and the Appeals Division may request additional briefing prior to an oral hearing;
- **Clearly identifies the conflict-of-interest provisions applicable to Board hearings** so that tax and fee payers and the public can judge the appropriateness of the Board Members' conduct;
- **Revises the Board's disclosure policies** by increasing the type and timing of documents available to the public so that tax and fee payers and the general public can better understand the matters being discussed during public business taxes and property tax oral Board hearings; and
- **Expressly permits Board Members to adopt their own concurring or dissenting opinions** when the Board adopts a Formal Opinion in an appeal from the FTB or a Memorandum Opinion on a business taxes appeal.

KC:CR:pb

Chief Counsel/Final/Rules of Practice Report

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Approved: \_\_\_\_\_

  
Ramon J. Hirsig  
Executive Director

## **Attachment A**

Media Coverage of Rules for Tax Appeals

*BNA – October 1, 2005*

### **California SBOE Proposes Comprehensive Procedures Governing Protests, Decisions**

The California State Board of Equalization proposed regulations that would govern the administrative and appellate review processes for all of the tax and fee programs that are administered by the agency. [Cal. State. Bd. of Equal., Prop. Regs. §§ 1000 to 5034, released 9/28/05]

If adopted, the rules would provide taxpayers and practitioners with detailed rules for protesting SBOE taxes and fees and would increase access to additional background information regarding agency determinations, a spokesman for the agency said.

The comprehensive proposal, which would be entitled "Board of Equalization Rules for California Tax Administration and Appellate Review," begins with a statement of intent that adopts language contained in the California Taxpayers' Bill of Rights (Cal. Rev. & Tax. Code §§ 7080 through 7099.1).

#### **Statement of Intent**

"The State Board of Equalization understands that taxes are the most sensitive point of contact between citizens and their government, and that there is a delicate balance between revenue collection and freedom from government oppression," the statement of intent contained in Prop. Regs. § 1000 states.

Part two of the proposal sets forth the administrative review procedures for taxpayer protests concerning sales and use tax, timber yield tax, and special taxes and fees. If adopted, these rules would provide taxpayers and practitioners with a comprehensive set of guidelines for protesting sales and use tax and other special taxes and fees, Bradley Heller, tax counsel for the SBOE told BNA Sept. 23.

Presently, the agency provides general guidance on procedures regarding petitions for redetermination or refund claims in publications No. 17 (redeterminations) and No. 117 (refund claims), Heller said. He added that "adopting regulations setting forth these procedures with respect to each type of tax would really give force of law to the agency's statements."

#### **Procedures for Each Type of Tax**

For each type of tax, the proposal addresses matters such as the contents of a petition for redetermination, the limitations period for filing a petition, and the accrual of interest on the amount of tax in dispute.

Part three of the proposal sets forth administrative review procedures for property taxes. The most significant aspect of this portion of the proposal is Prop. Regs. §§ 3150 and 3361, which requires the appeals division to perform a pre-hearing analysis and recommendation with respect to the tax dispute, Carole Ruwart, and attorney with the SBOE told BNA Sept. 23. The proposed rule would not require the SBOE to adopt the recommendation, however.

#### **FTB Appeals**

Part four of the proposal addresses appeals from the California Franchise Tax Board. Among other things, this section provides separate briefing schedules for different types of tax disputes. Each briefing schedule sets forth the filing deadline for opening briefs and reply briefs.

This part of the proposal also offers a simplified briefing schedule for small tax appeals, which would apply to tax disputes involving less than \$5,000. Under this procedure, a taxpayer may waive its right to an oral hearing. In such cases, the agency's determination would be based on the briefs submitted by the parties.

Part five of the proposal sets forth general board hearing procedures. One aspect of this section that might draw the FTB's interest is Prop. Regs. § 5015.1, regarding communications with board members, Heller said. The rule would expressly allow taxpayers and their lawyers to contact board members "at any time, including when a case or controversy involving such persons is pending before the Board."

#### Ex Parte Communications

In the past, the FTB has indicated that it would rather have ex parte communication prohibitions apply once an appeal has been filed, Heller said. However, Heller noted that the SBOE believes that its board members should be accessible at all times because they have a broad range of duties in addition to making determinations with respect to tax disputes.

Another significant aspect in this part of the proposal is Prop. Regs. §§ 5033 through 5033.3, which would relax some of the confidentiality requirements that apply to taxpayer records in tax disputes. Under the second of two alternative versions of these rules, documents relevant to issues discussed at an oral hearing would be available to the public. Right now, only transcripts and minutes of oral hearings are available to the public, Seller said.

In addition, the second alternative of Prop. Regs. § 3033.1 would provide that taxpayers would waive their right of confidentiality by appealing an SBOE administered tax. This rule would most likely allow the SBOE to publish more opinions. Presently, before the SBOE may publish an opinion, the agency must obtain a confidentiality waiver from the taxpayer, Heller explained.

Another change that would increase the amount of information available with respect to SBOE determinations is contained in Prop. Regs. § 5024, regarding agency decisions. Specifically, the proposed rule would allow a board member to draft a dissenting opinion. "Having a written record of a dissenting board member's rationale is important because the board's membership tends to dramatically change over the years as result of term limits, Heller said. He noted that SBOE board members are limited to two four-year terms.

The full text of the proposed regulations is available on the Internet at <http://www.boe.ca.gov/regs/timelineCAtax.htm>.

For a discussion of taxpayer protest procedures in California, see 1700-2<sup>nd</sup> T.M., State Tax Appeal Systems, at 1700.06, 1920 T.M., California Sales and Use Taxes, at 1920.09, 1910 T.M., California Franchise and Corporation Income Taxes, at 1910.14.C, 1930 T.M., California Property Taxes, at 1930.07, and 1900 T.M., California Personal Income Tax, at 1900.13. (Embedded image moved to file: pic00041.gif)

*BNA*– October 1, 2005

### **SBOE's New Rules of Practice Raise Concerns From Taxpayers, Advocates**

State Board of Equalization members launching an effort to formalize and improve the board's rules for tax administration and adjudication of taxpayer disputes heard stark differences of opinion about how to handle ex parte communications and release of taxpayer information during a public hearing Sept. 28.

Although the five-member elected board, and SBOE staff, began work more than a year ago on consolidating and formalizing its rules into one document, two bills proposed in the Legislature this year added some urgency to the project, board member Betty Yee (D) told *BNA* after the hearing. The bills, which did not win passage, were aimed at the two most controversial elements of the board's preliminary draft rules: ex parte communications with board members and confidentiality of taxpayer information.

SBOE recognizes that its current rules are not easy to follow, but wants to try to fix the problems rather than allowing the Legislature to write its rules, Yee said. At the same time the board attempts to consolidate rules that are now scattered in regulations, guidance publications, and the board's informal practices, it is tackling the complex issues of communications and confidentiality raised in the legislation.

In addition to administering more than 20 state tax programs such as sales and use tax and gasoline tax, SBOE adjudicates disputes between taxpayers and the Franchise Tax Board, which administers personal and corporate income tax laws. It also adjudicates disputes between taxpayers and its own staff. SBOE is the only elected body in the country that adjudicates taxpayer disputes, and it is this characteristic that complicates its attempt to formalize its rules.

