

ITEM 5

ADOPTION OF EMERGENCY REGULATIONS MANDATE REDETERMINATION PROCESS

PROPOSED AMENDMENTS TO
CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, TO ADD:
Article 10. Mandate Redetermination Process

EXECUTIVE SUMMARY

The purpose of the proposed emergency regulations is to implement Government Code section 17570. Statutes 2010, chapter 719 (S.B. 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. Government Code section 17570, subdivision (e) specifically directs the Commission to initially adopt the regulations implementing Government Code section 17570 first as 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."

Additionally, S.B. 856 added a new Government Code section 17570.1 which provides that the Legislature may, by statute, request that the Department of Finance consider exercising its authority to request the Commission to adopt a new test claim decision to supersede a previously adopted test claim decision pursuant to Section 17570, subdivision (c). Assembly Bill 1610, Statutes of 2010, chapter 724, requests that the Department of Finance submit requests to adopt a new test claim decision on *Collective Bargaining* (CSM 4425, 97-TC-08) and *Behavioral Intervention Plans* ("BIPs", CSM 4464) by December 31, 2010. Thus, it is critical that the Commission have a process in place for such requests by that time.

The proposed emergency regulations would add 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 with a proposed effective date immediate upon filing with the Secretary of State. The proposed emergency 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 emergency rulemaking process has different requirements from the regular rulemaking process, but generally includes a brief public notice period (five working days) and a brief public comment period (five calendar days). Because regulations of the Commission are exempt from OAL review (Gov. Code § 17527 (g)), there will be no review or decision by OAL with regard to the emergency regulations. Rather, OAL will file and print the regulations on the day after the

public comment period ends, unless the Commission requests that the proposed regulations be returned to the Commission for modification. The five calendar day comment period will begin when OAL posts the proposed emergency regulations (most likely on November 18, 2010). This date can be confirmed at www.oal.ca.gov (see tab “Emergency Regulations Under Review”). The emergency regulations will be effective for a maximum of 180 days after they are filed with the Secretary of State.

The Order to Initiate Rulemaking for the Certificate of Compliance rulemaking (i.e. a regular rulemaking) on substantially the same language as the proposed emergency regulations is also before the Commission today (Item 6). That process will allow the public an extended 70-day comment period on the permanent language for Article 10 and related provisions, and the opportunity to request a public hearing on the proposed regulation package. Additionally, that process will require a response to comments and may result in a modification of the text of the regulations.

The following is a summary of the proposed emergency regulations:

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

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 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.

Section 1190.01. Review and Response.

The proposed regulation provides for completeness review of the request by Commission staff and for notice and opportunity for public comment on a completed request.

Section 1190.02. Rebuttal.

The proposed regulation provides parties with the opportunity to rebut written responses on a request to adopt a new test claim decision.

Section 1190.03. Informal Conference.

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.

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

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.

Section 1190.05. Hearing Process and Form of Decision.

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 provides 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, subdivision (a) 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.

Staff Recommendation

Staff recommends that the Commission:

- Find that a statutory emergency exists pursuant to Government Code section 17570, subdivision (e), that requires immediate action and that this emergency regulatory action is necessary to avoid serious harm to the public peace, health, safety or general welfare.
- Adopt the proposed addition of Article 10 to California Code of Regulations, Title 2, Division 2, Chapter 2.5, effective upon 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.

1 **ORIGINAL PROPOSED TEXT OF EMERGENCY REGULATIONS**

2
3 **CALIFORNIA CODE OF REGULATIONS**

4 **TITLE 2. ADMINISTRATION**

5 **DIVISION 2. FINANCIAL OPERATIONS**

6 **CHAPTER 2.5. COMMISSION ON STATE MANDATES**

7 **ADD A NEW ARTICLE 10, SECTIONS 1190-1190.05**

8 **REGARDING THE MANDATE REDETERMINATION PROCESS**

9 **ARTICLE 10. MANDATE REDETERMINATION PROCESS**

10
11 § 1190. Filing a Request to Adopt a New Test Claim Decision.

12
13 (a) A local agency or a school district, statewide association of local agencies or school
14 districts, the Department of Finance, Office of the State Controller, or other affected state
15 agency, may file a request to adopt a new test claim decision to supersede a previously adopted
16 test claim decision by making a showing that the state’s liability pursuant to Article XIII B,
17 section 6, subdivision (a) of the California Constitution for the previously adopted test claim
18 decision has been modified based on a “subsequent change in law” as defined by Government
19 Code section 17570, subdivision (a)(2).

