



DEPARTMENT OF CONSUMER AFFAIRS
 CALIFORNIA BOARD OF ACCOUNTANCY
 2000 EVERGREEN STREET, SUITE 250
 SACRAMENTO, CA 95815-3832
 TELEPHONE: (916) 263-3680
 FACSIMILE: (916) 263-3675
 WEB ADDRESS: <http://www.cba.ca.gov>



**CALIFORNIA BOARD OF ACCOUNTANCY (CBA)
 PUBLIC MEETING NOTICE FOR THE COMMITTEE ON PROFESSIONAL CONDUCT
 (CPC), ENFORCEMENT PROGRAM OVERSIGHT COMMITTEE (EPOC),
 LEGISLATIVE COMMITTEE (LC), AND CBA MEETINGS**

DATE: Wednesday, November 17, 2010

COMMITTEE MEETING (LC)

TIME: 9:00 a.m.

COMMITTEE MEETING (CPC)

TIME: 9:45 a.m., or upon adjournment
 of the LC meeting

COMMITTEE MEETING (EPOC)

TIME: 10:00 a.m., or upon adjournment
 of the CPC meeting

CBA MEETING

TIME: 1:00 p.m. to 5:00 p.m.

DATE: Thursday, November 18, 2010

CBA MEETING

TIME: 9:00 a.m. to 4:30 p.m.

PLACE: Crowne Plaza Irvine
 17941 Von Karman Ave.
 Irvine, CA 92614
 Telephone: (949) 474-7236

Enclosed for your information is a copy of the agendas for the CPC, EPOC, LC, and CBA meetings on November 17-18, 2010. For further information regarding these meetings, please contact:

Veronica Daniel, Board Relations Analyst
 (916) 561-1716, or vdaniel@cba.ca.gov
 California Board of Accountancy
 2000 Evergreen Street, Suite 250
 Sacramento, CA 95815

An electronic copy of this notice can be found at <http://www.dca.ca.gov/cba/calendar.shtml>

The next CBA meeting is scheduled for January 27-28, 2011 in Irvine, CA.

The meeting is accessible to the physically disabled. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Veronica Daniel at (916) 561-1718, or email vdaniel@cba.ca.gov, or send a written request to the Board Office at 2000 Evergreen Street, Ste. 250, Sacramento, CA 95815. Providing your request is at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.



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DEPARTMENT OF CONSUMER AFFAIRS (DCA)
CALIFORNIA BOARD OF ACCOUNTANCY (CBA)

CBA MEETING
AGENDA

Revised
11/5/2010

Wednesday, November 17, 2010
1:00 p.m. – 5:00 p.m.

Thursday, November 18, 2010
9:00 a.m. – 4:30 p.m.

Crowne Plaza Irvine
 17941 Von Karman Ave.
 Irvine, CA 92614
 Telephone: (949) 863-1999
 Fax: (949) 474-7236

- November 17, 2010**
- 1:00-2:00**
- I. Roll Call and Call to Order (**Manuel Ramirez**).
 - II. Report of the President (**Manuel Ramirez**).
 - A. Update on Peer Review Implementation (**Rafael Ixta**).
 - B. DCA Legal Presentation – Litigation Against CBA Members (**LaVonne Powell**).
 - C. Resolution(s) for Retiring CBA Member(s).
 - D. 2011 CBA Meeting Locations.
 - E. CBA Member Committee Interest Survey.
 - F. Discussion on Legal Opinions Regarding Loans to the General Fund.
 - III. Petitions, Stipulations, and Proposed Decisions [Closed Session Government Code Section 111269(c)(3)]. Petition Hearings are Public Before the CBA with a Subsequent Closed Session.
- 2:00-4:15**
TIME CERTAIN

- A. Gary A. Porter – Petition for Modification of Probation.
- B. Rom De Guzman – Petition for Reinstatement of Revoked Certificate.
- C. Felix Wasser – Proposed Decision.
- D. Richard M. Large – Stipulated Settlement.
- E. Jack Garrett – Stipulated Settlement.

4:15-4:30

- IV. Report of the Vice President (**Sally Anderson**).
 - A. Recommendation for Appointment of Enforcement Advisory Committee (EAC) Chair.
 - B. Recommendation for Appointment of EAC Vice Chair.
 - C. Recommendation for Appointment of Qualifications Committee (QC) Chair.
 - D. Recommendation for Appointment of QC Vice Chair.

4:30-5:00

- V. Report of the Secretary/Treasurer (**Marshal Oldman**).
 - A. Discussion of Governor’s Budget.
 - B. FY 2010/2011 First Quarter Financial Report.
 - C. Options for Reporting Financial Information (**Nick Ng**).

VI. Public Comments.

November 18, 2010

VII. Roll Call and Call to Order (**Manuel Ramirez**).

9:00-10:30

- VIII. Report of the Executive Officer (**Patti Bowers**).
 - A. Update on 2010/2012 CBA Communications and Outreach Plan (**Lauren Hersh**).
 - B. DCA Director’s Report (**DCA Representative**).
 - 1. Update on Hiring Freeze.
 - 2. Performance Measures.
 - 3. Update on BreEZe.

- C. CBA Succession Plan.
 - D. CBA Annual Report (**Vincent Johnston**).
 - E. Sunset of Section 5050(b) – Temporary and Incidental Practice (**Matthew Stanley**).
 - F. Consideration of Adoption of Proposed Regulation – Peer Review Provider Reporting Responsibilities (**Matthew Stanley**).
 - G. Update on Current Projects List (Written Report Only).
- 10:30-11:00 IX. Report of the Licensing Chief (**Deanne Pearce**).
- A. Report on Licensing Division Activity.
- 11:00-11:30 X. Report of the Enforcement Chief (**Rafael Ixta**).
- A. Report on Status of Enforcement Matters.
 1. Enforcement Case Activity and Status Report.
 2. Aging Inventory Report.
 3. Report on Citations and Fines.
 4. Reportable Events Report.
 - B. Update on Enforcement Improvements.
 - C. Report on Implementation of Enforcement Performance Measures.
- 11:30-1:00 **LUNCH**
- 1:00-1:30 XI. Committee and Task Force Reports.
- A. Report of the Enforcement Program Oversight Committee (EPOC) (**Herschel Elkins, Chair**).
 1. Report of the November 17, 2010 EPOC Meeting.
 2. Discussion on Probationers Being Required to Pay for the Cost of Probation Monitoring.
 3. Discussion of Documents Served with Accusations/Statements of Issue.

- 1:30-2:00
- B. Report of the Committee on Professional Conduct (CPC)
(Leslie LaManna, Chair).
1. Report of the November 17, 2010 CPC Meeting.
 2. Discussion on Whether Existence of Liability Insurance Should be a Mitigating Factor in Enforcement Actions **(Rafael Ixta).**
- 2:00-2:30
- C. Report of the Legislative Committee (LC) **(Michelle Brough, Chair).**
1. Report of the November 17, 2010 LC Meeting.
 2. Update on Bills Which the CBA Has Taken a Position.
 3. Proposed Legislation – Retirement Status.
 4. Proposed Legislation – Restatements.
 5. Proposed Legislation – Peer Review Sunset Extension.
 6. Proposed Legislation – Webcast Exemption.
 7. Proposed Legislation – Loans to the General Fund.
- D. Report of the Accounting Education Committee (AEC)
(Ruben Davila).
- No Report.
- E. Report of the Ethics Curriculum Committee (ECC)
(Don Driftmier).
- No Report.
- 2:30-2:45
- F. Report of the Peer Review Oversight Committee (PROC)
(Nancy Corrigan, Chair).
1. Report of the November 9, 2010 PROC Meeting.
- 2:45-3:00
- G. Report of the EAC **(Harish Khanna, Chair).**
1. Report of the November 4, 2010 EAC Meeting.
- H. Report of the QC **(Fausto Hinojosa, Chair).**
- No Report.

- 3:00-3:10 XII. Adoption of Minutes
- A. Draft Minutes of the September 22-23, 2010 CBA Meeting.
 - B. Draft Minutes of the September 22, 2010 CPC Meeting.
 - C. Draft Minutes of the September 22, 2010 EPOC Meeting.
 - D. Minutes of the May 6, 2010 EAC Meeting.
- 3:10-3:30 XIII. Other Business.
- A. American Institute of Certified Public Accountants (AICPA).
 - 1. Update on AICPA State Board Committee (**Donald Driftmier**).
 - B. National Association of State Boards of Accountancy (NASBA).
 - 1. Update on NASBA Committees.
 - a. Accountancy Licensee Database Task Force (**Patti Bowers/Sally Anderson**).
 - b. Board Relevance & Effectiveness Committee (**Marshal Oldman**).
 - c. Compliance Assurance Committee (**Robert Petersen**).
 - d. Global Strategies Committee (**Rudy Bermúdez/Angela Chi**).
 - e. Uniform Accountancy Act Committee (UAA) (**Donald Driftmier**).
 - f. UAA Mobility Implementation (**David Swartz**).
 - 2. NASBA Regional Director's Focus Questions (**Dan Rich**).
- 3:30-4:00 XIV. Officer Elections (**Manuel Ramirez**).
- A. President.
 - B. Vice President.
 - C. Secretary/Treasurer.
- 4:00-4:30 XV. Closing Business.

- A. CBA Member Comments.
- B. Comments from Professional Societies.
- C. Public Comments.
- D. Agenda Items for Future CBA Meetings.
 - 1. CPC Charge Regarding International Delivery of the Uniform CPA Examination.
- E. Press Release Focus (**Lauren Hersh**).
 - 1. Recent Press Releases.

XVI. Adjournment.

Please note: Action may be taken on any item on the agenda. The time and order of agenda items are subject to change at the discretion of the CBA President and may be taken out of order. In accordance with the Bagley-Keene Open Meetings Act, all meetings of the CBA are open to the public. Government Code section 11125.7 provides the opportunity for the public to address each agenda item during discussion or consideration by the CBA prior to the CBA taking any action on said item. Members of the public will be provided appropriate opportunities to comment on any issue before the CBA, but the CBA President may, at his or her discretion, apportion available time among those who wish to speak.



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**CALIFORNIA BOARD OF ACCOUNTANCY (CBA)
LEGISLATIVE COMMITTEE (LC)**

LC Meeting
Agenda

Wednesday, November 17, 2010
9:00 a.m.

Crowne Plaza Irvine
17941 Von Karman Ave.
Irvine, CA 92614
Telephone: (949) 863-1999
Fax: (949) 474-7236

(CBA members who are not members of the LC may be attending the meeting.)

- I. Update on Bills on Which the CBA Has Taken a Position (**Written Report Only**).
- II. Proposed Legislation- Retirement Status (**Matthew Stanley**).
- III. Proposed Legislation- Restatements (**Matthew Stanley**).
- IV. Proposed Legislation- Peer Review Sunset Extension (**Matthew Stanley**).
- V. Proposed Legislation- Webcast Exemption (**Matthew Stanley**).
- VI. Proposed Legislation- Loans to the General Fund (**Matthew Stanley**).
- VII. Comments from Members of the Public.
- VIII. Agenda Items for Next Meeting.
- IX. Adjournment.

Action may be taken on any item on the agenda.

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Government Code section 11125.7 provides the opportunity for the public to address each agenda item during discussion or consideration by the CBA prior to the CBA taking any action on said item. Members of the public will be provided appropriate opportunities to comment on any issue before the CBA. Individuals may appear before the CBA to discuss items not on the agenda; however, the CBA can take no official action on these items at the time of the same meeting. (Government Code sec. 11125.7(a).)



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**CALIFORNIA BOARD OF ACCOUNTANCY (CBA)
COMMITTEE ON PROFESSIONAL CONDUCT (CPC)**

CPC Meeting
Agenda

Wednesday, November 17, 2010
9:45 a.m.
or upon conclusion of LC

Crowne Plaza Irvine
17941 Von Karman Ave.
Irvine, CA 92614
Telephone: (949) 863-1999
Fax: (949) 474-7236

(CBA members who are not members of the CPC may be attending the meeting.)