The draft rules discussed at the Sept. 28 hearing, Board of Equalization Rules for California Tax Administration and Appellate Review, cover the procedures taxpayers must follow to appeal their cases, either to SBOE staff or to the full board. Everything from the mailing addresses that should be used for correspondence to the scope of information taxpayers must provide, deadlines for filings, and the assessment of penalties and fines are included in the proposal. Much of the draft proposal reflects current, accepted practice and is not controversial.

At the hearing, comments focused primarily on the two controversial issues, and no clear consensus emerged.

#### **Ex Parte Communications an Issue**

In the draft, SBOE outlined a liberal approach to ex parte communications between interested parties and board members related to cases before the board. "The board members shall remain accessible to their constituents, their subordinates, and other governmental agencies at all times in order to execute their respective constitutional and statutory duties. Therefore, such persons and their authorized representatives, including members of the State Bar, may contact board members at any time, including while a case or controversy involving such persons is pending before the board."

FTB Tax Counsel Bruce Langston told the board that it should not adopt the language. However, if SBOE chooses to endorse ex parte communications, the rules should require that FTB be notified of meetings or communications and be allowed to participate in the discussions. A log of such communications should be available to the public, he said.

Lenny Goldberg of the California Tax Reform Association said the board needs to consider making a distinction between its legislative and adjudicatory roles. Ex parte communications in the

adjudicatory context should be disclosed to the public, he said. If they are not, SBOE runs the risk of allowing taxpayers to seek favor from board members and provide them with information that is not part of the public record.

Unfettered communication without disclosure could also allow board members to interfere in cases at the staff level before they reach the full board for hearing, Goldberg said. The rules should include a prohibition on board member interference in cases, he said.

David Doerr, chief tax consultant with the California Taxpayers Association, said the question of ex parte communications should focus on the issue of fairness. SBOE and FTB staff members have regular access to board members, and have no limit on the amount of communications they have about specific cases before the board. If the staff has access, then taxpayers should also have access, he said.

#### Legislation Could Be Reconsidered

The proposed legislation, A.B. 1029 by Assemblyman Jerome Horton (D), would regulate ex parte communications between taxpayers and board members. Under the bill, board members would be required to disclose ex parte communications with interested parties related to specific cases at the beginning of the board's oral hearing on those cases, which is part of the public record. The disclosure would include the name and position of each party, the date, subject matter discussed, and information provided to the board member.

Interested parties would be defined as any person with a direct or indirect interest in the outcome of a case, regardless of whether the interest was pecuniary.

The bill, which has the support of the Service Employees International Union local that represents state employees, failed passage on the Assembly floor in June, but can be reconsidered when the Legislature reconvenes in January for the second year of its two-year session.

Yee told BNA after the meeting that it is difficult to consider limiting the ability of taxpayers to communicate with board members, since they are elected officials with a duty to be accessible to the public and constituents. It is common practice for large, sophisticated taxpayers to communicate with board members before their cases appear before them. Smaller taxpayers may not be aware that they can do so.

"We need to think about what it means to have a prohibition on those communications," Yee said. "What is driving the desire to have those communications?"

For example, the current rules allow taxpayers 10 minutes to present their cases to the board at their oral hearings. If they had more time to present their cases, taxpayers may not need to meet with board members beforehand, she said.

#### Privacy of Information Options Discussed

On the issue of disclosure of information related to cases before the board, the draft proposal offers two alternatives. The first alternative is most similar to SBOE's current practice. Under that proposal, minutes and transcripts from oral hearings, and exhibits officially entered into the hearing record would be disclosable public records. These records are available to the public now. In addition, oral hearings on cases before the board are open to the public, and the board releases copies of its final decisions and opinions.

The second alternative also would allow for public disclosure of minutes, transcripts, and hearing exhibits, but would go farther to state that tax and fee payers who request oral hearings before the board would waive their right to confidentiality with regard to information that is directly relevant to

the issues to be discussed and decided at the hearings. This would broaden the scope of publicly available information, and could include SBOE staff briefings on the cases, or information submitted by the taxpayer to the agencies but not used as exhibits at the hearing.

Both alternatives would exempt some personal information from being disclosed, such as addresses, phone numbers, and Social Security numbers. The second alternative would also allow taxpayers to request that sensitive information not be publicly discussed at the oral hearing if it would be harmful to the taxpayer.

Teresa Casazza, vice president and legislative director for Cal-Tax, told the board the second alternative could have a chilling effect on taxpayers that want to appeal their cases. Taxpayers could lose their right to appeal if they do not want to risk disclosure of sensitive information. The proposed exceptions, and ability to request that harmful information not be disclosed, are too vague and do not offer much comfort to taxpayers.

Goldberg of CTRA agreed that the definition of what would be considered harmful to taxpayers if released must be much more specific. However, he said the scope of publicly available information in taxpayer appeals should be equivalent to what is available in court cases involving tax matters. Typically, much more information is available to the public in court cases involving tax issues than is available from SBOE, he said.

#### Legislation Would Ban Disclosure

The proposed legislation, S.B. 234 by Sen. George Runner (R), which is sponsored by SBOE Member Bill Leonard (R), would prohibit SBOE or FTB from disclosing taxpayers' personal information unless the disclosure is specifically authorized or required by law. Leonard sought the bill in response to concerns that FTB has, on occasion, released sensitive taxpayer information in appeals cases.

The bill passed the Senate in June, and was amended in the Assembly to state that documents submitted to SBOE in appeals cases are disclosable public records, although personal information must be deleted before the information is released.

S.B. 234 passed the Assembly Aug. 25, and needed only final concurrence on amendments in the Senate to be sent to the governor's desk. It was placed on the inactive file, partly in response to concerns from Cal-Tax, and can be taken up again in January.

Overall, Yee said the new rules should improve communication with taxpayers, and improve compliance because taxpayers will have clear and common expectations about how their cases will be handled.

"If you look at the history of our rules of practice, they are a little ad hoc," she said.

Those who testified at the hearing raised valid points that must be considered carefully, she said. "I want to hear all the comments and suggestions before I decide where to come down on these issues."

SBOE will conduct three more public meetings before formally proposing rules early in 2006: review of sales and use tax, timber yield tax, and special taxes and fees, Oct. 26; administrative review of property taxes, Nov. 16; and appeals from actions of the franchise tax board and general board hearing procedures; Dec. 14.

All meetings will be held at 9:30 a.m. at SBOE, 450 N St., Room 121, Sacramento, California.

*BNA* – December 10, 2005

### **California Equalization Board Staff Postpones Rules of Practice for Appellate Review**

After finding little consensus between taxpayer advocates, Franchise Tax Board staff, and other interested parties meeting Dec. 14 to address controversial draft rules governing board appellate procedures State Board of Equalization staff Dec. 15 postponed proposal of formal rules until after it gathers more comments in January and February.

The postponement means the five-member SBOE will not consider adoption of proposed rules for tax administration and appellate review at its next scheduled meeting Jan. 31, as the staff had intended. The volume of comments received and the lack of agreement among the fine-tune the rules, SBOE Tax Counsel Bradley Heller told *BNA*.

SBOE first issued draft rules in September and is attempting to issue formal proposed regulations in part to quash legislative attempts to regulate two key areas of controversy: *ex parte* communications with board members, and disclosure of confidential taxpayer information. Two bills that addressed these issues failed passage in 2005 but can be reconsidered in 2006.

The staff issued a revised draft of the regulations Dec. 9, and asked for interested parties to submit comments by Dec. 23. Heller said the comment deadline will likely be extended as well.

