

ITEM 14

**ADOPTION OF PROPOSED REGULATORY ACTION
MANDATE REDETERMINATION PROCESS**

PROPOSED AMENDMENTS TO
CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5,

TO AMEND: Article 1. General, sections 1181.1 and 1181.2.

TO ADD: Article 10. Mandate Redetermination Process

EXECUTIVE SUMMARY

This is a Certificate of Compliance Rulemaking for Article 10, meaning that it is a regular, noticed rulemaking that will be conducted as required by the Administrative Procedures Act, while the emergency regulations are in effect. The purpose of the proposed regulations is to implement Government Code section 17570. Statutes 2010, chapter 719 (SB 856) added section 17570 to the Government Code, which generally establishes a new process for redetermining existing mandates. Under this process, the Commission may adopt a new test claim decision to supersede a previously adopted test claim decision only upon a showing that the state's liability for that test claim decision pursuant to subdivision (a) of Section 6 of Article XIII B of the California Constitution has been modified based on a "subsequent change in law," as defined. The proposed regulations implement Government Code section 17570, subdivision (d), by establishing the procedures for receiving requests to adopt a new test claim decision and for providing notice and a hearing on those requests.

The notice of proposed rulemaking and the proposed text was mailed on November 19, 2010, which is 70 days prior to the close of the public comment period on January 28, 2011. Non-substantive changes were made to the proposed text by renumbering and relettering Roman numerals to Arabic numerals, to make the numbering and lettering within the proposed text consistent.¹

The California School Boards Association (CSBA) submitted written comments on the proposed rulemaking action.² In summary, CSBA contends that Government Code section 17570 is ambiguous and urges the Commission to resolve the ambiguity as part of the rulemaking process. CSBA also suggests that the regulations be modified or a definition of "materiality" be added. Finally, CSBA asserts that the regulations should be amended to say that the requestor has the burden of proof to show by a preponderance of the evidence that the change in law would change the underlying determination. Staff prepared a response to CSBA's comments and made no revision to the proposed rulemaking action.

Staff's summary and response to the written comments is in the final statement of reasons.³

¹ Exhibit A.

² Exhibit C.

³ Exhibit D.

Staff finds that no alternative would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective as and less burdensome to affected private persons than the proposed regulations.

Staff Recommendation

Staff recommends that the Commission:

- Find that no alternative would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective as and less burdensome to affected private persons than the proposed regulations.
- Adopt the proposed amendments to sections 1181.1 and 1181.2. California Code of Regulations, Title 2, Division 2, Chapter 2.5, and the addition of Article 10, sections 1190-1190.05, to California Code of Regulations, Title 2, Division 2, Chapter 2.5, effective 30 days after filing with the California Secretary of State.
- Authorize staff to make any non-substantive, technical corrections requested by the Office of Administrative Law or Barclays Official California Code of Regulations prior to publication.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

In the Matter of:

Amendments to Article 1 and Addition of
Article 10 to California Code of
Regulations, Title 2, Division 2, Chapter 2.5

No. 10-02

ADOPTION OF PROPOSED
REGULATORY ACTION

Mandate Redetermination Process

On March 24, 2011, at a duly noticed public hearing held in Room 447 of the State Capitol, Sacramento, California, the Commission on State Mandates adopted the proposed regulatory action after close of the public comment period.

PROPOSED REGULATORY ACTION. The Commission proposes to amend Article 1, Sections 1181.1 and 1181.2 and add Article 10 sections 1190, 1190.01, 1190.02, 1190.03, 1190.04, and 1190.05 to the California Code of Regulations, Division 2, Title 2, Chapter 2.5.

AUTHORITY AND REFERENCE. Government Code sections 17527, subdivision (g), and 17570, subdivision (d) and (e) authorize the Commission to adopt the proposed regulations.

The purpose of the proposed regulations is to implement Government Code section 17570. Statutes 2010, chapter 719 (SB 856) added section 17570 to the Government Code, which generally establishes a new process for redetermining existing mandates.

By: _____

Drew Bohan, Executive Director

Dated: March 24, 2011

1
2 **CALIFORNIA CODE OF REGULATIONS**
3 **TITLE 2. ADMINISTRATION**
4 **DIVISION 2. FINANCIAL OPERATIONS**
5 **CHAPTER 2.5. COMMISSION ON STATE MANDATES**

6 **Final Text of Proposed Regulations**

7 **Note that the proposed changes to Article 1 are to the regulations that became effective**
8 **1/1/2011.**

9 **Note that changes to Article 1 are in strike out for deletions and underline for additions**
10 **and the whole of Article 10 is a certificate of compliance rulemaking and is an addition to**
11 **the Code of Regulations which is not underlined for ease of viewing.**

12 **ARTICLE 1. GENERAL**
13
14

15 § 1181.1. Definitions.

16
17 Unless otherwise indicated, the definitions in this chapter and those found in Government Code
18 sections 17510 through 17524 apply to Articles 1, 2, 3, 4.5, 5, 6, 7, 8, and 8.5 of this chapter:
19

20 (a) "Affected state agency" means a state department or agency that is responsible, in whole or in
21 part, for implementation, enforcement, or administration of any statute(s) or executive order(s)
22 that is the subject of a claim.

23
24 (b) "Amendment" of a test claim means the addition of new allegations based on new statutes or
25 executive orders to an existing test claim. The addition or substitution of parties and supporting
26 declarations based on the original statutes or executive orders alleged in an existing test claim is
27 not an "amendment."
28

29 (c) "Claim" means test claim or incorrect reduction claim.
30

31 (d) "Claimant" means the local agency or school district filing a test claim or incorrect reduction
32 claim.
33

34 (e) "Commission staff" means the executive director, legal counsel, or other commission
35 employee authorized by the commission or the executive director to represent the commission on
36 a specific claim or request, or to receive filings at the commission office.
37

38 (f) "Completed" means that all requirements for filing a claim, proposed parameters and
39 guidelines, request to amend parameters and guidelines, request for reconsideration, or request to
40 review claiming instructions have been satisfied by the claimant or requester.
41

42 (g) "Filing date" means the date of delivery to the commission's office during normal business
43 hours. For purposes of meeting the filing deadlines required by statute, the filing is timely if:
44

1 (1) the filing was submitted via the e-filing link on the commission's web site or via
2 facsimile during normal business hours no later than the time for its filing has expired, or
3

4 (2) the filing was mailed by first class mail no later than the expiration of the time for filing.
5

6 (3) the filing was mailed by certified or express mail or a common carrier promising
7 overnight delivery no later than the expiration of the time for filing, or
8

9 (4) the filing was hand-delivered to commission staff during normal business hours no later
10 than the expiration of the time for filing.
11

12 (h) "Good cause" may include, but is not limited to, the following factors: (1) the number and
13 complexity of the issues raised; (2) a party is new to the case, or other counsel is needed; (3) the
14 individual responsible for preparing the document has other time-limited commitments during
15 the affected period; (4) the individual responsible for appearing at the hearing has other time-
16 limited commitments; (5) illness of a party; (6) a personal emergency; (7) a planned vacation that
17 cannot reasonably be rearranged; (8) a pending public records request; and (9) any other factor,
18 which in the context of a particular claim constitutes good cause. Good cause may be established
19 by a specific showing of other obligations involving deadlines that as a practical matter preclude
20 filing the document by the due date without impairing quality.
21

22 (i) "Incorrect reduction claim" means a claim alleging that the Office of State Controller
23 incorrectly reduced the reimbursement claim of a local agency or school district.
24

25 (j) "Informational proceeding" means any hearing designed to gather and assess information to
26 assist the commission in formulating policies, informing the public of commission actions, or
27 obtaining public comment and opinion.
28

29 (k) "Interested party" means a local agency or school district; an organization or association
30 representing local agencies or school districts; or a person authorized to represent a local agency
31 or school district, having an interest in a specific claim or request other than the claimant.
32

33 (l) "Interested person" means any individual, local agency, school district, state agency,
34 corporation, partnership, association, or other type of entity, having an interest in the activities of
35 the commission.
36

37 (m) "Party" means the test claimant, the Department of Finance, Office of State Controller, or
38 affected state agency.
39

40 (n) "Rulemaking proceeding" means any hearing designed to adopt, amend, or repeal any rule,
41 regulation, or standard of general application that implements, interprets, or makes specific any
42 provision of Title 2, Division 4, Part 7, beginning with Government Code section 17500 or any
43 other statute enforced or administered by the commission.
44

45 (o) "Statewide cost estimate" means the approximate sum of money that local agencies or school
46 districts may have incurred to implement a state-mandated program or any increased level of