- I. Draft Minutes of the September 22, 2010, CPC Meeting (**Leslie LaManna, Chair**).
- II. Discussion on Whether the Existence of Liability Insurance Should be a Mitigating Factor in Enforcement Actions (**Rafael Ixta**).
- III. Comments from Members of the Public.
- IV. Agenda Items for Next Meeting.
- V. Adjournment.

Action may be taken on any item on the agenda.

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CALIFORNIA BOARD OF ACCOUNTANCY (CBA)
ENFORCEMENT PROGRAM OVERSIGHT COMMITTEE (EPOC)

EPOC Meeting
Agenda

Wednesday, November 17, 2010
10:00 a.m.
or upon conclusion of CPC

CROWNE PLAZA IRVINE
17941 Von Karman Avenue
Irvine, CA 92614
(949) 863-1999

(CBA members who are not members of the EPOC may be attending the meeting.)

- I. Call to Order (**Herschel Elkins, Chair**).
- II. Draft Minutes of September 22, 2010 CPC Meeting.
- III. Discussion on Probationers Being Required to Pay for the Cost of Probation Monitoring (**Paul Fisher**).
- IV. Discussion of Documents Served with Accusations/Statements of Issue (**Rafael Ixta**).
- V. Public Comments.
- VI. Agenda Items and Meeting Dates for Future EPOC Meetings.
- VII. Adjournment.

Action may be taken on any item on the agenda.

In accordance with the Bagley-Keene Open Meetings Act, all meetings of the Board are open to the public.

Government Code section 11125.7 provides the opportunity for the public to address each agenda item during discussion or consideration by the Board prior to the Board taking any action on said item. Members of the public will be provided appropriate opportunities to comment on any issue before the Board. Individuals may appear before the Board to discuss items not on the agenda; however, the Board can take no official action on these items at the time of the same meeting.
(Government Code sec. 11125.7(a).)

Memorandum

CBA Agenda Item II.A.
November 17-18, 2010

To : CBA Members

Date : October 29, 2010

Telephone : (916) 561-1731

Facsimile : (916) 263-3673

E-mail : rixta@cba.ca.gov

From : Rafael Ixta, Chief
Enforcement Division

Subject : Update on Peer Review Implementation

In October 2010, the peer review implementation activities were transitioned from the Licensing Division to the Enforcement Division of the California Board of Accountancy (CBA). I extend my gratitude and compliments to Deanne Pearce and Dominic Franzella of the Licensing Division for their hard work and contributions in the area of peer review. They have done an outstanding job!

In an effort to continue to supply updates on peer review implementation activities, staff have provided this memorandum highlighting key topics where actions have occurred since the September CBA meeting.

Regulations

The following rulemaking packages are pending final approval by the Office of Administrative Law:

1. The package containing the peer review emergency regulations; and,
2. The package containing the remaining peer review regulations for which the CBA did not have emergency authority to adopt.

It is anticipated that both rulemaking packages will be approved by the end of December.

Peer Review Oversight Committee (PROC)

On October 6, 2010, CBA staff met with PROC Chair Nancy Corrigan to plan and prepare for the first PROC meeting. On October 13, 2010, Ms. Corrigan and CBA staff had a conference call with AICPA and CalCPA representatives to discuss their presentations at the first PROC meeting.

Staff also contacted the Texas Board of Accountancy, the Texas Peer Review Committee, and NASBA's Compliance Assurance Committee. All entities contacted were extremely cooperative and are providing excellent resource materials for the PROC to utilize.

Update on Peer Review Implementation

Page 2 of 2

The first PROC meeting is scheduled for Tuesday, November 9, 2010, at the CBA offices in Sacramento. Ms. Corrigan will report on the activities of the PROC at the November CBA meeting.

Peer Review Survey

The CBA has developed a voluntary survey for sole proprietors and small firms to complete as they submit their On-line Peer Review Reporting Form. The survey will gather valuable information on the impact of peer review on small firms and sole proprietors.

The CBA is required to report to the Legislature and the Governor, by January 1, 2013, the following:

- The extent to which peer review of small firms providing specified services has strengthened consumer protection.
- The impact of peer review on small firms providing specified services.
- The impact of small firms that provide specified types of accountancy services.

The survey is currently pending approval by the Department of Consumer Affairs' Legal Office. We anticipate that it will be on-line by the end of the year.

Reporting Statistics

On July 1, 2010, notification was sent to all corporations, partnerships, and individual licensees with license numbers ending in 01-33 – just over 28,000 licensees. As of October 19, 2010, 12,280 on-line peer review reports have been submitted. The breakdown is as follows:

Peer Review Required	829
Peer Review Not Required	2,069
Peer Review Not Applicable	9,382

Outreach

For the Winter 2010 *UPDATE*, staff is drafting additional Frequently Asked Questions (FAQs) targeted specifically at when and how licensees report peer review information. The new FAQs will also be added to the CBA Web site.

Again, staff will continue to inform members regarding the activities and progress of peer review implementation.

Memorandum

CBA Agenda Item IV
October 27, 2010

To : CBA Members

Date : October 13, 2010

Telephone : (916) 574-8220

Facsimile : (916) 574-8623

From : Gary Duke
Senior Staff Counsel, Legal Affairs Division
Department of Consumer Affairs (DCA)

Subject : DCA Legal Presentation – Litigation Against CBA Members

The attached Items are being provided in support of my presentation on litigation against CBA Members at the October Working Conference.

The first document is Attorney General's Opinion No. CV 74-128, dated July 31, 1974. This document is the Conclusion and Analysis to the request from the Occupational Safety and Health Standards Board for a legal opinion relating to possible liability of the board or its members as a result of any action or decision made by the board or its performance of duties imposed upon it by Labor Code, Section 140 et seq.

The second document is from the Office of the Attorney General, dated November 13, 1998. This document is the Conclusion and Analysis to the request of the Honorable Herschel Rosenthal, Member of the California Senate for an opinion on whether or not the State is required to provide indemnification and defense for an appointee to a state board, commission, or committee with respect to activities performed within the appointee's designated duties.

Attachments

Opinion No. CV 74-128—July 31, 1974

SUBJECT: OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD—The Occupational Safety and Health Standards Board as an entity and its members are immune from liability for injuries possibly alleged to be caused by Board decisions; the State will defend an action brought against a Board member or employee; the State is obligated to pay all except punitive or exemplary damages in a judgment for compensatory damages rendered against an officer or employee for an injury occurring within the scope of his employment.

Requested by: OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

Opinion by: EVELLE J. YOUNGER, Attorney General
Richard L. Mayers, Deputy

The Occupational Safety and Health Standards Board has requested the opinion of this office on several questions relating to possible liability of the Board or its members as a result of any action or decision made by the Board in its performance of duties imposed upon it by Labor Code, section 140 et seq.

The conclusions are as follows:

The Occupational Safety and Health Standards Board as an entity and its members are immune from possible liability for injuries that might be alleged to be caused by the decision of the Board to issue, deny, revoke or suspend orders or standards and the Board and its members are similarly immune from liability for failure or refusal to issue, deny, revoke or suspend an order or standard.

The State of California will defend an action brought against a Board member as well as an employee of the Board in either the State or Federal courts for acts done in the course of employment in all but a limited number of cases (as for example, where a Board member or employee is found to have acted with actual fraud, corruption or malice). The State is obligated to pay a judgment for compensatory damages rendered against an officer or employee for an injury arising out of an action or omission occurring within the scope of his employment, but is not authorized to pay such part of a judgment as is for punitive or exemplary damages.

ANALYSIS

The questions presented are generally answered by the specific provisions of California's Tort Claim Act (Gov. Code § 800, et seq.). Members of the Occupational Safety and Health Standards Board are public officers and are encompassed within the definition of the term "public employee" as that phrase is used in the Tort Claims Act (Gov. Code §§ 810.2 and 811.4).

Labor Code section 142.3 authorizes the Board to adopt, amend or repeal occupational safety and health standards and orders.

The statutes that appear most generally applicable to the liability question presented are Government Code sections 821.2 and 821. Government Code section

821.2 provides that a public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend or revoke any order or similar authorization where he is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked. Thus, the provisions of section 821.2 make it clear that the Board members are immune from liability growing out of the exercise of their authorized discretion in determining whether to issue, deny, suspend or revoke a standard or order.

An additional immunity is found in Government Code section 821 which provides that "A public employee is not liable for injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment." An "enactment" is defined by the Tort Claims Act to encompass the occupational safety and health orders or standards referred to in Labor Code section 142.3 (see Gov. Code §§ 810.6 and 811.6). The immunities conferred on Board members by Government Code section 821.2 and 821 are also conferred on the Board as an entity. (See Gov. Code §§ 818.4 and 818.2.)

Thus, to answer the specific hypothetical posed by the inquiry, if the Board were to issue a permanent variance with respect to a pressure vessel at a specific location and such vessel were later to explode, causing injury or death neither the Board nor its members would be subject to liability for an injury caused by the issuance of the variance.

We have been asked whether, in the event a civil or criminal action were to be filed naming the Board or a member thereof as defendant(s), the State of California would defend such an action?

Government Code section 995 provides as follows:

"Except as otherwise provided in Sections 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.

"For the purposes of this part, a cross-action, counterclaim or cross-complaint against an employee or former employee shall be deemed to be a civil action or proceeding brought against him."

Government Code section 995.2, one of the exceptions to section 995, provides:

"A public entity may refuse to provide for the defense of an action or proceeding brought against an employee or former employee if the public entity determines that:

- "(a) The act or omission was not within the scope of his employment; or
- "(b) He acted or failed to act because of actual fraud, corruption or actual malice; or,

"(c) The defense of the action or proceeding by the public entity would create a conflict of interest between the public entity and the employee or former employee."

Government Code section 995.4 provides as follows:

"A public entity may, but is not required to, provide for the defense of:

"(a) An action or proceeding brought by the public entity to remove, suspend or otherwise penalize its own employee or former employee, or an appeal to a court from an administrative proceeding by the public entity to remove, suspend or otherwise penalize its own employee or former employee.

"(b) An action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity, or an appeal therefrom."

With respect to the possibility of criminal actions, Government Code section 995.8 provides that public entities may, but are not required to, furnish a defense for their employees in criminal proceedings based on their official acts and omissions, if the entity determines that such defense would be in the best interests of the public entity and that the employee acted in good faith, without actual malice, and "in the apparent interests of the public entity."

We are next asked whether, in the event a judgment was reached imposing liability on the Board or member thereof, does the State of California assume such liability on behalf of the Board or the individual members so named. This question is largely answered by the provisions of Government Code section 825, which section provides in part:

"If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed."

In *Johnson v. State of California*, 69 Cal. 2d 782 (1968) the California Supreme Court commented on the obligation at page 791:

"Nor need the employee face any requirement that he assume the financial and mental burden of defending his official conduct in a personal suit filed against him The public employee need not suffer concern over the possibility that he will be compelled to finance and oversee a tort suit filed against him personally; the statute provides for defense by the public

entity upon notice, and the employee's best interests clearly favor the giving of such notice. Moreover, the public employee faces only a slim danger of ultimate personal liability; such liability attaches only in the rare instances of injuries arising from acts either outside the scope of employment or performed with actual fraud, corruption, or malice.⁵ Indeed, a principal purpose of the indemnification scheme laid out in Government Code section 825 to 825.6, limiting the personal threat of suit or liability, centered on assuring the zealous execution of official duties by public employees. To the extent that the ardor of public employees might be affected by the threat of personal liability [footnote omitted] these fears will be allayed by the indemnification provision." [1]

Finally, as provided by Government Code section 996.4, if the public entity refuses to furnish a defense requested by a public employee (on the ground, for example, that malice was present) the employee may bring an action for writ of mandate to compel the State to defend the action or he may retain his own counsel to defend the action or proceeding. If he elects the latter course, he is entitled to recover from the public entity such reasonable attorney's fees, costs and expenses as are necessarily incurred by him in defending the action or proceeding if the action or proceeding arose out of an act or omission in the scope of his employment as an employee of the public entity. But he is not entitled to such reimbursement if the public entity establishes (a) that he acted or failed to act because of actual fraud, corruption or actual malice, or (b) that the action or proceeding is one described in section 995.4.