SBOE staff will hold at least one more meeting for interested parties in late January or February, and will distribute details about the meeting and comment deadline in the next week, Heller said.

### **Rules Would Improve Procedures**

The proposed rules are intended to consolidate and improve procedures that are now scattered in regulations, guidance publications, and the board's informal practices. At the same time, the board is tackling the complex issues of communications and confidentiality raised in the 2005 legislation.

The board is the only elected body of its kind in the country, and was created under the state constitution to consist of five elected members, giving rise to the complex issues addressed in the draft rules. Four members represent geographic districts, and the fifth is the state controller. SBOE adjudicates disputes between taxpayers and the Franchise Tax Board on corporate and personal income tax matters, and disputes between taxpayers and its own staff on matters related to the more than 20 taxes it administers, including sales and use taxes.

Taxpayers who have a dispute with SBOE or FTB must appeal their cases to the board and receive a ruling before they may file suit in state trial court. Most cases appealed to SBOE are resolved without an oral hearing, but SBOE considers about 2,000 cases a year.

Because the board members are elected, SBOE has so far taken a liberal approach to *ex parte* communications between interested parties and board members related to cases before the board.

"The board members shall remain accessible to their constituents, their subordinates, and other governmental agencies at all times in order to execute their respective constitutional and statutory duties," SBOE proposed in the draft. "Therefore, such persons and their authorized representatives, including members of the State Bar, may contact board members at any time, including while a case or controversy involving such persons is pending before the board."

As they did at a public hearing on the draft rules in September, FTB staff members said SBOE should not adopt the draft language on *ex parte* communications. However, if SBOE chooses to

endorse ex parte communications, the rules should require that FTB be notified of meetings or communications and be allowed to participate in the discussions. A log of such communications should be available to the public, they said.

Two of the five SBOE members--the state controller and the chair--also serve on FTB. FTB staff has taken the position that it will not communicate with the three SBOE members who are not FTB members about cases before them, and FTB staff members generally do not seek to communicate with the two FTB members who also are SBOE members about cases.

### **Backing From Taxpayer Advocates**

Taxpayer advocates continued to support SBOE's approach to ex parte communications, and warned that any infringement on access to board members could violate the law.

Joseph Vinatieri, an attorney with Bewley, Lesselben & Miller in Whittier, Calif., said taxpayers' ability to communicate with elected board members is a positive element of California tax administration that is lacking in other states and jurisdictions.

"Any attempt to limit it may run afoul of the board members' duty under the constitution," he said. "We should never forget it and we should never move away from it."

Sarah Zimmerman, research and policy director for Service Employees International Union Local 1000, representing 3,000 state employees who are auditors or tax compliance representatives, told SBOE staff the union supports limitation on ex parte communications with members.

Local 1000 proposed an alternative that would allow board members and their staff members to communicate freely with taxpayers and constituents on tax matters up to two weeks before their cases would come before the board for adjudication. Once a hearing agenda is made public, no further communication regarding a case on the agenda could take place.

Under the union proposal, communication that does take place in the time between the agenda's release and the board's hearing would be disclosed to the public. Violations would result in postponement of a hearing for at least two weeks.

### **Disclosure of Taxpayer Information**

On the issue of disclosure of information related to cases before the board, the draft proposal offers two alternatives.

The first alternative is most similar to SBOE's current practice. Under that proposal, minutes and transcripts from oral hearings, and exhibits officially entered into the hearing record, would be disclosable public records. These records are available to the public now. In addition, oral hearings on cases before the board are open to the public, and the board releases copies of its final decisions and opinions.

Most of the discussion at the Dec. 14 meeting focused on the second alternative, which also would allow for public disclosure of minutes, transcripts, and hearing exhibits. But it would go farther to state that tax and fee payers who request oral hearings before the board would waive their right to confidentiality with regard to information that is directly relevant to the issues to be discussed and decided at the hearings. This would broaden the scope of publicly available information, and could include SBOE staff briefings on the cases, or information submitted by the taxpayer to the agencies but not used as exhibits at the hearing.

Both alternatives would exempt some personal information from being disclosed, such as addresses, phone numbers, and Social Security numbers. The second alternative would also allow taxpayers to request that sensitive information not be publicly discussed at the oral hearing if it would be harmful to the taxpayer.

Taxpayer advocates at the meeting were opposed to the second alternative, and were most concerned that it does not clearly state what information could be released, or who would decide what is relevant enough to be subject to disclosure.

When a taxpayer requests an oral hearing in the interest of due process, the taxpayer could be trading away protection of confidential information and trade secrets, said Peter Michaels, an attorney with Cooper, White & Cooper in San Francisco. Neither alternative is acceptable, he said.

Lenny Goldberg, executive director of the California Tax Reform Association, said CTRA supports the second alternative and the greater availability of documentation upon which SBOE rulings are based. Although transcripts of oral hearings are available, it is often impossible to know from the transcript what the underlying issues in a case were, he said.

SBOE staff acknowledged at the meeting that it must refine its provisions for taxpayers to request preservation of information that would be harmful if released.

### **Appeals Conferences Proposal**

In the Dec. 9 revised draft, SBOE staff proposed a new process for appeals conferences in franchise and income tax cases once the taxpayer and FTB have provided their briefings in their cases. The conference would be conducted by an employee of the SBOE Appeals Division.

Heller said the appeals conference would create uniformity across all types of taxes. SBOE already conducts such conferences for business and property taxes it administers.

Appeals conferences in income tax matters would help create a more complete record of cases that reach the full board for oral hearing, Heller said. They also would reduce the demand for oral hearings before the board and petitions for rehearing after the board has decided a case. The conferences also would encourage taxpayers to settle outstanding issues and make stipulations to undisputed facts.

The conferences also would allow taxpayers without representation to meet with FTB and SBOE staff in a less formal and intimidating setting, Heller said.

Because SBOE rules allow parties only 10 minutes to present their cases to the board in oral hearings, the appeals conferences could reduce the need for taxpayers—especially those with complex cases—to seek meetings, and thus ex parte communications, with board members to explain their cases, Heller told BNA.

### **Mandatory Appeals Conference**

The draft proposal would make the appeals conference a mandatory step for all taxpayers. Waiver of the right to an appeals conference would also require waiver of the right to request an oral hearing before the board.

FTB staff said at the meeting they did not have the staff or resources to add this procedural step to the appellate process, which would take at least six months longer.

FTB Tax Counsel Bruce Langston said the conference should not be required in every case, since the large majority of cases do not go to the board for oral hearing. In addition, the conference would undercut the protest and settlement processes at FTB, giving taxpayers new incentive to delay resolution of their cases with the agency.

"If taxpayers have another avenue, they will hold out for that," Langston said.

Heller told BNA Dec. 15 that, based on the comments received at the meeting, SBOE is likely to revise the appeals conference proposal to make it voluntary and allow taxpayers to preserve their right to an oral hearing before the board. Either party could request a conference, and the option would likely be available to all taxpayers.

"That way we won't slow down every case, and we won't need all the additional staff," he said. "We would get all the advantages we are looking for without the delay."

The Dec. 9 revised draft also includes a streamlined process for income tax matters valued at less than \$10,000, and all homeowners and renters property tax assistance cases. The proposal would simplify the briefing schedule so the cases could be resolved more quickly.

Heller told BNA the proposal is likely to be revised to make it voluntary for all small and HRA cases eligible.