1 service of an existing mandated program. A statewide cost estimate submitted by a test claimant
2 shall be an estimate of the first full fiscal year of actual or estimated costs based on the statutes
3 and executive orders alleged in a test claim, except as provided in Government Code section
4 17557.1, subdivision (a). A statewide cost estimate adopted by the commission shall be an
5 estimate based on the commission's determination of a test claim for the initial period of
6 reimbursement to be reported to the Legislature.
7

8 (p) "Statewide estimate of costs" is based on a reasonable reimbursement methodology proposed
9 by a test claimant and the Department of Finance, adopted by the commission, and reported to
10 the Legislature pursuant to Government Code section 17557.2.
11

12 (q) "Subsequent change in law" means a change in law that requires a finding that an incurred
13 cost is a cost mandated by the state, as defined by Government Code section 17514, or is not a
14 cost mandated by the state pursuant to Government Code section 17556, or a change in mandates
15 law. Amendments to Article XIII B, section 6 of the California Constitution that were approved
16 by the voters on November 2, 2004 and changes in the statutes or executive orders that impose
17 new state-mandated activities and require a finding pursuant to Government Code section 17551,
18 subdivision (a) are not a "subsequent change in law."
19

20 ~~(r)(q)~~ "Teleconference" means a conference of individuals in different locations, connected by
21 electronic means, through audio, video, or both.
22

23 ~~(s)(r)~~ "Written material" shall include, but is not limited to, requests and correspondence on
24 substantive and procedural matters, e.g., informal conferences, opposition, prehearing
25 conferences, postponements of hearings, extensions of due dates for submission of opposition,
26 recommendations, comments, reasonable reimbursement methodologies, responses, statewide
27 estimates of costs, supplemental declarations, supporting documentation, stipulations,
28 applications for subpoenas and subpoenas duces tecum, witness lists, etc. Test claims, proposed
29 parameters and guidelines, incorrect reduction claims, requests to review claiming instructions,
30 State Mandates Apportionment System requests, or amendments thereto, are not considered
31 written material.
32

33 Note: Authority cited: Sections 17527(g), ~~and~~ 17553(a), 17570 (d), Government Code.
34 Reference: Sections 11123, 17516-17521, 17527(c), 17529, 17530, 17531, 17532, 17551, 17553,
35 17557, 17557.1, 17557.2, 17570, 17571, 17600, 17615.1, 17615.4, 17615.7, 17615.8, and
36 17615.9, Government Code.
37

38 § 1181.2. Filing and Service of Written Materials 39

40 (a) For each completed claim or other filing, commission staff shall promulgate and make
41 available a mailing list of the names, addresses, phone numbers, facsimile phone numbers, and e-
42 mail addresses of the parties, interested parties, and interested persons who have requested
43 inclusion on the mailing list for a specific claim. This mailing list shall be provided by
44 commission staff to the parties and interested parties to the claim and to any person who requests
45 a copy.
46

1 (b) Unless otherwise provided in this chapter, when a party or interested party files with
2 commission staff any written material concerning a claim, it may do so electronically or by hard
3 copy as described in subdivision (c) of this section and shall simultaneously serve a copy of the
4 written material on the other parties, interested parties, and interested persons identified on the
5 mailing list provided by commission staff. A proof of service shall be included with any written
6 material filed with commission staff. Proof of personal service requires a declaration of the
7 messenger of the time and place that that the document was served.

8
9 (c) Filing and service of any written material may be effected by delivering or simultaneously
10 mailing the document by any of the following methods:

11
12 (1) By Electronic Mail (e-mail). Submit the original document to commission staff by
13 saving the signed original in an Adobe PDF file and submitting it via the commission's e-
14 file system, available on the commission's web site. The filing party is responsible for
15 maintaining the paper document with original signature(s) for the duration of the test
16 claim process, including any period of appeal. Following successful transmission or
17 notification, commission staff shall notify all parties and interested parties that written
18 material may be viewed on the commission's website. Notwithstanding any other
19 provision in these regulations, if a document is e-filed, no additional copies shall be
20 submitted to commission staff. The following shall apply to e-filing:

- 21
22 a. By providing an electronic mail (e-mail) address for the mailing list for a matter, a
23 person consents to e-mail service of documents for that matter.
24
25 b. Documents e-filed with the commission must be in readable, downloadable, printable,
26 and searchable formats. The subject line of the e-mail message must include in the
27 following order (1) the case number for the matter, (2) a brief title for the matter, and
28 (3) a brief identification of the document to be served, including the name of the
29 serving person. The text of the e-mail message must identify whether the e-mail
30 message is one of multiple e-mail messages transmitting the documents to be served
31 and, if so, how many e-mails, and the name, telephone number, e-mail address, and
32 facsimile transmission number of the person to whom problems with receipt of the
33 document to be served should be directed.
34
35 c. An automated notice that the document was successfully sent is immediately
36 available to the person tendering the document to the commission's e-filing system.
37 Commission staff shall reply by e-mail confirming actual receipt of the document by
38 the commission within two business days of receipt. In the absence of a confirmation
39 e-mail from commission staff, it is the responsibility of the person tendering the
40 document to obtain confirmation that the commission actually received it. E-mail
41 service is complete upon successful transmission to the commission.
42
43 d. By using e-filing, the filing person agrees, in the event of failure of e-filing service, to
44 re-file the document, no later than the business day after the business day on which
45 notice of the failure of e-mail service is received by the filing party, by any means
46 authorized by these rules. "Failure of e-filing" occurs when the filing person receives

1 notification, in any manner, of non-receipt of an e-mail message, or of the receiving
2 person's inability to open or download an attached document, or of any other inability
3 of commission staff to access the document to be served. The filing person and
4 commission staff may agree to any form for re-filing allowed by these rules.
5

6 e. Documents e-filed with the commission need not be otherwise served on persons that
7 have provided an e-mail address for the mailing list. Nothing in this regulation
8 excuses persons from serving hard copies of documents on persons who appear on the
9 mailing list and have not provided an e-mail address for the mailing list.
10

11 f. The commission may serve any document by e-mail service, and/or by making it
12 available at a particular URL, unless doing so would be contrary to state or federal
13 law.
14

15 g. The Executive Director may issue any order consistent with these rules to govern e-
16 mail service for a particular matter.
17

18 (2) By first class mail. Submit the original to commission staff and a copy to everyone
19 whose name is on the commission's mailing list by first class mail. Service by mail is
20 complete when the sealed envelope is deposited with the United States Postal Service
21 with the postage fully prepaid mailed by first class mail.
22

23 (3) By overnight delivery. Submit the original to commission staff and a copy to everyone
24 whose name is on the commission's mailing list by overnight delivery. Service by
25 overnight delivery is complete when the documents are enclosed in an envelope or
26 package provided by an overnight delivery carrier and the envelope or package is
27 deposited for collection and overnight delivery at an office or a regularly utilized drop
28 box of the overnight delivery carrier.
29

30 (4) By personal service. Hand the original to commission staff and a copy to each person
31 whose name is on the commission's mailing list or leave it in a place where the addressee
32 may reasonably be expected to obtain actual and timely receipt. Service by personal
33 service is complete when the document is placed in an envelope and personally served or
34 provided to a professional messenger service for service. (A declaration by the messenger
35 must accompany the Proof of Service required pursuant to subdivision (b) of this
36 regulation.)
37

38 (5) By facsimile. Submit the original to commission staff and a copy to everyone whose
39 name is on the commission's mailing list by facsimile. Service by facsimile is complete
40 upon the printing of verification of successful transmission. By using facsimile service,
41 the serving person agrees, in the event of failure of facsimile transmission for any reason,
42 to re-serve the document, no later than the business day after the business day on which
43 notice of the failure of facsimile service is received by the serving party, by any means
44 authorized by these rules, provided that facsimile service may be used for re-service only
45 if (1) the receiving person consents to the use of facsimile service, or (2) the serving
46 person determines that the cause of the failure of facsimile service has been rectified.