20
21 (b) All requests to adopt a new test claim decision shall be filed on a form developed by the
22 executive director and shall contain a detailed analysis of how and why the state’s liability for
23 mandate reimbursement has been modified pursuant to Article XIII B, section 6, subdivision (a)
24 of the California Constitution and all of the elements and accompanying documents required by
25 the form and Government Code section 17570, subdivision (d).

26
27 (c) The detailed analysis of how and why the state’s liability for mandate reimbursement has
28 been modified pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution
29 based on a “subsequent change in law” as defined by Government Code section 17570 requires
30 more than a written narrative or simple statement of the facts and law. It requires the application
31 of the law (Gov. Code § 17570 (a) and (b)) to the facts (i.e. the alleged subsequent change in
32 law) discussing, for each activity addressed in the prior test claim decision, how and why the
33 state’s liability for that activity has been modified. Specific references shall be made to chapters,
34 articles, sections, or page numbers that are alleged to impose or not impose a reimbursable state-
35 mandated program.

36
37 (d) The requester shall file one original request to adopt a new test claim decision and
38 accompanying documents with the commission. An “original” is either a signed hard copy or a
39 PDF electronic copy thereof submitted through the e-filing system on the commission’s web site.
40 If the request is e-filed with the commission, the requester is responsible for maintaining the
41 paper request with original signature(s) for the duration of the redetermination process, including
42 any period of appeal. If a hard copy is submitted, the original shall be unbound and single-sided,
43 without tabs, and include a table of contents. If the request is filed in PDF format, the
44 accompanying documents shall also be filed in PDF format.

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

5
6 (f) Within ten (10) days of receipt of a request to adopt a new test claim decision, commission
7 staff shall notify the requester if the request is complete or incomplete and refer the requester to
8 these regulations. Requests to adopt a new test claim decision shall be considered incomplete if
9 any of the elements required in subsections (b), (c), or (d) of this section are illegible or are not
10 included. If a complete request to adopt a new test claim decision is not received within thirty
11 (30) calendar days from the date the incomplete request was returned, the executive director shall
12 disallow the original request filing date. New request(s) to adopt a new test claim decision may
13 be accepted on the same subsequent change in law alleged to modify the state's liability pursuant
14 to Article XIII B, section 6, subdivision (a) of the California Constitution.

15
16 (g) A request to adopt a new test claim decision shall be filed on or before June 30 following a
17 fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that
18 fiscal year.

19
20 (h) Any request to adopt a new test claim decision that fails to allege a "subsequent change in
21 law" as defined by Government Code section 17570, shall be returned by the executive director
22 with a written notice stating the reason that the request is being returned. Examples of such
23 filings may include, but are not limited to, circumstances where the filing meets the requirements
24 for a proposed parameters and guidelines amendment or a new test claim filing.

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26 Note: Authority cited: Sections 17527(g) and 17570(d) Government Code. Reference: Sections
27 17530 and 17570 Government Code.

28
29 § 1190.01. Review and Response.

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

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

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

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

42
43 (1) If assertions or representations of fact are made, they must be supported by documentary
44 evidence which shall be submitted with the response. All documentary evidence shall be
45 authenticated by declarations under penalty of perjury signed by persons who are authorized

1 and competent to do so and must be based on the declarant's personal knowledge or
2 information or belief.

3
4 (2) Include a copy of relevant portions of state constitutional provisions, state and federal
5 statutes, and executive orders, and a copy of administrative decisions and court decisions that
6 may impact the alleged mandate, unless such authorities are also cited in the request to adopt
7 a new test claim decision. The specific chapters, articles, sections, or page numbers must be
8 identified. Published court decisions arising from state mandate determinations by the Board
9 of Control and the commission, article XIII B, section 6 of the California Constitution, and
10 Government Code sections 17500 and following are exempt from the requirements of this
11 subsection. When an omnibus bill is relevant to the response, only the relevant pages of the
12 statute, including the Legislative Counsel's Digest and the specific statutory changes at issue
13 shall be filed.

14
15 (c) The written response and supporting documentation shall be signed at the end of the
16 document, under penalty of perjury by an authorized representative, with the declaration that it is
17 true and complete to the best of the representative's personal knowledge or information or belief.
18 The date of signing, the representative's title, address, and telephone number shall be included. If
19 the authorized representative can be reached via facsimile machine or e-mail, the facsimile
20 number and e-mail address shall also be included.