The draft rules, Board of Equalization Rules for California Tax Administration and Appellate Review, cover the overall procedures taxpayers must follow to appeal their cases, either to SBOE staff or to the full board. Items ranging from mailing addresses that should be used for correspondence to the scope of information taxpayers must provide, deadlines for filings, and the assessment of penalties and fines are included in the proposal. Much of the draft proposal reflects current, accepted practice and is not controversial.

*BNA* – December 24, 2005

**SBOE Extends Comment Deadline on Draft Appellate Procedure Rules**

SACRAMENTO, Calif.— The state Board of Equalization has extended indefinitely its Dec. 23 deadline for comments on draft rules governing appellate procedures, and will schedule another meeting to address the draft with interested parties soon, a spokesman for the board told *BNA* Dec. 22.

SBOE staff Dec. 15 postponed issuance of formal proposed rules dealing with appellate procedures after finding little consensus among interested parties at a public meeting Dec. 14 (242 DTR H-3, 12/19/05). The board is moving ahead with the rules, and will continue to take comments from the public, SBOE spokesman Jacob Roper told *BNA*. SBOE staff will schedule another meeting for interested parties to address the most controversial elements of the procedures.

The board originally planned to close the comment period on the draft rules Dec. 23, and issue proposed rules in January to go before the five-member elected board for adoption Jan. 31. The rules are intended to consolidate and improve procedures that are now scattered in regulations, guidance publications, and the board's informal practices.

At the same time, the board is tackling the controversial issues of *ex parte* communications with board members and disclosure of taxpayer information to quash legislative attempts to regulate those issues.

The board is the only elected body of its kind in the country, and was created under the state constitution to consist of five elected members, giving rise to the complex issues addressed in the draft rules. Four members represent geographic districts, and the fifth is the state controller. SBOE adjudicates disputes between taxpayers and the Franchise Tax Board on corporate and personal income tax matters, and disputes between taxpayers and its own staff on matters related to the more than 20 taxes it administers, including sales and use taxes.

SBOE Acting Member Betty Yee (D) told *BNA* Dec. 22 the level of participation from members of the public, and the comments received so far, have been helpful.

"I'm pleased the staff has extended the comment deadline, especially since it's so near the holidays," Yee said.

It is important for SBOE staff to analyze comments and changes submitted, and understand how they could be implemented, Yee said.

*BNA* – March 1, 2006

**California Revises Property Tax Appeal Procedures**

The California State Board of Equalization released changes to proposed property tax protest procedures that include a new article that sets common appeal procedures applicable to different types of protests, revised briefing procedures and schedules, and provisions addressing electronic filing.

The SBOE's revisions, Proposed Regulations Sections 3100 to 3570, would add a new Article 5, which would set forth the common appeal procedures applicable to assessments of publicly owned property (Article 2), the denial of the welfare exemption (Article 3), and the property tax sampling program (Article 4). As a result, articles two, three, and four are shorter, with each article emphasizing only the differences from the general procedures, said the Jan. 30 changes.

The briefing procedure and schedules for petitions under articles two through four have been revised to conform to the schedule used for the briefing of appeals from the Franchise Tax Board, states the SBOE's notice to interested parties. "This allows more time for briefing and includes a conference with the Appeals Division," the notice explained.

*BNA* – March 14, 2006

### **SBOE Revises Draft Rules for Appeals, Board Communications, Taxpayer Data**

SACRAMENTO, Calif.—California State Board of Equalization staff members will try again to find consensus with taxpayers and the Franchise Tax Board on controversial draft rules governing board appellate procedures and communications with board members at public meetings March 15 and April 5.

SBOE staff members intend to use the two interested parties' meetings to work out concerns and make changes to the draft regulations as part of an overall regulatory package that would improve, unify, and simplify the board's procedures. Once the draft regulations are fine-tuned, the staff will ask the five-member elected board to approve a formal regulatory package to be enacted later this year, SBOE Tax Counsel Bradley Heller told BNA.

At the March 15 meeting, SBOE staff members will take comments on a revised draft of the regulations regarding appellate procedures they released Jan. 19 in response to concerns raised during a similar meeting in December (242 DTR H-3, 12/19/05). The draft covers procedures for taxpayer appeals of actions taken by the Franchise Tax Board, and is one of five parts of the overall regulatory package.

At the April 5 meeting, SBOE staff will discuss another part of the package addressing ex parte communications between board members and taxpayers, and confidentiality of taxpayer information. SBOE released a revised draft of the regulations March 13, incorporating comments it has already received on the issue.

Other parts of the package deal with sales and use tax, timber yield tax, and other special taxes. Although these elements of the package are less controversial, the five-member board asked at a Jan. 31 meeting that those sections also be revised, in part to include provisions that would allow for more electronic filing of documents, board member Bill Leonard told BNA March 9.

#### **Attempt to Avoid Legislative Regulation**

SBOE first issued draft rules in September (195 DTR H-2, 10/11/05), and is attempting to issue formal proposed regulations in part to quash legislative attempts to regulate two key areas of controversy: ex parte communications with board members, and disclosure of confidential taxpayer information. Two bills that addressed these issues failed passage in 2005 but can be reconsidered in 2006.

The draft rules are intended to consolidate and improve procedures that are now scattered in regulations, guidance publications, and the board's informal practices. At the same time, the board is tackling the complex issues of communications and confidentiality raised in the 2005 legislation.

The board is the only elected body of its kind in the country, and was created under the state Constitution to consist of five elected members, giving rise to the complex issues addressed in the draft rules. Four members represent geographic districts, and the fifth is the state controller. SBOE adjudicates disputes between taxpayers and the Franchise Tax Board on corporate and personal income tax matters, and disputes between taxpayers and its own staff on matters related to the more than 20 taxes it administers, including sales and use taxes.

Taxpayers who have a dispute with SBOE or FTB must appeal their cases to the board and receive a ruling before they may file suit in state trial court. Most cases appealed to SBOE are resolved without an oral hearing, but SBOE considers about 2,000 cases a year.

### **Appeals Conferences Made Voluntary**

In the latest draft version of the regulations dealing with appeals of actions from FTB, to be discussed at the March 15 meeting, SBOE dropped a proposal to require all taxpayers and FTB to take part in an appeals conference conducted by the SBOE Appeals Division in advance of an oral hearing before the board.

SBOE proposed the appeals conferences as a way to work out disagreements, create a more robust record of the case, and reduce the need for ex parte communications with board members. Taxpayers and FTB representatives said although such a process could be useful in some cases, it would be too time consuming and expensive to impose it on all cases set for oral hearing.

Instead, SBOE staff has proposed to allow taxpayers or FTB to request a voluntary appeals conference once a case has been scheduled for oral hearing. The voluntary approach would accomplish the same goals without the administrative burden, Heller said. The results of the pre-hearing conference would be incorporated into the hearing summary that is presented to the board at the oral hearing.

The draft rules for appeals also include an optional simplified briefing schedule for small tax cases, and homeowners and renters property tax assistance appeals. If taxpayers elected to use the simplified briefing schedule, they would waive their rights to an oral hearing at a later date.

### **Three Options on Ex Parte Communications**

The newly revised draft of the rules for ex parte communications offer three options for the board's consideration. SBOE staff has kept its proposal, which is the most liberal in its approach, and has added proposals from FTB and the Service Employees International Union Local 1000, which are more restrictive.