1 "Failure of facsimile service" occurs when the serving person receives notification, in any
2 manner, of non-receipt of a facsimile, or of the receiving person's inability to read the
3 facsimiled document, or of any other inability of the receiving person to access the
4 document to be served. The serving person and receiving person may agree to any form
5 for re-service allowed by these rules.
6

7 The executive director may require more expeditious service or a particular form of service in
8 appropriate circumstances.
9

10 (d) For the following new filings received by the commission, the executive director shall issue
11 sequential case numbers, by fiscal year, as follows:
12

- 13 1. Test Claim (TC)
- 14
- 15 2. Incorrect Reduction Claim (I)
- 16
- 17 3. Request to Amend Parameters and Guidelines (PGA)
- 18
- 19 4. Joint Request for Reasonable Reimbursement Methodology (RRM)
- 20
- 21 5. Request for Review of Claiming Instructions (CI)
- 22
- 23 6. Request for Removal or Inclusion in State Mandates Apportionment System (SMAS)
- 24
- 25 7. Joint Request for Legislatively Determined Mandate (LDM)
- 26
- 27 8. Request to Adopt a New Test Claim Decision to Supersede an Existing Test Claim
28 Decision (NTCD)
29

30 Note: Authority cited: Sections 17527(g), 17553(a), 17570(d) and 11104.5, Government Code.
31 Reference: Sections 17530, 17551, 17553, 17554, 17557, 17557.1, 17571, 17557.2, 17570,
32 17573(b), 17573(g), 17574(c) and 17615.1, Government Code.
33

34 Note: Authority cited: Sections 17527(g) and 17553(a), Government Code. Reference: Sections
35 17530, 17553(a), 17557 and 17557.2, Government Code.
36

37 **ARTICLE 10. MANDATE REDETERMINATION PROCESS**
38

39 § 1190. Filing a Request to Adopt a New Test Claim Decision.
40

41 (a) A local agency or a school district, statewide association of local agencies or school
42 districts, the Department of Finance, Office of the State Controller, or other affected state
43 agency, may file a request to adopt a new test claim decision to supersede a previously adopted
44 test claim decision by making a showing that the state's liability pursuant to Article XIII B,
45 section 6, subdivision (a) of the California Constitution for the previously adopted test claim
46 decision has been modified based on a "subsequent change in law" as defined by Government

1 Code section 17570, subdivision (a)(2).

2
3 (b) All requests to adopt a new test claim decision shall be filed on a form developed by the
4 executive director and shall contain a detailed analysis of how and why the state's liability for
5 mandate reimbursement has been modified pursuant to Article XIII B, section 6, subdivision (a)
6 of the California Constitution and all of the elements and accompanying documents required by
7 the form and Government Code section 17570, subdivision (d).

8
9 (c) The detailed analysis of how and why the state's liability for mandate reimbursement has
10 been modified pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution
11 based on a "subsequent change in law" as defined by Government Code section 17570 requires
12 more than a written narrative or simple statement of the facts and law. It requires the application
13 of the law (Gov. Code § 17570 (a) and (b)) to the facts (i.e. the alleged subsequent change in
14 law) discussing, for each activity addressed in the prior test claim decision, how and why the
15 state's liability for that activity has been modified. Specific references shall be made to chapters,
16 articles, sections, or page numbers that are alleged to impose or not impose a reimbursable state-
17 mandated program.

18
19 (d) The requester shall file one original request to adopt a new test claim decision and
20 accompanying documents with the commission. An "original" is either a signed hard copy or a
21 PDF electronic copy thereof submitted through the e-filing system on the commission's web site.
22 If the request is e-filed with the commission, the requester is responsible for maintaining the
23 paper request with original signature(s) for the duration of the redetermination process, including
24 any period of appeal. If a hard copy is submitted, the original shall be unbound and single-sided,
25 without tabs, and include a table of contents. If the request is filed in PDF format, the
26 accompanying documents shall also be filed in PDF format.

27
28 (e) The requester shall also file seven (7) copies of the request to adopt a new test claim decision
29 and accompanying documents with the commission, if the request is filed in hard copy. The
30 copies shall be double-sided and shall not include tabs. If the request is e-filed, no copies shall
31 be filed.

32
33 (f) Within ten (10) days of receipt of a request to adopt a new test claim decision, commission
34 staff shall notify the requester if the request is complete or incomplete and refer the requester to
35 these regulations. Requests to adopt a new test claim decision shall be considered incomplete if
36 any of the elements required in subsections (b), (c), or (d) of this section are illegible or are not
37 included. If a complete request to adopt a new test claim decision is not received within thirty
38 (30) calendar days from the date the incomplete request was returned, the executive director shall
39 disallow the original request filing date. New request(s) to adopt a new test claim decision may
40 be accepted on the same subsequent change in law alleged to modify the state's liability pursuant
41 to Article XIII B, section 6, subdivision (a) of the California Constitution.

42
43 (g) A request to adopt a new test claim decision shall be filed on or before June 30 following a
44 fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that
45 fiscal year.

1 (h) A requester may not add a new subsequent change in law to a request to adopt a new test
2 claim decision after the request has been deemed complete.

3
4 (i) Any request to adopt a new test claim decision that fails to allege a “subsequent change in
5 law” as defined by Government Code section 17570, shall be returned by the executive director
6 with a written notice stating the reason that the request is being returned. Examples of such
7 filings may include, but are not limited to, circumstances where the filing meets the requirements
8 for a proposed parameters and guidelines amendment or a new test claim filing.

9
10 Note: Authority cited: Sections 17527(g) and 17570(d) Government Code. Reference: Sections
11 17530 and 17570 Government Code.

12
13 § 1190.01. Review and Response.

14
15 (a) Within ten (10) days of receipt of a completed request to adopt a new test claim decision,
16 commission staff shall send a written notice to the Department of Finance, Office of the State
17 Controller, any affected state agency, the original test claimant, and any known interested party,
18 that:

19 (1) a copy of the request to adopt a new test claim decision has been posted on the
20 commission’s web site, and

21 (2) they shall have the opportunity to review and provide written a response concerning the
22 request to adopt a new test claim decision within thirty (30) days and to present evidence
23 at the hearing on the request to adopt a new test claim decision.

24 (b) Content and Form. Written responses on the request to adopt a new test claim decision shall
25 contain the following documentary evidence, if applicable:

26
27 (1) If assertions or representations of fact are made, they must be supported by documentary
28 evidence which shall be submitted with the response. All documentary evidence shall be
29 authenticated by declarations under penalty of perjury signed by persons who are authorized
30 and competent to do so and must be based on the declarant's personal knowledge or
31 information or belief.

32
33 (2) Include a copy of relevant portions of state constitutional provisions, state and federal
34 statutes, and executive orders, and a copy of administrative decisions and court decisions that
35 may impact the alleged mandate, unless such authorities are also cited in the request to adopt
36 a new test claim decision. The specific chapters, articles, sections, or page numbers must be
37 identified. Published court decisions arising from state mandate determinations by the Board
38 of Control and the commission, article XIII B, section 6 of the California Constitution, and
39 Government Code sections 17500 and following are exempt from the requirements of this
40 subsection. When an omnibus bill is relevant to the response, only the relevant pages of the
41 statute, including the Legislative Counsel’s Digest and the specific statutory changes at issue
42 shall be filed.

43
44 (c) The written response and supporting documentation shall be signed at the end of the
45 document, under penalty of perjury by an authorized representative, with the declaration that it is

1 true and complete to the best of the representative's personal knowledge or information or belief.
2 The date of signing, the representative's title, address, and telephone number shall be included. If
3 the authorized representative can be reached via facsimile machine or e-mail, the facsimile
4 number and e-mail address shall also be included.

5
6 (d) Filing. An original and two (2) copies of a written response and supporting documentation
7 concerning a request to adopt a new test claim decision shall be filed with commission staff and
8 served in accordance with Section 1181.2 of these regulations. If a hard copy is submitted, the
9 original document shall be unbound and single-sided. If the response is e-filed, no copies shall
10 be filed. Proof of service shall be included with the response filed with commission staff.

11
12 (e) Everyone on the mailing list described in Section 1181.2 of these regulations shall be
13 provided written notice that a copy of the response has been posted on the commission's web
14 site.

15
16 Note: Authority cited: Sections 17527(g), 17570(d), Government Code. Reference: Sections
17 17530, and 17570, Government Code.

18
19 § 1190.02. Rebuttal.

20
21 (a) Parties and interested parties shall be given an opportunity to rebut written responses
22 concerning a request to adopt a new a test claim decision by filing written rebuttals within thirty
23 (30) days of service of the responses.

24
25 (b) Content and Form. A written rebuttal shall contain the following documentary evidence, if
26 applicable:

27
28 (1) If new assertions or representations of fact are made, they must be supported by
29 documentary evidence which shall be submitted with the rebuttal. All documentary evidence
30 must be authenticated by declarations under penalty of perjury signed by persons who are
31 authorized and competent to do so and must be based upon the declarant's personal
32 knowledge or information or belief.