21
22 (d) Filing. An original and two (2) copies of a written response and supporting documentation
23 concerning a request to adopt a new test claim decision shall be filed with commission staff and
24 served in accordance with Section 1181.2 of these regulations. If a hard copy is submitted, the
25 original document shall be unbound and single-sided. If the response is e-filed, no copies shall
26 be filed. Proof of service shall be included with the response filed with commission staff.

27
28 (e) Everyone on the mailing list described in Section 1181.2 of these regulations shall be
29 provided written notice that a copy of the response has been posted on the commission's web
30 site.

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32 Note: Authority cited: Sections 17527(g), 17570(d), Government Code. Reference: Sections
33 17530, and 17570, Government Code.

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35 § 1190.02. Rebuttal.

36
37 (a) Parties and interested parties shall be given an opportunity to rebut written responses
38 concerning a request to adopt a new a test claim decision by filing written rebuttals within thirty
39 (30) days of service of the responses.

40
41 (b) Content and Form. A written rebuttal shall contain the following documentary evidence, if
42 applicable:

43
44 (1) If new assertions or representations of fact are made, they must be supported by
45 documentary evidence which shall be submitted with the rebuttal. All documentary evidence
46 must be authenticated by declarations under penalty of perjury signed by persons who are

1 authorized and competent to do so and must be based upon the declarant's personal
2 knowledge or information or belief.

3
4 (2) A copy of relevant portions of state constitutional provisions, federal statutes, and
5 executive orders, and a copy of administrative decisions and court decisions that are cited in
6 the rebuttal, unless such authorities are also cited in the request to adopt a new test claim
7 decision or any response thereto. The specific chapters, articles, sections, or page numbers
8 shall be identified. Published court decisions arising from state mandate determinations by
9 the Board of Control and the commission, article XIII B, section 6 of the California
10 Constitution, and Government Code sections 17500 and following are exempt from the
11 requirements of this subsection. When an omnibus bill is relevant to the rebuttal, only the
12 relevant pages of the statute, including the Legislative Counsel's Digest and the specific
13 statutory changes at issue shall be filed.

14
15 (c) The original written rebuttal to a response concerning a request to adopt a new test claim
16 decision shall be filed with commission staff and served in accordance with Section 1181.2 of
17 these regulations.

18
19 (d) The rebuttal shall be signed at the end of the document, under penalty of perjury by the
20 requester or its authorized representative, with the declaration that the rebuttal is true and
21 complete to the best of the declarant's personal knowledge or information or belief. The date of
22 signing, the declarant's title, address, and telephone number shall be included. If the declarant
23 can be reached by facsimile machine or e-mail, the declarant's facsimile number and e-mail
24 address shall also be included.

25
26 (e) Everyone on the mailing list described in Section 1181.2 of these regulations shall be
27 provided written notice that a copy of the rebuttal has been posted on the commission's web site.

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29 Note: Authority cited: Sections 17527(g), 17570(d), Government Code. Reference: Sections
30 17530 and 17570, Government Code.

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32 § 1190.03. Informal Conference.

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34 (a) The executive director may schedule an informal conference with the requester, the
35 Department of Finance, Office of the State Controller, other affected state agencies and
36 interested parties upon request. With the consent of the parties, the informal conference may be a
37 teleconference.

38
39 (b) The purpose of an informal conference may be to

40
41 (1) Set dates for receiving responses or rebuttal; completing the staff analyses; and hearing the
42 request.

43
44 (2) Give the requester the opportunity to present the request to adopt a new test claim decision to
45 supersede a prior test claim decision and to respond to questions from commission staff and
46 other state or local agency or school district staff or representatives for the purpose of resolving

1 or clarifying issues of fact or law.

2
3 (c) Any party may notify the executive director of any interested parties who should be invited to
4 attend an informal conference.

5
6 (d) Unless waived by the parties, commission staff shall provide at least ten (10) days notice of
7 the informal conference by mail, facsimile transmission, e-mail, or by other electronic media.

8
9 (e) Anything said, any document disclosed, and any new assertions and representations of fact
10 made during an informal conference shall not be made part of the administrative record of a
11 request to adopt a new test claim decision unless properly admitted into the record through the
12 submission of an amendment to a request to adopt a new test claim decision, a written response,
13 rebuttal, and/or public testimony.