The SBOE staff language places no restrictions on ex parte communications. "The board members shall remain accessible to their constituents, their subordinates, and other governmental agencies at all times in order to execute their respective constitutional and statutory duties," SBOE proposed in the draft. "Therefore, such persons and their authorized representatives, including members of the State Bar, may contact board members at any time, including while a case or controversy involving such persons is pending before the board."

Under the FTB proposal, ex parte communications would be allowed, but FTB would be notified of meetings and communications between taxpayers and board members, and would be allowed to participate in the discussions. A log of such communications would be kept, and would be available to the public.

Under the proposal from SEIU, which represents 3,000 state employees who are auditors or tax compliance representatives, board members and their staff members could communicate freely with taxpayers and constituents on tax matters up to two weeks before their cases would come before the board for adjudication. Once a hearing agenda is made public, no further communication regarding a case on the agenda could take place.

If ex parte communications did take place after a case is placed on a board meeting agenda, those communications would be disclosed and the case would be postponed for at least two weeks.

### **Requests for Closed Sessions**

The new revisions to the draft rules regarding disclosure of taxpayer information would allow some taxpayers to request that their oral hearing be conducted in closed session, to prevent disclosure of trade secrets or other confidential information.

Such an option would be available to taxpayers appealing matters involving personal and corporate income tax. Taxpayers would be required to submit a written request for a closed hearing, describing the trade secrets or other confidential research, development, or commercial information that would be disclosed at an oral hearing causing "unwarranted annoyance, embarrassment, or oppression.

The SBOE chief counsel would review such requests, and make a recommendation to the board chair, who could order the oral hearing to be scheduled for a closed session. A majority of board members present at the closed session could overturn the chair's decision, and request that the hearing be conducted during open session.

Taxpayers appealing matters involving sales and use tax, timber yield tax, special taxes and fees, or property tax would not have the option to request an oral hearing during closed session. In these tax matters, taxpayers requesting an oral hearing would waive their right to confidentiality of information provided to or obtained by the board and actually disclosed on the transcript of the oral hearing before the board or included in the hearing summary.

Information such as addresses, phone numbers, Social Security numbers, federal identification numbers, account numbers, and other private information would not be disclosed.

*BNA* – March 17, 2006

### **SBOE Staff Makes Progress in Drafting New Rules Package on Appeals Procedures**

SACRAMENTO, Calif.—State Board of Equalization staff members are almost ready to ask the five-member elected board to approve a regulatory package that would simplify and unify procedures for taxpayers who appeal rulings on state tax matters, after reaching consensus on most of the package at two recent public meetings, SBOE Tax Counsel Bradley Heller told *BNA* March 16.

The staff is fine-tuning three sections of the package that address appeals dealing with SBOE-administered taxes including sales and use tax, timber yield tax, and special taxes, and will ask the board to approve a final draft of those sections at a meeting April 18.

Heller said SBOE staff also will be making final changes to a draft of the fourth part of the regulations, addressing appeals from actions of the Franchise Tax Board, based on comments received during a meeting with interested parties March 15. FTB administers corporate and personal income tax. Staff will present a final draft of the fourth part of the package to the board at a meeting May 17.

The fifth and most controversial part of the regulations, dealing with ex parte communications with board members and disclosure of taxpayer information, will be the subject of a meeting for interested parties April 5. Heller said SBOE staff expects to ask the board to approve a draft of the fifth section at a meeting June 27.

### **Formal Rulemaking Sometime After June**

Once the board has approved all five parts of the package, SBOE will begin the formal rulemaking process, which will include opportunity for interested parties to comment further before the regulations become final.

SBOE staff has included in all sections of the draft regulations alternative approaches to several issues, based on comments and suggestions from FTB, taxpayer representatives, and others, Heller said. At this point, the staff is working to decide which alternatives to include in the package to be presented to the board.

For example, Part 4 of the regulations dealing with appeals from actions of FTB includes an alternative suggested by FTB that would allow SBOE to settle questions of whether it has jurisdiction over the subject of a taxpayer's appeal before it begins to address the underlying merits of a case.

Under current practice, questions of jurisdiction and taxation are handled at the same time. Heller said SBOE staff has not yet decided whether to include this option in the final draft to present to the board.

Part 5 of the regulations, dealing with ex parte communications with board members, includes the staff's proposal to establish a policy on the issue, as well as proposals from FTB, and from the state employee's union on behalf of auditors at the state tax agencies.

Heller said SBOE is asking taxpayers and others to indicate which option they prefer, and why. SBOE staff will take comments on the draft Part 4 regulations until April 7, and on Part 5 until the end of April, Heller said. Interested parties may still submit comments on the first three parts of the regulations, but those comments may not be reflected in the draft proposal presented to the board in April.

*BNA Tax Report* – April 7, 2006

### **Proposal to Keep Open Communications Between SBOE, Taxpayers, Gets Support**

SACRAMENTO, Calif.—Legal staff members of the State Board of Equalization have received overwhelming public support for their regulatory proposal to allow continued, unrestricted taxpayer communications with the five elected members of the board, but are still weighing two other proposals that would place restrictions on those communications, SBOE Tax Counsel Bradley Heller told BNA April 6.

The draft proposal dealing with communications with board members is part of the larger effort to unify and simplify all of SBOE's rules for taxpayers who appeal actions of SBOE staff, or the staff of the Franchise Tax Board (52 DTR H-5, 3/17/06). The question of how taxpayers may communicate with board members is central to all elements of the draft rules of practice, and has been the most controversial part of the project since SBOE staff launched it in September.

During a public meeting with interested parties April 5, SBOE staff heard detailed explanations of the more restrictive proposals from the Franchise Tax Board legal staff and Service Employees International Union Local 1000, which represents state employees. SBOE staff has not yet decided which proposals to present to board members for approval, Heller said.

The SBOE staff language places no restrictions on communications between board members and taxpayers or other members of the public. "The board members shall remain accessible to their constituents, their subordinates, and other governmental agencies at all times in order to execute their respective constitutional and statutory duties," SBOE proposed in the draft. "Therefore, such persons and their authorized representatives, including members of the State Bar, may contact board members at any time, including while a case or controversy involving such persons is pending before the board."

Under the FTB proposal, communications would be allowed, but FTB would be notified of meetings and communications between taxpayers and board members, and would be allowed to participate in the discussions. A log of such communications would be kept, and would be available to the public. FTB's proposal would apply only to appeals of its decisions.

Under the proposal from SEIU, which represents 3,000 state employees who are auditors or tax compliance representatives, board members and their staff members could communicate freely with taxpayers and constituents on tax matters up to two weeks before their cases would come before the board for adjudication. Once a hearing agenda is made public, no further communication regarding a case on the agenda could take place. If communications did take place after a case is placed on a board meeting agenda, those communications would be disclosed and the case could be postponed for at least two weeks. SEIU's proposal would apply to appeals of actions from FTB or SBOE.

### **Plans Could Be Difficult in Practice**

FTB's answers to questions from SBOE staff members at the meeting who work directly for the board members, as well as from taxpayer advocates, illustrated how difficult the FTB's proposal might be in practice.

For example, under FTB's scheme, if a taxpayer called an SBOE member to discuss his or her appeal case, the member would have to advise the taxpayer that FTB must be invited to participate in the conversation before it could continue, Kenneth Davis of the FTB legal staff said. Members could not conduct separate meetings with taxpayers and FTB regarding specific cases.

