Hearing Date: October 27, 2011
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ITEM 8

FINAL STAFF ANALYSIS
PROPOSED PARAMETERS AND GUIDELINES

Elections Code Sections 2151 and 13102(b)
Statutes 2000, Chapter 898 (SB 28)

Modified Primary Election (01-TC-13)

County of Orange, Claimant

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EXHIBIT A

BEFORE THE

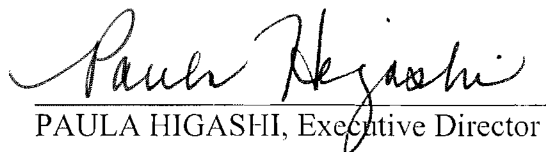
COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

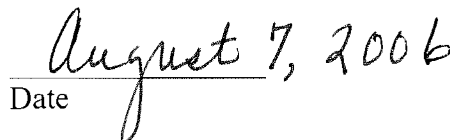
IN RE TEST CLAIM: Elections Code Sections 2001, 2151, 13102, 13203, 13230, 13300, 13301 and 13302; Statutes 2000, Chapter 898; Filed on April 18, 2002, by County of Orange, Claimant.	No. 01-TC-13 *Modified Primary Election* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on July 28, 2006)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.



PAULA HIGASHI, Executive Director



Date August 7, 2006

Hearing Date: July 28, 2006
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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:

Elections Code Sections 2001, 2151, 13102, 13203, 13230, 13300, 13301 and 13302;

Statutes 2000, Chapter 898;

Filed on April 18, 2002, by County of Orange, Claimant.

Case No.: 01-TC-13

Modified Primary Election

PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on July 28, 2006)

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 28, 2006. Pamela Stone of Maximus, and Suzanne Slupsky, Assistant Registrar of Voters, appeared on behalf of claimant, County of Orange. Susan Geanacou appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve this test claim at the hearing by a vote of 7-0.

Summary of Findings

This test claim deals with changes to the partisan primary system in California. In 1996 and earlier, California had a closed primary system in which registered voters who were declared members of any political party could only vote for members of their own party in partisan primary contests, and any voters who declined to state a party affiliation could only vote on non-partisan matters at a primary election. This changed in 1996 when Proposition 198, the "Open Primary Act," was approved by the California voters. However, Proposition 198 was challenged and litigated up to the United States Supreme Court in *California Democratic Party v. Jones* (2000) 530 U.S. 567, which found the law unconstitutional.

Statutes 2000, chapter 898 largely repealed and reenacted the code sections that had been amended by Proposition 198--generally restoring the language to the law that was in place immediately prior to Proposition 198. However, by amending a few of the Elections Code

sections, the test claim legislation altered the prior closed primary system to one in which those voters who decline to state a political party affiliation may choose any political party's partisan primary ballot, if that political party allows it. This created a form of open primary.

The Commission concludes that Statutes 2000, chapter 898, as it amended Elections Code sections 2151, 13102, subdivision (b), mandates a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities:

- Add information to the voter registration card stating that voters who declined to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, § 2151.)
- Allow voters who declined to state a party affiliation to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, §§ 2151 and 13102, subd. (b).)

The Commission concludes that Statutes 2000, chapter 898, as it repealed, reenacted, or amended Elections Code sections 13203, 13230, 13301 and 13302, does not mandate a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution.

Regarding the two additional code sections pled by the claimant: Elections Code section 2001 was repealed in its entirety by Statutes 2000, chapter 898, and therefore did not mandate a new program or higher level of service; and Elections Code section 13300 was not amended by Statutes 2000, chapter 898, but by Statutes 2000, chapter 899.

BACKGROUND

This test claim deals with changes to the partisan primary system in California. In 1996 and earlier, California had a closed primary system. Elections Code section 2151 provided:

> At the time of registering and of transferring registration, each elector may declare the name of the political party with which he or she intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.
>
> The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, but *no person shall be entitled to vote the ballot of any political party at any primary election unless he or she has stated the name of the party with which he or she intends to affiliate*. The voter registration card shall include a listing of all qualified political parties.
>
> No person shall be permitted to vote the ballot of any party or for any delegates to the convention of any party other than the party designated in his or her registration, except as provided by Section 2152.

(Emphasis added.)

In other words, registered voters who were declared members of any political party could only vote for members of their own party in partisan primary contests, and any voters who declined to

state a party affiliation could only vote on non-partisan matters at a primary election, such as initiatives, bond measures, or local, non-partisan races (e.g. school board, city council.) This changed in 1996 when Proposition 198, the "Open Primary Act," was approved by the California voters. The act added Elections Code section 2001, as follows:

> *All persons entitled to vote*, including those not affiliated with any political party, *shall have the right to vote*, except as otherwise provided by law, at any election in which they are qualified to vote, *for any candidate regardless of the candidate's political affiliation.*

In addition, Proposition 198 amended Elections Code sections 2151, 13102, 13203, 13206, 13230, 13301, and 13302 to conform the prior closed primary system, to the new blanket primary provisions. The title of Proposition 198, "*Open* Primary Act," was a misnomer, as the initiative actually created a "blanket" primary system. The proposition was challenged up to the United States Supreme Court in *California Democratic Party v. Jones* (2000) 530 U.S. 567, 576, which described the difference between open and blanket primaries, at footnote 6:

> An open primary differs from a blanket primary in that, although as in the blanket primary any person, regardless of party affiliation, may vote for a party's nominee, his choice is limited to that party's nominees for all offices. He may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general.

The Supreme Court found that the law placed a "severe and unnecessary" burden on the First Amendment rights of political association for the petitioner political parties, and therefore found a partisan blanket primary, as established by Proposition 198, unconstitutional. The Supreme Court decision was issued on June 26, 2000.

> California's blanket primary violates the principles set forth in these cases. Proposition 198 forces political parties to associate with--to have their nominees, and hence their positions, determined by--those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival. In this respect, it is qualitatively different from a closed primary. Under that system, even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to "cross over," at least he must formally *become a member of the party*; and once he does so, he is limited to voting for candidates of that party.
>
> > FN8. In this sense, the blanket primary also may be constitutionally distinct from the open primary, see n. 6, *supra*, in which the voter is limited to one party's ballot. ... This case does not require us to determine the constitutionality of open primaries.[1]

(Emphasis in original.)

Statutes 2000, chapter 898 was chaptered on September 29, 2000; it amended Elections Code section 3006, repealed Elections Code section 2001, and repealed and reenacted Elections Code

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[1] *California Democratic Party v. Jones*, *supra*, 530 U.S. 567, 577.

sections 2151, 13102, 13203, 13206, 13230, 13300, 13301, and 13302.[2] The test claim statute largely repealed and reenacted the code sections that had been amended by Proposition 198--generally restoring the language to the law that was in place immediately prior to Proposition 198. However, by amending a few of the Elections Code sections, the test claim legislation altered the prior closed primary system to one in which those voters who decline to state a political party affiliation may choose any political party's partisan primary ballot, if that political party allows it. This created a form of open primary. So now, for example, a registered Democrat in California will be given a primary ballot with only Democrats listed for partisan offices. But, if the political parties permit it, at each primary election, a decline-to-state voter--one who is not registered with any party--may choose *one* partisan primary ballot to vote, be it Republican, Democratic, or any other qualified party.[3]

Claimant's Position

Claimant, County of Orange, filed this test claim on April 18, 2002.[4] Claimant contends that "The specific sections which contain the mandated activities are Elections Code, Sections 2001, 2151, 13102, 13203, 13230, 13300, 13301, and 13302." Claimant asserts that these code sections, as amended by Statutes 2000, chapter 898 to change the primary system in California, constitute a reimbursable state-mandated program. Following are some of the reimbursable activities or costs asserted by the claimant:

- have planning meetings in order to obtain information from the Secretary of State as to which political parties allow voters who have not designated their political party to vote in primary elections of given political parties;
- have meetings within the elections department in order to ascertain what activities are necessary to implement the legislation;

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[2] Elections Code sections 3006 and 13206 were not named in the test claim pleading.

[3] In the Voter Information Guide for the June 6, 2006 Primary Election, the Secretary of State's Office published the following information (also available at <http://www.ss.ca.gov/elections/vig_06/vig_pdf/dts_voters.pdf> as of May 22, 2006):

> The following political parties are allowing voters who are not registered with a political party to request and vote their party's ballot at the June 6, 2006 Primary Election:
>
> • American Independent Party (all candidates except county central committee candidates)
>
> • Democratic Party (all candidates except county central committee candidates)
>
> • Republican Party (all candidates except county central committee candidates)
>
> You may NOT request more than one party's ballot. If you do not request a specific ballot, you will be given a nonpartisan ballot containing only the names of candidates for nonpartisan offices and the measures to be voted upon at the June 6, 2006 Primary Election.

[4] Potential reimbursement period for this claim begins no earlier than July 1, 2000, based on the filing date of the test claim. (Gov. Code, § 17557, subd. (c).)

- develop new policies and procedures;
- redesign and republish the sample ballot and absentee voter application;
- redesign and implement new election software;
- provide additional trained poll workers;
- hand process absentee voter requests;
- retrain personnel on new program, including revising training program and manuals.

In response to DOF's June 2002 comments on the test claim filing, described below, claimant disputes DOF's disagreements with the reimbursable activities identified, and reasserts that all of activities identified are necessary to implement the test claim legislation, or are the most reasonable method to comply.

No comments were received on the draft staff analysis from the claimant or interested parties.

Department of Finance's Position

DOF filed comments on June 28, 2002, addressing the allegations stated in the test claim. The comments state: "the claimant has identified a number of new activities related to the State's modified primary law, which it asserts are reimbursable state mandates. While we agree that the test claim statute may have resulted in a State mandated program, we do not concur with all of the activities identified by the claimant." DOF then describes claimant-identified activities that should either be designated as "one-time" activities, or denied altogether.

No comments were received on the draft staff analysis from DOF.

Secretary of State's Position

The Secretary of State's Office, Elections Division, filed comments on July 31, 2002, agreeing with the test claim allegations that Statutes 2000, chapter 898 "does constitute a mandate that is reimbursable by the State." The letter states that "While the language of the bill sounds simple – permit "decline to state" voters to vote in party primary elections, if the political party allows it – the actual administration of this requirement added layers of complexity and cost to the conduct of elections." The letter continues:

> Specifically, in order to plan for this new requirement, counties met together for months to hammer out the specifics of implementation. These meetings exposed issues of complexity and implementation that were then transmitted to all county elections officials via printed implementation manuals as well as on-site visits with virtually every county to ensure uniform implementation throughout the state.
>
> I want to stress that this uniformity is absolutely critical to the State's interest in a fair election, and without the planning undertaken by the counties there could have been serious equal protection and other legal issues arising over this issue. The planning stage was essential.