Thus it may be said that on request of an employee, the State is expected to provide for the defense of any civil action or proceeding against an employee based on acts or omissions in the scope of his employment and pay any resulting judgment in all but a limited number of cases.

⁵ It is noteworthy that these exceptions, in addition to limiting liability to a narrow range of actions by public employees, only require the employee to persuade his employer that he acted in good faith and in the course of his employment. An injured member of the public bringing a tort suit may well take an adamant and even unreasonable position. On the other hand, the governmental entity, which will probably maintain continuous contacts with the employee whose conduct is at issue, and in any event must consider the effects of its actions on the conduct and morale of its other employees, will probably take a much more reasonable position. Accordingly, the California system, by eliminating the possibility that the public employee will be at the mercy of an injured member of the public, further decreases the danger of 'dampened ardor' arising from fear of a lawsuit.

[1] An exception to this obligation to pay a judgment imposing liability is the rare case in which the judgment rendered against the employee is for exemplary or punitive damages.

Government Code section 818 declares that the State is not liable for exemplary or punitive damages and section 825 relating to the defense of public employees says that nothing in the section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages. The reason for this rule is that "Such damages are imposed to punish a defendant for oppression, fraud or malice. They are inappropriate where a public entity is involved since they would fall on the innocent taxpayers." California Law Revision, Commission Recommendations Relating to Sovereign Immunity 817.

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

DANIEL E. LUNGREN
Attorney General

OPINION :
 : No. 98-101
of :
 : November 13,
 : 1998
DANIEL E. LUNGREN :
Attorney General :
 :
ANTHONY M. SUMMERS :
Deputy Attorney General :
 :

THE HONORABLE HERSCHEL ROSENTHAL, MEMBER OF THE CALIFORNIA SENATE, has requested an opinion on the following question:

Is the state required to provide indemnification and defense for an appointee to a state board, commission, or committee with respect to activities performed within the appointee's designated duties?

CONCLUSION

The state is required to provide indemnification and defense for an appointee to a state board, commission, or committee with respect to activities performed within the appointee's designated duties if the appointee exercises a portion of the sovereignty of the state and thus is a state "officer." Appointees who are state "employees" would also be entitled to indemnification and defense. Whether an appointee is a state employee must be determined on a case-by-case basis by applying factors specified in section 220 of the Restatement Second of Agency.

ANALYSIS

An action at law for civil liability against an officer or employee of a public entity, including the state, is controlled by the provisions of the California Tort Claims Act (Gov. Code, §§ 810-996.6; "Act"). Footnote No. 1 The Act prescribes the substantive liabilities and immunities of (§§ 810-895.8), the procedures for initiating claims against (§§ 900-935.6), and the entitlement to defense of (§§ 995-996.6) Footnote No. 2 and indemnification for (§§ 825-825.6) public employees.

For purposes of the Act, section 810.2 defines the term "employee" to include officers and uncompensated servants: "'Employee' includes an officer, judicial officer as defined in Section 327 of the Elections Code, employee, or servant, whether or not compensated, but does not include an independent contractor."

The question to be resolved is whether an appointee to a state board, commission, or committee is an "employee" as defined in section 810.2. We conclude that whether such an appointee would be entitled to indemnification and defense by the state would depend upon the facts in each particular situation.

Numerous examples may be given of state boards, commissions, and committees that are filled by appointment. The Public Utilities Commission, created by the Constitution (Cal. Const., art. XII, § 1), and an education advisory committee, created by statute (Ed. Code, § 33501, subd. (b)), are but two examples. For purposes of our analysis, we may assume that the state board, commission, or committee in question has been duly established by formal action taken pursuant to the Constitution or some authorizing statute. (Cf., § 11121.8.)

It is clear that if appointees to state boards, commissions, or committees are "officers," they are covered under the express terms of section 810.2. (See also Lab. Code, § 3351, subd. (b).) An officer generally is one who exercises a portion of the sovereignty of the state. (*Parker v. Riley* (1941) 18 Cal.2d 83, 87; *People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 641-642; *Schaefer v. Superior Court* (1952) 113 Cal.App.2d 428, 432-433; 42 Ops.Cal.Atty.Gen. 93, 95 (1963).)

Whether a member of a state board, commission, or committee exercises a portion of the sovereignty of the state depends upon the particular circumstances. In *People ex rel. Chapman v. Rapsey, supra*, 16 Cal.2d at 639-640, the court observed:

""The words 'public office' are used in so many senses that the courts have affirmed that it is hardly possible to undertake a precise definition which will adequately and effectively cover every situation. Definitions and application of this phrase depend, not upon how the particular office in question may be designated nor upon what statute may name it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the nature of the position and mark its character, irrespective of any formal designation. But so far as definition has been attempted, a public office is said to be right, authority, and duty, created and conferred by law - the tenure of which is not transient, occasional, or incidental - by which for a given period an individual is invested with power to perform a public function for public benefit.

""

"" . . . One of the prime requisites is that the office be created by the Constitution or authorized by some statute. And it is essential that the incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public.""

In *Shaeffer v. Superior Court*, *supra*, 113 Cal.App.2d at 432-433, the court described the "sovereign powers of the state" as follows:

"In *Parker v. Riley*, 18 Cal.2d 83, it was said at page 87: '[I]t is generally said that an office or trust requires the vesting in an individual of a portion of the sovereign powers of the state.' Sovereignty is defined in Webster's Dictionary as: 'The supreme political power, authority, or status of the person or persons in a state whom the citizens as a body habitually obey; the power that determines and administers the government of a state in the final analysis.' In *State ex rel. Pickett v. Truman*, 333 Mo. 1018 [64 S.W.2d 105, 106] it was said at page 1022, in referring to *State ex rel. Landis v. Board of Commissioners*, 96 Ohio 157 [115 N.E. 919]: 'Illustrative of what is meant by "sovereignty of the State," in the same opinion it said: "If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with the independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or State, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the State.'"

Thus in *Parker v. Riley*, *supra*, 18 Cal.2d at 87, the Supreme Court concluded that membership on the Commission on Interstate Cooperation was not an "office." Likewise, we concluded in a 1963 opinion that membership on an advisory board of the Joint Legislative Committee for the Revision of the Penal Code was not an "office." (42 Ops. Cal. Atty. Gen., *supra*, at 95.) If a state board, commission, or committee does not exercise sovereign powers, then its members would not be "officers" of the state. (*Ibid.*)

It is also apparent that any appointee who is a state "employee," whether in the civil service or exempt therefrom, would be covered under the express language of section 810.2. The critical issue to be resolved is whether an appointee to an *advisory* board, commission, or committee is entitled to defense and indemnification. While such a person may not be considered an "officer" for purposes of section 810.2, would the person nonetheless be an "employee, or servant, whether or not compensated" within the meaning of the statute?

In examining this language of section 810.2, we apply well established principles of statutory construction. "To interpret statutory language, we must 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.]" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632.) "In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . ." (*Ibid.*; see *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 763.) "In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose . . ." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.)

The term "employee" may mean different things in different contexts. (*Knight v. Bd. etc. Employees' Retirement* (1948) 32 Cal.2d 400, 402 ["The term 'employees' has no fixed meaning that must control in every instance"]; *Villanazul v. City of Los Angeles* (1951) 37 Cal.2d 718, 722-723; *Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 613; 68 Ops. Cal. Atty. Gen. 127, 132

(1985).) While an "employee" normally receives compensation (*Parker v. Riley, supra*, 18 Cal.2d at 87; 42 Ops.Cal.Atty.Gen., *supra*, at 95), here the Legislature has expressly defined an "employee" for purposes of the Act as one "whether or not compensated" (§ 810.2). "The fact that a person is not paid monetary compensation for his services does not prevent him from occupying the status of an employee. [Citation.]" (*Chavez v. Sprague* (1962) 209 Cal.App.2d 101, 111; cf., Lab. Code, §§ 3352, subd (i), 3363.5; *Key Insurance Exchange v. Washington* (1970) 7 Cal.App.3d 209, 212.)

As for the term "servant," it is commonly defined as including "a government official considered as the servant of his sovereign or of the public." (Webster's Third New Internat. Dict. (1971) p. 2075.) A "public servant" is "an individual . . . rendering a public service." (*Id.*, at p. 1836.) When section 810.2 was enacted in 1963 (Stats. 1963, ch. 1681, § 1), the legislative committee comment stated with respect thereto:

"'Employee' was originally defined (in the bill as introduced) to include 'an officer, agent, or employee,' but not an 'independent contractor.' By amendment, the word 'servant' was substituted for 'agent' because (1) 'servant' was considered more appropriate than 'agent' when used in a statute relating to tort liability and (2) the public entities feared that to impose liability upon public entities for the torts of 'agents' would expand vicarious liability to include a large indefinite class of persons and 'servant' was believed to be more restrictive than 'agent.' . . ."

Further complicating the matter is the fact that the phrase "employee, or servant, whether or not compensated" contained in section 810.2 does not stand alone. Section 810.2 expressly excludes "an independent contractor." Footnote No. 3 How are these two phrases to be reconciled?

In examining whether a person is an employee or an independent contractor, various factors must be considered. (*Gonzalez v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 1584, 1590; *Briggs v. Lawrence, supra*, 230 Cal.App.3d at 615-616; *Townsend v. State of California* (1987) 191 Cal.App.3d 1530, 1534-1535.) A particular position often has some characteristics of an employment relationship and other characteristics of an independent contractor relationship. (*Tieberg v. Employment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949-954; *Truesdale v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 608, 613-617; 72 Ops.Cal.Atty.Gen. 94, 100 (1984).) However, for legal purposes, a person may only be one or the other, and the relevant factors are weighed to make the appropriate determination. (*Gonzalez v. Workers' Comp. Appeals Bd.*, *supra*, 46 Cal.App.4th at 1590; *Briggs v. Lawrence, supra*, 230 Cal.App.3d at 614; 72 Ops.Cal.Atty.Gen., *supra*, at 100.)

The crucial factor in distinguishing an employee from an independent contractor is "the right to control the manner and means by which the work is to be performed." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 457.) When the right to exercise complete control is retained, an employer-employee relationship is established. When control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*Id.*, at p. 458.)

Although the right to control is the most important test, recent cases have focused upon other criteria specified in section 220 of the Restatement Second of Agency. (See, e.g., *Briggs v.*

Lawrence, supra, 230 Cal.App.3d at 614 [determining that a public defender acted as an employee for certain purposes; also holding a person is either an employee or independent contractor, but not both].) In *Briggs*, the court provided a detailed analysis of the Restatement factors as follows:

"... Our Supreme Court characterized a similar approach [using right to control as the exclusive factor] as improper in *Tieberg v. Unemployment Ins. App. Bd., supra*, 2 Cal.3d at page 946, pointing out that although '[t]he right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship' other factors, enumerated in the Restatement Second of Agency, should be considered as well. [Citations.]

"The Restatement defines a 'servant' (generally equivalent to an employee) as 'a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. ... In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.' [Citations.]" (*Id.*, at pp. 615-616.)

Here, various factors weigh in favor of finding that an appointee to a state advisory board, commission, or committee is an "employee" of the state. The appointee may be subject to the control of the particular state agency when providing the advice, whether with regard to the frequency of committee meetings or the conditions under which the recommendations are to be given; the appointee may serve at the pleasure of the appointing power. (See *Briggs v. Lawrence, supra*, 230 Cal.App.3d at 618.) Moreover, a particular advisory body may be considered part of the "enterprise" of the state agency involved, resulting in an appointee being considered an employee rather than an independent contractor for purposes of section 810.2. An advisory body may be created to assist state agency officials in the performance of official duties; any act or omission in the performance of an appointee's designated duties in such circumstances may constitute part of the business" of the agency, inherent in and created by the enterprise as a whole. (See *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 960; *Gonzalez v. Workers' Comp. Appeals Bd., supra*, 46 Cal.App.4th at 1589-1590; *Briggs v. Lawrence, supra*, 230 Cal.App.3d at 617-618; *Chavez v. Sprague, supra*, 209 Cal.App.2d at 109-111.)