33
34 (2) A copy of relevant portions of state constitutional provisions, federal statutes, and
35 executive orders, and a copy of administrative decisions and court decisions that are cited in
36 the rebuttal, unless such authorities are also cited in the request to adopt a new test claim
37 decision or any response thereto. The specific chapters, articles, sections, or page numbers
38 shall be identified. Published court decisions arising from state mandate determinations by
39 the Board of Control and the commission, article XIII B, section 6 of the California
40 Constitution, and Government Code sections 17500 and following are exempt from the
41 requirements of this subsection. When an omnibus bill is relevant to the rebuttal, only the
42 relevant pages of the statute, including the Legislative Counsel's Digest and the specific
43 statutory changes at issue shall be filed.

44
45 (c) The original written rebuttal to a response concerning a request to adopt a new test claim
46 decision shall be filed with commission staff and served in accordance with Section 1181.2 of

1 these regulations.

2
3 (d) The rebuttal shall be signed at the end of the document, under penalty of perjury by the
4 requester or its authorized representative, with the declaration that the rebuttal is true and
5 complete to the best of the declarant's personal knowledge or information or belief. The date of
6 signing, the declarant's title, address, and telephone number shall be included. If the declarant
7 can be reached by facsimile machine or e-mail, the declarant's facsimile number and e-mail
8 address shall also be included.

9
10 (e) Everyone on the mailing list described in Section 1181.2 of these regulations shall be
11 provided written notice that a copy of the rebuttal has been posted on the commission's web site.

12
13 Note: Authority cited: Sections 17527(g), 17570(d), Government Code. Reference: Sections
14 17530 and 17570, Government Code.

15
16 § 1190.03. Informal Conference.

17
18 (a) The executive director may schedule an informal conference with the requester, the
19 Department of Finance, Office of the State Controller, other affected state agencies and
20 interested parties upon request. With the consent of the parties, the informal conference may be a
21 teleconference.

22
23 (b) The purpose of an informal conference may be to

24
25 (1) Set dates for receiving responses or rebuttal; completing the staff analyses; and hearing the
26 request.

27
28 (2) Give the requester the opportunity to present the request to adopt a new test claim decision to
29 supersede a prior test claim decision and to respond to questions from commission staff and
30 other state or local agency or school district staff or representatives for the purpose of resolving
31 or clarifying issues of fact or law.

32
33 (c) Any party may notify the executive director of any interested parties who should be invited to
34 attend an informal conference.

35
36 (d) Unless waived by the parties, commission staff shall provide at least ten (10) days notice of
37 the informal conference by mail, facsimile transmission, e-mail, or by other electronic media.

38
39 (e) Anything said, any document disclosed, and any new assertions and representations of fact
40 made during an informal conference shall not be made part of the administrative record of a
41 request to adopt a new test claim decision unless properly admitted into the record through the
42 submission of an amendment to a request to adopt a new test claim decision, a written response,
43 rebuttal, and/or public testimony.

44
45 Note: Authority cited: Sections 17527(g), 17570(d), Government Code. Reference: Sections
46 17530, and 17570, Government Code.

1
2 § 1190.04. Executive Director's Authority to Consolidate Requests to Adopt a New Test Claim
3 Decision.

4
5 (a) The executive director may consolidate a request to adopt a new test claim decision with
6 another request to adopt a new test claim decision for the second hearing, if some or all of the
7 same statutes, regulations or executive orders are at issue, if necessary to ensure the complete,
8 fair, or timely consideration of any request to adopt a new test claim decision.

9
10 (b) At least ten (10) days before the action is taken, the executive director shall serve on the
11 parties and interested parties on the mailing list described in Section 1181.2 of these regulations,
12 and post on the commission's web site, a notice of any proposed action to consolidate.

13
14 Note: Authority cited: Section 17527(g) and 17570(d), Government Code. Reference: Sections
15 17530, 17570, Government Code.

16
17 § 1190.05. Hearing Process and Form of Decision.

18
19 Notwithstanding any other provision of these regulations, mandate redetermination process
20 hearings and decisions shall be subject to article 7 of these regulations. There shall be a two-step
21 hearing process for requests to adopt a new test claim decision as follows:

22
23 (a) The First Hearing:

24
25 (1) The first hearing shall be limited to the issue of whether the requester has made an
26 adequate showing which identifies a subsequent change in law as defined by Government
27 Code section 17570, material to the prior test claim decision, that may modify the state's
28 liability pursuant to Article XIII B, section 6, subdivision (a) of the California
29 Constitution. The commission shall find that the requester has made an adequate
30 showing if it finds that the request, when considered in light of all of the written
31 responses and supporting documentation in the record of this request, has a substantial
32 possibility of prevailing at the second hearing.

33
34 (2) At least eight (8) weeks before the hearing or at such other time as required by the
35 executive director or stipulated to by the parties, commission staff shall prepare a draft
36 staff analysis and distribute it to the parties, interested parties, and any person who
37 requests a copy, and shall post it on the commission's web site. A request to adopt a new
38 test claim decision is set for the first hearing when commission staff issues its draft staff
39 analysis. A written notice of the date, time, and place of the first hearing shall be served
40 on everyone on the mailing list described in Section 1181.2 of these regulations and
41 posted on the commission's web site.

42
43 (3) Any party or interested party may file written comments concerning the draft staff
44 analysis with commission staff. Written comments shall be filed and served as described
45 in Section 1181.2 of these regulations, by the date determined and publicized by the
46 executive director. A three (3) week period for comments shall be given, subject to the

1 executive director's authority to expedite all matters pursuant to Government Code
2 section 17530. All written comments timely filed shall be reviewed by commission staff
3 and may be incorporated into the final written analysis of the request to adopt a new test
4 claim decision.

5
6 (4) Before the first hearing on the request to adopt a new test claim decision, commission
7 staff shall prepare a final written analysis limited to the issue of whether the requester has
8 made a showing that identifies a subsequent change in law, material to the prior test claim
9 decision, which may modify the state's liability pursuant to Article XIII B, section 6,
10 subdivision (a) of the California Constitution. This analysis shall consider only a review
11 of the request, written responses, written rebuttals and supporting documentation filed by
12 the parties and interested parties. The final staff analysis for the first hearing shall find
13 that the requester has made an adequate showing if staff finds that the request, when
14 considered in light of all of the written responses and supporting documentation in the
15 record of this request, has a substantial possibility of prevailing at the second hearing.

16
17 (5) If, at the first hearing, the commission finds that:

18
19 (A) the requester has not made an adequate showing, when considered in light of all of
20 the written responses, rebuttals and supporting documentation in the record and testimony
21 at the hearing, that the request to adopt a new test claim decision has a substantial
22 possibility of prevailing at the second hearing, the commission shall publish a decision
23 denying the request to adopt a new test claim decision.

24
25 (B) the requester has made an adequate showing, when considered in light of all of the
26 written responses, rebuttals and supporting documentation in the record and testimony at
27 the hearing, the commission shall publish a decision finding that an adequate showing has
28 been made and setting the second hearing on the request to adopt a new test claim
29 decision to supersede the previously adopted test claim decision.

30
31 Everyone on the mailing list described in Section 1181.2 of these regulations shall be
32 provided written notice that the commission's decision has been posted on the
33 commission's web site and, if applicable, that the date, time, and place of the second
34 hearing has also been posted on the commission's web site.

35
36 (b) The Second Hearing:

37
38 (1) If the commission proceeds to the second hearing, it shall consider whether the state's
39 liability pursuant to Article XIII B, section 6, subdivision (a) of the California
40 Constitution has been modified based on the subsequent change in law alleged by the
41 requester, thus requiring adoption of a new test claim decision to supersede the
42 previously adopted test claim decision. If the commission finds that the state's liability
43 pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution has
44 been modified based on the subsequent change in law alleged by the requester, it shall
45 adopt a new statement of decision that reflects the modified liability of the state.

1 (2) Before the second hearing on the request to adopt a new test claim decision, commission
2 staff shall prepare a final written analysis. At least eight (8) weeks before the hearing or
3 at such other time as required by the executive director or stipulated to by the parties,
4 commission staff shall prepare a draft staff analysis and distribute it to everyone on the
5 mailing list described in Section 1181.2 of these regulations and post it on the
6 commission's web site. The analysis shall consider only a review of the request, written
7 responses, written rebuttals and supporting documentation filed by the parties and
8 interested parties in the record of this request.

9
10 (3) Any party or interested party may file written comments concerning the draft staff
11 analysis with commission staff. Written comments shall be filed and served as described
12 in Section 1181.2 of these regulations, by the date determined and publicized by the
13 executive director. A three (3) week period for comments shall be given, subject to the
14 executive director's authority to expedite all matters pursuant to Government Code
15 section 17530. All written comments timely filed shall be reviewed by commission staff
16 and may be incorporated into the final written analysis of the request to adopt a new test
17 claim decision.