The letter concludes by describing how counties were required to:

- review and adapt printed materials, as well as software and computer processes to count and tabulate votes;

- provide notice to voters of the options available for "decline-to-state" voters;
- adapt pollworker training programs and polling place procedures; and
- train office staff in the elections department on the new law, because providing accurate information "is critical to the integrity of the process and the confidence the public feels in the conduct and administration of elections."

No comments were received on the draft staff analysis from the Secretary of State's Office.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[5] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[6] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[7] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[8] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[9]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[10] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared

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[5] Article XIII B, section 6, subdivision (a), provides: (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[6] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[7] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[8] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[9] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.*); *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

[10] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

with the legal requirements in effect immediately before the enactment of the test claim legislation.[11] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[12]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[13]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[14] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[15]

Issue 1: Is the test claim legislation subject to article XIII B, section 6, of the California Constitution?

As a preliminary matter, the test claim alleges Elections Code section 13300, as amended by Statutes 2000, chapter 898, imposes a reimbursable state-mandated program. This amendment was never operative upon the subsequent adoption of Statutes 2000, chapter 899.[16] Statutes 2000, chapter 899, including amendments to Elections Code section 13300, was pled in another test claim, *Fifteen Day Close of Voter Registration* (01-TC-15.) Therefore, any future references to "test claim legislation" do not include Elections Code section 13300.

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[17] The court has held that only one of these findings is necessary.[18]

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[11] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[12] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[13] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[14] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[15] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[16] Affected by two or more acts at the same session of the Legislature. (See Gov. Code, § 9605.)

[17] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[18] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

The Commission finds that administering partisan primary elections imposes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. County elections officials provide a service to the members of the public who vote in primary elections. The test claim legislation also requires local elections officials to engage in administrative activities solely applicable to local government, thereby imposing unique requirements upon counties that do not apply generally to all residents and entities of the state.

Accordingly, the Commission finds that the test claim legislation constitutes a "program" and, thus, may be subject to subvention pursuant to article XIII B, section 6 of the California Constitution *if* the legislation also mandates a new program or higher level of service, and costs mandated by the state.

Issue 2: Does the test claim legislation mandate a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution?

Test claim legislation mandates a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required.[19] The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[20] A statute or executive order mandates a reimbursable "higher level of service" when the statute or executive order, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service to the public provided in the existing program.[21]

As discussed above, Proposition 198, the "Open Primary Act," was found to create an unconstitutional blanket primary by the Supreme Court in *California Democratic Party v. Jones*, *supra*, 530 U.S. 567. Statutes 2000, chapter 898 was the solution reached by the California Legislature to create a constitutional open primary. The bill analysis by the Senate Committee on Elections and Reapportionment from August 30, 2000, states: "According to the author, this bill is necessary because the Court's decision leaves California with obsolete statutes that arguably do not provide the statutory mechanism for any primary system, although the California Constitution requires primary elections for partisan offices."[22] The argument that without action

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[19] *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 836.

[20] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

[21] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[22] The bill analysis refers to California Constitution, article 2, section 5, subdivision (a), which begins, "The Legislature shall provide for primary elections for partisan offices, including an open presidential primary... ." On November 2, 2004, Proposition 60 was enacted, amending article 2, section 5, to add subdivision (b): "A political party that participated in a primary election for a partisan office has the right to participate in the general election for that office and

by the Legislature, California would have been left without a legal primary system is not quite accurate. In *Cummings v. Morez* (1974) 42 Cal.App.3d 66, 73, the Court found that "A statute which violates either [California or US] Constitution is to that extent void and, '[i]n legal contemplation, a void act is as inoperative as though it had never been passed. ...'." Therefore, the voiding of Proposition 198 by the Court left the law exactly as it was prior to the enactment of Proposition 198 -- with a closed primary system. The problem that the Legislature needed to address was that the earlier statutes were no longer physically on the books, which could lead to confusion.

Test Claim Legislation:[23]

Elections Code Section 2001:

First, Statutes 2000, chapter 898,[24] repealed Elections Code section 2001 entirely, which was the section added by Proposition 198 to create a blanket primary system. The repeal of this law, in accordance with the decision of the Court, did not mandate a new program or higher level of service.

Elections Code Sections 2151 and 13102:

Elections Code section 2151, prior to the 1996 initiative, provided that no decline-to-state voter could vote a partisan primary ballot. Proposition 198 removed this restriction, explicitly allowing all voters—party members and "decline-to-state" alike—to vote "for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance." Again, such a requirement was found to be an unconstitutional violation of political parties' right of political association.

Most of the language of Elections Code section 2151 was restored to prior law, consistent with the Supreme Court decision, with one significant addition: allowing decline-to-state voters to

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shall not be denied the ability to place on the general election ballot the candidate who received, at the primary election, the highest vote among that party's candidates."

[23] Claimant has identified a number of reimbursable activities in the test claim filing that are disputed by DOF. In its letter dated June 28, 2002, DOF identifies 14 separate activities that it asserts should either be identified as one-time activities, or excluded from reimbursement altogether [see exh. B]. The Commission can consider claimant's requests for activities that are not expressly included in the test claim legislation at the parameters and guidelines stage, to determine whether the requested activities are a reasonable method of complying with the mandate. (Cal. Code of Regs., tit. 2, § 1183.1, subd. (a)(4).)

[24] The Legislature repealed and reenacted the test claim Elections Code sections, (except section 2001, which was repealed entirely). "Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time." (*In re Martin's Estate* (1908) 153 Cal. 225, 229. See also 15 Ops.Cal.Atty.Gen. 49 (1950).) The Commission finds that when a statute is renumbered or reenacted, only substantive changes to the law creating new duties or activities meet the criteria for finding a reimbursable state mandate.

vote the partisan primary ballot of any party that chooses to allow it. Elections Code section 2151, follows, with changes to prior law (pre-Proposition 198) indicated in underline and strikeout:

> At the time of registering and of transferring registration, each elector may declare the name of the political party with which he or she intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.
>
> The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, but no person shall be entitled to vote the ballot of any political party at any primary election unless he or she has stated the name of the party with which he or she intends to affiliate or unless he or she has declined to state a party affiliation and the political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to state a party affiliation to vote the ballot of that political party. The voter registration card shall include a listing of all qualified political parties.
>
> No person shall be permitted to vote the ballot of any party or for any delegates to the convention of any party other than the party designated in his or her registration, except as provided by Section 2152 or unless he or she has declined to state a party affiliation and the party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to state a party affiliation to vote the party ballot or for delegates to the party convention.

Elections Code section 13102, as amended by Statutes 2000, chapter 898 follows,[25] with changes to prior law indicated in underline and strikeout:

> (a) All voting shall be by ballot. There shall be provided, at each polling place, at each election at which public officers are to be voted for, but one form of ballot for all candidates for public office, except that, for partisan primary elections, one form of ballot shall be provided for each qualified political party as well as one form of nonpartisan ballot, in accordance with subdivision (b).
>
> (b) At partisan primary elections, each voter not registered as intending to affiliate with any one of the political parties participating in the election shall be furnished only a nonpartisan ballot, unless he or she requests a ballot of a political party and that political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to state a party affiliation to vote the ballot of that political party. The nonpartisan ballot shall contain only the names of all candidates for nonpartisan offices and measures to be voted for at the primary election. Each voter registered as intending to affiliate with a political party participating in the election shall be furnished only a ballot of the political party with which he or she is registered and the nonpartisan ballot, both of which shall be printed together as one ballot in the form prescribed by Section 13207.

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[25] Elections Code section 13102 has been subsequently amended, but those statutes were not included in this test claim, and none of the amendments affect the outcome to this test claim.

(c) A political party may adopt a party rule in accordance with subdivision (b) that authorizes a person who has declined to state a party affiliation to vote the ballot of that political party at the next ensuing partisan primary election. The political party shall notify the party chairman immediately upon adoption of that party rule. The party chairman shall provide written notice of the adoption of that rule to the Secretary of State not later than the 60th day prior to the partisan primary election at which the vote is authorized.

Although new, Elections Code section 13102, subdivision (c), does not mandate a new program or higher level of service, because the requirements are entirely vested in political party officials and the Secretary of State, not local agencies.

However, as to the other amendments by Statutes 2000, chapter 898, the Commission finds that holding any form of an open primary was neither the law prior to Proposition 198, nor required by the Court in *California Democratic Party v. Jones*, *supra*, 530 U.S. 567, when it invalidated Proposition 198. Therefore, the Commission finds that amendments to Elections Code sections 2151, and 13102, subdivision (b), mandate a new program or higher level of service, for the following new activities:

- Add information to the voter registration card stating that voters who declined to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so.
- Allow voters who declined to state a party affiliation to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so.

Elections Code Sections 13203, 13230, 13301 and 13302:

Elections Code sections 13203, 13301 and 13302, describing the printing requirements of partisan primary ballots, including things such as typefaces and paper, were restored to prior law, conforming to the order of the Court invalidating Proposition 198. Using Elections Code section 13203 as an example, here is how the law was changed by Proposition 198 in 1996, indicated by underline and strikethrough:

> Across the top of the ballot shall be printed in heavy-faced gothic capital type not smaller than 30-point, the words "OFFICIAL BALLOT." However, if the ballot is no wider than a single column, the words "OFFICIAL BALLOT" may be as small as 24-point. Beneath this heading, in the case of an official ~~partisan~~ primary election, shall be printed in 18-point boldfaced gothic capital type ~~the official party designation or~~ the words "OFFICIAL PRIMARY ~~NONPARTISAN~~ BALLOT". Beneath the heading line or lines, there shall be printed, in boldface type as large as the width of the ballot makes possible, the number of the congressional, Senate, and Assembly district, the name of the county in which the ballot is to be voted, and the date of the election.