We note that the determination whether a person is an employee or independent contractor "is affected by policy considerations." (*Townsend v. State of California, supra*, 191 Cal.App.3d at 1535.) Providing defense and indemnification for appointees of state advisory bodies would further the policy of encouraging private individuals to participate in government activities

without fear of being named in a civil suit regarding their designated duties. (See *Farmers Ins. Group v. County of Santa Clara*, *supra*, 11 Cal.4th at 1001; *Johnson v. State of California* (1968) 69 Cal.2d 782, 792; *Elder v. Anderson* (1962) 205 Cal.App.2d 325, 333.)

Other factors, however, may weigh against the finding of "employee" status for members of state advisory bodies. The criteria specified in the Restatement must be considered on a case-by-case basis before a determination may be made. No conclusion may be drawn as to the status of a member of an advisory board, commission, or committee without an examination of the relevant factors peculiar to the board, commission, or committee and its appointees.

We conclude that the state is required to provide indemnification and defense for an appointee to a state board, commission, or committee with respect to activities performed within the appointee's designated duties if the appointee exercises a portion of the sovereignty of the state and thus is a state "officer." Appointees who are state "employees" would also be entitled to indemnification and defense. Whether an appointee is a state employee must be determined on a case-by-case basis by applying factors specified in section 220 of the Restatement Second of Agency.

* * * * *

Footnote No. 1

Unidentified section references herein are to the Government Code.

Footnote No. 2 Section 995.2 specifies conditions under which a public entity may refuse to provide a defense, including a determination by the public entity that the act or omission of the employee was not within the scope of employment. The present inquiry assumes that the act or omission in question falls within the appointee's designated duties. (See *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1002-1007.)

Footnote No. 3

In limited instances the Legislature has provided legal rights of representation for independent contractors. (See § 815.4; Bus. & Prof. Code, §§ 154.5, 2317, 2356.)

Memorandum

CBA Agenda Item II.D.
November 17-18, 2010

To : CBA Members

Date : October 28, 2010

Telephone : (916) 561-1716

Facsimile : (916) 263-3674

E-mail : vdaniel@cba.ca.gov

From : 
Veronica Daniel
Executive Analyst

Subject : 2011 CBA Meeting Locations

At the request of the CBA President, the attached 2011 year-at-a-glance calendar is being brought before the CBA for reconsideration of CBA meeting locations.

If you have any questions or concerns, please contact me at the telephone number or email address listed above.

Attachment

**CALIFORNIA BOARD OF ACCOUNTANCY (CBA)
PROPOSED 2011 MEETING DATES/LOCATIONS
(CBA MEMBER COPY)**

JANUARY 2011

S	M	T	W	Th	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31		NC	SC	SC	

FEBRUARY 2011

S	M	T	W	Th	F	S
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20	21	22	23	24	25	26
27	28					

MARCH 2011

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27	28	29	30	NC	NC	
				31		

APRIL 2011

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MAY 2011

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28						
29	30	31				

JUNE 2011

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JULY 2011

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31						

AUGUST 2011

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SEPTEMBER 2011

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OCTOBER 2011

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30	31		SC			

NOVEMBER 2011

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26						
27	28	29	30			

DECEMBER 2011

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11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

COMMITTEE/TASK FORCE
 SB-SPECIAL CBA MEETING ON LEGISLATION
 EAC-ENFORCEMENT ADVISORY COMMITTEE
 QC-QUALIFICATIONS COMMITTEE

GENERAL LOCATION
 NC-NORTHERN CALIFORNIA
 SC-SOUTHERN CALIFORNIA

	ON SHADED DATES CBA OFFICE IS CLOSED
	CBA MEETING
	DCA CONFERENCE
	CBA WORKING CONFERENCE
	SPECIAL CBA MEETING ON LEGISLATION
	EAC MEETING
	QC MEETING

Memorandum

CBA Agenda Item II.E.
November 17-18, 2010

To : CBA Members

Date : October 28, 2010

Telephone : (916) 561-1716

Facsimile : (916) 263-3674

E-mail : vdaniel@cba.ca.gov


From : Veronica Daniel
Executive Analyst

Subject : CBA Member Committee Interest Survey

If you would like to be appointed or maintain your current appointment to a CBA committee in 2011, please indicate your interest on the attached CBA Member Committee Interest Survey. These surveys will be provided to the incoming CBA President. Appointments will be announced in advance of the January 2011 CBA meeting.

Please submit your completed interest survey to me by December 8, 2010.

If you have any questions or concerns, please contact me at the telephone number or email address listed above.

Attachment



DEPARTMENT OF CONSUMER AFFAIRS
CALIFORNIA BOARD OF ACCOUNTANCY
 2000 EVERGREEN STREET, SUITE 250
 SACRAMENTO, CA 95815-3832
 TELEPHONE: (916) 263-3680
 FACSIMILE: (916) 263-3675
 WEB ADDRESS: <http://www.cba.ca.gov>



Attachment

CBA Member Committee Interest Survey

I, _____, would like to participate in the following committees for the upcoming year.

___ Committee on Professional Conduct (CPC)

The purpose of the CPC is to assist the CBA in consideration of issues relating to professional conduct by:

- Considering and developing recommendations on issues that apply to the practice of public accountancy and affect consumers.
- Considering, formulating, and proposing policies and procedures related to emerging and unresolved issues.
- Reviewing selected exposure drafts and developing recommendations to present to the CBA.
- The CPC generally meets before CBA meetings, or as needed.

___ Enforcement Program Oversight Committee (EPOC)

The purpose of the EOPC is to assist the CBA in the consideration of issues relating to professional conduct by:

- Reviewing policy issues related to the Enforcement Program.
- Overseeing the program's compliance with CBA policies by way of performing periodic internal audits.

___ Legislative Committee (LC)

The purpose of the LC is to assist the CBA in its activities by:

- Reviewing, recommending, and advancing legislation relating to the practice of public accountancy.
- Coordinating the need for and use of CBA members to testify before the Legislature.

___ Liaison to the Enforcement Advisory Committee (EAC)

___ Liaison to the Qualifications Committee (QC)

CBA members acting as Liaisons to committees are responsible for keeping the CBA informed regarding emerging issues and policy recommendations made at the committee level. Conversely, CBA Liaisons are to keep the committee informed of CBA policies and assignments. Finally, Liaisons will evaluate committee chairs, vice-chairs, and members for whom they have specific knowledge of their performance, and report to the CBA President and Vice-President as required.

___ I would be interested in serving on other ad hoc committees or task forces as needed.

Memorandum

CBA Agenda Item II.F.
November 17-18, 2010

To : CBA Members

Date : November 10, 2010

Telephone : (916) 561-1713

Facsimile : (916) 263-3675

E-mail : drich@cba.ca.gov

From : Dan Rich
Assistant Executive Officer

Subject: Discussion on Legal Opinions Regarding Loans to the General Fund

In order to assist the California Board of Accountancy (CBA) as it continues to discuss Accountancy Fund loans to the General Fund, staff are providing three legal opinions on this subject.

The first opinion (**Attachment 1**) is dated August 14, 2008 and was written by Doreathea Johnson, DCA's Deputy Director, Legal Affairs. This opinion concluded that special fund monies may be temporarily loaned to the General Fund if it is authorized and the terms and conditions are set forth and such loans will be paid back to the special fund.

The second opinion (**Attachment 2**) is dated September 7, 2010 and was written by Gary Duke, CBA Legal Counsel. This opinion concluded that the CBA's nine-month reserve requirement is not violated by the 2010-11 Budget Act requiring the Accountancy Fund to loan \$10 million to the General Fund.

The final opinion (**Attachment 3**) is dated October 12, 2010 and was written by L. Erik Lange, Deputy Legislative Counsel. This opinion concluded that the 2010-11 Budget Act requiring the Accountancy Fund to loan \$10 million to the General Fund, with its specified repayment date, can be considered as a receivable and therefore be calculated as a part of the CBA's reserve balance. In a side analysis, this opinion also states on pages 4-6 that there is statutory authority for loans from special funds to the General Fund if reimbursement is made to the fund and there is no interference with the purpose for which the fund was created.

These opinions are provided to assist the CBA in its discussions and with any direction it may provide to staff.

Attachments



Attachment 1

MEMORANDUM

DATE	August 14, 2008
TO	Doreathea Johnson Deputy Director, Legal Affairs
FROM	 Don Chang, Supervising Senior Counsel Department of Consumer Affairs Division of Legal Affairs
SUBJECT	LOANS OF SPECIAL FUNDS TO THE GENERAL FUND

You have asked whether the money in a special fund of a board within the Department of Consumer Affairs (Department) may be loaned to the General Fund to address a budgetary shortfall.

Conclusion

It is our opinion that Government Code section 16320 authorizes the money in a special fund to be temporarily loaned to the General Fund if such a loan is authorized, i.e., section 16320 is amended to authorize such a loan, and the terms and conditions of the loan, including an interest rate, are set forth in the loan authorization and such loans will be paid back to the special fund of the lending board if either the board has a need for the money or the General Fund no longer needs the money.

Analysis

General and Special Funds

The moneys of the State are segregated into various funds such as the General Fund and special funds created by law. The General Fund consists of money received into the treasury and not required by law to be credited to any other fund. (Government Code section 16300 – all section references are to that Code unless otherwise indicated). Tax money paid to the Treasurer is required to be paid into the treasury like other moneys and it thus goes into and becomes part of the General Fund. It is not earmarked, but becomes a part of the mass and cannot be distinguished from any other money.

The Department's constituent agencies e.g., boards, bureaus, committees and commission (hereafter collectively referred to as "boards") are funded by the licensing and registration fees that they assess upon persons whom they regulate.

Business and Professions Code section 205 establishes the funds of the boards that make up the Department. It provides in relevant part as follows:

"(a) There is in the State Treasury the Professions and Vocations Fund. The fund shall consist of the following special funds:

- Board of Accountancy
- Acupuncture Board
- Arbitration Certification Program
- California Architects Board
- Landscape Architects Technical Committee
- Athletic Commission
- Bureau of Automotive Repair
- Bureau of Barbering & Cosmetology
- Board of Behavioral Sciences
- California State Approving Agency for Veterans Education--Title 38
- Cemetery and Funeral Bureau
- Contractors State License Board
- Court Reporters Board of California
- Committee on Dental Auxiliaries
- Dental Bureau of California
- Bureau of Electronic & Appliance Repair
- Board for Professional Engineers and Land Surveyors
- Board for Geologists & Geophysicists
- State Board of Guide Dogs for the Blind
- Hearing Aid Dispensers Bureau
- Bureau of Home Furnishings & Thermal Insulation
- Medical Board of California
- Bureau of Naturopathic Medicine
- California Board of Occupational Therapy
- Osteopathic Medical Board
- Board of Optometry
- Board of Pharmacy
- Physician Assistant Committee
- Physical Therapy Board of California
- Board of Podiatric Medicine
- Professional Fiduciaries Bureau
- Board of Psychology
- Board of Registered Nursing
- Respiratory Care Board

Bureau of Security & Investigative Services
Speech-Language Pathology & Audiology Bureau
Structural Pest Control Board
Telephone Medical Advice Bureau
Veterinary Medical Board
Bureau of Vocational Nursing & Psychiatric Examiners

(b) For accounting and recordkeeping purposes, the Professions and Vocations Fund shall be deemed to be a single special fund, and each of the several special funds therein shall constitute and be deemed to be a separate account in the Professions and Vocations Fund. Each account or fund shall be available for expenditure only for the purposes as are now or may be provided by law."

Each board has in its respective governing law, a statute that provides that fees collected pursuant to that governing law shall be paid into the State Treasury to the credit of that board's fund and that money paid into the board's fund is to be used in the manner prescribed by law to defray the expenses of the board in carrying out and enforcing the provisions of the board's governing law. Since the funds of boards are specifically earmarked for deposit in and the use of particular boards, such funds are considered special funds.