If an SBOE member had a chance meeting with a taxpayer who had appealed a case, and discussed the case with the taxpayer, the board member would be required to keep a log of the conversation and disclose it to other board members and other parties to the appeal.

Board members also would be unable to talk to one another about pending cases without disclosing those conversations.

Member staff and taxpayer advocates said FTB's proposal left unanswered the questions of how much detail must be included in disclosures of communications, and how the rule would be enforced if board members varied in their level of compliance. They also said it is unclear whether communications between member staff and other SBOE staff, usually made to clarify questions or obtain additional information about pending cases, would be allowed.

Peter Michaels, an attorney with Cooper, White, and Cooper in San Francisco, suggested the FTB proposal would encourage creation of "substitute advocates" such as trade associations or other businesses with similar interests that would contact SBOE members on behalf of taxpayers. If such communications occurred frequently, the advocates could be required to register as lobbyists.

### **Amendments Expected**

Davis said the rule would need to be amended to address such circumstances.

Bruce Langston with the FTB Legal Department said the proposal is intended to keep communications within the confines of a clear process once a taxpayer has filed an appeal with SBOE.

"If you have any respect for the integrity of the process you follow it," he said. "You don't go around it."

SEIU Research and Policy Director Sarah Zimmerman said the union's proposal is intended to focus mainly on communications between board members and taxpayers in the two-week period between public notice of a taxpayer's oral hearing before the board and the hearing. SEIU is not focused on conversations between staff and taxpayers.

Heller told BNA April 6 that SBOE has not received much support for the FTB or SEIU proposals from taxpayers and members of the public who have submitted comments on the draft rules. SBOE staff is working to narrow the alternatives to present to the board members at a meeting in June, but has not ruled out the SEIU and FTB proposals entirely.

"We've had an overwhelming amount of support for the current board staff proposal," Heller said. "We are not looking to recommend something that is contrary to the majority of the comments."

### **Other Provisions Being Fine-Tuned**

Heller said SBOE staff is also fine-tuning other provisions of the draft rules discussed at the April 5 public meeting, including provisions that would allow taxpayers to request closed oral hearings before the board to avoid disclosure of trade secrets, and another provision that would clarify whether taxpayers may include information raised during settlement negotiations with FTB in their appeals before SBOE.

SBOE has not set deadlines for comments on the draft rules, but would prefer to receive comments at least three weeks before the drafts are presented to the board for approval, Heller said.

SBOE staff will ask the board to approve Part 1 and Part 2 of the draft rules, which address appeals of sales and use tax, timber yield tax, and special taxes and fees at a meeting scheduled for April 18.

SBOE staff intends to ask the board to approve Part 3 and Part 4, which address property tax and appeals of actions from FTB, at a meeting scheduled for May 17.

At the board's June 27 meeting, SBOE staff expects to present its recommendations for Part 5, dealing with communications with board members and disclosure of taxpayer information.

Once the board has approved all sections of the draft rules, SBOE will begin the formal rulemaking process, which also includes public hearings and comment periods, Heller said.

BNA Tax Report – May 19, 2006

### **SBOE OKs Property Tax Appeal Revisions But Calls for More Detail on FTB Appeals**

SACRAMENTO, Calif.—The State Board of Equalization May 17 approved its staff recommendations to revise procedures for appeals of property tax matters as part of a larger project to revise all of the board's rules of practice, but members said they need more detailed proposals for appeals of matters from the Franchise Tax Board before that part of the project can advance.

The five-member elected board in April approved the staff's recommendations for two sections of the revised rules of practice regarding the sales and use tax, timber yield tax, and special taxes and fees. With its approval of the third section of the rules addressing property tax appeals, the board needs only to approve the fourth section on FTB appeals and a fifth section on communications with board members to complete the package.

Once the board approves staff recommendations for all five sections, the entire package will be part of a formal proposed rule later this year. The more detailed proposal for appeals of FTB matters, as well as staff recommendations for taxpayer communications with board members and disclosure of taxpayer information will come before the board at its June 27 meeting.

SBOE launched the project in 2004 to revise its rules of practice in an effort to unify and simplify all of its rules for taxpayers who appeal actions of SBOE staff or the staff of the Franchise Tax Board (67 DTR H-5, 4/7/06). Since October 2005, board staff members have conducted a series of public meetings with interested parties to develop each section of the package.

### **Administration of 20 Tax Programs**

SBOE adjudicates disputes between taxpayers and its own staff regarding more than 20 tax programs it administers, including the sales and use tax. The board also adjudicates disputes between taxpayers and FTB regarding personal and corporate income tax.

In accepting the staff recommendations regarding property tax appeals, the board approved the broad concepts that staff will now develop into specific language for the proposed regulations. In general, the section describes the process for state assesseees to appeal their assessments. The section would establish a new process that would allow all appeals to be handled through an appeals conference if the taxpayer requests it. If a taxpayer also requests an oral hearing before the board, the appeals conference would be mandatory.

In delaying their approval of the section on appeals of FTB matters, board members raised concerns about provisions of the staff's recommendations dealing with a simplified briefing schedule for small cases, and handling of repeat appeals from taxpayers.

Under the staff's proposal, taxpayers with appeals involving amounts less than \$15,000 could elect to follow a simplified briefing schedule. In making such an election, the taxpayer would waive his or her right to an oral hearing before the board.

### **Board Seeks Clarity for Taxpayers**

Board members said they are hesitant to require taxpayers to waive their right to an oral hearing, and want to be sure the information provided to taxpayers would make it absolutely clear that the election to participate in the simplified process is optional. They said they want to see proposed

regulatory language, as well as proposed letters or other communications to taxpayers regarding the simplified process, before they can approve the section.

Board members also said they could not support a provision in the staff recommendations to establish procedures for denying taxpayer requests for oral hearings in cases that have been appealed previously. Staff proposed that the board deny oral hearings in cases in which a taxpayer makes a claim for refund stemming from an assessment that was the subject of a previous appeal, or when an appeal involves an interest-abatement request that repeats a prior request involving the same interest.

Several board members questioned whether SBOE should automatically bar appeals that have been made more than once. Some cases come up again because new information is submitted, or facts change that would not be apparent on the face of an appeal. They asked staff to delete or change the language so that repeat appeals would not be barred.

*BNA* – June 28, 2006

**SBOE Delays Rules on Communications with Taxpayers until August at Earliest**

SACRAMENTO, Calif.—The five-member State Board of Equalization will consider controversial draft rules governing communications with taxpayers in August at the earliest, rather than this week as SBOE staff had planned, so the board and staff can fine-tune the rules, an SBOE spokeswoman said June 26.

The board also has delayed approval of the draft taxpayer communications rules until it first approves each of the other four parts of the five-part project to revise all of its rules of practice, SBOE spokeswoman Anita Gore said. SBOE has approved three of the four other parts, but in May delayed approval of the part dealing with appeals of matters from the Franchise Tax Board.

The board is expected to consider the section on FTB appeals in July, once SBOE staff provides more information to the board members regarding a proposed simplified briefing schedule for small cases, and the process for handling repeat appeals from taxpayers. The board tentatively will move ahead with the section on taxpayer communications in August, Gore said.

SBOE staff members working on the rules of practice project have not yet released a final draft proposal for communications with taxpayers. So far, SBOE staff and board members have supported draft proposals that would allow unrestricted communications between them and taxpayers. FTB and a union representing state auditors have advocated some restrictions on those communications, especially in appeal cases that are set to go before the board in an oral hearing.