Then, after the law was voided by the Supreme Court decision issued on June 26, 2000, the Legislature restored the law on the books exactly to the prior law, by Statutes 2000, chapter 898. But even before the operative date of Statutes 2000, chapter 898 – this was the actual law in California because of the legal principles of *Cummings v. Morez* (1974) 42 Cal.App.3d 66, 73: "A statute which violates either Constitution is to that extent void and, '[i]n legal contemplation,

a void act is as inoperative as though it had never been passed. ...'." For legal purposes, there was no gap in the law because the law treats Proposition 198 as though it never existed; meaning prior law is continuous in effect.

So here is the law as it exists today, word for word the same as before Proposition 198:

> Across the top of the ballot shall be printed in heavy-faced gothic capital type not smaller than 30-point, the words "OFFICIAL BALLOT." However, if the ballot is no wider than a single column, the words "OFFICIAL BALLOT" may be as small as 24-point. Beneath this heading, in the case of a partisan primary election, shall be printed in 18-point boldface gothic capital type the official party designation or the words "NONPARTISAN BALLOT" as applicable. Beneath the heading line or lines, there shall be printed, in boldface type as large as the width of the ballot makes possible, the number of the congressional, Senate, and Assembly district, the name of the county in which the ballot is to be voted, and the date of the election.

Therefore, the Commission finds that Elections Code sections 13203, 13301 and 13302, as repealed and reenacted by Statutes 2000, chapter 898, do not mandate a new program or higher level of service.

In addition to reenacting the language of prior law, subdivision (c) was added to Elections Code section 13230, defining "partisan voters" as including persons who have declined to state a party affiliation but have chosen to vote a party ballot, if allowed by the political party. The Commission finds that this definition, in and of itself, does not require any new activities of county elections officials. Therefore, the Commission finds that Elections Code sections 13230, as amended by Statutes 2000, chapter 898, does not mandate a new program or higher level of service.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Reimbursement under article XIII B, section 6 is required only if any new program or higher-level of service is also found to impose "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" as any *increased* cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant estimated costs of $200 or more for the test claim allegations, which was the statutory threshold at the time the test claim was filed. The claimant also stated that none of the Government Code section 17556 exceptions apply. For the activities listed in the conclusion below, the Commission agrees and finds accordingly that they impose costs mandated by the state upon counties within the meaning of Government Code section 17514.

CONCLUSION

The Commission concludes that Statutes 2000, chapter 898, as it amended Elections Code sections 2151, 13102, subdivision (b), mandates a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities:

- Add information to the voter registration card stating that voters who declined to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, § 2151.)[26]
- Allow voters who declined to state a party affiliation to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, §§ 2151 and 13102, subd. (b).)[27]

The Commission concludes that Statutes 2000, chapter 898, as it repealed, reenacted, or amended Elections Code sections 13203, 13230, 13301 and 13302, does not mandate a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution.

Regarding the two additional code sections pled by the claimant: Elections Code section 2001 was repealed in its entirety by Statutes 2000, chapter 898, and therefore did not mandate a new program or higher level of service; and Elections Code section 13300 was not amended by Statutes 2000, chapter 898, but by Statutes 2000, chapter 899. Statutes 2000, chapter 899 was pled in another test claim, *Fifteen Day Close of Voter Registration* (01-TC-15), which will be heard by the Commission as a separate item.

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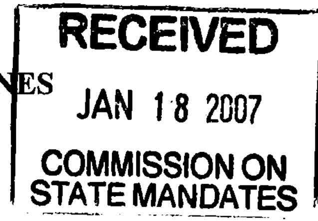
[26] As amended by Statutes 2000, chapter 898, operative January 1, 2001.

[27] As amended by Statutes 2000, chapter 898, operative January 1, 2001.

EXHIBIT B



AMENDED PROPOSED PARAMETERS AND GUIDELINES

Modified Primary Election
(01-TC-13)

Elections Code Sections 2001, 2151, 13102, 13202, 13230, 13300, 13301 and 13302
Statutes 2000, Chapter 898 (SB 28)

County of Orange, Claimant

I. SUMMARY OF THE MANDATE

In 1996, the California voters approved Proposition 198, "The Open Primary Act", which would have established the open primary for the State of California, by allowing anyone, regardless of party affiliation, to vote in the primary held of any party. That proposition was found unconstitutional by the United States Supreme Court in *California Democratic Party* v. *Jones* (2000) 530 U.S. 567.

After the proposition was declared unconstitutional, the legislature passed Chapter 989, Statutes of 2000, chaptered on September 29, 2000. It mainly restored the language in the law that was in existence prior to the passage of Proposition 198. However, by amending a few elections code sections, it altered the prior closed primary system, it allowed those voters who decline to state a political party affiliation to choose any political party's partisan primary ballot, if that political party allowed it.

On July 28, 2006, the Commission on State Mandates found that the above referenced test claim constituted a partially reimbursable mandate for the following new activities:

- Add information to the voter registration card stating that voters who declined to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, § 2151.)
- Allow voters who declined to state a party affiliation to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, §§ 2151 and 13102, subd. (b).)

II. ELIGIBLE CLAIMANTS

Any county, or city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557 states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. The test claim for this mandate was filed by the test claimant, County of Orange, on April 18, 2002. Therefore, the period of reimbursement begins September 29, 2000, the date of enactment.

Actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given year do not exceed $1,000, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any given fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, calendars, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise reported in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following activities are eligible for reimbursement:

A. One-Time Activities

1. Conducted meetings in order to obtain information from the Secretary of State as to which political parties allowed voters who have not designated their political party to vote in primary elections of given political parties.
2. Had meetings with the elections department in order to ascertain what activities were necessary to implement the legislation.
3. Developed new internal policies and procedures.
4. Redesigned and republished the sample ballot and absentee voter application.
5. Redesigned and implemented new election software.
6. Informed and trained poll workers regarding the voting options for the decline to state voter.
7. Provided specialized official ballots for the decline to state voter at each poll site.

B. On-Going Activities

1. Notify every permanent voter who is registered as a decline to state voter that they have an option to vote a partisan ballot as long as that political party has agreed.
2. Hand process absentee voter requests.
3. Provide postage paid post card for the permanent absent voter decline to state voter to indicate which partisan absentee ballot they would like sent to them.
4. Enter the requested partisan ballot information from the post card into the computer software database.
5. Send to each voter a sample ballot containing the information regarding the options available to the decline to state voters.
6. Inform and train poll workers regarding the options for the decline to state voter.
7. Provide specialized official ballots for the decline to state voter at each poll site.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for the reimbursable activities identified in section IV of this document. Each reimbursable cost must be supported by source documentation as described in section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services were also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. <u>Indirect Cost Rates</u>

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include (1) the overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect shall exclude capital expenditures and unallowable costs (as defined and described in OMB A-87 Attachments A and B.) However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distributions base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should e expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separate a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORDS RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the State Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING SAVINGS AND REIMBURSEMENTS

Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any federal, state or non-local source shall be identified and deducted from this claim.

Pursuant to Government Code section 17558, subdivision (c), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the parameters and guidelines from the Commission, to assist local agencies in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(2), issuance of the claiming instructions shall constitute a notice of the right of local agencies to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon the request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (a), and California Code of Regulations, title 2, section 1183.2.

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[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

EXHIBIT C

DEPARTMENT OF FINANCE

ARNOLD SCHWARZENEGGER, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

September 29, 2006

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento CA 95814

Dear Ms. Higashi:

As requested in your letter of September 5, 2006, the Department of Finance has reviewed the proposed parameters and guidelines submitted by the County of Orange (Claimant), regarding Claim No. CSM 01-TC-13 "Modified Primary Election." Finance concurs with portions of the proposed parameters and guidelines but recommends changes as detailed below.

Delete the Following One-Time Activities

Conducted meetings in order to obtain information from the Secretary of State as to which political parties allowed voters who have not designated their political party to vote in primary elections of given political parties.
Finance notes that there are only eight registered political parties in California; and that to communicate with these parties, or the Secretary of State, as to the party's allowances is easily obtained by phone calls or web-site accessing. Additionally the California Association of Clerks and Elections Officials is an efficient and obvious conduit for relaying this information without holding a meeting.

Redesign and republish the sample ballot and the absentee ballot.
Finance notes that the sample ballot and absentee ballot for each election are completely different from the prior election. Finance points out that this is an ongoing part of an existing process. We also note that activities related to the absentee ballot should already be reimbursed through the "Absentee Ballot" mandate. The current reimbursement method for the "Absentee Ballot" claims consist of several formulas based on the number of ballots rather than specific activities.

Informed and trained poll workers regarding the voting options for the decline to state voter.
Finance notes language in the original test claim application the Claimant authored: "Generally, with every election, the extra help employees have never worked an election previously. These individuals need training." Training is already a part of any election and not unique to the requirements of the "Modified Primary Election" mandate.

Delete the Following Ongoing Activities

Hand process absentee voter requests.
Finance notes that a mandate program already exists to reimburse local agencies for activities related to absentee ballots. The "Absentee Ballot" mandate already provides reimbursement for costs associated with the increase in absentee ballot filings.

Send to each voter a sample ballot containing the information regarding the options available to the "decline to state" voters.
Finance again notes that every sample ballot is completely different from the prior election. Sending sample ballots to voters is an ongoing part of an existing legally required process.

Inform and train poll workers regarding the options for the decline to state voter.
Again, Finance notes language in the original test claim application the Claimant authored: "Generally, with every election, the extra help employees have never worked an election previously. These individuals need training." Training is already a part of any election and not unique to the requirements of the "Modified Primary Election" mandate.

Move from Ongoing Activity to One-Time Activity

Notify every permanent voter who is registered as a "decline to state" voter that they have an option to vote a partisan ballot as long as that political party has agreed.
Finance notes this is a one-time activity that can be satisfied using the same language the Secretary of State uses on its statewide registration cards; *"Note: If you do not register with a party, you can still vote in general elections and nonpartisan (nonparty) primary elections."*

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your September 5, 2006 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Carla Castañeda, Principal Program Budget Analyst at (916) 445-3274.

Sincerely,

Thomas E. Dithridge
Program Budget Manager

Attachments

Attachment A

DECLARATION OF CARLA CASTANEDA
DEPARTMENT OF FINANCE
CLAIM NO. CSM-01-TC-13

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

9/27/06
at Sacramento, CA

Carla Castañeda

PROOF OF SERVICE

Test Claim Name: Modified Election Primary
Test Claim Number: 01-TC-13

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 12th Floor, Sacramento, CA 95814.