18
19 (4) If, at the second hearing, the commission finds that the state's liability pursuant to Article
20 XIII B, section 6, subdivision (a) of the California Constitution:

21
22 (1) has not been modified based on a subsequent change in law as defined by
23 Government Code section 17570, subdivision (a)(2), the commission shall publish a
24 decision denying the request.

25
26 (2) has been modified based on a subsequent change in law, as defined by Government
27 Code section 17570, subdivision (a)(2) the commission shall adopt a new statement of
28 decision shall to supersede the prior statement of decision. The new statement of
29 decision shall be prepared in writing, based on the record, and shall include a statement
30 of reasons for the decision, findings and conclusions.

31
32 Everyone on the mailing list described in Section 1181.2 of these regulations shall be
33 provided written notice that a copy of the decision has been posted on the commission's
34 web site.

35
36 (5) After a decision or proposed decision has been served or posted on the commission's web
37 site, it shall not be changed except to correct clerical errors, in which case a corrected
38 decision or proposed decision shall be prepared and posted on the commission's web site.
39 Everyone on the mailing list described in Section 1181.2 of these regulations shall be
40 provided written notice that a copy of the revised decision has been posted on the
41 commission's web site.

42
43 (6) If a new statement of decision is adopted which finds that there are costs mandated by the
44 state pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution,
45 the amount and method of reimbursement shall be redetermined in accordance with
46 sections 1183.1- 1183.32 of these regulations.
47

INITIAL STATEMENT OF REASONS
CALIFORNIA CODE OF REGULATIONS
TITLE 2. ADMINISTRATION
DIVISION 2. FINANCIAL OPERATIONS
CHAPTER 2.5. COMMISSION ON STATE MANDATES

To Amend: Article 1. General, sections 1181.1 and 1181.2.

To Add: Article 10. Mandate Redetermination Process

INTRODUCTION

This is a Certificate of Compliance Rulemaking. The purpose of the proposed regulations is to implement the Mandate Redetermination Process pursuant to Government Code section 17570, subdivisions (d) and (e) (Stats. 2010, ch.719, eff. October 19, 2010 (SB 856)).

SB 856 is a budget trailer bill which establishes a Mandate Redetermination Process for the Commission on State Mandates. Specifically, the bill does the following:

- Establishes a new program for the Commission to adopt new test claim decisions to supersede prior decisions only upon a showing that the state’s liability for mandate reimbursement pursuant to article XIII B, section 6, subdivision (a) of the California Constitution and sections 17514 and 17556 of the Government Code has been modified based on a “subsequent change in law” as defined.
- Defines “test claim decision,” “mandates law” and “subsequent change in law.”
- Allows cities, counties, special districts, school districts, state agencies, and statewide associations of cities, counties, and school districts to file a request for the Commission to adopt a new test claim decision.
- Requires the Commission to adopt regulations to specify the filing requirements, procedures and standards for the two-step hearing process.
- Requires the Commission to first adopt emergency regulations and specifies that “the adoption of the regulations shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public peace, health and safety, and general welfare.”
- Defines the applicable period of reimbursement based on the filing date.
- Requires the Commission to adopt new parameters and guidelines, amend existing parameters and guidelines, adopt a statewide cost estimate, if necessary, and report to the Legislature when a new test claim decision is adopted to supersede a prior decision.

SPECIFIC PURPOSE OF EACH SECTION OF THE REGULATIONS

Section 1181.1. Definitions

Specific Purpose of the Regulation

This amendment adds a new subdivision (q) defining “subsequent change in law” utilizing language contained in Government Code section 17570, subdivision (a) (2). It also re-letters existing subdivision (q) and following.

Necessity

This section is necessary to have all definitions in one place for the ease of parties participating in the redetermination process.

Section 1181.2. Filing and Service of Written Materials

Specific Purpose of the Regulation

This amendment adds a new subdivision (d)(8) defining requests to adopt a new test claim decision as “NTCD” for purposes of issuing sequential case numbers, by fiscal year. This amendment also strikes the word “Adobe” in subdivision (c)(1) to allow electronic filing in any PDF format.

Necessity

This section is necessary to define how a new test claim decision will be sequentially numbered. It also allows for electronic filing in any PDF format.

Section 1190, Filing Request to Adopt a New Test Claim Decision

Specific Purpose of the Regulation

This section sets out how local governments, state agencies, and interested parties may file a request to adopt a new test claim decision to supersede a previously adopted test claim decision upon a showing that the state’s liability for that test claim decision pursuant to article XIII B, subdivision (a) of section 6 of the California Constitution has been modified based on a subsequent change in law, as defined. This section also describes the process for completeness review by Commission staff and provides for the return of filings that do not meet these requirements.

The proposed regulation specifies the requirements for filing a request to adopt a new test claim decision. Specifically it:

- Provides that all requests shall be filed on a form prescribed by the Commission that contains requirements specified by Government Code section 17570, subdivision (d)(1). Among these requirements is that the request contain a “detailed analysis of how and why the state’s liability for mandate reimbursement has been modified pursuant to subdivision (a) of section 6 of Article XIII B of the California Constitution based on a subsequent change in law,” as defined.
- Further elaborates on what a “detailed analysis” is.

- Provides for completeness review of the request by Commission staff and specifies that the executive director shall return any written request that fails to allege a subsequent change in law with a written notice stating the reason that the request is being returned.
- Provides that the Commission shall return a submitted request that is incomplete to the requester and allow the requester to remedy the deficiencies and may disallow the original filing if a complete request is not received by the Commission within 30 calendar days from the date that the incomplete request was returned to the requester.
- Specifies that a requester may not add a new subsequent change in law to a request to adopt a new test claim decision after the request has been deemed complete.

Necessity

This section is necessary to give parties and interested parties clear guidance in how to file a request to adopt a new test claim decision.

Section 1190.01. Review and Response

Specific Purpose of the Regulation

This section specifies how a completed request to adopt a new test claim decision will be noticed and posted for public comment, and specifies how written responses shall be filed and posted.

The proposed regulation specifies that upon receipt of a completed request to adopt a new test claim decision:

- Written notice shall be sent to the Department of Finance, Office of the State Controller, any affected state agency, the original test claimant, and any known interested party that a copy of the request has been posted on the Commission’s website and that they shall have the opportunity to review and provide a response and to present evidence at the hearing on the request.

The proposed regulation also specifies the content, form, and number of copies of written responses to be filed, and that written notice will be provided that a copy of the response has been posted on the Commission’s website.

Necessity

This section is necessary to provide the parties and interested parties with notice of each completed request to adopt a new test claim decision, and a process for the opportunity to review, provide a response, and present evidence at the hearing.

Section 1190.02. Rebuttal

Specific Purpose of the Regulation

The proposed regulation provides parties with the opportunity to rebut written responses on a request to adopt a new test claim decision and specifies how rebuttals shall be filed and posted.

Necessity

This section is necessary to provide the parties and interested parties with a process to rebut written responses on a request to adopt a new test claim decision.

Section 1190.03. Informal Conference

Specific Purpose of the Regulation

The proposed regulation authorizes the executive director to schedule an informal conference with the requester, the Department of Finance, Office of the State Controller, and other affected state agencies and interested parties upon request.

Necessity

This section is necessary to authorize the executive director to schedule an informal conference with the parties upon request.

Section 1190.04. Executive Director's Authority to Consolidate Requests to Adopt a New Test Claim Decision

Specific Purpose of the Regulation

The proposed regulation authorizes the executive director to consolidate a request to adopt a new test claim decision with another request to adopt a new test claim decision for the second hearing, as specified.

Necessity

This section is necessary to ensure the complete, fair, and timely consideration of requests on the same test claim decision.

Section 1190.05. Hearing Process and Form of Decision

Specific Purpose of the Regulation

The proposed regulation specifies the procedures and standards for the two-step hearing process to consider requests for adoption of a new test claim decision. Specifically, it:

- Provides that at the first hearing, the Commission shall determine if the requester has made a showing that the state's liability pursuant to subdivision (a) of section 6 of Article XIII B, has been modified based on a subsequent change in law; and provides that if the Commission determines that the requester has made this showing, then the Commission shall notice the request for a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted test claim decision.
- Requires Commission staff to prepare a draft staff analysis for each hearing at least eight weeks before the hearing or at such other time as required or stipulated to by the parties and provide a process for receipt of public comment on a draft staff analysis, and preparation of a final staff analysis for hearing.
- Provides that mandate redetermination process hearings and decisions are subject to article 7 of the Commission's regulations which generally provides for requests for postponement and withdrawal of a matter as well as the presentation of evidence and legal argument at the hearings by the requester, interested parties, the Department of Finance, the Controller, any other affected state agency, and interested persons.