State Budgetary Process

Although the boards have their own funds, they are not given unfettered use of their funds. They may not expend their funds without a legislative appropriation. Thus, such funds are subject to the state budget process. The State Constitution requires that the Governor submit a budget to the Legislature for its review and approval. As part of this process, the Director of Finance, as the chief financial advisor to the Governor, directs the effort for preparation of the Governor's Budget. Under the policy direction of the Governor, the Director of Finance issues instructions and guidelines for budget preparation to agencies and departments. For those departments that are under an Agency Secretary, departments must clear their proposals through Agency level hearings. The Department of Finance generally attends these hearings. For non-Agency departments, proposals are presented directly to the Department of Finance. Issues which are not resolved between departments and Finance staff are discussed at hearings conducted by the Director of Finance. The most sensitive issues are ultimately presented to the Governor for a decision. After all decisions are completed, the Department of Finance coordinates the printing of the Governor's Budget. As required by the California Constitution, the Governor's Budget must be accompanied by a Budget Bill itemizing recommended expenditures which must be introduced in each house of the Legislature. Both the Senate and the Assembly will review and make recommendations and revisions to the Budget Bill. Ultimately both the Senate and the Assembly must agree on a version of the Budget Bill by a two thirds vote of each house. Thereafter it is returned to the Governor who is allowed to reduce or eliminate an item of appropriation in the Budget Bill. Thus, a board's annual budget or appropriation, while developed with input from the board, results mainly from the interplay between the Governor/Department of Finance and the Legislature.

Outright Transfer Of Board Funds

In the early 1990s there were outright transfers of surplus moneys from the special funds of boards to the General Fund. Such transfers were challenged and found to be unlawful. The courts, in unreported trial court decisions, found that the funds of the Department's constituent boards were "trust-like" instruments for protection of the public and the fees paid into the funds were earmarked to implement the laws administered by the boards. To apply those fees to the General Fund would violate the special law prohibition of the California Constitution because such a redirection of funds for a generalized use would arbitrarily require the licensees who paid into the fund and obtained the benefit therefrom to pay more in general taxes than other persons.

Underlying these decisions was the case of *Daugherty v. Riley* (1934) 1 Cal.2d 298. The case involved three legislative transfers from the Department of Corporations (DOC). At that time the DOC received its sole support through revenues from fees and permits of its licensees. In 1929, the Legislature appropriated \$300,000 from the DOC to pay for the construction of an office building that would house the DOC. Other state agencies would also occupy this building and they would pay rent to DOC. The Court held that the 1929 appropriation was constitutional since the purpose of the transfer was to house the DOC and DOC was to receive the rents for space that was rented by other state agencies.

In 1931, the State appropriated an additional \$210,000 from DOC to complete the construction of the new building, without restrictions as to office space for housing the DOC or for the collection of rents from other state agency tenant to be applied to DOC account. In 1933, the Legislature repealed the provisions that provided that rents from other state agencies in the new building would be paid to DOC and instead provided that the rents would go to the State. The Commissioner of Corporations challenged the taking of the rents as an unconstitutional tax and double taxation.

The Court held that the DOC's revenues "are impositions for purposes of regulation only. When collected this revenue is permanently set apart ... for use of the department. In this respect the revenues are in the nature of a trust fund raised for a particular purpose in the exercise by the state of its police power. They are not state revenues in the sense that they may be used for any state purpose as long as the department is in need of them, and the justification for their collection is to make the department self supporting." (Id at 308)

In discussing this and other similar special funds, the Court stated that "these funds are raised for regulatory purposes and are set apart for the exclusive use of the state departments and agencies for which they are imposed and collected cannot be doubted. That these funds may not be permanently diverted from their specific purpose and to such an extent as to render the department or agency unable to function is likewise clear." Id at 309

With respect to the 1931 appropriation, the Court found that the transfer of funds was not a loan since it had no provisions for repayment either out of moneys from the General Fund or by way of rentals charged to other state tenants. The Court further stated that "to hold that the Legislature could provide fees for regulatory purposes under the police power and then devote the money so received to capital expenditures for a foreign purpose would be to declare that the Legislature could thus raise money by a special tax in contravention of section 25 of the Constitution. This course of legislative conduct cannot be justified..." (Id at 310) Ultimately the Court concluded, among other things, that the 1931 appropriation "was ineffectual as an appropriation measure... because it was an outright diversion of a special or trust fund raised for regulatory purposes to a capital expenditure or general tax purpose with no provision for its return, or for safeguarding it as an investment on behalf of the special fund (Id at 311)

The trial court decisions in the 1990s relating to the outright transfer of Board funds to the General Fund and the *Daugherty* case stand for the proposition that special fund moneys are in the nature of trust funds that cannot be permanently diverted to general fund purposes. Such is not the case if the boards' special funds were to be loaned to the General Fund. *Daugherty* recognized it is constitutional for special fund moneys to be loaned to other funds provided that such moneys are paid back to the special fund.

Statutory Authorization For Loans

In 2002, the Legislature enacted section 16320 to address a budgetary shortfall. This law allows loans from one state fund to any other state fund to address fiscal year budgetary shortfalls. Such loans must be "authorized" and the terms and conditions of the loan, including an interest rate, must be set forth in the loan authorization. To date, the Legislature has authorized loans to address budgetary shortfalls occurring in 2001-02, 2002-03 and 2003-04. Section 16320 addresses the repayment of such loans by providing that the Director of Finance shall order repayment of all or a portion of the loan if he or she determines that either (1) the fund from which the loan was made has a "need" for the moneys or (2) there is no longer a "need" for the moneys in the fund that received the loan.

Section 16320 does not define the term "need," and there has been discussion of the ambiguous nature of this term for purposes of determining what must occur to trigger repayment of a loan.

In a report issued in 2005 by the Joint Committee on Boards, Commissions and Consumer Protection (hereafter "Joint Committee") that was entitled "Cross-Cutting Issues For All Boards Under the Department of Consumer Affairs," (hereafter "the Report") it was suggested that one way to determine whether a board "needs" repayment of its loan is whether the board risks insolvency, financial distress, or an imprudent reserve without it. Under this interpretation, the borrower, i.e., the General Fund, has sufficient control over the lending board finances through the Governor's Budget to prevent the board from ever needing repayment. That is, the Department and the Department of Finance could exercise significant

control to thwart any proposed board action, e.g., expansion or even maintenance of funding for a board program, that might lead it to "need" repayment. Accordingly, the borrower could prevent the occurrence of the contingency needed to trigger repayment. Under such an interpretation, the loans could be viewed as a permanent transfer because there would be little if no possibility of repayment. Such a transfer of special funds to the General Fund could be viewed as an unlawful double tax against licensees who paid into the special fund for the maintenance of their licensing program.

The Joint Committee also considered another interpretation of "need" as it relates to the lending board. This alternative interpretation would define that term as the need of the board to run its programs as they were statutorily intended to be run. That is, a board must have sufficient money to administer its programs in a manner that addresses its statutory mandate that public protection is paramount. Under such an interpretation of "need," a board's need would be based upon its ability to continue to perform all those statutory duties and responsibilities necessary for the regulation of its licensees to ensure consumer protection.

Conversely, repayment of the loan is required if there is no longer a need by the fund which received the loan, e.g., General Fund. The Joint Committee report suggested that under a literal interpretation, repayment of a loan by the General Fund would never occur since the need for the money arose in the year the money was loaned and the money has already been spent to finance the deficit. Thus, there will never be a time when this already spent money is no longer needed. Under this interpretation, the loan would never be paid back, causing the loan to be a permanent transfer to the General Fund and raising the issue of it being an unconstitutional transfer of money from a special fund to the General Fund.

However, the Joint Committee report acknowledged that another interpretation could be that in the event the General Fund obtains a surplus, the State would not have a "need" to continue to carry the debt it owes to a special fund and at that time will repay the loan to the board. The Joint Committee report opined that such an interpretation would be inconsistent with the literal reading of the statute, but that such an interpretation is the only potential meaning that can make sense.

Where more than one statutory construction is arguably possible, the Supreme Court's policy has long been to favor the construction that leads to the more reasonable result; this policy derives largely from the presumption that the Legislature intends reasonable results consistent with its apparent purpose. *Copley Press Inc. v. Superior Court* (06) 39 Cal.4th 1272,1291. "When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation; in this regard it is presumed the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences." *Hart v. Autowest Dodge* (07) 147 Cal.App.4th 1258,1262.

Based upon these rules of statutory construction, one should seek to interpret the term "need" as used in section 16320 in a manner that promotes a reasonable result. We believe that

"need" should be interpreted in a manner that facilitates a reasonable likelihood that the loan will be paid back to a lending board. Accordingly, we believe that "need" as it relates to a lending board's "need" for the moneys must relate to that board's ability to meet its statutory mandate of consumer protection. We do not believe that the Legislature intended that a lending board's need is based upon its ability to fend off insolvency.

Similarly, we believe that "need" as it relates to General Fund's obligation to repay the loan if there is no longer a "need" for the funds should be similarly interpreted in a manner that facilitates repayment. Accordingly, we believe in that circumstance, "need" should be interpreted to mean that the General Fund should repay the loans if it obtains a surplus.

Thus, it is our opinion that the section 16320 authorizes the money in a special fund to be temporarily loaned to the General Fund if such a loan is authorized, i.e., section 16320 is amended to authorize such a loan, and the terms and conditions of the loan, including an interest rate, are set forth in the loan authorization and such loans will be paid back to the special fund of the lending board if either the board has a need for the money or the General Fund no longer needs the money.

Must A Lending Board Approve The Loan

Finally, there has been some discussion that the loans authorized by section 16320 are questionable in that, unlike a conventional loan, the lending party did not initially consent to the loan. Boards within the Department are considered part of the Executive Branch of State government. As discussed above, the State Budget process involves considerable oversight and control by the Governor, the Department of Finance and the Legislature. Individual boards are not given the independent authority to control their own budgets. Section 16320 provides that loans may be made from one state fund to any other state fund if "authorized." Such authorization can come in the form of a Budget Act. Accordingly, to the extent that the Governor and the Legislature agree that the General Fund has a budgetary shortfall, the Legislature may include provisions for a loan from a board to the General Fund by amending section 16320 to specify such a loan is authorized in a current Budget Act. Unlike a conventional loan, the laws relating to loans between state agencies to address budgetary shortfalls do not require the consent of the lending agency to accomplish the loan.

Such a procedure for loans among state agencies appears to be a longstanding practice. For example, section 16310 provides that when the General Fund is or will be exhausted, the Governor may order the transfer of all or any part of moneys not needed in other funds to the General Fund. All money so transferred must be returned to the funds from which it was transferred as soon as there are sufficient moneys in the General Fund to return it. Interest is payable on specified portions of moneys transferred to the General Fund. Conversely, when any special fund in the treasury is exhausted and there is money in the General Fund not required to meet any demand that has accrued or may accrue against it, the Governor may order the transfer of the money to the special fund in need. This statute, like section 16320, does not require the consent of the agency lending the money to the General Fund. The law

recognizes the common purpose of the money held in the State Treasury is to promote the business of the State government to provide services for and protect its citizens. To this end, the law recognizes the need of the Governor or the Governor and the Legislature to temporarily redirect money from among different state accounts to address budgetary shortages. Accordingly, unlike a conventional loan, the consent of the lending party is not required for such transfers.

In conclusion, we believe that section 16320 authorizes the money in a special fund to be temporarily loaned to the General Fund if such a loan is authorized, i.e., section 16320 is amended to authorize such a loan, and the terms and conditions of the loan, including an interest rate, are set forth in the loan authorization and such loans will be paid back to the special fund of the lending board if either the board has a need for the money or the General Fund no longer needs the money.

We trust that the foregoing is of assistance.



