

## Memorandum

**To:** Honorable Diane L. Harkey, Chair, State Board of Equalization      **Date:** May 19, 2017  
Honorable George Runner, Vice Chair, State Board of Equalization  
Honorable Fiona Ma, CPA, Member, State Board of Equalization  
Honorable Betty T. Yee, State Controller

**From:** Jerome E. Horton, Member  
State Board of Equalization

**Re:** **Agenda Item R-2, Board Member Requested Matters, Proposed Action Items,  
May 23, 2017**

Dear Colleagues:

Members, to assist us in addressing the governance challenges facing the agency, including Provision One of the Budget Act (back to the 1999 audit of the BOE), herein for the Board's consideration are eight (8) proposed action items more descriptive of my previous recommendations to enhance our current governance documents. In our deliberation, we should consider our current governance policies and protocols in *BEAM*, the *Board Reference Manual*, the *BOE Code of Ethics*, the confidential *Executive Director Protocols & Procedures* manual, the *Rules of Tax Appeals*, and Legal opinions to assure the legality of our recommendations and avoid redundancy. With some modifications, we may find that our best course of action is to affirm, clarify, and enforce existing rules and to assure that the agency timely provide accurate, complete, and transparent information to the public.

Key to discussions on governance is the fact that Members cannot control what happens throughout the agency on a daily basis, given the restrictions of Bagley-Keene, the confidentiality of personnel communications, and the inability of individual Members to make policy changes or take action inconsistent with Board policy without a public consensus of the entire Board. Accordingly, the Board has delegated to the ED exclusively, the authority to assure that that the agency, including Member's staff, executive management, and employees are in compliance with all applicable laws, policies, and procedures, and to correct any deviations from these by Members and immediately bring them to the attention of the Board. Further, Government Code section 15605 provides that the ED "shall do and perform all other acts and things enjoined by law or required by the Board." In addition, the ED has sole responsibility to hire and terminate all employees, including the termination of CEAs (Career Executive Assignments). And it takes three votes (traditionally unanimous) to terminate an ED.

Over the last century, past EDs have used this enormous power to manage the types of governance issues facing the BOE and have taken affirmative and appropriate action to assist Board Members, executive management, and BOE staff in complying with existing rules. By delegating such powers, the Members have historically assured that management and staff follow all laws enacted by the Legislature (including Government Code section 15623 and Provision One of the Budget Act), all BOE policy and procedures, all BOE legal opinions, operational procedures, and audit and compliance manuals, etc. This delegation assumes that the ED is empowered and required to (1) notify management, staff, and Members of the laws, policies, and procedures impacting their

activities and decisions, (2) ensure and keep Members aware of all compliance issues with regard to the control agencies (including corrective actions that need to be taken), and (3) provide accurate, complete, and comprehensive data and documented historical records in response to inquiries from the Legislature.

To the extent that we can strengthen these powers and clarify the roles of Members in this process, and reaffirm our commitment to the provisions in the *Resolution Conferring Powers on the Executive Director (Resolution Conferring Powers)*, *BEAM*, the *Board Reference Manual*, the *BOE Code of Ethics*, the confidential *Executive Director Protocols & Procedures* manual, the *Rules of Tax Appeals*, and relevant Legal opinions; I believe the leadership of the ED is fundamental to the agency's efforts to meet the challenges that have evolved over the past three years. We need to regain the confidence of the Senate and Assembly committees and the Department of Finance (DOF) by assuring that the agency will be forthcoming with accurate and complete evidence and transparency on all compliance issue to fully address their concerns. Based on my discussions with various Senators and Assembly Members, they understand that the Board has a strong manager form of governance and nothing happens in terms of procurement, hiring, budget, facility acquisition, or direction of employees without the involvement of the ED and various control agencies.

As the Board considers measures to improve its governance and transparency, I have codified my previous recommendation into the following eight proposed action items for your consideration.

