

ITEM 6
ADOPTION OF PROPOSED REGULATION AMENDMENTS
AFTER CLOSE OF 15-DAY COMMENT PERIOD
GENERAL CLEANUP PROVISIONS

PROPOSED AMENDMENTS TO
CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5
ARTICLES 1, 2, 3, 4, 5, 6, 7, 8, AND 10

SECTIONS 1181.2 THROUGH 1181.3; 1182.2; 1182.7; 1182.9; 1182.10; 1182.15;
1183.1 THROUGH 1183.4; 1183.6; 1183.8 THROUGH 1183.13; 1183.15 THROUGH 1183.17;
1184.1; 1185.1 THROUGH 1185.3; 1185.7; 1185.8; 1186.2; 1186.4; 1187.5; 1187.8; 1187.9;
1187.12; 1187.14; 1187.15; 1190.1 THROUGH 1190.3; 1190.5

EXECUTIVE SUMMARY

Background

The purpose of this rulemaking is to: (1) clarify and streamline Commission on State Mandates (Commission) regulations; (2) update language for consistency; (3) clarify the definition of interested person; (4) clarify the certification and signature requirements for documents filed with the Commission; (5) clarify the requirements to e-file documents in a searchable PDF format and include an original signature; (6) clarify the period of limitation for filing a test claim consistent with the statutory scheme; (7) clarify the requirement for a single claimant representative for joint test claim filings; (8) clarify the requirements for filing a proposed amendment to parameters and guidelines consistent with changes to the Government Code; (9) clarify evidence submission requirements; (10) clarify that the same certification and filing requirements apply to all new filings and written materials; (11) update authority and reference citations; and (12) update punctuation for consistency throughout the regulations.

At its regular meeting on May 26, 2017, the Commission adopted Order No. 17-01 to initiate rulemaking proceedings in accordance with Government Code sections 11346.2, 11346.4, 11346.8, and 11346.9.

The proposed text was made available to the public for 45 days from June 9, 2017 through the end of the written comment period on July 24, 2017. A request to hold a public hearing was received on July 7, 2017. The California Special Districts Association (CSDA), California State Association of Counties (CSAC), and League of California Cities (League) filed comments on the proposed regulation amendments on July 24, 2017.

At its regular meeting on July 28, 2017, the Commission held a public hearing on Order No. 17-01 in accordance with Government Code section 11346.8(a). Mr. Dillon Gibbons, California Special Districts Association, Ms. Dorothy Johnson, California State Association of Counties, and Mr. Andy Nichols, Nichols Consulting appeared at the hearing and provided testimony on the proposed regulation amendments.

Both the written comments and the testimony at the public hearing objected to four proposed changes:

- The period of limitation for filing test claims under section 1183.1(c);
- The requirement that joint test claims have designated a sole representative for all claimants under section 1183.1(g);
- The elimination in section 1182.10, addressing findings of significant financial distress, of a duplicative reference to the evidentiary requirements found in section 1187.5; and,
- Elimination of duplicative and inconsistent references to filing and service requirements of section 1181.3 and evidentiary requirements of section 1187.5 throughout the regulations.

The Commission Staff Report presented at the Commission hearing on September 22, 2017 (Item 6), responded to these comments and disagreed with the commenters proposed modifications, but proposed a modification to section 1183.1(c) of the regulations addressing the statute of limitations for filing test claims, which was issued for an additional 15-day comment period.¹

Based upon the comments received during the 15-day comment period on the proposed modification to section 1183.1(c) and on the staff analysis that follows below, staff recommends that the Commission adopt the regulations as originally proposed and included in the Commission's Order No. 17-01 to initiate rulemaking proceeding, adopted May 26, 2017 and issued June 5, 2017.²

Discussion

Modification to Section 1183.1(c) Issued for an Additional 15-Day Comment Period

Government Code section 17551(c) states the following: "Local agency or school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."

Section 1183.1(c) provides for the period of limitation within which a test claim must be filed in accordance with Government Code section 17551(c). This regulation states that "For purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant." The regulatory change, as originally proposed, eliminates this language, and clarifies that "within 12 months" speaks for itself, as follows:

Except as provided in Government Code sections 17573 and 17574, any test claim or amendment filed with the Commission must be filed not later than 12 months (365 days) following the effective date of a statute or executive order, or within 12 months (365 days) of first incurring increased costs as a result of a statute or executive order, whichever is later. ~~For purposes of claiming based on the date of first incurring costs, "within 12 months" means by June 30 of the fiscal~~

¹ Exhibit G, Item 6: Staff Report on Proposed Substantial Changes, Subject to 15 Day Comment Period, General Cleanup Provisions.