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MEMORANDUM

DATE	September 7, 2010
TO	MEMBERS OF THE CALIFORNIA BOARD OF ACCOUNTANCY via PATTI BOWERS Executive Officer California Board of Accountancy
SUBJECT	Proposed Transfer of Money from Accountancy Fund to General Fund Business and Professions Code section 5134(f)

At the July 28th, 2010 meeting of the California Board of Accountancy (hereinafter, "CBA" or "Board"), I was requested to provide an analysis and opinion regarding whether the proposed transfer of funds from the Accountancy Fund to the General Fund as provided in the proposed fiscal year (FY) budget of 2010-2011 (AB 1609) meets existing legal requirements.

Question Presented

Is the requirement in Business and Professions Code section 5134(f) that the Board maintain a contingent fund reserve balance equal to nine months of estimated annual authorized expenditures violated by the proposed FY 2010-2011 budget that transfers \$10 million dollars, as a "loan," to be repaid by June 30, 2012, from the Accountancy Fund to the General Fund?

Short Answer

The requirement under Business and Profession Code section 5134(f) that the CBA maintain a contingent fund reserve balance equal to nine months of the estimated annual authorized expenditures is not violated under the terms of the proposed FY 2010-2011 Budget.

Analysis

The CBA is a "special fund" agency and operates exclusively on funding from the Accountancy Fund, a continuing special fund established for the sole use of the Board under section 5133 of the Business and Professions Code. The statute provides that "[a]ll money in the Accountancy Fund is hereby appropriated to the State Board of Accountancy to carry out the provisions of this chapter." Chapter 1 of Division 3 of the Business and Professions Code regulates the practice of public accountancy. As such, the statutory purpose of the special fund is to fund the CBA in a manner sufficient to carry out the provisions of the California Accountancy Act (Act).

The primary sources of revenue to the Accountancy Fund are license application, license, and license renewal fees. These fees amount to more than \$10 million in annual revenue and along with other fees, penalties and moneys collected by the Board, must be remitted to the State Treasury to the credit of the Accountancy Fund. (Bus. & Prof. Code § 5132.) Each year, the state's budget approval process requires the Legislature and Governor to appropriate money from the Accountancy Fund to cover the Board's annual operating expenses.

Business and Professions Code section 5134 provides the Board authority, within limits, to fix and determine its fees. In relevant part, subdivision (f) of section 5134 specifically requires the to Board to "fix the biennial renewal fee so that ... the reserve balance in the board's contingent fund shall be equal to approximately nine months of annual authorized expenditures." This requires the Board to lower or increase biennial renewal fees as appropriate to maintain the statutorily mandated reserve level. Consequently, the Board must set its renewal fees in regulation in such a manner so that the Board maintains a nine month reserve.

In recent years, the Board has maintained a very healthy reserve. (See attachment, Analysis of Fund Condition) During FY 2005-06, the Board's reserve approximated 26 months and reached as high as 35 months in FY 2007-08. During FY 2009-10, the prior fiscal year, the reserve dropped to 18.8 months. There are several reasons for the Board having such large reserves that include personnel savings and the inability to recruit a sufficient number Investigative Certified Public Accountants. Also, the Board has often overestimated its actual expenditures for future fiscal years.

The excessive reserve level in the Accountancy Fund has become problematic. Because the Board has maintained such a large reserve, it recently has proposed regulations to reduce its fees. Business and Professions Code section 128.5 actually requires Department of Consumer Affairs agencies that have unencumbered funds in an amount that equals or is more than the agency's operating budget for the next two fiscal years to reduce license or other fees in such an amount so that the unencumbered funds are less than the operating budget for the following two fiscal years. The Board's proposed regulation will reduce fees beginning July 1, 2011. Even

with the anticipated fee reductions, however, the Board will continue to maintain a healthy reserve of more than nine-months and less than twenty-four months.

As of the date of this memorandum, the Legislature and Governor have not agreed upon a State budget. Currently AB 1609 (Blumenfeld) is the legislative vehicle for the proposed state budget. In its most recently amended form, if enacted, the Budget would transfer money from the Accountancy Fund to the General Fund. In relevant part, section 2, provides the following:

" * * *
1110-011-0704--For transfer by the
Controller, upon order of the Director of
Finance, from the Accountancy Fund,
Professions and Vocations Fund to the
General Fund..... (10,000,000)

Provisions:

1. The amount transferred in this item is a loan to the General Fund and shall be repaid by June 30, 2012. Repayment shall be made so as to ensure that the programs supported by the Accountancy Fund, Professions and Vocations Fund are not adversely affected by the loan. This loan shall be repaid with interest calculated at the rate earned by the Pooled Money Investment Account at the time of the transfer.

* * * "

Unlike so called "loan transfers" that were undertaken in prior years, this loan has a set repayment date and by its own terms must be paid back to the Accountancy Fund by June 30, 2012, the last day of FY 2011-12. Since the \$10 million, with interest, would be repaid no later than the end of the fiscal year, it would be accounted as revenue for the 2011-12 fiscal year. According to the most recent budget projections, that takes into account the proposed fee reduction beginning in July 2011 and the proposed loan transfer of \$10 million in FY 2010-2011, the Board will continue to maintain a fund reserve greater than 9 months for the next several years. (See attached 0704 California Board of Accountancy, Analysis of Fund Condition.) As a practical matter, at this point in time, there is no conflict between the proposed budgetary transfer and Business and Professions Code section 5134.

In interpreting the statutory provision in question, we may rely upon several principles of statutory construction. "In construing a statute, a court's objective is to ascertain and effectuate the underlying legislative intent." (*Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999, 1012.) In determining legislative intent, we look first to the language of the statute, giving effect to its "plain meaning." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 208-209.) In addition, various sections of all codes must be read together and harmonized if possible. (*Channell v. Superior Court of Sacramento County* (1964) 226 Cal. App.2d 246; *Rupley v. Johnson* (1953) 120 Cal.App.2d 548; *In Re Thrasher's Guardianship* (1951) 105 Cal.App.2d 768.) As such, the codes are to be regarded as blending into each other and constituting but a single statute. (*Pesce v. Department of Alcoholic Beverage Control* (1958) 51 Cal.2d 310.) Consequently, the codes must be construed to give effect to all provisions, if reasonably possible. (*Pareses v. California State Board of Prison Directors* (1929) 208 Cal. 353; *People v. Pryal* (App.1914) 25 Cal.App. 779.) Also, it must be presumed that the Legislature, when enacting this statute, was aware of existing related laws and intended to maintain a consistent body of rules. (*Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1055-1056; 93 Cal.Rptr.3d 457.) Consequently, Business and Professions section 5134 must be read together and harmonized with the relevant enacted budget provisions. According to the most recent budgetary projections, there is no conflict between the Accountancy Act and the proposed language of AB 1609.

Issues still remain if the Accountancy Fund were to fall below the statutorily mandated nine month reserve. The provision in the proposed FY 2010-11 budget concerning the loan repayment only provides that "[r]epayment shall be made so as to ensure that the programs supported by the Accountancy Fund, Professions and Vocations Fund are not adversely affected by the loan."¹ This provision is consistent with Government Code section 16310 that authorizes the Governor to "order the Controller to direct the transfer of all or any part of the moneys not needed in other funds or accounts to the General Fund" in situations "[w]hen the General Fund...is or will be exhausted." Special funds, like the Accountancy Fund, are included among the funds from which money may be transferred under Government Code section 16310.

Some may argue that any budgetary transfer directed by the FY 2010-11 proposed budget that allows the Accountancy Fund to fall below an estimated the nine month reserve would violate Business and Professions Code section 5134. However, the requirement to maintain a nine month reserve is more directed to the Board's obligation to determine the biennial licensing fees to be charged to licensees. This provision does not specify that the Accountancy Fund always maintain a nine month reserve, but rather that the Board shall fix the renewal fees in such a manner so that the reserve balance in the Board's contingent fund shall be equal to approximately nine months of annual authorized expenditures. (Bus. & Prof. Code 5134(f).) "Any increase in the renewal fee shall be made by regulation upon a determination by the board that additional moneys

¹ See AB 1609, sec. 2, item 1110-011-0704.

are required to fund authorized expenditures and maintain the board's contingent fund reserve balance equal to nine months of estimated annual authorized expenditures in the fiscal year in which the expenditures will occur." (Ibid., emphasis added.) The statute essentially limits the Board from increasing renewal fees in a manner that would create a reserve greater than, approximately, nine months. The proposed temporary loan to the General Fund is not a result of Board action regarding the determination of license renewal fees; rather, it would be the result of legislative action. Consequently, budget item number 1110-011-0704 in the proposed FY 2010-11 budget bill would not violate Business and Professions Code section 5134(f). Insofar as the budget bill and Government Code section 16310 requires repayment of any loans to be made to ensure that the programs supported by the Accountancy Fund are not adversely affected by the loan, CBA's programs are not adversely affected if the fund reserve falls below nine months. There are still adequate reserves to maintain program operations so long as the Accountancy Fund has an approximate reserve of at least two to four months.²

If the Board's reserve were to fall below the nine month requirement specified in section 5134 of the Business and Professions Code, the Board may appeal and argue to the Department of Finance that the loan made to General Fund is adversely affecting its programs since the law requires the Board to determine renewal fees in order to maintain a nine month reserve. The Department of Finance could accelerate the loan repayment in order for the Board to maintain its nine month reserve. However, in the alternative, the Department of Finance may ignore or refuse the Board's request for repayment to maintain the nine month reserve since current budget projections show that the Board has sufficient reserves to maintain existing program operations.

In California, it is unconstitutional for special funds to be permanently transferred for a General Fund purpose. (*Daugherty v. Riley* (1934).¹ Cal. 2d 298, 34 P.2d 1005) The California Supreme Court, in *Daugherty v. Riley*, stated:

That these special funds are raised for regulatory purposes and are set apart for the exclusive use of the state departments and agencies for which they are imposed and collected cannot be doubted. That these funds may not be permanently diverted from their specific purposes and to such an extent as to render the department or agency unable to function is likewise clear. This is especially true in the present case where the legislature has established elaborate governmental machinery the effective operation of which is essential to the transaction of business depending on its proper functioning. It would appear to be self-evident that the legislature may not on the one hand set up a department to authorize, regulate and supervise business transactions large and

² Most licensing programs within the Department of Consumer Affairs do not specify fund reserve levels. However, there are exceptions: The Medical Board's statutes require the Medical Board to set fees in a manner that maintains the Contingent Fund at a reserve level equal to two to four months' operating expenditures. (Bus.&Prof. Code § 2435(d) and (h).) The Respiratory Care Board is mandated to maintain a six month reserve. (Bus.&Prof. Code § 3775(d).) The Veterinary Board is required to maintain a reserve of no less than three month but no more than ten months. (Bus.&Prof. Code § 4905.) The Contractors' State License Board specifies a reserve not to exceed six months. (Bus.&Prof. Code § 7138.1.) The Pharmacy Board is required to maintain a reserve of twelve months. (Bus.&Prof. Code § 4400(p).) Only the Pharmacy Board's mandated reserve level is greater than the Accountancy Fund reserve.

small, imposing fees upon those affected for the purpose of carrying out the purposes of the law, and on the other hand permanently divert the funds thus raised and constituting the life blood of the department to a general fund or other general tax purpose.

However, the right of the legislature and governor to temporarily loan or transfer money from one fund or department to another; the right to borrow money temporarily from one fund for use in another has been sustained by our courts and is codified in Government Code section 16310. Under this section, a transfer from a special fund to the General Fund may only be made when the general fund is or will be exhausted and only when the money is not needed in the special fund and the transfer will not interfere with the object for which the special fund was created. (See Op.Leg.Counsel, 1967 A.J. 5333.) In the 1990s, there were several challenges to the state's diversion of money from agency special funds of the Department of Consumer Affairs during FYs 1991-1994. Three of the cases resulted in settlement in which the state, over time, repaid the amounts previously transferred to the General Fund. (*Malibu Video Systems, et al. v. Kathleen Brown, et al.*, No. BC082830 (Los Angeles County Superior Court), *Abramovitz, et al. v. Wilson, et al.*, No. BC120571 (Los Angeles County Superior Court), and *Hathaway, et al. v. Wilson, et al.*, No. BC137792 (Los Angeles County Superior Court).)