- Provides that if a new statement of decision is adopted which finds that there are costs mandated by the state pursuant to Article XIII B, section 6 of the California Constitution, the amount and method of reimbursement shall be redetermined in accordance with sections 1183.1-1183.32 of the Commission's regulations.

Necessity

This section is necessary in order to give the parties and interested parties guidance in distinguishing the issues that will be considered by the Commission at the first hearing and the second hearing, and also to provide procedures for hearing requests for a new test claim decision.

MATERIAL RELIED UPON TO DEVELOP REGULATIONS

Commission staff did not rely on any technical, theoretical, or empirical studies or reports in proposing the adoption of these regulations.

Commission staff did rely on *Natural Resources Defense Council v. California Fish and Game Commission* (1994), 28 Cal.App.4th 1104 in developing section 1190.05 of the proposed regulations.

Commission staff did review the regulations with parties who expressed an interest in developing the regulations. This meeting took place on October 25, 2010.

REASONABLE ALTERNATIVES TO THE REGULATIONS AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

No other alternatives have been presented to or considered by the Commission.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE ECONOMIC IMPACT ON SMALL OR OTHER BUSINESSES

The Commission has no jurisdiction over small or any other businesses. Therefore there is no adverse impact on small or other businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

There are no businesses that are parties or interested parties in matters before the Commission.

Law Offices of

OLSON

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FISHBURN

LLP

January 28, 2011

Ms. Heidi Palchik, Program Analyst
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

RE: RULEMAKING PROCEEDING
Amending Article 1, sections 1181.1 and 1181.2
Adding Article 10, sections 1190 – 1190.05

Dear Ms. Palchik:

The California School Boards Association submits these comments in response to the rulemaking proceeding concerning implementation of Government Code 17570.

Senate Bill 856, a trailer bill enacted in conjunction with the 2010-11 Budget Act amended the Government Code to add new section 17570. (Sec. 33, Ch. 719, Stats. 2010.)¹ Section 17570 authorizes the Commission on State Mandates (“the Commission”) to make a new test claim determination to supersede a previously adopted test claim decision (“NTCD”) when there is a “subsequent change in law” that modifies the state’s mandate liability. It defines a “subsequent change in law” as “a change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by section 17514, or is not a cost mandated by the state pursuant to section 17556, or a change in mandates law...” A ‘subsequent change in law’ also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of section 17551.” Section 17570 also directs the Commission to adopt regulations to implement its terms. The Commission is directed to adopt regulations to implement these provisions. This letter provides comments on the proposed regulations.

BACKGROUND

There appears to be a threshold question as to whether section 17570 is intended only to allow changes that affect the ultimate mandate decision (i.e., whether a statute or executive order DOES impose costs under 17514 or DOES NOT impose costs under 17556) or whether it is meant to allow for a NTCD anytime a change is made that may affect reimbursement for particular activities within a mandate determination but not otherwise affect the fact that there is a mandate determination. We believe that fundamental question must be resolved as part of the rulemaking process.

Under section 17551, the Commission is charged with determining whether a local agency “is entitled to be reimbursed by the state for costs

¹ All references are to the Government Code unless otherwise indicated.

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mandated by the state...” Section 17514 defines “costs mandated by the state” as any increased costs which local agencies are required to incur as a result of statutes or executive orders enacted after January 1, 1975 which mandate[] a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.” A test claim determination, therefore includes a determination that the costs are required to be reimbursed because they have been incurred as the result of a specific state statute or executive order.

We believe that section 17570 only applies to those changes in law that require a finding which meets either the requirements of section 17514 or 17556. Since, by definition, a test claim determination has already been made, section 17570 would be limited to those circumstances where the change in law affects the ultimate determination as to whether the statute or executive order imposes reimbursable costs. It would not be available where the change in law merely affects the amount to be reimbursed.

The reference to “changes in mandate law” must similarly be read narrowly to refer only to those changes in mandate law which affect the underlying mandate determination. Otherwise, separating the term “changes in mandate law” from the determinations made pursuant to either section 17514 or 17556 would allow any “change in mandates law” to constitute a “subsequent change in law” that would trigger a new test claim request and potentially a new test claim determination.

We acknowledge that the language in section 17570 is not clear; in particular, the reference to “an incurred cost” sounds like it may contemplate changes that only affect the cost of certain activities within a mandate. Also, section 17570(d)(1) requires that the Commission adopt regulations that require certain information to be included with a test claim, including “the actual and estimated amount of the annual statewide change in the state's liability for mandate reimbursement.” (Gov. Code, § 17570(d)(1)(C).) These provisions suggest that the NTCD process can be used to adjust the amount of the claim as well as to render a new determination as to whether or not a claim for reimbursement exists.

However, as we understand current law and practice, there are already procedural mechanisms that can be used to accommodate changes in the activities required by a statute or executive order, or the amount to be reimbursed for those activities: a new test claim can be used for newly required activities, and an amendment to the parameters and guidelines can be used when activities are deleted from a statute or executive order, or the amount to be reimbursed changes for some other reason. We do not see the addition of 17570 to reflect an intent to change the currently available processes, but to introduce a wholly different process for a separate purpose not governed by existing procedures, i.e., changing the underlying mandate determination.

PROPOSED REGULATIONS

The proposed regulations tend to reflect the same ambiguity that is in the statute. They do require a claimant to show in the first hearing “a subsequent change in law as defined by Government Code 17570, *material to the prior test claim decision*, that may modify the state's

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liability” under article XIII B, section 6, but they do not explain what this means. In light of the ambiguous statutory language and the absence of additional definitions, it is unclear whether “material to the prior test claim decision” means that the change in law has to affect the ultimate mandate/no mandate determination or whether it includes changes in law that merely affect the amount of the state's liability.

We suggest that the regulations be modified, and/or a definition of materiality be added, that make it clear that the change in law upon which the requestor relies must be a change that goes to the ultimate decision as to whether the statute or executive order imposes reimbursable duties and not merely the addition or deletion of activities within a mandate or changes affecting the amount to be reimbursed.

In *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183 [“CSBA”], the Court of Appeal invalidated legislation that directed modification of specific mandate decisions. The Court concluded that when the Commission exercises its quasi-judicial authority and renders a final mandate decision, legislative attempts to change that final decision are unconstitutional. As the *CSBA* court stated, “[o]nly the courts can set aside a specific commission decision and command the Commission to reconsider, and even then, this can be only within the bounds of statutory procedure.” (*Ibid.*) The Court did acknowledge that “[o]ver time, any particular decision of the Commission may be rendered obsolete by changes in the law and material circumstances *that originally justified the Commission’s decision*...logic may dictate that [final Commission decisions] must be subject to some procedure for modification after changes in the law or material circumstances.” (*Id.* at 1202.)

We believe that this language reinforces our view that setting aside a final Commission decision can be done – if at all – only where changes in law or factual circumstances affect the fundamental premise upon which the decision was based. While we know that the Commission is bound by the terms of the statute, and that disagreements with the validity of the statute must be asserted elsewhere, we believe that the Commission regulations should provide guidance on the appropriate scope of the statute in the view of the Commission. In this case, we believe that requires a narrow reading of the statutory language – a reading that would limit the applicability of section 17570 to changes in law that affect the underlying mandate determination and the rationale for that determination.²

For the same reasons (i.e., legal constraints on the ability to modify final decisions), we also believe the regulations should be amended to make clear that the requestor has the burden of proof to show by a preponderance of the evidence that the change in law would change the underlying determination that a particular program or service constitutes a reimbursable mandate. If two interpretations of law are equally tenable – one which would change the underlying mandate determination and one which would not – the original test claim determination should not be set aside, as the proponent will have failed to meet the required burden of proof.

² As you know, CSBA is currently challenging the constitutionality of this provision – and others – in Superior Court.

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Very truly yours,

OLSON HAGEL & FISHBURN LLP

A handwritten signature in black ink, appearing to read "Deborah B. Caplan". The signature is fluid and cursive, written over the printed name.