² Exhibit D, Proposed Text, issued June 5, 2017.

~~year following the fiscal year in which increased costs were first incurred by the test claimant.~~

This change is intended to make the regulation consistent with the plain language of Government Code section 17551(c).

As explained in the Staff Report presented at the Commission’s September 22, 2017 hearing and in the Final Statement of Reasons (Exhibit L), CSAC, CSDA, and the League objected to the proposed change based primarily on the assertion that deleting the language that allows a test claim to be filed by June 30 of the fiscal year following the fiscal year in which increased costs are first incurred “would strongly deter local governments from submitting test claims by hindering their ability to gather the relevant data and file in a timely manner.”³ These commenters conceded that they routinely treat June 30 as the only deadline for filing a test claim.⁴

Commission staff, in its analysis for the September 22, 2017 hearing interpreted the statute, finding that neither the language of section 17551(c) nor in the legislative history of AB 2856, which amended that subdivision, suggested the Legislature intended local government to ignore the first test in section 17551(c) (requiring the filing of a test claim 12 months after the effective date of the statute or executive order) or to grant local governments the option to always choose the later filing deadline (based on when costs are first incurred) no matter when costs are incurred. Given that state-mandated increased costs cannot, by definition, be incurred before the effective date of the statute, an interpretation of section 17551(c) that relies only on the second test could render the first test surplusage and essentially without effect. The courts have made it clear that an interpretation of a statute that renders statutory language surplusage is to be avoided.⁵ Thus, under the rules of construction, Government Code section 17551(c) could be interpreted to require that a test claim may only be filed within 12 months following the effective date of a statute or executive order that imposes new mandated activities and costs that begin immediately. If newly mandated activities are not performed and costs are not incurred within 12 months following the effective date of a statute or executive order (as is sometimes the case where an independent triggering event causes local entities to incur costs), then a test claim may be filed no later than 12 months following the date of first incurring increased costs as a result of a statute or executive order.

Thus, the Commission, at its hearing on September 22, 2017, made the following modifications to the proposed text of section 1183.1(c), which was noticed for a 15-day comment period, from September 25, 2017 until October 10, 2017 (additional amendments noted in double underline and double strikeout):

Except as provided in Government Code sections 17573 and 17574, any test claim or amendment filed with the Commission ~~must~~ shall be filed not later than 12 months (365 days) following the effective date of a statute or executive order.⁵
~~or~~ If costs are not incurred within 12 months following the effective date of a statute or executive order, then a test claim may be filed within 12 months (365

³ Exhibit E, CSDA, CSAC, and League of Cities Comments, July 24, 2017, page 2.

⁴ *Ibid.*

⁵ *People v. Valencia* (2017) 3 Cal.5th 347, 357-358, emphasis added.

~~days) of first incurring increased costs as a result of a statute or executive order, whichever is later. For purposes of claiming based on the date of first incurring costs, "within 12 months" means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.~~

The CSAC, CSDA, and the League of California Cities filed joint comments on the proposed modified text during the 15 day comment period.⁶ Commenters state that “While our organizations appreciate the attention that Commission Staff gave to our previous written comments and the responses provided, the modifications to Section 1183.1(c)...give us additional cause for concern.”⁷ Commenters further state that “[a]lthough associations representing local government urged the Commission to reject the prior version of the proposed regulatory changes in previous written comments...they nonetheless conceded that the proposed changes would align the language of Section 1181.3(c) with that of Government Code section 17551(c).”⁸ Commenters now argue that the additional proposed modifications “propose a regulation that subtracts entitlements enacted in statute and may cause the Commission to act in excess of its statutory authority.”⁹ As a practical matter, commenters protest that “[b]y striking out the ‘whichever is later’ test and inserting an exclusionary clause, . . . the modified text diverge[s] from Government Code Section 17551(c), [and] creates a situation where local governments may have as little as a month or even a few days between first incurred costs and the deadline to submit a test claim.”¹⁰ Commenters suggest “[t]his becomes even more problematic if a local government does not begin incurring costs until month 11 of a statute taking effect, thereby potentially leaving a claimant with less than a month to file a test claim.”¹¹

Commenters suggest that the Commission “consider restoring the earlier version of changes to Section 1183.1(c) as originally proposed.”¹²

Response to Comments Received During the 15-Day Comment Period and Recommendation on Section 1183.1(c)

Upon review of the comments on the modified text, staff recommends that the Commission restore and adopt the original proposed regulatory changes to section 1183.1(c) as follows.