SBOE has approved the staff's recommendations for revised rules of practice regarding the sales and use tax, timber yield tax, special taxes and fees, and property tax. Once the board approves the staff's recommendations for FTB appeals and taxpayer communications, the entire package will be part of a formal proposed rule later this year.

SBOE adjudicates disputes between taxpayers and its own staff regarding more than 20 tax programs it administers, including the sales and use tax. The board also adjudicates disputes between taxpayers and FTB regarding personal and corporate income tax.

*BNA* – September 21, 2006

### **Board Members Would Be Accessible to Taxpayers Under Draft Appeals Rules**

SACRAMENTO, Calif.—The five members of California's State Board of Equalization and their staff members would remain accessible to taxpayers and other interested parties who have matters before the board, under draft rules the board will consider at its next meeting Sept. 27.

The final draft of the rules for board member communications with taxpayers is one of five parts in an overall package that would update, streamline, and clarify SBOE's rules for appeals of decisions made by the Franchise Tax Board or SBOE's staff. Everything from the mailing addresses that should be used for correspondence to the scope of information taxpayers must provide, deadlines for filings, and the assessment of penalties and fines are included in the package.

SBOE has been working on the package for two years, and the provisions dealing with taxpayer communications have been among the most controversial. The final draft includes communications provisions originally backed by SBOE staff and its members, instead of more restrictive provisions proposed by FTB and a labor union that represents state auditors. If the board approves of the staff's draft Sept. 27, the package will be proposed as a formal rule in October.

The five members of SBOE are elected, and the board adjudicates disputes between taxpayers and its own staff regarding more than 20 tax programs it administers, including the sales and use tax. The board also adjudicates disputes between taxpayers and FTB regarding personal and corporate income tax.

Because the board members are elected officials, the proposal takes a liberal approach to communications with taxpayers, for example through phone calls and meetings.

"The Board Members shall remain accessible to their constituents, their subordinates, other governmental agencies, and taxpayers at all times in order to execute their constitutional and statutory duties," the draft states. "Therefore, such persons and their authorized representatives, including members of the State Bar, may contact Board Members and a Board Member's staff at any time, including while a matter involving such persons is awaiting an oral hearing before the Board."

FTB had asked that the rules require SBOE to notify FTB when a taxpayer appealing an FTB action contacted SBOE, and to invite FTB staff to attend all meetings with the SBOE members and the taxpayer. FTB asked that the meetings and topics of discussion be disclosed to the public.

### **Employee Union Request for Restricted Communications**

Service Employees International Union Local 1000 proposed that once an appeal has been scheduled for an oral hearing before SBOE, communications between board members and taxpayers be restricted and disclosed.

SBOE Tax Counsel Bradley Heller told *BNA* Sept. 20 that the two competing proposals received almost no support from board members, taxpayers, or other interested parties. The language in the final draft accurately reflects the scope of the board's authority and duties in adjudicating tax disputes.

SEIU has since withdrawn its proposal, and has agreed to work more closely with SBOE staff and managers to enable the agency's auditors to better understand board rulings, and have better access to information the members weigh in making their decisions, Heller said.

The taxpayer communication provisions are included in Chapter 5 of the proposal. The chapter also makes several other changes or clarifications to the board's practices, including describing the conflict of interest provisions that apply to the board, permitting board members to adopt their own dissenting or concurring opinions, and protecting trade secrets by allowing taxpayers to request that part of their oral hearing be conducted in a closed session.

At the Sept. 27 meeting, SBOE staff will ask the board to approve the draft of Chapter 5 and Chapter 4, which details the procedures for taxpayers who are appealing actions of the Franchise Tax Board. SBOE already has approved the drafts of the first three chapters dealing with sales and use tax, timber yield tax, special taxes and fees, and property tax.

*BNA* – September 29, 2006

### **SBOE Delays Regulations for Tax Appeals to Weigh Rules for Taxpayer Communications**

SACRAMENTO, Calif.—A split State Board of Equalization voted 3-2 Sept. 27 to delay proposal of new rules governing California taxpayers' appeals of assessments to give the board members and interested parties one more chance to reach an accord regarding communications with taxpayers who have cases pending before the board.

SBOE staff will conduct at least one more informal meeting for interested parties, focusing on the fifth part of the five-part rule package dealing with the accessibility of board members and disclosure of taxpayer information, before bringing the package back to the board for approval at a meeting in November. SBOE has been working for two years to develop the rule package, intended to streamline and unify rules for taxpayer appeals of rulings from SBOE and the Franchise Tax Board.

The three Democrats on the SBOE, Acting Member Betty Yee, Chairman John Chiang, and Marcy Jo Mandel representing State Controller Steve Westly, asked for the delay out of concern that issues raised by the FTB and a labor union representing state auditors were not addressed adequately. The two Republicans on the board, Bill Leonard and Claude Parrish, said they want to see the rules move forward immediately.

The split in the board highlights the difficulty the members have in their dual role as elected officials and adjudicators of tax disputes. Unlike any other tax administrators in the country, SBOE members adjudicate disputes between taxpayers and the board's own staff regarding more than 20 tax programs they administer, including the sales and use tax, as well as disputes between taxpayers and FTB regarding personal and corporate income tax.

With the dual roles of board members in mind, SBOE staff has proposed a liberal approach to communications between the members and taxpayers or other interested parties. The draft regulations would make permanent the informal policy of board members to be accessible to taxpayers and constituents, for example through phone calls and meetings.

"The Board Members shall remain accessible to their constituents, their subordinates, other governmental agencies, and taxpayers at all times in order to execute their constitutional and statutory duties," the draft said. "Therefore, such persons and their authorized representatives, including members of the State Bar, may contact Board Members and a Board Member's staff at any time, including while a matter involving such persons is awaiting an oral hearing before the Board."

### **SEIU, Tax Reform Group Dislike Language**

At the meeting, representatives of Service Employees International Union Local 1000 and the California Tax Reform Association told the board they were disappointed that the language would place no restrictions on communications with taxpayers who have matters pending before the board, and would not require disclosure of such communications. The proposal is nearly identical to what they considered to be "placeholder" language that SBOE staff first proposed more than a year ago, and does not reflect alternatives proposed by SEIU and FTB, they said.

FTB had asked that the rules require SBOE to notify FTB when a taxpayer appealing an FTB action contacted SBOE, and to invite FTB staff to attend all meetings with the SBOE members or staff and the taxpayer. FTB asked that the meetings and topics of discussion be disclosed to the public.

SEIU Local 1000 proposed that, once an appeal has been scheduled for an oral hearing before SBOE, communications between board members and taxpayers be restricted and disclosed.

SEIU Lobbyist Joshua Golka told the board that the union had withdrawn its proposal, but in doing so it did not “acquiesce” to the SBOE staff language. He and Lenny Goldberg of CTRA said the other options were not thoroughly discussed before the board, and staff has not explained why it has taken the approach it has.

In addition, Goldberg said other provisions of the rule that would allow taxpayers to request closed hearings, rather than the usual oral hearing that is open to the public, are too broad. He also said it is not clear how interested parties can have access to information that is provided to the board when it decides an appeal in sales and use tax cases.

If the board adopts the current version of the rules, it would allow “unlimited lobbying” on matters before the board without public disclosure, Goldberg argued in a letter to the board members.