The California Medical Association (CMA) challenged the FY 1993-1994 Budget Act transfer of \$2.6 million in physician licensing fees from the Medical Board's Contingent Fund to the General Fund. On February 22, 1994, the Sacramento County Superior Court issued an order favorable to California Medical Association (CMA) in *CMA v. Hayes*, Case No. 374372 (Sacramento Superior Court). Ruling in favor of CMA on two separate constitutional grounds, the court granted CMA's petition and directed the state to return all Medical Board funds transferred under the unconstitutional provisions. The court found that the transfer of funds required by the Budget Act is a "special law" which violates the state constitution because it requires physicians to pay more in general taxes than other similarly situated persons. Also, the court held that because the Budget Act transfer language purports to amend the Medical Practice Act (which restricts the use of physician licensing fees for consumer protection activities by the Medical Board and expressly prohibits the transfer of those fees to the General Fund), the Budget Act language violates the single subject rule of the state constitution. The Department of Finance (DOF) subsequently decided not to appeal the superior court's ruling and subsequently returned \$2.6 million to the Medical Board. Since the CMA case, there have been no Appellate or California Supreme Court decisions on the aforementioned issues.

Currently, the CMA is challenging the FY 2008-09 transfer of \$6 million from the Medical Board Contingent Fund to the General Fund. (*CMA v. Schwarzenegger, Chang, Endsley and Genest*, Case No. 09-509896 (San Francisco County Superior Court).) Although the CMA was unsuccessful at the trial court level, the matter is currently being appealed to the First Appellate District Court, Division One. (*CMA v. Schwarzenegger*

et al. (2010) App. No. A128172.) The CMA completed its opening brief on July 28, 2010. This case will be the first appellate case on the issues concerning the transfer of special funds from the Department of Consumers Affairs' accounts to the General Fund. How this case is determined will have implications for all future "transfers" or loans from special funds to the General Funds. However, the facts in the current CMA case are significantly distinguishable from the proposed FY 2010-11 transfer from the Accountancy Fund to the General Fund. First, Bus. & Prof. Code section 2445 specifically prohibits any surplus of the Contingent Fund of the Medical Board to be deposited in or transferred to the General Fund. The Accountancy Act does not specifically prohibit transfers to the General Fund. The transfer or loan made from the Medical Board's Contingent Fund has no specified or concrete timetable for repayment. The proposed transfer from the Accountancy Fund has an actual repayment date of June 30, 2012. Also, pursuant to Business and Profession Code section 2435 (h), the Medical Board is required to "seek to maintain a reserve in the Contingent Fund in an amount not less than two nor more than four months operating expenditures." In contrast, the Accountancy Fund requires a nine month reserve. The aforementioned distinctions provide a good argument for insisting that the transfer from the Contingent Fund of the Medical Board is not really a loan, particularly since there is no repayment timetable scheduled. The proposed transfer from the Accountancy Fund more clearly appears to be a loan; and as such, it meets existing constitutional requirements.

Since the issues concerning the validity of the budgetary transfers are currently in litigation, it would be best to await the appellate court in the CMA case before taking any action. Politically, it may be more appropriate for an industry association to contest any transfer of funds from a special fund account to the General Fund. Such an entity would have standing to contest the budget measure. It would be extremely difficult for the CBA to challenge a budgetary measure. The Governor exercises the ultimate control over state agencies and departments through the appointment and removal power of appointed public officials. (Gov. Code § 12801.) Also, the budgetary process starts and ends with the Governor. (Cal. Const., Art. IV, § 12.) The Department of Finance prepares the Governor's budget and each state agency must submit to it a proposed budget for the fiscal year. (Gov. Code § 13320.) Until the enactment of the annual fiscal budget act, the Department of Finance may revise, alter or amend the budget of any state agency (Gov. Code § 13322.) After the Legislature has approved the final budget bill, the Governor has the power to veto, eliminate or reduce any item of appropriation for any agency program or service (Cal. Const., Art. IV, § 10, subds. (a), (e).) Any challenge to the Governor's policy or authority would probably not be welcome. There also remains an issue as to how the CBA would finance any legal challenge.

MEMBERS OF THE CBA
September 7, 2010
Page 8 of 8

I trust this is responsive to your inquiry. Please feel free to call me at (916) 574-8220 if you have any questions regarding this opinion.

Sincerely,

DOREATHEA JOHNSON
Deputy Director, Legal Affairs

A handwritten signature in black ink, appearing to read "Gary Duke". The signature is written in a cursive style with a large initial "G" and "D".

By: Gary Duke
Senior Staff Counsel

attachment

0704 - California Board of Accountancy
 Analysis of Fund Condition
 (Dollars in Thousands)

Prepared 8/4/10

NOTE: \$20.270 Million General Fund Repayment Outstanding as of 7/1/09

2010-11 Governor's Budget +1B w/ Proposed \$10 million GF Loan and Fee Decrease Regulation		ACTUAL		ACTUAL		ACTUAL		ACTUAL		ACTUAL		Governor's	BY + 1
		2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2010-11	2011-12	2010-11	2011-12	Budget	2011-12
BEGINNING BALANCE		\$ 12,033	\$ 15,957	\$ 20,548	\$ 25,653	\$ 15,693	\$ 19,550	\$ 19,550	\$ 10,323				
Prior Year Adjustment		\$ 126	\$ 354	\$ 59	\$ 212	\$ -	\$ -	\$ -	\$ -				
Adjusted Beginning Balance		\$ 12,159	\$ 16,311	\$ 20,607	\$ 25,865	\$ 15,693	\$ 19,550	\$ 19,550	\$ 10,323				
REVENUES AND TRANSFERS													
Revenues:													
125600	Other regulatory fees	\$ 82	\$ 62	\$ 56	\$ 55	\$ 66	\$ 98	\$ 98	\$ 98				
125700	Other regulatory licenses and permits	\$ 3,416	\$ 3,585	\$ 4,194	\$ 4,804	\$ 4,819	\$ 5,020	\$ 5,020	\$ 5,020				
	Initial fee decrease												\$ (242)
125800	Renewal fees	\$ 6,544	\$ 6,743	\$ 6,939	\$ 7,246	\$ 7,426	\$ 7,647	\$ 7,647	\$ 7,647				\$ 7,647
	Renewal fee decrease												\$ (2,921)
125900	Delinquent fees	\$ 282	\$ 298	\$ 291	\$ 294	\$ 290	\$ 293	\$ 293	\$ 293				\$ 293
	Delinquent fee decrease												\$ (116)
141200	Sales of documents	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -				\$ -
142500	Miscellaneous services to the public	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -				\$ -
150300	Income from surplus money investments	\$ 509	\$ 903	\$ 934	\$ 372	\$ 96	\$ 186	\$ 186	\$ 74				\$ 74
160400	Sale of fixed assets	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -				\$ -
161000	Escheat of unclaimed checks and warrants	\$ 2	\$ 3	\$ 3	\$ 3	\$ 3	\$ 3	\$ 3	\$ 3				\$ 3
161400	Miscellaneous revenues	\$ 1	\$ 1	\$ 5	\$ 2	\$ 1	\$ 1	\$ 1	\$ 1				\$ 1
164300	Penalty Assessments	\$ 12	\$ 17	\$ 1,017	\$ 35	\$ 1	\$ 1	\$ 1	\$ 1				\$ 1
	Totals, Revenues	\$ 10,828	\$ 11,610	\$ 13,433	\$ 12,611	\$ 12,702	\$ 13,250	\$ 13,250	\$ 9,859				
Transfers from Other Funds													
F00683	Teale Data Center (CS 15.00, Bud Act of 2005)	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -				\$ -
F00001	GF loan repay	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 10,000				\$ 10,000
Transfers to Other Funds													
T00001	GF loan per Item 1120-011-0704, BA of 2002	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -				\$ -
T00001	GF loan per Item 1120-011-0704, BA of 2003	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -				\$ -
T00001	GF loan per item, BA of 2008	\$ -	\$ -	\$ -	\$ (14,000)	\$ -	\$ -	\$ -	\$ -				\$ -
T00001	Proposed GF Loan	\$ -	\$ -	\$ -	\$ -	\$ -	\$ (10,000)	\$ (10,000)	\$ -				\$ -
	Totals, Revenues and Transfers	\$ 10,828	\$ 11,610	\$ 13,433	\$ (1,389)	\$ 12,702	\$ 3,250	\$ 18,859					
	Totals, Resources	\$ 22,987	\$ 27,921	\$ 34,040	\$ 24,476	\$ 28,395	\$ 22,800	\$ 30,181					
EXPENDITURES													
Disbursements:													
0840	State Controller (State Operations)				\$ 4	\$ 8	\$ 20						
1110	Program Expenditures (State Operations)	\$ 7,025	\$ 7,367	\$ 8,380	\$ 8,779	\$ 8,837	\$ 12,450	\$ 12,699					
<u>2010-11 BCPs - Program</u>													
	Cal-Licensing System BCP 1B								\$ 4				
8880	Financial Information System for California (State Operations)						\$ 7						
	Total Disbursements	\$ 7,030	\$ 7,373	\$ 8,387	\$ 8,783	\$ 8,845	\$ 12,477	\$ 12,703					
FUND BALANCE													
	Reserve for economic uncertainties	\$ 15,957	\$ 20,548	\$ 25,653	\$ 15,693	\$ 19,550	\$ 10,323	\$ 17,478					
	Months in Reserve	28.0	29.4	35.0	21.3	18.8	16.2						

NOTES:

- A. ASSUMES WORKLOAD AND REVENUE PROJECTIONS ARE REALIZED
- B. EXPENDITURE GROWTH PROJECTED AT 2% BEGINNING FY 2011-12



A TRADITION OF TRUSTED LEGAL SERVICE
TO THE CALIFORNIA LEGISLATURE

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October 12, 2010

Honorable Tony Mendoza
Room 2188, State Capitol

CALIFORNIA BOARD OF ACCOUNTANCY - #1022896

Dear Mr. Mendoza:

You have asked, if pursuant to the annual Budget Act, a loan is made from the Accountancy Fund to the General Fund and that loan causes the reserve balance in the fund to fall below nine months of annual authorized expenses from the fund, whether the California Board of Accountancy would be required to increase the biennial renewal fee payable by licensees of the board pursuant to subdivision (f) of Section 5134 of the Business and Professions Code.

The California Board of Accountancy (hereafter the board) is created pursuant to Chapter 1 (commencing with Section 5000) of Division 3 of the Business and Professions Code. The board licenses and regulates individual certified public accountants and accounting firms. Revenues collected by the board are deposited in the Accountancy Fund.

The Accountancy Fund consists of regulatory fees and administrative fines collected pursuant to Chapter 1 (commencing with Section 5000) of Division 3 of the Business and Professions Code, relating to the regulation of accountants (Secs. 125.9, 5132, and 5134, B.& P.C.; 16 Cal. Code Regs. 95 and following).¹ Moneys in the fund are continuously appropriated to the board to carry out the provisions of Chapter 1 (Sec. 5133).

Pursuant to Section 5134, the board is required to charge certain fees for various matters, including licensing and renewal fees. Among the fees that the board is required to impose is a biennial renewal fee pursuant to subdivision (f) of Section 5134. Section 5134 reads as follows:

"5134. The amount of fees prescribed by this chapter is as follows:

¹ All further section references are to the Business and Professions Code, unless otherwise indicated.

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"(a) The fee to be charged to each applicant for the certified public accountant examination shall be fixed by the board at an amount not to exceed six hundred dollars (\$600). The board may charge a reexamination fee not to exceed seventy-five dollars (\$75) for each part that is subject to reexamination.

"(b) The fee to be charged to out-of-state candidates for the certified public accountant examination shall be fixed by the board at an amount not to exceed six hundred dollars (\$600) per candidate.

"(c) The application fee to be charged to each applicant for issuance of a certified public accountant certificate shall be fixed by the board at an amount not to exceed two hundred fifty dollars (\$250).

"(d) The application fee to be charged to each applicant for issuance of a certified public accountant certificate by waiver of examination shall be fixed by the board at an amount not to exceed two hundred fifty dollars (\$250).