On September 29, 2006, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 12th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

B-08
Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall Suite 518
Sacramento, CA 95814

D-15
Mr. John Mott-Smith
Secretary of State's Office
1500 11th Street
Sacramento, CA 95814

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: William Ashby
3301 C Street, Room 500
Sacramento, CA 95816

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd., Suite 121
Sacramento, CA 95826

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite 106
Roseville, CA 95661

Mr. Neal Kelley
Country of Orange – Registrar of Voters
1300 South Grand Avenue, Building C
Santa Ana, CA 92705

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Mr. Jim Jaggers
P.O. Box 1993
Carmichael, CA 95609

B-08
Ms. Ginny Brummels
State Controller's Office
Division of Accounting and Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. Glen Everroad
City of Newport Beach
3300 Newport Blvd.
P.O. Box 1768
Newport Beach, CA 92659-1768

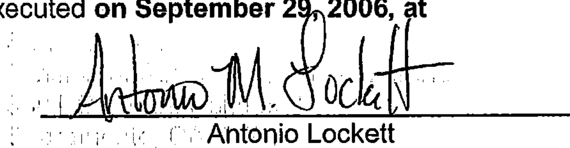
Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415-0018

Ms. Beth Hunter
Centration, Inc.
8570 Utica Avenue, Suite 100
Rancho Cucamonga, CA 91730

A-15
Ms. Susan Geanacou
Department of Finance
915 L Street, Suite 1190
Sacramento, CA 95814

A-15
Ms. Carla Castaneda
Department of Finance
915 L Street, Suite 1190
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed **on September 29, 2006, at** Sacramento, California.



Antonio Lockett

ICC: DITHRIDGE, LYNN, GEANACOU, FEREBEE, CASTANEDA, MCGINN, FILE

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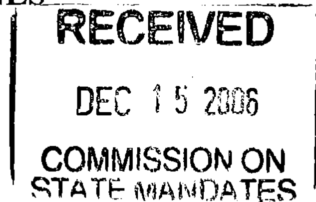
RESPONSE TO COMMENTS BY DEPARTMENT OF FINANCE ON PROPOSED PARAMETERS AND GUIDELINES



Modified Primary Election
CSM-01-TC-13

By County of Sacramento

The Department of Finance requests that various activities be deleted. This in response to same.

The Department of Finance requests deletion of "Conducted meetings in order to obtain information from the Secretary of State as to which political parties allowed voters who have not designated their political party to vote in primary elections of given political parties." We object to same.

Elections Code, Section 13102, as found by the Commission, allows only those persons who have declined to state their party affiliation to vote in a partisan primary if the political party "by rule duly noticed to the Secretary of State, authorizes a person who has declined to state a party affiliation to vote the ballot of that political party." When the legislation was initially passed, it was unclear as to what political parties, if any, would allow decline to state voters to participate in their primary election. Meetings were necessary in order to obtain the information from the Secretary of State. Only if the Secretary of State received such a rule could persons vote in that party's primary. Neither the Counties nor the California Association of Clerks and Elections Officials (CACEO) are authorized to obtain this information directly from the political parties, as contended by the Department of Finance.

Although this activity did not take long, it was required in order to properly implement the test claim legislation.

The Department of Finance next claims that the following should not be reimbursable on a one-time basis: "Redesign and republish the sample ballot and the absentee ballot", on the basis that the activities are on-going for each election and any costs should be included in absentee ballot claim for those ballots. However, both the sample ballot and absentee ballot had to be redesigned on a one time basis by creating and adding material that addressed the fact that those individuals who had declined to state their party affiliation could request a ballot for those parties whose rules allow those who decline to state to vote in their primary. This activity is a new activity strictly for the implementation of this test claim legislation and was not previously required to be included in the sample ballot or absentee ballots. Accordingly, this activity should be allowed.

The Department of Finance also claims that the following activity should not be allowed: "Informed and trained poll workers regarding the voting options for the decline to state

voter", on the basis that at each election most of the extra help employees have never worked an election previously. This does not obviate the fact that all poll workers must now be trained on the decline to state voter. Each poll worker is trained on all election duties for each election. Training on this issue is in addition to the existing training and is only included as a result of this test claim legislation. This request includes only that portion of the training dealing with the modified primary rules and the decline to state voter.

The Department of Finance has requested that the following activity be deleted: Hand process absentee voter requests". The stated reason for such deletion is that same is already covered by an increase in absentee ballots in the absentee ballot claim. This is not what is being requested. Rather, those absentee voters who decline to state their party affiliation can vote in the party's primary if the party so allows. This absentee voter can select a different party affiliation in different primaries. This activity relates to selecting the correct party for the decline to state voter and must be hand processed, as their primary party selection is not permanently "keyed in" to the computer for future elections. This activity is not related to the increase in absentee ballots to be voted, but recognizes that there is an additional activity to make sure that each decline to state voter who chooses to vote absentee in a primary has their computer record properly coded in order to receive the proper absentee ballot.

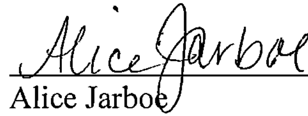
Finance also requests deletion of "Send to each voter a sample ballot containing the information regarding the options available to the 'decline to state' voters." Voters who have declined to state their political party are required by this legislation to be given the opportunity to select which political party ballot to receive. This selection changes with each primary election, depending on which political parties opt to open their election for that particular primary. This information is in addition to the existing information required to be in the sample ballot and is solely there in response to this legislation, adding to the number of pages needed in each sample ballot. This legislation has increased the complexity of the booklet layout, as well as adding to printing and mailing costs.

Finance also requests that the training of poll workers in the decline to state voters must be deleted because poll workers change each year and is already part of the election process and not unique to the requirements of this test claim. However, what we are requesting is that portion of training which now must be given for each primary so that the poll workers know what to do with the decline to state voter. The decline to state voter is the most difficult voter to assist during the primary election due to this legislation. It has necessitated additional training on the subject of modified primary voting in order to eliminate any voter disenfranchisement due to confusion on the part of the poll worker. This is a necessary component of this test claim legislation and is clearly an on-going cost. Without this training, the poll workers will not be able to implement the intent of the modified primary.

The Department of Finance has requested that the activity of notification to each decline to state voter that they have the option to vote in a political party's primary should be

moved from an ongoing activity to a one-time activity, and claims that the terminology can be satisfied by using the wording on the Secretary of State's statewide voter registration cards. The Department of Finance does not state that the political parties who opt into the modified primary changes for each primary election so a one-time notice will not be sufficient. Therefore, each decline to state voter must be sent a notice prior to each primary election informing them of their voting rights for that particular election. This was not a requirement prior to this legislation but is now a necessary in order to provide the decline to state voters their legal voting options.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 13th day of December, 2006 at Sacramento, California.



Alice Jarboe
Assistant Registrar of Voters

RESPONSE TO COMMENTS BY DEPARTMENT OF FINANCE ON PROPOSED PARAMETERS AND GUIDELINES

Modified Primary Election
CSM-01-TC-13

By County of Orange

The Department of Finance requests that various activities be deleted. This in response to same.

First of all, the Department of Finance requests deletion of "Conducted meetings in order to obtain information from the Secretary of State as to which political parties allowed voters who have not designated their political party to vote in primary elections of given political parties." We object to same.

Elections Code, Section 13102, as found by the Commission, allows only those persons who have declined to state their party affiliation to vote in a partisan primary if the political party "by rule duly noticed to the Secretary of State, authorizes a person who has declined to state a party affiliation to vote the ballot of that political party." When the legislation was initially passed, it was unclear as to what political parties, if any, would so allow. Meetings were necessary in order to obtain the information from the Secretary of State. Only if the Secretary of State received such a rule could persons vote in that party's primary – requesting information from the political parties, as contended by the Department of Finance, would not satisfy the test claim legislation.

Although this activity did not take long, it was required by the test claim legislation.

The Department of Finance next claims that the following should not be reimbursable on a one-time basis: "Redesign and republish the sample ballot and the absentee ballot", on the basis that the activities should be included in absentee ballot for those ballots. However, both the sample ballot and absentee ballot had to be redesigned on a one time basis to address the fact that those individuals who had declined to state their party affiliation could request a ballot for those parties whose rules allow those who decline to state to vote in their primary. This activity is not just for absentee ballots, which, to the best of my knowledge, does not allow for the redesign of the absentee ballot. Accordingly, this activity should be allowed.

The Department of Finance also claims that the following activity should not be allowed: "Informed and trained poll workers regarding the voting options for the decline to state voter", on the basis that at each election most of the extra help employees have never worked an election previously. This does not obviate the fact that all poll workers must now be trained on the decline to state voter. Each poll worker should be allowed such training on a one-time basis. We are not requesting all training for each poll worker, just that portion of their training which pertains to the decline to state voter.

The Department of Finance has requested that the following activity be deleted: Hand process absentee voter requests". The stated reason for such deletion is that same is already covered by an increase in absentee ballots in the absentee ballot claim. This is not what is being requested. Rather, those absentee voters who decline to state their registration can vote in the primary if a party so allows. This absentee voter can vote in different parties in different primaries. This activity must be hand processed, as their party affiliation is not "keyed in" to the computer. This activity is not related to the increase in absentee ballots to be voted, but recognizes that there is an additional activity to make sure that each decline to state voter who chooses to vote absentee in a primary receives the proper ballot.

Finance also requests deletion of "Send to each voter a sample ballot containing the information regarding the options available to the 'decline to state' voters." Without this option during a primary, those voters who have declined to state their political party, when receiving a sample ballot, may have forgotten that they are eligible to vote in the primary in a political party' primary which so allows. This has nothing to do with the fact that the sample ballot changes in each election: it refers to sending the information to the decline to state voters when there are political primaries.

Finance also requests that the training of poll workers in the decline to state voters must be deleted because poll workers change each year and is already part of the election process and not unique to the requirements of this test claim. However, what we are requesting is that portion of training which now must be given for each primary so that the poll workers know what to do with the decline to state voter. This increases the time that training must be given for each primary election, and is a necessary component to reasonably conduct the election.

The Department of Finance has requested that the activity of notification to each decline to state voter that they have the option to vote in a political party's primary should be moved from an ongoing activity to a one-time activity, and claims that the terminology can be satisfied by using the verbage on the Secretary of State's statewide voter registration cards. What the Department of Finance does not note is that frequently voters do not remember from one primary to another that they have the ability to vote in a partisan primary election even if they have declined to state their political party affiliation. Without notification, the Registrar of Voters would be inundated with telephone calls and inquiries, which take up valuable time during an election season. The only way to streamline the process and enable the election to proceed smoothly is to notify the decline to state voters of their option to vote in a partisan party's primary.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 11th day of December, 2006 at Santa Ana, California.