1. **CEAs, Power and Role of ED:** Amend the *Resolution Conferring Powers* to empower the ED to hire (and terminate) all CEAs except the Chief Counsel, the Legislative Division Chief, and the Taxpayer Advocate; and require the ED (a) to issue annual performance evaluations of all CEAs, (b) assure CEAs (and all employees) that only the ED has authority to terminate, (c) report any deviations or threats to the Chief Counsel for appropriate resolution and/or notification to the Board, and (d) to prohibit CEAs from serving on compensation committees that may recommend their own increases and submit increases with supporting justifications to CalHR; and post increases on BOE's website.
2. **Transparency, Full Disclosure of Information to Control Agencies, Legislature:** Amend the *Resolution Conferring Powers* to direct the establishment of a *Budget and Finance Committee* of BOE experts to work with the Legislature and control agencies to assure timely, complete, and accurate reporting and full disclosure of transactions (including use of revenue-generating positions for other than Provision One purposes) to seek all appropriate approvals, and report to the Board monthly. Any deviations or dissemination of confidential, inaccurate, and incomplete information should be reported to the Chief Counsel to take appropriate actions as required.
3. **Provision One Clarification:** Direct the ED to negotiate with DOF a broader definition of "revenue-generating" that includes taxpayer education work that is directly attributable to increasing tax collection (as supported by all tax compliance studies) and to sustain BOE's 98% compliance rate. Further direct the ED to consolidate taxpayer education workloads currently conducted by district offices and District Liaisons under the Deputy Director of External Affairs and an indirect report to the Assistant Chiefs of Field in collaboration with the Taxpayers' Rights Advocate; use classifications with tax expertise (tax skills, knowledge, and hands-on experience) to provide such taxpayer education and constituent services (including responding to complaints, requests for speakers, etc.); and encourage capitalizing

on the economy of scale in collaboration with other local, state, and federal agencies to increase participation and share the costs of educational events.


4. **Governance, Ethics Enforcement and Compliance:** Amend BEAM to authorize the establishment of a *Board Governance Committee* consisting of the Chief Counsel, the Internal Auditor, and the Chief Deputy Director to regularly update governance documents (*BEAM*, the *BOE Code of Ethics*, the confidential *Executive Director Protocols & Procedures* manual, the *Rules of Tax Appeals*, legal opinions, etc.) and oversee governance issues, address personnel and compliance concerns regarding Members, staff of Members, and CEAs. The Committee should report to the Board in collaboration with the ED, who shall cause appropriate recommendations or notifications to the Board and/or employees.
5. **Section 15623 Interpretation on Role of Members:** Direct the Chief Counsel to clarify the interpretation of the term “to investigate” in Government Code Section 15623 (if necessary with assistance from the AG), meaning that Members have the *authority to request or advocate for* proposed policy, program, or procedural changes regarding activities in their respective districts; however, the ED must submit actual policy, program, or procedural changes to the Board through the Issue Paper process in *BEAM* and assure uniform treatment of taxpayers and staff throughout the state before any changes are implemented. Direct the Chief Counsel to develop and prescribe methods for Members to remain compliant, including channeling requests to the Assistant Chief of Field, the Chief of Field, the Deputy Director of Business & Special Taxes, the Chief Counsel, and the Taxpayers’ Rights Advocate.
6. **Ex Parte Communication, Disclosure by Members:** Amend Rule of Tax Appeals 5523.8. *Communications with Board Members* to clarify that, consistent with current Board policy and Chief Counsel advice regarding ex parte communication, any evidence or documents provided to a Member by or concerning a taxpayer shall be fully disclosed to the Appeals Division prior to the hearing; and the Appeals Division may require the Board to postpone the hearing if the evidence is untimely submitted or is determinative to the case. Facilitate consolidations of all information in one location on the BOE website (hearing summaries, Board votes, dissenting opinions, motions, and other identifying information).
7. **Future District Offices, Consolidation Plan:** Amend *BEAM* to delete criteria that allow for the allocation of taxpayer permits and corresponding staff positions in district offices based on election boundaries, and require the ED to issue updated cost benefit analyses (including permits and staff assignments) on current offices to assure customer and workload needs are being met. Require the ED to prepare and submit to the Board a *Five-Year Office Consolidation Plan* that reflects current and future workload realities at the August Board meeting.
8. **Mass Mailing Prohibition:** Adopt a new rule of tax appeals, or establish a policy relevant to FPPC Regulation 18901, stating that the name of elected officials shall not be used on any tax forms, pay warrants, deposit receipts, or related documents. Consider seeking legislation that codifies Board policy prohibiting any mailing bearing the names of the Members individually or collectively, for 60 days prior to an election.

In closing, Members, the Board’s basic governance policies and laws are in place and may only need to be clarified, and executive management and the staff should be educated on their contents. In

accordance with the *Resolution Conferring Powers*, the Board, through the Chief Counsel, should assure that these policies are consistently applied, with reports presented to the Board by the ED on any deviations for appropriate Board action. Thus, the Board will be positioned to mitigate the challenges we currently face. To the extent that Board Members, including myself, have contributed to this not happening in the past, now is the time for us to work together for the betterment of the agency and its employees.