DEBORAH B. CAPLAN
DBC:ab

cc: Mailing list for State Agencies and Interested Parties

FINAL STATEMENT OF REASONS
UPDATE OF INITIAL STATEMENT OF REASONS

**SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL
NOTICE PERIOD OF NOVEMBER 19, 2010, THROUGH JANUARY 28, 2011**

On January 28, 2011 the California School Boards Association (CSBA) provided general comments on the proposed regulations, without specifying any particular proposed regulatory sections. A summary of the comment and a response follows:

Summary of Comment: CSBA contends that Government Code section 17570 is ambiguous and urges the Commission to resolve the ambiguity as part of the rulemaking process. CSBA states that there is “a threshold issue whether Government Code section 17570 is intended only to allow changes that affect the ultimate mandate decision (i.e., whether a statute or executive order DOES impose costs under 17514 or DOES NOT impose costs under 17556) or whether it is meant to allow for a [new test claim decision] anytime a change is made that may affect reimbursement for particular activities within a mandate determination but not otherwise affect the fact that there is a mandate determination.” CSBA interprets Government Code section 17570 as follows: “We believe that section 17570 only applies to those changes in law that require a finding which meets either the requirements of section 17514 or 17556. Since, by definition, a test claim determination has already been made, section 17570 would be limited to those circumstances where the change in law affects the ultimate decision as to whether the statute or executive order imposes reimbursable costs. It would not be available where the change in law merely affects the amount to be reimbursed.”

CSBA suggests that the regulations be modified or a definition of materiality be added to “make it clear that the change in law upon which the requester relies must be a change that goes to the ultimate decision as to whether the statute or executive order imposes reimbursable duties and not merely the addition or deletion of activities within a mandate or changes affecting the amount to be reimbursed.”¹ Finally, CSBA asserts that the regulations should be amended to say that the requester has the burden of proof to show by a preponderance of the evidence that the change in law would change the underlying determination.

Response:

- I. Government Code section 17570 applies only when subsequent changes in the law modify the state’s liability under article XIII B, section 6, and only applies to those changes in law that require a finding which meets the requirements of Government Code sections 17514 or 17556.**

Staff agrees that Government Code section 17570 applies only when subsequent changes in the law modify the state’s liability under article XIII B, section 6, and only applies to those changes in law that require a finding which meets the requirements of Government Code sections 17514 or 17556. All determinations of the state’s requirement to reimburse under article XIII B, section 6, require an analysis of Government Code sections 17514 and 17556.

Test claim decisions adopted by the Commission determine whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B,

¹ CSBA, Comments on the rulemaking proceeding, *supra*, p. 3.

section 6. (Gov. Code, section 17551, subd. (a).) To establish a prima facie case for reimbursement under article XIII B, section 6 of the California Constitution the following elements must be satisfied: (1) the test claim statute or executive order must impose state-mandated activities on local government; (2) those activities constitute a new program or higher level of service (i.e., they must be newly required and provide a service to the public); and (3) the mandated new program or higher level of service results in actual increased costs mandated by the state. (*Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735-736, *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 12564, 1284; Gov. Code, §§ 17514 and 17556.)

Government Code section 17514 implements article XIII B, section 6 of the California Constitution and defines “costs mandated by the state” as any increased costs which a local agency or school district is required to incur as a result of any statute or executive order that mandates a new program or higher level of service within the meaning of article XIII B, section 6. If the provisions of Government Code section 17514 are satisfied, the state is required to provide reimbursement for the mandated activity. Government Code section 17556 provides several exceptions where the Commission shall not find costs mandated by the state. If the provisions of Government Code section 17556 are met, reimbursement is not required for the mandated activity.

II. The mandates redetermination process may not be used where a parameters and guidelines amendment or new test claim filing is appropriate and such filings “shall be returned” to the requester.

Government Code section 17570, subdivision (b), gives the Commission jurisdiction to adopt a new test claim decision to supersede a previously adopted decision when the state’s liability for reimbursement has been modified based on a subsequent change in the law as follows:

The commission may adopt a new test claim decision to supersede a previously adopted test claim decision only upon a showing that the state’s liability for that test claim decision pursuant to subdivision (a) of Section 6 of Article XIII B of the California Constitution has been modified based on a subsequent change in law.

Government Code section 17570, subdivision (a)(2) defines “subsequent change in law” as:

A change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by section 17514, or is not a cost mandated by the state pursuant to section 17556, or a change in mandates law, except that a “subsequent change in law” does not include [Proposition 1A.]. A “subsequent change in law” also does not include a change to the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of section 17551.

“Mandates law” means:

Published court decisions arising from state mandate determinations by the State Board of Control or the Commission on State Mandates, or that address [Title 2, Division 4, Part 7 of the Government Code] or Section 6 of Article XIII B of the California Constitution. “Mandates law” also includes statutory amendments to

[Title 2, Division 4, Part 7 of the Government Code] or Section 6 of Article XIII B of the California Constitution.” (Gov. Code § 17570, subd. (a)(1).)

Subsequent changes in the law come in many different forms. For example, a subsequent statute or executive order may be adopted and, for the first time, impose new state-mandated activities on local government. Government Code section 17570 makes it clear that a subsequent change in the law that can trigger a request for redetermination *cannot* include those changes to statutes or executive orders that impose new state-mandated activities that have never been addressed by the Commission. In that case, for the Commission to have jurisdiction to determine whether a statute or executive order imposes new state-mandated activities, a test claim must be filed pursuant to Government Code section 17551, subdivision (a). The statutes make that clear.

Subsequent changes in the law can also be the subject of a parameters and guidelines amendment. In the same bill that added the redetermination process (SB 856), the Legislature also clarified when parameters and guidelines can be amended. Government Code section 17557, subdivision (d), clarifies that a subsequent change in the law can be considered as part of a request to amend parameters and guidelines when the requested change is *consistent with the original statement of decision*. For example, the Commission can consider a subsequent change in the law that updates offsetting revenue or offsetting savings that apply to a mandated program in a parameters and guidelines amendment if the subsequent change in the law does not require a new legal finding that there are no costs mandated by the state pursuant to Government Code section 17556. In this situation, the subsequent change in the law may reduce the costs of the reimbursement claim for a mandated program when fee authority is added to statute with respect to a particular mandated activity. The subsequent change in the law may also increase the cost of the claim when fee authority is repealed. However, a party cannot request a parameters and guidelines amendment if the subsequent change in the law conflicts with the Commission’s original determination that a state-mandated activity exists and is reimbursable under article XIII B, section 6 – unless that activity has been completely repealed.

Unlike a parameters and guidelines amendment, however, Government Code section 17570 gives the Commission jurisdiction to adopt a new test claim decision to supersede a previously adopted test claim decision when the state’s liability for that test claim decision pursuant to article XIII B, section 6 of the California Constitution has been modified. The state’s liability to reimburse is modified when an activity that was either approved or denied in a previously adopted Commission decision must be reversed because of the subsequent change in the law. For example, the process applies when an activity previously denied by either the Commission or the Board of Control now, because of a subsequent change in the law, is reimbursable. The process also applies to an activity that was previously approved by either the Commission or the Board of Control and, because of a subsequent change in the law, now is not reimbursable.

For each request, a full mandates analysis on the prima facie elements, including a determination of Government Code sections 17514 and 17556, must be done before the Commission adopts a new test claim decision. The “subsequent change in law” includes any change to statute or executive order that results in a section 17514 or 17556 finding on an activity that is allegedly contrary to the finding in a previously adopted decision on that activity. A “subsequent change in law” also includes a change in “mandates law.” “Mandates law” includes published court decisions arising from state mandate determinations that disagree with a finding by the Commission or the Board of Control on an issue, or interpret article XIII B, section 6 or Government Code sections 17500 et seq. differently than a previously adopted test claim

decision. “Mandates law” also includes statutory amendments to Government Code section 17500 et seq. and amendments to article XIII B, section 6 (except for the amendments to article XIII B, section 6, subdivision (b), that were approved by the voters on November 2, 2004) that would result in a reversal or modification of a prior finding.

The proposed regulations track these definitions and, in particular, proposed Section 1190, subdivision (i), provides that:

Any request to adopt a new test claim decision that fails to allege a “subsequent change in law” as defined by Government Code section 17570, shall be returned by the executive director with a written notice stating the reason the request is being returned. Examples of such filings may include, but are not limited to, *circumstances where the filing meets the requirements for a proposed parameters and guidelines amendment or a new test claim filing.*” (Emphasis added.)

This language addresses the commenter’s concern that the mandates redetermination process not be used where a parameters and guidelines amendment or new test claim filing is appropriate since such filings “shall be returned” to the requester.

III. The statute and proposed regulations already contain a materiality standard and allow a new test claim decision for subsequent changes in law that may result in the addition or deletion of activities within a mandated program.

Pursuant to Government Code section 17570, the Commission “may adopt a new test claim decision to supersede a previously adopted test claim decision only upon a showing that the state’s liability for that test claim decision pursuant to subdivision (a) of Section 6 of Article XIII B of the California Constitution *has been modified based on a subsequent change in law.*” (Emphasis added.) A subsequent change in law that changes or “modifies” a decision that affects an activity within a program, changes the state’s liability under article XIII B, section 6 if a new activity is determined to be reimbursable or not reimbursable based on the subsequent change in the law.