Neal Kelley
Registrar of Voters
County of Orange

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On December 15, 2006, I served Amended Proposed Parameters and Guidelines, *Modified Primary*, by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 15th day of December, 2006, at Sacramento, California.

Declarant

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Auditor-Controller's Office
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Los Angeles, CA 90012

Mr. Glen Everroad, Revenue Manager
City of Newport Beach
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Roseville, CA 95661

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415-0018

Hearing Date: October 27, 2011
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ITEM ___

DRAFT STAFF ANALYSIS
PROPOSED PARAMETERS AND GUIDELINES

Elections Code Sections 2151 and 13102(b)

Statutes 2000, Chapter 898 (SB 28)

Modified Primary Election
(01-TC-13)

County of Orange, Claimant

EXECUTIVE SUMMARY

Background

This program deals with changes to the partisan primary system in California. In 1996 and earlier, California had a closed primary system in which registered voters who were declared members of any political party could only vote for members of their own party in partisan primary contests, and any voters who declined to state a party affiliation could only vote on non-partisan matters at a primary election. This changed in 1996 when Proposition 198, the "Open Primary Act," was approved by the California voters. However, Proposition 198 was challenged and litigated up to the United States Supreme Court in *California Democratic Party v. Jones* (2000) 530 U.S. 567, which found the law unconstitutional.

Following the court's decision, the test claim statute was enacted (Statutes 2000, chapter 898) and largely repealed and reenacted the code sections that had been amended by Proposition 198 – generally restoring the language to the law that was in place immediately prior to Proposition 198. However, by amending a few of the Elections Code sections, the test claim statute altered the prior closed primary system to one in which those voters who decline to state a political party affiliation may choose any political party's partisan primary ballot, if that political party allows it. This created a form of open primary.

The Commission concluded that Statutes 2000, chapter 898, as it amended Elections Code sections 2151 and 13102(b), mandates a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following specific new activities:

- Add information to the voter registration card stating that voters who declined to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, § 2151.)

- Allow voters who declined to state a party affiliation to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, §§ 2151 and 13102(b).)

The remaining allegations pled in the test claim were denied by the Commission.

Proposed Parameters and Guidelines

The issues in dispute involve the period of reimbursement and the reimbursable activities.

Period of Reimbursement

The claimant's proposed parameters and guidelines state that the period of reimbursement for the test claim begins on September 29, 2000, the date of enactment of the test claim statute.

Although the test claim statute, Statutes 2000, chapter 898, was approved by the Governor and filed with the Secretary of State on September 29, 2000, it was not enacted as urgency legislation and, thus, did not immediately go into effect upon its enactment. Nor did the statute have a delayed operative date to give counties time to implement the statute.[1] Rather, the operative and effective date of the statute was January 1, 2001.[2] A statute has no force and effect until its operative and effective date.[3] Thus, the reimbursable activities identified in the parameters and guidelines did not become "mandated" and were not required to be implemented until January 1, 2001.

Staff has modified Section III of the proposed parameters and guidelines to reflect the period of reimbursement beginning January 1, 2001, and to incorporate the most recent boilerplate language.

Reimbursable Activities

The first activity approved by the Commission as a reimbursable state-mandated activity is to add information about the *Modified Primary* program to the voter registration card. Although the claimant did not include this activity in its proposed parameters and guidelines, the Commission is required to identify all costs mandated by the state in the parameters and guidelines. Staff recommends that the Commission identify this activity in the parameters and guidelines as a one-time activity.

The second activity determined by the Commission to be reimbursable is the ongoing activity to "allow" voters who declined to state a party affiliation to vote a party ballot at each primary election if a political party authorizes such a vote. The Commission's statement of decision does not define what it means to "allow" a decline to state voter to vote a party ballot, and the claimant's proposed parameters and guidelines list of reimbursable activities attempt to define that activity.

However, the Legislature has established a statutory process to allow the decline to state voter to vote a partisan ballot in primary elections. To the extent the process was adopted by the

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[1] *Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 223–224.

[2] Article IV, section 8(c), of the California Constitution; Government Code section 9600.

[3] *People v. Camba* (1996) 50 Cal.App.4th 857, 866.

Legislature at the same time as the test claim statute (Stats. 2000, ch. 898), staff recommends that the Commission include the activities in the parameters and guidelines to define what is meant to "allow" the decline to state voter to vote under the *Modified Primary* program.

In addition, in June 2010, the voters adopted Proposition 14, the "Top Two Primaries Act," effective January 1, 2011. The proposition amended article II, sections 5 and 6 of the California Constitution to provide for a "voter-nominated primary election" for each state elective office and congressional office in California. Voters can vote in the primary election for any candidate for a congressional or state elective office without regard to the political party affiliations of either the candidate or the voter. The *Modified Primary* rules continue to apply at any primary election for President of the United States or for a party committee. Thus, the *Modified Primary* program no longer applies to primary elections for state elective or congressional offices. Staff recommends that the parameters and guidelines reflect this change in law.

The Commission may also authorize reimbursement for activities that are "the most reasonable methods of complying with the mandate" pursuant to section 1183.1(a)(4) of the Commission's regulations. Staff has included those activities to extent they are supported by evidence in the record.

Staff recommends that Section IV of the parameters and guidelines state the following:

A. One-Time Activities

1. Conduct a meeting with the Secretary of State's Office and a meeting with employees from the county elections department regarding the implementation of the *Modified Primary* program.
2. Develop new internal policies and procedures relating to the activities mandated by Elections Code sections 2151 and 13102(b) to allow voters who decline to state a party affiliation to vote a party ballot in a primary election if authorized by the political party to do so, and to add such information regarding the modified primary statutes to the voter registration card.
3. Add information to the voter registration card stating that voters who decline to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes that vote. (Elec. Code,§ 2151.)
4. Add the following information regarding the *Modified Primary* program to the notice and application to vote by mail:
   a. Language informing the voter that if he or she is not affiliated with a political party, the voter may request an absentee ballot for a particular political party for the primary election, if that political party has adopted a party rule, duly noticed to the Secretary of State, authorizing that vote.
   b. A toll-free telephone number, established by the Secretary of State, which the voter may call to access information to identify which political parties have adopted such a rule authorizing decline to state voters to vote their party ballot. The application shall also contain a check-off box with a statement that says "I

am not presently affiliated with any political party. However, for this primary election only, I request a vote by mail ballot for the ___ Party." (Elec. Code, § 3006.)

B. On-going Activities

From January 1, 2001 through December 31, 2010, these activities apply to all primary elections. Beginning January 1, 2011, these activities apply only to primary elections for President of the United States or for a party committee and do not apply to primary elections for state elective or congressional offices. (Proposition 14, June 2010.)

1. If authorized by the political party, and upon receipt of the application to vote by mail by decline to state voters, deliver to the decline to state voters the partisan ballot requested for the primary election. (Elec. Code, § 3009.)

   This activity includes and reimbursement is authorized for entering into the computer a request from the decline to state voter to vote a partisan ballot at a primary election following the receipt of the vote by mail application sent pursuant to Elections Code section 3006 in order to ensure that the proper ballot is delivered.[4]

2. If authorized by the political party, provide partisan ballots at the polls to decline to state voters that request a partisan ballot for the primary election. (Elec. Code, § 13300(c).)

3. Inform and train poll workers before each primary election regarding the option for the decline to state voter to vote a party ballot if authorized, by party rule duly noticed to the Secretary of State, by the political party.

Conclusion and Staff Recommendation

Staff recommends that the Commission:

- Adopt the proposed parameters and guidelines, beginning on page 22.
- Authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

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[4] The costs for the administration of the *Absentee Ballot* program (CSM 3713), as required by Statutes 1978, chapter 77 and Statutes 2002, chapter 1032, are not reimbursable under these parameters and guidelines.

STAFF ANALYSIS

Claimant

County of Orange

Chronology

07/28/2006	Commission adopts statement of decision
08/07/2006	Statement of decision issued
08/25/2006	Claimant files proposed parameters and guidelines
09/05/2006	Proposed parameters and guidelines deemed complete and issued for comment
09/29/2006	Department of Finance files comments on claimant's proposed parameters and guidelines
10/03/2006	Claimant requests extension of time to file rebuttal comments; extension granted until October 23, 2006
12/15/2006	Claimant files rebuttal comments and declarations from the County of Orange Registrar of Voters and the County of Sacramento Assistant Registrar of Voters
01/18/2007	Claimant files proposed amended parameters and guidelines to add time study language and to amend the boilerplate language for Section VII, Offsetting Savings and Reimbursements
01/25/2007	Claimant files proposed amended parameters and guidelines and informs Commission staff that it will be negotiating a joint reasonable reimbursement methodology (RRM) with Department of Finance
01/__/2010	Claimant informs Commission staff that it is no longer negotiating an RRM with Department of Finance, and parameters and guidelines may proceed

I. Background and Summary of the Mandate

This program deals with changes to the partisan primary system in California. In 1996 and earlier, California had a closed primary system in which registered voters who were declared members of any political party could only vote for members of their own party in partisan primary contests, and any voters who declined to state a party affiliation could only vote on non-partisan matters at a primary election. This changed in 1996 when Proposition 198, the "Open Primary Act," was approved by the California voters. However, Proposition 198 was challenged and litigated up to the United States Supreme Court in *California Democratic Party v. Jones* (2000) 530 U.S. 567, which found the law unconstitutional.

Following the court's decision, the test claim statute was enacted (Statutes 2000, chapter 898) and largely repealed and reenacted the code sections that had been amended by Proposition 198 – generally restoring the language to the law that was in place immediately prior to Proposition 198. However, by amending a few of the Elections Code sections, the test claim statute altered the prior closed primary system to one in which those voters who decline to state a political party affiliation may choose any political party's partisan primary ballot, if that political party allows it. This created a form of open primary.

The Commission concluded that Statutes 2000, chapter 898, as it amended Elections Code sections 2151 and 13102(b), mandates a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following specific new activities:

- Add information to the voter registration card stating that voters who declined to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, § 2151.)
- Allow voters who declined to state a party affiliation to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, §§ 2151 and 13102(b).)

The remaining allegations pled in the test claim were denied by the Commission.