14
15 Note: Authority cited: Sections 17527(g), 17570(d), Government Code. Reference: Sections
16 17530, and 17570, Government Code.

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18 § 1190.04. Executive Director's Authority to Consolidate Requests to Adopt a New Test Claim
19 Decision.

20
21 (a) The executive director may consolidate a request to adopt a new test claim decision with
22 another request to adopt a new test claim decision for the second hearing, if some or all of the
23 same statutes, regulations or executive orders are at issue, if necessary to ensure the complete,
24 fair, or timely consideration of any request to adopt a new test claim decision.

25
26 (b) At least ten (10) days before the action is taken, the executive director shall serve on the
27 parties and interested parties on the mailing list described in Section 1181.2 of these regulations,
28 and post on the commission's web site, a notice of any proposed action to consolidate.

29
30 Note: Authority cited: Section 17527(g) and 17570(d), Government Code. Reference: Sections
31 17530, 17570, Government Code.

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33 § 1190.05. Hearing Process and Form of Decision.

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

38
39 (a) The First Hearing:

- 40
41 i. The first hearing shall be limited to the issue of whether the requester has made an
42 adequate showing which identifies a subsequent change in law as defined by Government
43 Code section 17570, material to the prior test claim decision, that may modify the state's
44 liability pursuant to Article XIII B, section 6, subdivision (a) of the California
45 Constitution. The commission shall find that the requester has made an adequate
46 showing if it finds that the request, when considered in light of all of the written

1 responses and supporting documentation in the record of this request, has a substantial
2 possibility of prevailing at the second hearing.

3
4 ii. At least eight (8) weeks before the hearing or at such other time as required by the
5 executive director or stipulated to by the parties, commission staff shall prepare a draft
6 staff analysis and distribute it to the parties, interested parties, and any person who
7 requests a copy, and shall post it on the commission's web site. A request to adopt a new
8 test claim decision is set for the first hearing when commission staff issues its draft staff
9 analysis. A written notice of the date, time, and place of the first hearing shall be served
10 on everyone on the mailing list described in Section 1181.2 of these regulations and
11 posted on the commission's web site.

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

21
22 iv. Before the first hearing on the request to adopt a new test claim decision, commission
23 staff shall prepare a final written analysis limited to the issue of whether the requester has
24 made a showing that identifies a subsequent change in law, material to the prior test claim
25 decision, which may modify the state's liability pursuant to Article XIII B, section 6,
26 subdivision (a) of the California Constitution. This analysis shall consider only a review
27 of the request, written responses, written rebuttals and supporting documentation filed by
28 the parties and interested parties. The final staff analysis for the first hearing shall find
29 that the requester has made an adequate showing if staff finds that the request, when
30 considered in light of all of the written responses and supporting documentation in the
31 record of this request, has a substantial possibility of prevailing at the second hearing.

32
33 v. If, at the first hearing, the commission finds that:

34
35 (1) the requester has not made an adequate showing, when considered in light of all of
36 the written responses, rebuttals and supporting documentation in the record and testimony
37 at the hearing, that the request to adopt a new test claim decision has a substantial
38 possibility of prevailing at the second hearing, the commission shall publish a decision
39 denying the request to adopt a new test claim decision.

40
41 (2) the requester has made an adequate showing, when considered in light of all of the
42 written responses, rebuttals and supporting documentation in the record and testimony at
43 the hearing, the commission shall publish a decision finding that an adequate showing has
44 been made and setting the second hearing on the request to adopt a new test claim
45 decision to supersede the previously adopted test claim decision.

1 Everyone on the mailing list described in Section 1181.2 of these regulations shall be
2 provided written notice that the commission's decision has been posted on the
3 commission's web site and, if applicable, that the date, time, and place of the second
4 hearing has also been posted on the commission's web site.
5