Thank you for your consideration.

Sincerely,



JEROME E. HORTON, Member  
Board of Equalization, 3<sup>rd</sup> District

## **Exhibit A**

### **Board Member Discussion Requested: Operational Issues for Information and Discussion Prepared for Public Hearing Tuesday, May 23, 2017 Submitted by Board Member Jerome E. Horton**

#### **I. Clarification of CSAE Meeting Minutes regarding Provision One.**

Clarification is needed on the minutes regarding the sub-issue discussed during the April 26, 2017 Customer Service & Administrative Efficiency (CSAE) Committee meeting on the specific direction of the Board for the use of revenue generating positions under Provision One of the Budget Act. I recommend that the Board clarify and provide the following direction:

1. The Board placed a moratorium on all educational and outreach events not already publicized, until the Board approves its 2017/18 Education and Outreach Plan.
2. The Board directed the ED to itemize/summarize the revenue-generating positions used in other tax administration activities that are/were used in violation of Provision One and submit the information to the Board, the Department of Finance and the Legislature with a supporting justification and cost-benefit analysis for their approval or the corrective action taken if unapproved.
3. The Board advised the ED to continue following BEAM policy on all taxpayer education and outreach events, which requires approval by the Deputy Director of External Affairs, the Legal Department, and the ED. To the extent these policies were not followed or were improperly applied in the past, the ED was directed to take corrective steps to ensure full compliance with BOE policy and Provision One.
4. The Board advised the ED that the *Resolution Conferring Powers* gives him the authority to address and correct any violations of the Budget Act throughout the agency and that he did not need further delegation of power.
5. The Board directed the ED to immediately issue a Memo to all managers and supervisors on the Provision One requirements with specific instructions on the duties that revenue generating staff are required to perform and cannot be diverted from or redirected elsewhere.
6. To further clarify, I recommend the Board direct the ED to seek legislative clarification of Provision One regarding a possible de Minimis exception (discussed in the Senate Oversight Committee hearing) that allows a minimal percentage of hours for revenue-generating positions to be used for specific non-revenue generating tax administration duties (e.g., training, conducting taxpayer classes), provided the purpose is to increase compliance.

As I recall, the Board directed the ED to exercise his existing authority under the *Resolution Conferring Powers* (given his acknowledgement that revenue positions have been used for non-revenue-generating activities since he was promoted to the executive team) to determine which events should be continued and which employees should be assigned to taxpayer education activities, such as presenting classes, speaking engagements, Small Business and Non-profit seminars, etc. The Board expressed that if revenue generating positions needed to be used, the ED may continue previously scheduled events where it is not economically feasible to cancel them – although this would appear to authorize a continuing violation of Provision One – which is why clarity is needed.

## **II. Clarification on Vacancies and Recruitment.**

### **a. Policy for Filling Vacancies in Field Offices:**

I recommend that the agency discontinue the unofficial policy of considering the redistricting of election boundaries as a basis for the allocation of permits and corresponding positions, staff and field offices; and adopt the one BOE policy that distributes permits based on economic efficiency, customer and workload needs.

I recommend that the Board prohibit holding positions vacant beyond the normal period (to advertise and complete recruitment) solely for establishing new district offices, as the practice delays hiring and impacts the Board's ability to effectively implement its vacancy reduction plan required by the legislative Budget Subcommittee. I also recommend that the Board direct the agency to develop and submit the Office Consolidation Plan and report as required by the Legislature.

### **b. BEAM Policy Requiring Annual Vacancy Reduction & Recruitment Plan.**

Vacant positions at BOE generally represent revenue loss to the state; it is my understanding that our current average return on investment (ROI) is a revenue generating rate of \$420,000 per audit staff and \$1.4 million per collector. I recommend the Board place in BEAM a policy requiring the ED to issue an *Annual Recruitment & Vacancy Reduction Plan* to create a large pool of highly-qualified candidates to fill our vacancies on a sustainable basis as follows:

- Practical, cost effective improvements to recruitment processes in and out of state;
- Utilize proven methods to connect candidates with hiring teams in district offices ;
- Develop a new recruitment program and training plan for employee recruiters;
- Leverage/develop relationships with colleges/universities statewide, particularly those offering tax classes or involved in free tax filing programs;
- Develop metrics to measure the number of candidates hired through recruiters, events, advertising, employee referrals, promotions, laterals and other methods; and
- Determine a timeline and specific steps for implementation.