⁶ Exhibit J, CSDA, CSAC, and the League Comments on Proposed Regulations as Modified.

⁷ Exhibit J, CSDA, CSAC, and the League Comments on Proposed Regulations as Modified, page 1.

⁸ Exhibit J, CSDA, CSAC, and the League Comments on Proposed Regulations as Modified, page 2.

⁹ Exhibit J, CSDA, CSAC, and the League Comments on Proposed Regulations as Modified, page 2.

¹⁰ Exhibit J, CSDA, CSAC, and the League Comments on Proposed Regulations as Modified, page 3.

¹¹ Exhibit J, CSDA, CSAC, and the League Comments on Proposed Regulations as Modified, page 3.

¹² Exhibit J, CSDA, CSAC, and the League Comments on Proposed Regulations as Modified, page 4.

Except as provided in Government Code sections 17573 and 17574, any test claim or amendment filed with the Commission must be filed not later than 12 months (365 days) following the effective date of a statute or executive order, or within 12 months (365 days) of first incurring increased costs as a result of a statute or executive order, whichever is later. ~~For purposes of claiming based on the date of first incurring costs, "within 12 months" means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.~~

As stated in the Final Statement of Reasons, staff agrees with the commenters that the proposed modification eliminating the “whichever is later” language in the regulation, presents the possibility that an otherwise-legitimate test claim might be effectively, if not actually, time barred when costs are first incurred close to the end of the one year period of limitation from the effective date. And, although the rules of construction militate against an interpretation of the section 17551(c) period of limitation that deems the first part of the statute, requiring a test claim filing 12 months from the effective date of the statute or executive order mere surplusage and without effect, the plain language of the statute allows the filing of a test claim based on either test, “whichever is later.” The original proposed regulatory changes to section 1183.1(c) retains the “whichever is later” language consistent with the plain language of the statute.

Therefore, staff recommends that the Commission adopt the proposed regulation as originally proposed and included in the Commission’s Order No. 17-01 to initiate rulemaking proceeding, adopted May 26, 2017 and issued June 5, 2017, which eliminates the June 30 fiscal year-end deadline for filing claims, but still permits the claimant to choose to file a test claim based on either 12 months from the effective date of the statute or executive order, or 12 months from the date costs were first incurred.¹³

Additional Clerical Change to Internal Reference

An additional minor and non-substantive change to an internal reference is proposed to improve the readability and clarity of the regulations.

Section affected: 1187.12

Specific Purpose of Regulation

Section 1182.12 provides for the withdrawal of a matter.

Proposed Change

The internal reference in section 1187.12 regarding the dismissal of items withdrawn pursuant to this section should refer to the procedures described in section 1187.14 which describes the procedures for substitution of parties and dismissal of a matter, not section 1187.15 which refers to the reconsideration of an adopted decision.

Necessity and Anticipated Benefit

This change is clerical in nature and is necessary to correct a minor error.

¹³ Exhibit D, Proposed Text, issued June 5, 2017.

Staff Recommendation

Therefore, staff recommends that the Commission:

- Find that no alternative would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective as and less burdensome to affected private persons than the proposed regulations or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.
- Adopt the Final Statement of Reasons (Exhibit L).
- Adopt the proposed amendments as originally noticed, in response to comments received on the modifications to the proposed amendments, and the additional clerical change as described in the Executive Summary and the Final Statement of Reasons to California Code of Regulations, Title 2, Division 2, Chapter 2.5, Articles 1, 2, 3, 4, 5, 6, 7, 8, and 10, effective April 1, 2018 (Proposed Text With an Additional Minor Non-Substantive Change, Exhibit K).
- Authorize staff to issue the Order to Adopt (Exhibit M) and make any non-substantive, technical corrections to the proposed regulatory text requested by the Office of Administrative Law or Barclays Official California Code of Regulations prior to publication.