6 (b) The Second Hearing:
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- 8 i. If the commission proceeds to the second hearing, it shall consider whether the state's
9 liability pursuant to Article XIII B, section 6, subdivision (a) of the California
10 Constitution has been modified based on the subsequent change in law alleged by the
11 requester, thus requiring adoption of a new test claim decision to supersede the
12 previously adopted test claim decision. If the commission finds that the state's liability
13 pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution has
14 been modified based on the subsequent change in law alleged by the requester, it shall
15 adopt a new statement of decision that reflects the modified liability of the state.
16
- 17 ii. Before the second hearing on the request to adopt a new test claim decision, commission
18 staff shall prepare a final written analysis. At least eight (8) weeks before the hearing or
19 at such other time as required by the executive director or stipulated to by the parties,
20 commission staff shall prepare a draft staff analysis and distribute it to everyone on the
21 mailing list described in Section 1181.2 of these regulations and post it on the
22 commission's web site. The analysis shall consider only a review of the request, written
23 responses, written rebuttals and supporting documentation filed by the parties and
24 interested parties in the record of this request.
25
- 26 iii. Any party or interested party may file written comments concerning the draft staff
27 analysis with commission staff. Written comments shall be filed and served as described
28 in Section 1181.2 of these regulations, by the date determined and publicized by the
29 executive director. A three (3) week period for comments shall be given, subject to the
30 executive director's authority to expedite all matters pursuant to Government Code
31 section 17530. All written comments timely filed shall be reviewed by commission staff
32 and may be incorporated into the final written analysis of the request to adopt a new test
33 claim decision.
34
- 35 iv. If, at the second hearing, the commission finds that the state's liability pursuant to Article
36 XIII B, section 6, subdivision (a) of the California Constitution:
37
- 38 (1) has not been modified based on a subsequent change in law as defined by
39 Government Code section 17570, subdivision (a)(2), the commission shall publish a
40 decision denying the request.
41
- 42 (2) has been modified based on a subsequent change in law, as defined by Government
43 Code section 17570, subdivision (a)(2) the commission shall adopt a new statement of
44 decision shall to supersede the prior statement of decision. The new statement of
45 decision shall be prepared in writing, based on the record, and shall include a statement
46 of reasons for the decision, findings and conclusions.

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

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

vi. 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, subdivision (a) of the California Constitution, the amount and method of reimbursement shall be redetermined in accordance with sections 1183.1- 1183.32 of these regulations.

FINDING OF EMERGENCY AND INFORMATIVE DIGEST

The Commission on State Mandates (the Commission) finds that a statutory emergency exists that requires immediate action and that this emergency regulatory action is necessary to avoid serious harm to the public peace, health, safety or general welfare.

SPECIFIC FACTS DEMONSTRATING NEED FOR EMERGENCY ACTION. Statutes 2010, chapter 719 (S.B. 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 Legislature included a finding in Senate Bill 856 that: "[t]his act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: In order to implement the Budget Act of 2010 as soon as possible, it is necessary for this act to take immediate effect."

Regulations are required to implement, interpret and make specific Government Code section 17570 and Government Code section 17570, subdivision (e) specifically directs the Commission to initially adopt the regulations implementing Government Code section 17570 as 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."

Because Government Code section 17570 did not exist in law prior to October 19, 2010, it would not have been possible for the Commission to adopt the proposed emergency regulations earlier as non-emergency regulations. However, the Commission has also initiated a regular rule making proceeding for these regulations.

AUTHORITY AND REFERENCE. Government Code Sections 17527 (g) generally authorizes the Commission to adopt regulations and Government Code section 17570, subdivision (e) specifically requires the Commission to adopt these proposed regulations first as emergency regulations. The purpose of this rulemaking is to implement the Mandate Redetermination Process pursuant to Government Code Section 17570, Subdivision (d) (Stats. 2010, ch. 719, eff. October 19, 2010 (SB 856)).

INFORMATIVE DIGEST. Statutes 2010, chapter 719 (SB 856, urgency, eff. Oct. 19, 2010) authorizes the Commission on State Mandates to 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. The proposed emergency 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 following is a summary of the proposed emergency regulations:

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

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 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.

Section 1190.01. Review and Response.

The proposed regulation provides for completeness review of the request by Commission staff and for notice and opportunity for public comment on a completed request.

Section 1190.02. Rebuttal.

The proposed regulation provides parties with the opportunity to rebut written responses on a request to adopt a new test claim decision.

Section 1190.03. Informal Conference.

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.

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

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.

Section 1190.05. Hearing Process and Form of Decision.

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 provides 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, subdivision (a) 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.

LOCAL MANDATE.

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 S.B. 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.

COSTS OR SAVINGS TO STATE GOVERNMENT.