### **III. Clarify BOE Governance**

#### **a. Amend Government Code Section 15623.**

I recommend the Board sponsor legislation to amend Government Code section 15623 to clarify the Members' investigative functions within their respective districts, or in lieu of such, I recommend that clarification be provided through the Board's regulatory process – and that the “investigative” duties are defined as “advocacy,” in accordance with the following protocols:

- Advocacy for taxpayers rights shall be through the Taxpayers' Rights Advocate, Executive Director, Deputy Director of Field Operations, Deputy Director of Business Tax and Fee Department;
- Advocacy addressing policy or procedure issues and requests for corresponding changes in Board policy or procedures shall be directed to the ED for consideration by the full Board,
- Advocacy addressing legal, regulatory and appeals issues shall be directed to the Chief Counsel for clarifying opinions or changes presented for the Board's consideration.

#### **b. Change in Governance of Education / Outreach**

I recommend that the Board centralize and consolidate the education and outreach occurring in the districts under the External Affairs Department. Staff conducting education should be required to have BOE tax knowledge, background and experience. This will enable the district audit and compliance tax expert staff to focus on specialized revenue generating activities. Accordingly, this would allow the agency could capitalize on the economy of scale in working collaboratively with other local and state agencies and consolidating educational efforts conducted by the district.

### **IV. CEA Policy Clarifications under Resolution Conferring Powers.**

#### **a. Policy Clarification on Increasing CEA Salaries.**

Consistent with the intent of the *Resolution Conferring Powers*, I recommend the Board expressly state therein that the ED and his/her assigned deputies make decisions on CEA salary increases and notify CalHR, DOF, and subsequently the Board based upon the following:

- Prohibit the ED from assigning CEAs to recommend their own salary increases;
- Require the ED to submit CEA salary increases with supporting justification, comparative data and an analysis of similar salary structures of the FTB and EDD to CalHR and DOF for approval;
- Require that the Salary of the ED be approved by the Governor's Office;
- Publish salaries in the annual report to the Legislature and on BOE's Website.

Every salary adjustment should be supported by a thorough analysis and justification showing any discrepancies that exist, duties performed, salary ranges compared to other agencies, and confirmation from the Legal Department on consistency with CalHR requirements and prevailing law. CEAs who benefit from salary increases should not participate as this creates the “perception” of a conflict of interest.

**b. Clarification on Performance Evaluations for CEAs.**

I recommend the Board clarify the *Resolution Conferring Powers* by directing the ED to provide all CEAs with annual performance evaluations to establish a base line for their overall performance (with a letter of expectation signed by the ED) and to provide a level of confidence on job security through ongoing knowledge of their performance. The ED must also clarify to staff that he has the sole authority to terminate CEAs under the *Resolution*.

**c. Clarify CEA Hiring Authority.**

I recommend that the Board amend the *Resolution Conferring Powers* to stipulate that with the exception of the Chief Counsel, Taxpayer's Rights Advocate, and Legislative Division Chief, all CEAs should be hired under the direct authority of the ED with non-binding input from the Members on the top three candidates selected by the ED.

**V. Clarify Member Communication Receipt of Evidence and Mass Mailing.**

**a. Ex Parte Communication.**

I recommend the Board consider amending Rule of Tax Appeals 5523.8. *Communications with Board Members* to clarify that consistent with current Board policy and Chief Counsel advice, any evidence or documents provided to a Board Member by or concerning a taxpayer shall be fully disclosed to the Appeals division prior to the hearing; and the Appeals division may require the Board to postpone the hearing if the evidence is untimely submitted or is determinative to the case.

The Board should direct the ED to cause the publication of the Hearing Summary, Description of Appellants, their representative, amount in question, motion of the Board, vote of the Board, descending or confirming opinions, and resulting changes in original recommendation on one schedule on the BOE website to allow for the this information to be consolidated in one location on the BOE website.

**b. Clarification of Mass Mailing Requirements.**

I recommend the Board adopt a policy clarification that consistent with FPPC Regulation 18901, the name of elected officials shall not be used on any tax forms, pay warrants, deposit receipts or related documents forms and that the Board of Equalization shall not send any mailing bearing the names of the Members, individually or collectively, 60 days prior to any election. I believe that this will assure consistency with the legislative intent of the underlying statute and will help the ED and staff to have clear boundaries for reviewing and approving a significant category of mailings.