"(e) The fee to be charged to each applicant for registration as a partnership or professional corporation shall be fixed by the board at an amount not to exceed two hundred fifty dollars (\$250).

"(f) The board shall fix the biennial renewal fee so that, together with the estimated amount from revenue other than that generated by subdivisions (a) to (e), inclusive, the reserve balance in the board's contingent fund shall be equal to approximately nine months of annual authorized expenditures. Any increase in the renewal fee shall be made by regulation upon a determination by the board that additional moneys are required to fund authorized expenditures and maintain the board's contingent fund reserve balance equal to nine months of estimated annual authorized expenditures in the fiscal year in which the expenditures will occur. The biennial fee for the renewal of each of the permits to engage in the practice of public accountancy specified in Section 5070 shall not exceed two hundred fifty dollars (\$250).

"(g) The delinquency fee shall be 50 percent of the accrued renewal fee.

"(h) The initial permit fee is an amount equal to the renewal fee in effect on the last regular renewal date before the date on which the permit is issued, except that, if the permit is issued one year or less before it will expire, then the initial permit fee is an amount equal to 50 percent of the renewal fee in effect on the last regular renewal date before the date on which the permit is issued. The board may, by regulation, provide for the waiver or refund of the initial permit fee where the permit is issued less than 45 days before the date on which it will expire.

"(i) (1) On and after the enactment of Assembly Bill 1868 of the 2005-06 Regular Session, the annual fee to be charged an individual for a practice privilege pursuant to Section 5096 with an authorization to sign attest reports shall be fixed by the board at an amount not to exceed one hundred twenty-five dollars (\$125).

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"(2) On and after enactment of Assembly Bill 1868 of the 2005-06 Regular Session, the annual fee to be charged an individual for a practice privilege pursuant to Section 5096 without an authorization to sign attest reports shall be fixed by the board at an amount not to exceed 80 percent of the fee authorized under paragraph (1).

"(j) The fee to be charged for the certification of documents evidencing passage of the certified public accountant examination, the certification of documents evidencing the grades received on the certified public accountant examination, or the certification of documents evidencing licensure shall be twenty-five dollars (\$25).

"(k) The board shall fix the fees in accordance with the limits of this section and, on and after July 1, 1990, any increase in a fee fixed by the board shall be pursuant to regulation duly adopted by the board in accordance with the limits of this section.

"(l) It is the intent of the Legislature that, to ease entry into the public accounting profession in California, any administrative cost to the board related to the certified public accountant examination or issuance of the certified public accountant certificate that exceeds the maximum fees authorized by this section shall be covered by the fees charged for the biennial renewal of the permit to practice." (Emphasis added.)

Therefore, under subdivision (f) of Section 5134, the amount of the biennial renewal fee for a certified public accountant certificate or accounting firm certificate is not specified by statute, but rather it is to be fixed by the board in an amount, not to exceed \$250, so that the reserve balance in the board's contingent fund is equal to approximately nine months of annual authorized expenditures. To the extent the board determines that an increase in the renewal fee is required, implementation of that increase must be made by regulation (subds. (f) and (k), Sec. 5134).²

The Budget Act of 2010 transfers \$10,000,000 from the Accountancy Fund to the General Fund as a loan to be repaid, with interest, by June 30, 2012 (see Item 1110-011-0704, Budget Act of 2010 (Ch. 712, Stats. 2010)). The question presented then is whether the board is required, pursuant to subdivision (f) of Section 5134, to increase the biennial renewal fee if the budget transfer occurs and, as a result, the reserve balance in the board's contingent

² If, on the other hand, the board has unencumbered funds that equal or exceed two years' worth of the board's operating budget, then the board is required to reduce fees (Sec. 128.5).

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fund falls below an amount approximately equal to nine months of annual authorized expenditures.³

We start our analysis by first examining the propriety of the proposed transfer of funds from the Accountancy Fund to the General Fund.

In general, except as to funds that are constitutionally or otherwise protected, the Legislature may repeal or revise the statutory provisions related to various state funds, and transfer the moneys in those funds to the General Fund. Thus, to the extent the revenues in the fund are derived from administrative penalties imposed pursuant to Section 125.9 or Article 6.5 (commencing with Section 5116) of Chapter 1 of Division 3, those revenues may be transferred to the General Fund by enactment of statutory authority because they are considered to be General Fund in nature and are not constitutionally or otherwise protected from diversion.

However, to the extent the revenues in the fund are derived from regulatory fees imposed on licensees of the board under the police power of the state, those revenues may not be diverted from the specific purposes for which they were imposed. The California Supreme Court, in *Daugherty v. Riley* (1934) 1 Cal.2d 298, held that these funds "are in the nature of a trust fund" for use in administering and enforcing the laws under which the money in a particular fund was collected. Therefore, while those types of revenues are not restricted to particular purposes by an express constitutional provision, they are protected under a trust fund doctrine announced by the Supreme Court.

Thus, as a general rule, the revenues in the fund collected from licensees may not be permanently taken and transferred to the General Fund. In this case, however, the Budget Act of 2010 provides for a temporary two-year loan of revenues from the fund to the General Fund, with that loan to be repaid, with interest, by June 30, 2012. The California Supreme Court has suggested that loans are not subject to the same prohibitions as permanent transfers. "That these funds may not be permanently diverted from their specific purposes and to such an extent as to render the department or agency unable to function is likewise clear" (*Daugherty v. Riley*, supra, at p. 309; emphasis added).

There is statutory authority for a loan from a fund such as the Accountancy Fund to the General Fund set forth in Sections 16310, 16381, and 16382 of the Government Code, which provide as follows:

"16310. (a) When the General Fund in the Treasury is or will be exhausted, the Controller shall notify the Governor and the Pooled Money Investment Board. The Governor may order the Controller to direct the transfer of all or any part of the moneys not needed in other funds or accounts to the General Fund from those funds or accounts, as determined by the

³ The current biennial renewal fee is \$200, which is below the \$250 maximum amount (16 Cal. Code Regs. 70(e)).

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Pooled Money Investment Board, including the Surplus Money Investment Fund or the Pooled Money Investment Account. All moneys so transferred shall be returned to the funds or accounts from which they were transferred as soon as there are sufficient moneys in the General Fund to return them. No interest shall be charged or paid on any transfer authorized by this section, exclusive of the Pooled Money Investment Account, except as provided in this section. This section does not authorize any transfer that will interfere with the object for which a special fund was created or any transfer from the Central Valley Water Project Construction Fund, the Central Valley Water Project Revenue Fund, or the California Water Resources Development Bond Fund.

"(b) (1) Interest shall be paid on all moneys transferred to the General Fund from the following funds:

"(A) The Department of Food and Agriculture Fund.

"(B) The DNA Identification Fund.

"(C) The Mental Health Services Fund.

"(D) All funds created pursuant to the California Children and Families Act of 1998, enacted by Proposition 10 at the November 3, 1998, statewide general election.

"(E) Any funds retained by or in the possession of the California Exposition and State Fair pursuant to this section.

"(2) With respect to all other funds, and unless otherwise specified, if the total moneys transferred to the General Fund in any fiscal year from any special fund pursuant to this section exceed an amount equal to 10 percent of the total additions to surplus available for appropriation as shown in the statement of operations of a prior fiscal year as set forth in the most recent published annual report of the Controller, interest shall be paid on the excess. Interest payable under this section shall be computed at a rate determined by the Pooled Money Investment Board to be the current earning rate of the fund from which transferred.

"(c) Except as described in subdivision (d), all moneys in the State Treasury may be loaned for the purposes described in subdivision (a).

"(d) Subdivision (c) shall not apply to any of the following:

"(1) The Local Agency Investment Fund.

"(2) Funds classified in the State of California Uniform Codes Manual as bond funds or retirement funds.

"(3) All or part of the moneys not needed in other funds or accounts for purposes of subdivision (a) where the Controller is prohibited by the California Constitution, bond indenture, or statutory or case law from transferring all or any part of those moneys."

"16381. The General Cash Revolving Fund in the treasury is continued in existence. Whenever the Governor, upon request of the Controller,

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determines in writing that there is insufficient cash in the General Fund to meet payments authorized by law, and until his determination is revoked in writing by the Governor, the Governor may direct the Controller to make transfers of money from any special funds and other State accounts to the General Cash Revolving Fund."

"16382. This article does not authorize any transfer which will interfere with the carrying out of the object for which a special fund or other State account was created. Retransfers to special funds and other State accounts shall be made on order of the Governor in season so that the objects for which they were created may be carried out."

Thus, pursuant to the above provisions, a loan of special fund revenues to the General Fund is authorized, if reimbursement is made to the fund from which the loan is made and there is no interference with the purposes for which the fund was created.

In this case, to the extent that the \$10,000,000 contained in the Budget Act of 2010 to be loaned from the Accountancy Fund to the General Fund is derived from licensing fees, which are special fund revenues, it appears that the loan would affect only the board's reserves and not its operating revenues and therefore would not interfere with the board's activities.⁴ In addition, the current budget proposal requires that the loan be repaid "so as to ensure that the programs supported by the Accountancy Fund . . . are not adversely affected by the loan" (Item 1110-011-0704, Budget Act of 2010).

Assuming that the \$10,000,000 loan occurs and those funds are in fact withdrawn from the Accountancy Fund, we now turn to the question of whether the board would be required by subdivision (f) of Section 5134 to increase biennial renewal fees in order to restore the board's reserves.

At the outset, we observe that the Legislature could enact legislation in conjunction with the Budget Act that waives the reserve requirement in subdivision (f) of Section 5134 as long as a loan of Accountancy Fund revenues remains outstanding, or that simply repeals that requirement (see, for example, paras. (4) and (5), subd. (a), Sec. 16320, Gov. C.). If that legislation were to be enacted, the board would be temporarily or permanently relieved from the requirement to increase fees in order to maintain a specified reserve.

Alternatively, if the Legislature does not waive the reserve requirement, because Section 5134 does not provide an exception to that requirement for any reason, we think that

⁴ According to the board's fee analysis for its March 2010 meeting, reserves during the 2010-11 fiscal year are projected to remain over \$23,000,000, with projected revenues of more than \$13,000,000 (http://www.dca.ca.gov/cba/regulation_notices/isr10-06.pdf; as of October 6, 2010). The 2010-11 fiscal year appropriation for the California Board of Accountancy is \$12,450,000 (see Item 1110-001-0704, Budget Act of 2010).

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the board would generally be obligated to increase the biennial renewal fee to restore the required nine months of reserves.

However, because the loan in question is to be repaid, with interest, by June 30, 2012, and because the regulatory process to adopt a resolution likely would take some time before the regulation becomes final, it may be reasonable for the board to treat the anticipated revenues from loan repayment as a receivable. In that case, the loan would be viewed as an asset within the fund and the required reserve would be maintained. We think such a decision by the board would be reasonable considering that the Legislature has imposed a requirement for fee increases to be implemented not by a unilateral act of the board, which could be accomplished almost immediately, but rather by adoption of a regulation, which necessarily takes a longer period of time due to the process established in the Administrative Procedure Act (Ch. 3.5 (commencing with Sec. 11340), Pt. 1, Div. 3, Title 2, Gov. C.). This implies, we think, that the Legislature did not necessarily intend the reserve requirement to be strictly complied with at all times, as long as a mechanism was in place to address an actual reserve deficiency.

Accordingly, if pursuant to the annual Budget Act, a loan is made from the Accountancy Fund to the General Fund which is to be repaid with interest within two years, and the reserve balance in the fund without the loan amount falls below nine months of annual authorized expenses from the fund, we think the California Board of Accountancy would have the discretion to consider that loan repayment as a receivable and as part of the board's contingent fund reserve balance for purposes of subdivision (f) of Section 5134 of the Business and Professions Code. Under those circumstances, we are of the opinion that the board could reasonably determine that the contingent fund reserve balance has not fallen below the required nine months of reserves and that an increase in the biennial renewal fee payable by licensees of the board would not be required pursuant to subdivision (f) of Section 5134 of the Business and Professions Code.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

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By
L. Erik Lange
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