1. Potential costs to the Commission as a result of Proposed Regulations.

The proposed regulations may result in potential costs to the Commission to process and determine requests for the adoption of a new test claim decision to supersede a previously adopted decision pursuant to Government Code section 17570. .B. 856 gives the Commission new jurisdiction to revisit old decisions, adopt or amend parameters and guidelines, adopt new statewide cost estimates and, thus, may increase the Commission's existing workload.

Costs to the Commission are unknown at this time because no requests have been filed. If new workload is filed pursuant to S.B. 856, the Commission may file a mid-year budget change proposal.

2. Potential costs to the Department of Finance, State Controller, or other affected state agencies participating in the redetermination process.

The proposed regulations may result in potential costs to the state agencies that participate in the redetermination process by complying with the proposed regulations to file requests, file comments on requests and draft staff analyses, file rebuttals, and participate in Commission hearings on pending requests.

There may also be potential costs to the Department of Finance, State Controller, and other affected state agencies, if the Commission adopts a new decision to supersede a prior test claim decision. On a case-by-case basis, the Controller's claiming instructions may need to be modified if the parameters and guidelines are modified, and the State Budget may need to be modified based on new or increased costs for mandate reimbursement pursuant to Article XIII B, section 6 of the California Constitution.

The State Controller may also have potential costs for the process of offsetting current reimbursement claims to recover reimbursements that may have been previously paid.

Costs to the Department of Finance, State Controller's Office, and other state agencies are unknown at this time because no requests have been filed.

3. Potential savings to state government if a request for a new test claim decision is filed and results in a new decision denying reimbursement.

The proposed regulations may result in cost savings for the state if the Commission adopts a new decision (superseding prior decision) which denies reimbursement or partially modifies reimbursement. Potential cost savings to the state would result from:

- Reduction in number of reimbursement claims filed with the State Controller could result in potential savings in costs to review, audit, and report to the Legislature on reimbursement claims.

- Reduction in reimbursements paid to local governments pursuant to Article XIII B, section 6.

Assembly Bill 1610 (AB 1610)¹ requests the Department of Finance, by December 31, 2010, to file with the Commission a request for a new test claim decision on two previously approved test claims: *Collective Bargaining* (CSM 4425, 97-TC-08) and *Behavioral Intervention Plans* (4464). If the Department of Finance files the requests pursuant to AB 1610, and the Commission approves the requests, the Commission would be required to adopt a new test claim decision to supersede the prior decision. New decisions may reduce or eliminate the state's liability for these programs under article XIII B, section 6. The period of reimbursement for the new test claim decisions would begin in the fiscal year before the fiscal year the request was filed. (Gov. Code, § 17570, subd. (f).)

Based on the State Controller's Deficiency Report to the Legislature submitted on April 30, 2010, we calculate that the combined average annual cost claimed by school districts and community college districts is \$31.9 million for the *Collective Bargaining* program. Thus, there is a potential cost savings of approximately \$31.9 million if a new decision is adopted.

Parameters and guidelines and a statewide cost estimate have not yet been adopted for the *Behavioral Intervention Plans* program. However, in 2009, the Department of Finance and the school districts reached an agreement to settle this test claim for a total of \$585 million. This agreement was contingent on the following actions:

- a. By February 28, 2009, 85% of all local educational agencies (LEAs) representing 92% of statewide ADA must waive their rights to file claims under the test claim statutes and regulations;
- b. The parties will seek a court ruling that the settlement agreement is the final resolution of this matter and is binding on all LEAs; and
- c. Legislation to appropriate the funding for the settlement (AB 661). Pursuant to AB 661, schools would receive \$65 million for 2009, \$85 million per year for 6 years (2011-12 through 2016-17), and a one-time appropriation of \$10 million for payment to county offices of education and special education local plan areas.

If the total amount of the settlement is divided by 17 which represents the number of years in the period of reimbursement for payment of this settlement, the cost per year would be \$34.4 million. Thus, if this is an approximation of the annual cost for this program, there is a potential cost savings of approximately \$34.4 million if a new decision is adopted.

¹ Statutes 2010, chapter 724, effective October 19, 2010.

NOTICE OF PROPOSED EMERGENCY ACTION.

The Commission on State Mandates is complying with the requirement to provide notice of the proposed emergency rulemaking action pursuant to Government Code section 11346.1 (a)(2) on November 9, 2010 by providing a Notice of Proposed Emergency Action, the text of the proposed emergency regulations and this Finding of Emergency and Informative Digest to interested parties, posting it on the Commission's web site, and including in the emergency rulemaking file.