II. Commission's Responsibility for Adopting Parameters and Guidelines

If the Commission approves a test claim, the Commission is required by Government Code section 17557 to adopt parameters and guidelines for the reimbursement of any claims. The successful test claimant is required to submit proposed parameters and guidelines to the Commission for review. The parameters and guidelines shall include the following information: a summary of the mandate; a description of the eligible claimants; a description of the period of reimbursement; a description of the specific costs and types of costs that are reimbursable, including activities that are not specified in the test claim statute or executive order, but are determined to be reasonably necessary for the performance of the state-mandated program; instructions on claim preparation, including instructions for the direct or indirect reporting of the actual costs of the program or the application of an RRM; and any offsetting revenue or savings that may apply.[5]

As of January 1, 2011, Commission hearings on the adoption of proposed parameters and guidelines are conducted under Article 7 of the Commission's regulations.[6] Article 7 hearings are quasi-judicial hearings. The Commission is required to adopt a decision that is based on substantial evidence in the record, and oral or written testimony is offered under oath or affirmation.[7] Each party has the right to present witnesses, introduce exhibits, and submit declarations. However, the hearing is not conducted according to the technical rules of evidence. Any relevant non-repetitive evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Irrelevant and unduly repetitious evidence shall be excluded. Hearsay evidence may be used to supplement or explain, but is not sufficient in itself to support a finding unless the hearsay evidence would be admissible in civil actions.[8]

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[5] Government Code section 17557; California Code of Regulations, Title 2, section 1183.1.

[6] California Code of Regulations, Title 2, section 1187.

[7] Government Code section 17559(b); California Code of Regulations, Title 2, section 1187.5.

[8] California Code of Regulations, Title 2, section 1187.5.

Should the Commission adopt this analysis and proposed parameters and guidelines, a cover sheet would be attached indicating that the Commission adopted the analysis as its decision. The decision and adopted parameters and guidelines are then submitted to the State Controller's Office to issue claiming instructions to local governments, and to pay and audit reimbursement claims. Issuance of the claiming instructions constitutes the notice of the right of local governments to file reimbursement claims with the State Controller's Office based on the parameters and guidelines.

III. Party Positions

Claimant

The claimant requests reimbursement for the following activities:

A. One-Time Activities

1. Conducted meetings in order to obtain information from the Secretary of State as to which political parties allowed voters who have not designated their political party to vote in primary elections of given political parties.
2. Had meetings with the elections department in order to ascertain what activities were necessary to implement the legislation.
3. Developed new internal policies and procedures.
4. Redesigned and republished the sample ballot and absentee voter application.
5. Redesigned and implemented new election software.
6. Informed and trained poll workers regarding the voting options for the decline to state voter.
7. Provided specialized official ballots for the decline to state voter at each poll site.

B. Ongoing Activities

1. Notify every permanent voter who is registered as a decline to state voter that he or she has an option to vote a partisan ballot as long as that political party has agreed.
2. Hand process absentee voter requests.
3. Provide postage paid post card for the permanent absent decline to state voter to indicate which partisan absentee ballot they would like sent to them.
4. Enter the requested partisan ballot information from the post card into the computer software database.
5. Send to each voter a sample ballot containing the information regarding the options available to the decline to state voters.
6. Inform and train poll workers regarding the options for the decline to state voter.
7. Provide specialized official ballots for the decline to state voter at each poll site.

Although these activities are not expressly required by the test claim statute, the claimant argues they are the most reasonable methods of complying with the mandate and, pursuant to section 1183.1(a)(1)(4), should be reimbursable.

The claimant also requests reimbursement from the enactment date of the statute, rather than from the later operative and effective date of the statute.

Department of Finance

As described more fully in the analysis, the Department of Finance argues that many activities requested by the claimant are not reasonably necessary to comply with the mandate and, thus, should be denied.

IV. Discussion

Staff reviewed the claimant's proposed parameters and guidelines, and comments from the parties. As described below, staff recommends that the Commission amend the proposed boilerplate language to conform to recently adopted parameters and guidelines. Staff further recommends that the Commission amend the proposed language for Section III, Period of Reimbursement, to reflect the operative and effective date of the statute, and the proposed language for Section IV, Reimbursable Activities.

A. Section III, Period of Reimbursement

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. This test claim was filed on April 18, 2002 (fiscal year 2001-2002), establishing eligibility for reimbursement beginning July 1, 2000. The test claim statute, however, was enacted and became operative and effective after that date.

The claimant's proposed parameters and guidelines state that the period of reimbursement for the test claim begins on September 29, 2000, the date of enactment of the test claim statute.

Although the test claim statute, Statutes 2000, chapter 898, was approved by the Governor and filed with the Secretary of State on September 29, 2000, it was not enacted as urgency legislation and, thus, did not immediately go into effect upon its enactment. Nor did the statute have a delayed operative date to give counties time to implement the statute.[9] Rather, the operative and effective date of the statute was January 1, 2001.[10] A statute has no force and effect until its operative and effective date.[11] Thus, the reimbursable activities identified in the parameters and guidelines did not become "mandated" and were not required to be implemented until January 1, 2001.

Staff has modified Section III of the proposed parameters and guidelines to reflect the period of reimbursement beginning January 1, 2001, and to incorporate the most recent boilerplate language.

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[9] *Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 223–224.

[10] Article IV, section 8(c), of the California Constitution; Government Code section 9600.

[11] *People v. Camba* (1996) 50 Cal.App.4th 857, 866.

B. Section IV, Reimbursable Activities

1. Activities required by the *Modified Primary* program

The Commission approved this test claim for the following reimbursable state-mandated activities:

- Add information to the voter registration card stating that voters who decline to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, § 2151.)
- Allow voters who declined to state a party affiliation to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, §§ 2151 and 13102(b).)

The first activity to add information about the *Modified Primary* program to the voter registration card has been determined by the Commission to be a reimbursable state-mandated cost. Although the claimant did not include this activity in its proposed parameters and guidelines, the Commission is required to identify all costs mandated by the state in the parameters and guidelines.[12] Staff recommends that the Commission identify this activity in the parameters and guidelines as a one-time activity.

The second activity determined by the Commission to be reimbursable is the ongoing activity to "allow" voters who declined to state a party affiliation to vote a party ballot at each primary election if a political party authorizes such a vote. The Commission's statement of decision does not define what it means to "allow" a decline to state voter to vote a party ballot, and the claimant's proposed parameters and guideline and list of reimbursable activities attempt to define that activity.

At the time the test claim statute was adopted in 2000, however, the Legislature enacted statutes to implement the *Modified Primary* program that allows the decline to state voter (either an absentee or vote by mail voter[13] or one that votes at the polls) to vote a partisan ballot at a primary election. Some of the claimant's proposed activities are generally modeled from these statutes, but the claimant's proposed language does not track the statutory language. Staff recommends that the Commission include in the parameters and guidelines the statutory activities adopted by the Legislature when the test claim statute was enacted to define the reimbursable activity to allow the decline to state voter to vote a partisan ballot in a primary election. These activities are described in the paragraphs below.

The Legislature also continued to add statutes to the *Modified Primary* program in years after it enacted the initial program. The claimant has not specifically identified these activities in its proposed parameters and guidelines as being required or necessary to implement the program.

[12] Government Code sections 17514 and 17557.

[13] In 2007, the Legislature renamed the "absent voter" and "permanent absent voter" to "vote by mail voter." (Stats. 2007, ch. 508.)

In addition, a test claim has not been filed on these later-adopted statutes. Staff recommends that the Commission *not* include the later-added activities in the parameters and guidelines.[14]

Under the process adopted with the test claims statute, the voter is first made aware of the *Modified Primary* rules at the time of registration or of transferring registration. As indicated in the statement of decision, when an elector registers to vote, the elector may declare the name of the political party with which he or she intends to affiliate at the primary election. The voter registration card shall inform the electors that they may decline to state a political affiliation, but no person shall be entitled to vote the ballot of any political party at any primary election unless the elector has stated the name of the party with which he or she intends to affiliate, or unless under the *Modified Primary* program, he or she has declined to state a party affiliation and the political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to state a party affiliation to vote the ballot of that political party. In addition, no person shall be permitted to vote the ballot of any party or for any delegates to the convention of any party other than the party designated in registration, unless he or she has declined to state a party affiliation and the party, by party rule duly noticed to the Secretary of State, authorizes a

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[14] In this case, the Commission's determination that a reimbursable mandate exists under the *Modified Primary* program to allow a decline to state voter to vote a partisan ballot is based on the enactment of Statutes 2000, chapter 898. Elections Code sections 3205(b) (amended by Stats. 2001, ch. 925) and 13102(d) (amended by Stats. 2002, ch. 10), are later-adopted statutes amending the *Modified Primary* program that have not been properly included in a test claim. Section 3205 was addressed in *Permanent Absentee Voters II* (03-TC-11, pp. 10-11), but the Commission determined that it was not properly pled in that test claim and did not reach any conclusions on that statute.

Elections Code section 3205(b) states that prior to each primary election, county election officials shall mail to every decline to state voter *whose name appears on the permanent vote by mail voter list* a notice and application regarding voting in the primary election. The notice shall inform the voter that he or she may request a vote by mail ballot for a particular political party for the primary election, if that political party has adopted by rule, duly noticed to the Secretary of State, authorizing these voters to vote in their primary. The notice is required to contain a toll-free telephone number, established by the Secretary of State, stating that the voter may call to access information regarding which political parties have adopted such a rule. The application also contains a check-off box that states "I am not presently affiliated with any political party. However, for this primary election only, I request a vote by mail ballot for the ___ Party." The name of the political party is affixed by the voter.

Elections Code section 13102(d) states that the county elections official shall maintain a record of which political party's ballot was requested pursuant to subdivision (b), or whether a nonpartisan ballot was requested, by each person who declined to disclose a party preference. The record shall be made available to any person or committee who is authorized to receive copies of the printed indexes or registration for primary and general elections pursuant to Elections Code section 2184.