SBOE Acting Chief Counsel Robert Lambert told the board that his staff notified FTB and SEIU that their proposals would not be part of the final draft presented to board members. The proposals had little support, and the FTB proposal was not supported by the law because it would treat board members like judicial officers. All the proposals have been available to the board members and the public for several months, he said.

### **One More Meeting**

The board adopted a motion from Yee to hold at least one more meeting with interested parties so board members and the public can more clearly understand how the board staff concluded that its proposal should go forward, and so board members can express their concerns.

In arguing against the motion, Parrish said the elected board members must be able to talk to their constituents. CTRA and SEIU are essentially pushing for SBOE to act as a tax court, which is something the Legislature has consistently rejected. The opponents “will continue with delaying tactics” and not be satisfied until SBOE becomes a tax court, he said.

“This is not a court of law. We are not judges,” Parrish said. “Enough is enough.”

SBOE already has approved the drafts of the first three chapters of the regulatory package dealing with sales and use tax, timber yield tax, special taxes and fees, and property tax. It must still approve Chapter 4, which details the procedures for taxpayers who are appealing actions of FTB, and Chapter 5, which deals with board member communications and disclosure of taxpayer information. Once the board approves the draft, it would be proposed as a formal regulation.

*BNA* – October 27, 2006

**SBOE to Revise Draft Rules for Tax Appeals to Address Confidential Taxpayer Information**

SACRAMENTO, Calif.—The State Board of Equalization will issue one more revised draft of proposed rules for tax appeals by Nov. 9, based on comments received from interested parties regarding disclosure of confidential taxpayer information and a few other provisions of the lengthy rules, SBOE staff announced in an Oct. 24 notice.

SBOE staff will release the revised draft in time to ask the five-member board at its Nov. 20 meeting to begin the formal rulemaking process to streamline and unify its policies and procedures for taxpayer appeals of rulings from SBOE and the Franchise Tax Board. SBOE has been working on the project for two years.

The latest draft of the Rules for Tax Appeals follows an Oct. 18 meeting between board staff and interested parties held at the request of the California Tax Reform Association. The meeting was held after CTRA and the Service Employees International Union Local 1000, representing state tax auditors, told the board at a Sept. 27 meeting that they were surprised and disappointed that SBOE staff had proposed draft rules with no restrictions on communications between board members and taxpayers who have matters pending before the board (189 DTR H-1, 9/29/06).

CTRA Executive Director Lenny Goldberg submitted a new written proposal Oct. 18 to restrict communications between board members and taxpayers, but SBOE is not likely to incorporate the proposal, or any others that restrict communications, into the rules, SBOE Senior Tax Counsel Bradley Heller told *BNA* Oct. 26.

The final draft will be the same as previous drafts of the rules regarding board member communications with taxpayers, taking a liberal approach that allows unfettered communications, Heller said.

Because board members are elected officials, the staff has taken the position that access to the members cannot be limited. The board members have generally supported the staff position.

**Closed Sessions**

The Nov. 9 draft is likely to contain some changes to provisions that would allow taxpayers to request that their oral hearings before the board on their appeals be held in closed session to protect proprietary or confidential information.

Under the current draft, a taxpayer could request that its oral hearing, or part of the hearing, be held in closed session if an open hearing would cause “annoyance, embarrassment, or oppression.” The taxpayer would be required to make an initial showing that a public oral hearing would result in disclosure of trade secrets or other confidential research, development, or commercial information.

The board chair would make an initial ruling on the request for a closed session. If the full board met to hear the case in closed session based on the chair’s ruling, the board could move to overrule the chair’s decision and shift the hearing back to an open session. If the board overruled the chair’s decision, the hearing would be postponed to a later date.

Acting SBOE Member Betty Yee (D) proposed at the Oct. 18 meeting that the grounds for a closed hearing should be narrowed, and that the full board should make the initial decision on whether to hold a taxpayer’s oral hearing in a closed session. Yee also said the oral hearing should be held the same day the board decides whether it would be in a closed or open session.

**Looking Ahead to Draft**

Heller said the Nov. 9 draft will likely contain some elements of Yee's proposal, either as a replacement of the previous proposal or as an alternative for the board to consider. Some elements of Yee's proposal would complicate the process.

For example, if the full board was required to decide on a request for a closed hearing, the board would be required to include its discussion of the request on its agenda and provide notice to the public. Such notice might defeat the purpose of keeping the matter confidential.

SBOE members adjudicate disputes between taxpayers and the board's own staff regarding more than 20 tax programs they administer, including the sales and use tax, as well as disputes between taxpayers and FTB regarding personal and corporate income tax.

SBOE has already approved the drafts of the first three chapters of the regulatory package dealing with sales and use tax, timber yield tax, special taxes and fees, and property tax.

It must still approve Chapter 4, which details the procedures for taxpayers who are appealing actions of FTB, and Chapter 5, which deals with board member communications and disclosure of taxpayer information.

The Nov. 9 draft may also contain minor, technical changes to Chapter 2. Once the board approves the drafts of all five chapters, the agency would propose the package as a formal regulation.

SBOE staff must receive comments or proposed revisions by Nov. 9 if they are to be considered before completion of the revised draft.

*BNA* – November 24, 2006

### **SBOE Approves Revised Proposal on Rules Governing Tax Appeals**

SACRAMENTO, Calif.—The California State Board of Equalization Nov. 21 approved a revised set of proposed rules for tax appeals, including a provision that would continue to allow members to communicate freely with taxpayers who have matters pending before the five-member board.

The rules now will be published, with a public hearing on the proposals set for sometime in January 2007.

The adoption of the proposed rules came after a board discussion regarding several provisions of a section that outlines allowable communications between board members and taxpayers.

“I’d like taxpayers to have a better information stream so they know the status of the case,” SBOE member Bill Leonard said. “We’re actually publishing what we do. To not publish what we do runs the risk of misleading taxpayers that there aren’t any rules.”

During prior hearings on the proposed rules, representatives of the California Tax Reform Association and the Service Employees International Union Local 1000, representing state tax auditors, argued in favor of restricting communications.

CTRA’s executive director offered an alternative—considered Nov. 21, but rejected by the board—that said in the adjudication of tax disputes, board members “shall refrain from private discussions with the parties in the case about matters pertaining to the case ....”

### **Notification to Parties Contemplated**

In another alternative—also rejected—Franchise Tax Board Chief Counsel John Davies recommended that board members adopt a process requiring notification of all parties involved in an appeal prior to any communication, so that all parties could participate. His recommendation also included a provision that if one of the parties in the appeal is not present for part of the conversation, the board member or board staff prepare a public record of what transpired.

In rejecting that alternative, board member Claude Parrish complained that Davies’s restrictions would limit public access to board members, while leaving the attorneys and SBOE staff free to communicate with board members at any time.

“How about having a court reporter with me every time I talk with the BOE staff member?” Parrish asked. “What about the taxpayer’s right to know?”

Parrish’s comments were echoed by board member Betty Yee, who said that she had an alternative to the staff proposal adopted, as well as the two proposals the board rejected. She said, however, that her proposal was not ready for presentation to the board. “I think we are going to need a thorough analysis first,” Yee said.

In the part of the proposed rules dealing with property tax, the board opted to pull the section from public review pending further discussion. Marcy Jo Mandell, a board member and deputy state controller for taxation, said that the rules outlined in that area are actually being used this year by the agency, but that the “jury is still out,” on their effectiveness.

The board voted to delay publishing those rules until further board discussion takes place at future meetings.