For example, assume the Commission adopts a decision and determines that a program is a reimbursable state-mandated program and identifies in the parameters and guidelines the activities determined to be mandated by the state within the meaning of article XIII B, section 6 of the California Constitution. Thereafter, a statute is enacted that authorizes local government to assess fees sufficient to pay for the cost of one of the mandated activities, which may result in a finding of no costs mandated by the state under Government Code section 17556, subdivision (d). Under these circumstances, a request for the Commission to redetermine the original decision is appropriate because the subsequent fee authority statute may result in a change of the Commission’s ultimate determination with respect to that activity.

Thus, the right to request redetermination is not limited to a change in the law that affects the entire statute or executive order – the right exists under Government Codes section 17570 to request redetermination when the Commission’s original determination with respect to an activity is changed as a result of a subsequent law, which modifies the state’s liability under article XIII B, section 6. A subsequent change in law is relevant and material, if it results in a change in the state’s liability under article XIII B, even if the modification in the state’s liability is a result of the addition or deletion of activities within a mandated program. The language of the statute specifies that a modification of the state’s liability based on a subsequent change in

law is the trigger for the adoption of a new test claim decision. Therefore the statute and proposed regulation already contain a materiality standard.

As discussed above, every change in the state's liability requires a finding under section 17514 or falls under an exception under 17556 whether it arises due to a change in statutory or case law. That said, the Commission is required, under the California Constitution, to presume that the statute is valid and constitutional and to comply with its plain language. (California Constitution Article 3, section 3.5.) The Commission has no authority to read the phrase "*has been modified*" out of the statute. In matters of statutory construction, significance should be given, where possible, to every word of a statute and any construction which renders a word surplus should be avoided. (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.) It appears that CSBA is asserting that only a new test claim decision that results in a complete approve or deny should be permissible. If that is the case, CSBA's assertion is in conflict with the plain language of the statute. "Modified" does not mean that a mandated program can only be totally approved or denied. To "modify" means: "to change in form or character," "to make less extreme, severe or strong," or "to qualify or limit the meaning of." (Webster's II New College Dictionary.)

CSBA's proposed amendment would not allow for a finding that the state's liability has been modified. It would not allow additions or deletions of activities to prior approved, denied, or partially approved test claim decisions based on a subsequent change in mandates law that could not be made by filing a test claim (because the applicable statutes are already the subject of a final decision of the Commission) or a parameters and guidelines amendment (because it requires a finding pursuant to Government Code section 17556 and would conflict with the adopted statement of decision). However, these are precisely the situations that would call for the filing of a request for a new test claim decision. Therefore, it would be inappropriate for the Commission to adopt CSBA's interpretation that a change in law requiring a new test claim decision under 17570 cannot include a change in law that results in "merely the addition or deletion of activities within a mandate."

IV. A "subsequent change in law" either modifies the state's liability or it does not; this is an issue of law and therefore applying an evidentiary standard to the ultimate determination of whether reimbursement is required is inappropriate.

The statute and regulations specify that the burden is on the requester to "make an adequate showing" of a modification in the state's liability at the first hearing, meaning that the request "has a substantial possibility of prevailing at the second hearing." A "subsequent change in law" either modifies the state's liability or it does not. Prior mandates cases have held that the issue of whether a statute imposes a reimbursable state-mandated program under article XIII B, section 6 is a question of law and, thus, the Commission's decision on a request for redetermination must be correct as a matter of law. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109; *San Diego Unified School Dist.* (2004) 33 Cal.4th at p. 890.)

At the first hearing, the staff analysis will only consider "whether the requester has made an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state's liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution." (Proposed regulation § 1190.05, subdivision (a)(i).) The Commission shall find that the requester has made

an adequate showing if it finds that the request, when considered in light of all of the written responses and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing. (*Ibid.*) This language draws from a case in which another California quasi-judicial entity, the California Fish and Game Commission, was adopting regulations for a two-hearing process where the legislation required “sufficient information to indicate that the petitioned action may be warranted.” (*Natural Resources Defense Council v. California Fish and Game Commission* (1994) 28 Cal.App.4th 1104 (*NRDC*).

Requiring “sufficient information to indicate that the petitioned action may be warranted” is very similar to requiring the requester to “make a showing” except that in *NRDC* they were dealing with a factual showing and here it is strictly a legal showing. In *NRDC* the court found that “sufficient information to indicate that the petitioned action may be warranted” means “the amount of information that, considered with Fish and Game Department’s written report and comments received, that would lead a reasonable person to conclude that there is a substantial possibility that the requested listing could occur. . . .” (*Ibid.*) Making an adequate showing for the first hearing is what the statute requires. (Gov. Code § 17570, subd. (d)(4)) and what the proposed regulation requires. (Proposed Commission regulation § 1190.05.) The ultimate adoption of a new test claim decision based on a “subsequent change in law” is an issue of law and applying an evidentiary standard to the ultimate determination whether reimbursement is required for a cost under article XIII B, section 6 is not appropriate.

V. When the Commission makes findings on mixed issues of fact and law in its mandate determinations, the courts have held that the substantial evidence standard applies.

A full mandates analysis is required for the second hearing to determine whether the change in law actually modifies the state’s liability, and if so, how. Thus, in the analysis for the second hearing (which is essentially a new test claim hearing) there may be some circumstances where mixed issues of fact and law arise. Such potential issues include the issues of increased costs mandated by the state under 17514, whether there is sufficient fee authority to cover all of the costs, and whether there is practical compulsion. When issues of fact are necessary elements of the legal question presented and are disputed, Government Code section 17559 states that “a claimant or the state may commence a proceeding in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by *substantial evidence*.” (Emphasis added.) The courts have interpreted the standard of review in Government Code section 17559 as follows:

The determination of whether the statute at issue here established a mandate under California Constitution article XIII B, section 6, is a question of law. [Citations omitted.] Under Government Code section 17559, administrative mandamus is the exclusive means to challenge a decision of the Commission on a subvention claim. [Citations omitted.] “Government Code section 17559 governs the proceeding below and requires that the trial court review the decisions of the Commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, we are generally confined to inquiring whether substantial evidence supports the court’s findings and judgment. However, we independently review the superior court’s legal conclusions about the meaning and effect of constitutional and statutory provisions.

(*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1186; *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 980.) The question is whether there is substantial evidence to support an agency's decision is a question of law. (*Santa Teresa Citizen Action Group v. City of San Jose* (2004) 114 Cal.App.4th 689, 706.)

The Commission must base its findings on substantial evidence in the record. (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515; Government Code section 17559, subdivision (b).) "Substantial evidence has been defined in two ways: first, as evidence of ponderable legal significance . . . reasonable in nature, credible, and of solid value [citation]; and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion." (*Desmond v. County of Contra Costa* (1993) 21 Cal. App. 4th 330, 335.) As in its test claim decisions, the Commission's findings for the adoption of a new test claim decision must be supported by ". . . all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by 'substantial evidence.'" (*Ibid.*) All other mandate findings (whether there is a state-mandated new program or higher level of service) are questions of law.

Revision Made: None.

Non-substantive changes were made to the proposed text by renumbering and relettering Roman numerals to Arabic numerals, to make the numbering and lettering within the proposed text consistent.

ALTERNATIVES DETERMINATION

The Commission has determined that no alternative would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective as and less burdensome to affected private persons than the proposed regulations.

LOCAL MANDATE DETERMINATION

The proposed regulations may result in a fiscal effect on local government that may require reimbursement by the state to local agencies and school districts under article XIII B, section 6 of the California Constitution. The fiscal effect on local government may occur for the following reasons:

1. *New Test Claim Filed on SB 856 and Proposed Regulations.* A test claim is filed on SB 856 and the proposed regulations and the Commission finds that the statute and regulations require reimbursement to local governments under Article XIII B, section 6 of the Constitution for the increased costs of complying with the redetermination process. To date, no test claim has been filed on the statute and a test claim may be filed on the regulations.

2. *New Test Claim Decision Adopted to Supersede Prior Decision.* If the Commission finds that an alleged subsequent change in law modifies the state's liability and adopts a new test claim decision to supersede a prior decision, local governments may receive increased reimbursements from the state pursuant to Article XIII B, section 6 of the Constitution for the costs of:

- The state-mandated program that is the subject of the mandate redetermination; and,
- Preparing a new reimbursement claim under the *Mandate Reimbursement Process I* program, if it is not suspended.

Since no requests for mandate redetermination have yet been filed, the approximate amount of the fiscal effect on local government is unknown.