These activities are not addressed in the proposed parameters and guidelines for *Modified Primary*.

person who has declined to state a party affiliation to vote the party ballot or for delegates to the party convention.[15]

Within a specified number of days before the primary election, county elections officials are required to prepare separate sample ballots for each political party and a separate sample nonpartisan ballot. The sample ballots are required to be identical to the official ballot, except as authorized by law. The nonpartisan ballot provided to the decline to state voter shall contain only the names of all candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election. Voters that register with a political party shall be furnished only a ballot for which the voter disclosed a party preference and the nonpartisan ballot, both of which shall be printed together as one ballot.[16]

County elections officials are also required to include with the sample ballot an application for a vote by mail ballot.[17] The application for a vote by mail ballot includes language that the decline to state voter has the option to vote a partisan ballot if authorized by the political party. The application is required to also contain a toll-free telephone number, established by the Secretary of State, which the voter may call to access information to identify which political parties have adopted such a rule. The application shall also contain a check-off box with a statement that says "I am not presently affiliated with any political party. However, for this primary election only, I request a vote by mail ballot for the ___ Party." The name of the political party is affixed by the voter.[18] Under existing statutes, if the voter requests to vote by mail for a primary election, the county is required to verify the voter's signature and address on the application and, when successfully filed, the county elections official delivers to each qualified applicant the correct ballot.[19]

If the decline to state voter does not vote by mail and instead votes at the polls, the decline to state voter may request to vote the ballot of a political party if authorized by the party's rules and duly noticed to the Secretary of State.[20]

Thus, in order to "allow" a decline to state voter the right to vote a partisan ballot at a primary election, when authorized by a political party, the following activities are required by statute to be performed:

- One-time activity to add information to the voter registration card stating that voters who declined to state a party affiliation shall be entitled to vote a party ballot at a primary election if the political party, by party rule duly noticed to the Secretary of State, authorizes that vote. (Elec. Code, § 2151.)

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[15] Elections Code section 2151, as amended by Statutes 2000, chapter 898.

[16] Elections Code sections 13102(b) and 13300(b).

[17] Elections Code section 3022.

[18] Elections Code section 3006, as amended by Statutes 2000, chapter 898. The claimant did not plead section 3006 in its test claim.

[19] Elections Code sections 3000 et seq. (added by Stats. 1994, ch. 920.)

[20] Elections Code section 13300(c), as amended by Statutes 2000, chapter 898.

- One –time activity to add the following information regarding the *Modified Primary* program to the notice and application to vote by mail:
  1. Language informing the voter that if he or she is not affiliated with a political party, the voter may request an absentee ballot for a particular political party for the primary election, if that political party has adopted a party rule, duly noticed to the Secretary of State, authorizing that vote.
  2. A toll-free telephone number, established by the Secretary of State, which the voter may call to access information to identify which political parties have adopted such a rule authorizing decline to state voters to vote their party ballot. The application shall also contain a check-off box with a statement that says "I am not presently affiliated with any political party. However, for this primary election only, I request a vote by mail ballot for the ___ Party." (Elec. Code, § 3006.)
- If authorized by the political party, and upon receipt of the application to vote by mail by decline to state voters, deliver to the decline to state voters the partisan ballot requested for the primary election. (Elec. Code, § 3009.)
- If authorized by the political party, provide partisan ballots at the polls to decline to state voters that request a partisan ballot for the primary election. (Elec. Code, § 13300(c).)

Staff recommends that the Commission include these activities in the parameters and guidelines.

In addition, the Department of Finance has noted the relationship between this program and the *Absentee Ballot* program (CSM 3713). Under the *Absentee Ballot* program, counties are eligible for reimbursement for the administration of absentee ballots based on a funding formula for the number of absentee ballots cast in the jurisdiction. The *Modified Primary* program does not reimburse counties for the administration of the absentee, or vote by mail ballots. Rather, the proposed activities are limited to those activities directly related to the *Modified Primary* program. Staff recommends that the proposed parameters and guidelines include language that states the following: "The costs for the administration of the *Absentee Ballot* program (CSM 3713) are not reimbursable under these parameters and guidelines."

2. 2011 change in law

In June 2010, the voters adopted Proposition 14, the "Top Two Primaries Act," effective January 1, 2011. The proposition amended article II, sections 5 and 6 of the California Constitution to provide for a "voter-nominated primary election" for each state elective office and congressional office in California. Voters can vote in the primary election for any candidate for a congressional or state elective office without regard to the political party affiliations of either the candidate or the voter. The *Modified Primary* rules continue to apply at any primary election for President of the United States or for a party committee.

The Legislature implemented Proposition 14 by amended Elections Code section 2151(b) to now states in relevant part the following:

The voter registration card shall inform the affiant that any elector may decline to state a political party reference, but no person shall be entitled to vote the ballot of any political party at any primary election for President of the United States or for a party committee unless he or she has disclosed the name of the party that he or she prefers or unless he or

she has declined to disclose a party preference and the political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote the ballot of that political party. The voter registration card shall further inform the affiant that any registered voter may vote for any candidate at a primary election for state elective office or congressional office, regardless of the disclosed party preference of the registrant or the candidate seeking that office or the refusal of the registrant or candidate to disclose a party preference. . . . [21]

Thus, the *Modified Primary* program no longer applies to primary elections for state elective or congressional offices. Staff recommends that the parameters and guidelines reflect this change in law.

3. Other activities requested by the claimant

The Commission may also authorize reimbursement for activities that are "the most reasonable methods of complying with the mandate" pursuant to section 1183.1(a)(4) of the Commission's regulations. Section 1183.1(a)(4) states the following:

> Reimbursable Activities. A description of the specific costs and types of costs that are reimbursable, including one-time costs and on-going costs, and a description of the most reasonable methods of complying with the mandate. "The most reasonable methods of complying with the mandate" are those methods not specified in statute or executive order that are necessary to carry out the mandated program.
>
> Approval of the most reasonable methods of complying with the mandate requires substantial evidence in the record, provided through oral or written testimony offered under oath or affirmation, to support the finding that the requested activity is necessary to carry out the mandated program.[22]

An analysis of the claimant's request for other activities follows below.

a) Conduct meetings to obtain information from the Secretary of State and with the county elections department

The claimant requests one-time reimbursement to:

- Conduct meetings in order to obtain information from the Secretary of State as to which political parties allowed voters who have not designated their political party to vote in primary elections of given political parties.
- Conduct meetings with the elections department in order to ascertain what activities were necessary to implement the legislation.

The Department of Finance opposes the first activity to conduct meetings to obtain information from the Secretary of State and requests that the activity be deleted. Finance states the following:

[21] Statutes 2009, chapter 1.

[22] Government Code section 17559(b); California Code of Regulations, Title 2, section 1187.5.

> Finance notes that there are only eight registered political parties in California; and that to communicate with these parties, or the Secretary of State, as to the party's allowances is easily obtained by phone calls or web-site accessing. Additionally, the California Association of Clerks and Elections Officials is an efficient and obvious conduit for relaying this information without holding a meeting.

The claimant has provided two declarations to respond to the objections of the Department of Finance. The declarations are signed under penalty of perjury by the County of Sacramento Assistant Registrar of Voters and Orange County's Registrar of Voters, who both declare the following:

> Elections Code, Section 13102, as found by the Commission, allows only those persons who have declined to state their party affiliation to vote in a partisan primary if the political party "by rule duly noticed to the Secretary of State, authorizes a person who has declined to state a party affiliation to vote the ballot of that political party." When the legislation was passed, it was unclear as to what political parties, if any, would allow decline to state voters to participate in their primary election. Meetings were necessary in order to obtain the information from the Secretary of State. Only if the Secretary of State received such a rule could persons vote in that party's primary. Neither the Counties nor the California Association of Clerks and Elections Officials (CACEO) are authorized to obtain this information directly from the political parties, as contended by the Department of Finance.
>
> Although this activity did not take long, it was required in order to properly implement the test claim legislation.

Elections Code sections 2151 and 13102(b) provide that a decline to state voter may vote a party ballot at any primary election if "the political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to state a party affiliation to vote the ballot of that political party." By the plain language of the statutes, if a political party authorizes decline to state voters to vote the ballot of that political party, the party notifies the Secretary of State's Office. There is no requirement to notify the California Association of Clerks and Elections Officials, as implied by the Department of Finance.

When the test claim was filed, the Secretary of State's Office filed comments supporting the approval of the test claim and explaining that the test claim statute "added layers of complexity and cost to the conduct of elections," and that meetings were conducted with counties to implement the statutes.

> [I]n order to plan for this new requirement, counties met together for months to hammer out the specifics of implementation. These meetings exposed issues of complexity and implementation that were then transmitted to all county election officials via printed implementation manuals as well as on-site visits with virtually every county to ensure uniform implementation throughout the state.
>
> I want to stress that this uniformity is absolutely critical to the State's interest in a fair election, and without the planning undertaken by the counties there could

> have been serious equal protection and other legal issues arising over this issue. The planning stage was essential.[23]

Based on the comments from the Secretary of State's Office and the declarations filed by the counties, staff finds that the two activities requested by the claimant were reasonable methods of carrying out the mandated program. Staff recommends that the Commission approve the following activity for one-time reimbursement: "Conduct a meeting with the Secretary of State's Office and a meeting with employees from the County elections department regarding the implementation of the *Modified Primary* program."

b) Develop internal policies and procedures

The claimant requests reimbursement for the one-time activity of developing internal policies and procedures. The Department of Finance does not object to this activity.

Staff finds that the activity of developing internal policies and procedures for the modified primary program is a reasonable method of complying with the mandate and is supported by the comments filed on the test claim by the Secretary of State's Office, which provided the following:

> Fifth, a part of the training process depends on the office staff in the Elections Department understanding the new law and being able to communicate it to the public and to potential pollworkers who call. Providing accurate information to the public and other customers in the election process is critical to the integrity of the process and the confidence the public feels in the conduct and administration of elections.[24]

Staff recommends that the Commission modify the claimant's proposed language to tailor the activity to the scope of the mandate as follows:

> Develop~~ed~~ new internal policies and procedures relating to the activities mandated by Elections Code sections 2151 and 13102(b) to allow voters who decline to state a party affiliation to vote a party ballot in a primary election if authorized by the political party to do so, and to add such information regarding the modified primary statutes to the voter registration card.

c) Redesign and republish the sample ballots

The claimant requests reimbursement to redesign and republish the sample ballot and the absentee ballot. The absentee ballot issue has been addressed under Issue 1.

The Department of Finance recommends that this activity by deleted for the following reasons:

> Finance notes that the sample ballot and absentee ballot for each election are completely different from the prior election. Finance points out that this is an ongoing part of an existing process. We also note that activities related to the absentee ballot should already be reimbursed through the "Absentee Ballot" mandate. The current reimbursement method for the "Absentee Ballot" claims

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[23] Secretary of State comments, filed July 29, 2002.

[24] Secretary of State comments, filed July 29, 2002.

> consist of several formulas based on the number of ballots rather than specific activities.

The claimant responded as follows:

> However, both the sample ballot and absentee ballot had to be redesigned on a one-time basis by creating and adding material that addressed the fact that those individuals who had declined to state their party affiliation could request a ballot for those parties whose rules allow those who decline to state to vote in their primary. This activity is a new activity strictly for the implementation of the test claim legislation and was not previously required to be included in the sample ballot or absentee ballot.[25]

Staff recommends that the Commission deny the request to redesign and republish the sample ballot. As stated above, the mandated activity here requires counties, pursuant to Elections Code section 2151, to add to the voter registration card a statement that voters who declined to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. Similar information is required to be included in the notice and application to vote by absentee or vote by mail ballots. There is no requirement in law to add this information to the sample ballot or provide notice of the modified primary rules in the sample ballot.

d) Send to each voter a sample ballot containing the information regarding the options available to the decline to state voters

The claimant requests reimbursement to send to each voter a sample ballot containing the information regarding the options available to the decline to state voters.

Staff recommends that the Commission deny this request. As indicated above, there is no requirement in law to add the *Modified Primary* information to the sample ballot.

Moreover, since at least 1994, Elections Code sections 13102 and 13300 have required counties to send a sample ballots before each primary election to all voters. The sample ballots are required to be substantively identical to the official ballots. The *Modified Primary* program did not change the law with respect to sample ballots.

Accordingly, staff recommends that the Commission deny the request for reimbursement to send to each voter a sample ballot containing the information regarding the options available to the decline to state voters.

e) Redesign and implement new election software

The claimant requests reimbursement to redesign and implement new election software. The Department of Finance does not object to the reimbursement of this activity. In comments to the test claim, the Secretary of State's Office stated that counties had to review and adapt "software and computer processes to count and tabulate votes."

Staff recommends that the Commission deny this request. Counting and tabulating votes is not required by the *Modified Primary* statutes. Nor has the claimant identified how this activity is

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[25] Declarations from the County of Sacramento Assistant Registrar of Voters and the Orange County Registrar of Voters.

reasonably necessary to comply with the activities mandated by the 2000 test claim statute to add information to the voter registration card and to allow a decline to state voter to vote a party ballot at a primary election.

In 2002, the Legislature added subdivision (d) to Elections Code section 13102 to require counties to maintain a record of which political party's ballot was requested under the modified primary program.[26] Redesigning software may be necessary to comply with the requirement in Elections Code section 13102(d), but there has been no mandate finding on the 2002 statute.

Thus, staff finds that the request to redesign and implement new election software goes beyond the scope of the mandate determined by the Commission and is not supported by any evidence in the record.

f) Inform and train poll workers regarding the options for the decline to state voters

Claimant requests reimbursement for the ongoing activity of informing and training poll workers before each primary election regarding the options for the decline to state voter.

The Department of Finance objects to the reimbursement of this activity, arguing that training is already a part of any election and not unique to the requirements of the *Modified Primary Election* mandate.

The claimant filed reply declarations from county elections officials, stating the following:

> However, what we are requesting is that portion of training which now must be given for each primary so that the poll workers know what to do with the decline to state voter. The decline to state voter is the most difficult voter to assist during the primary election due to this legislation. It has necessitated additional training on the subject of modified primary voting in order to eliminate any voter disenfranchisement due to confusion on the part of the poll worker. This is a necessary component of this test claim legislation and is clearing an on-going cost. Without this training, the poll workers will not be able to implement the intent of the modified primary.[27]

Elections Code section 13300(c) allows the decline to state voter to request to vote the ballot of a political party on election day. Based on the declarations filed by the claimant, staff finds that the activity to inform and train poll workers regarding the options available for decline to state voters is reasonably necessary to comply with the mandate to allow decline to state voters the right to vote a party ballot if the political party authorizes the vote, by party rule duly noticed to the Secretary of State.

This finding is supported by the declarations filed by the claimant, and the comments on the test claim filed the Secretary of State's Office that stated the following:

> Fourth, because voters would be treated differently at the polling place, depending on their political affiliation or lack of it, each county had to adapt its pollworker training programs and polling place procedures.

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[26] Statutes 2002, chapter 10 (SB 585).

[27] Declarations of Alice Jarboe, Assistant Registrar of Voters, County of Sacramento; and Neal Kelley, Registrar of Voters, County of Orange.

> This is not an insignificant task. On the contrary, it is a very difficult task. No matter what procedures are written down and distributed to implement a new law, they are of no use whatsoever unless the people who implement them understand them and are equipped to apply them on election day.
>
> The universe of pollworkers is made up of many elderly persons and others who have followed a given set of procedures for years, and modifying their behavior is both critical and requires repetition and patience. If this training does not take place, or is not successful, the potential for voters to receive the wrong ballot is unacceptably high and could result in legal exposure and jeopardy for the outcome of the election.
>
> This procedure also had the effect of discouraging people from becoming pollworkers because it added one more level of complexity to an already long and difficult day for a population of largely elderly persons. The result was to make it more difficult to recruit and retain pollworkers, requiring more time, resources, and money to make sure they polls were open on election day and staffed by people who could serve the customers (voters).[28]

Staff further recommends that the language proposed by the claimant be clarified with the following underlined text:

> Inform and train poll workers before each primary election regarding the option~~s~~ for the decline to state voter to vote a party ballot if authorized, by party rule duly noticed to the Secretary of State, by the political party.

Accordingly, staff recommends that the Commission approve this activity for ongoing reimbursement.

g) Hand process absentee voter requests and enter the requested partisan ballot information from the post card into the computer software database

The claimant requests reimbursement to hand process absentee voter requests and to enter the requested partisan ballot information from the post card into the computer software database. The Department of Finance object to this activity, arguing that the *Absentee Ballot* mandate already provides reimbursement for costs associated with the increase in absentee ballot filing.

In response to the Department of Finance comments, the claimant clarifies that it is not seeking reimbursement for the increase in absentee ballots. Rather, what is being requested is the activity to "key into" the computer the decision of the decline to state voter to vote a partisan ballot in order to ensure that the proper ballot is delivered. The declarations filed by the claimant states the following:

> The absentee voter can vote in different parties in different primaries. This activity is not related to the increase in absentee ballots to be voted, but recognizes that there is an additional activity to make sure that each decline to state voter who chooses to vote absentee in a primary receives the proper ballot.[29]

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[28] Secretary of State comments filed July 24, 2002.

[29] Declarations of Alice Jarboe, Assistant Registrar of Voters, County of Sacramento; and Neal Kelley, Registrar of Voters, County of Orange.

Based on the declarations filed by the claimant, staff finds that entering into the computer a request of the decline to state voter to vote a partisan ballot at a primary election following the receipt of the vote by mail application sent pursuant to Elections Code section 3006 in order to ensure that the proper ballot is delivered, is an activity that is reasonably necessary to comply with the mandate to allow the decline to state voter the right to vote a partisan ballot under the *Modified Primary* program. Staff recommends that the Commission include this activity in the parameters and guidelines.

4. Summary of proposed reimbursable activities

Based on the above analysis, staff recommends that Section IV. of the parameters and guidelines state the following:

A. One-Time Activities

1. Conduct a meeting with the Secretary of State's Office and a meeting with employees from the County elections department regarding the implementation of the *Modified Primary* program.
2. Develop new internal policies and procedures relating to the activities mandated by Elections Code sections 2151 and 13102(b) to allow voters who decline to state a party affiliation to vote a party ballot in a primary election if authorized by the political party to do so, and to add such information regarding the modified primary statutes to the voter registration card.
3. Add information to the voter registration card stating that voters who decline to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes that vote. (Elec. Code, § 2151.)
4. Add the following information regarding the *Modified Primary* program to the notice and application to vote by mail:
   a. Language informing the voter that if he or she is not affiliated with a political party, the voter may request an absentee ballot for a particular political party for the primary election, if that political party has adopted a party rule, duly noticed to the Secretary of State, authorizing that vote.
   b. A toll-free telephone number, established by the Secretary of State, which the voter may call to access information to identify which political parties have adopted such a rule authorizing decline to state voters to vote their party ballot. The application shall also contain a check-off box with a statement that says "I am not presently affiliated with any political party. However, for this primary election only, I request a vote by mail ballot for the ___ Party." (Elec. Code, § 3006.)

B. On-going Activities

From January 1, 2001 through December 31, 2010, these activities apply to all primary elections. Beginning January 1, 2011, these activities apply only to primary elections for President of the United States or for a party committee and do not apply to primary elections for state elective or congressional offices. (Proposition 14, June 2010.)

1. If authorized by the political party, and upon receipt of the application to vote by mail by decline to state voters, deliver to the decline to state voters the partisan ballot requested for the primary election. (Elec. Code, § 3009.)

   This activity includes and reimbursement is authorized for entering into the computer a request from the decline to state voter to vote a partisan ballot at a primary election following the receipt of the vote by mail application sent pursuant to Elections Code section 3006 in order to ensure that the proper ballot is delivered.[30]

2. If authorized by the political party, provide partisan ballots at the polls to decline to state voters that request a partisan ballot for the primary election. (Elec. Code, § 13300(c).)

3. Inform and train poll workers before each primary election regarding the option for the decline to state voter to vote a party ballot if authorized, by party rule duly noticed to the Secretary of State, by the political party.

V. Conclusion and Staff Recommendation

Staff recommends that the Commission:

- Adopt the proposed parameters and guidelines, beginning on page 22.
- Authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

[30] The costs for the administration of the *Absentee Ballot* program (CSM 3713), as required by Statutes 1978, chapter 77 and Statutes 2002, chapter 1032, are not reimbursable under these parameters and guidelines.

STAFF'S PROPOSED PARAMETERS AND GUIDELINES

Elections Code Sections 2151 and 13102(b)

Statutes 2000, Chapter 898 (SB 28)

Modified Primary Election (01-TC-13)

County of Orange, Claimant

I. SUMMARY OF THE MANDATE

This program deals with changes to the partisan primary system in California. In 1996 and earlier, California had a closed primary system in which registered voters who were declared members of any political party could only vote for members of their own party in partisan primary contests, and any voters who declined to state a party affiliation could only vote on non-partisan matters at a primary election. This changed in 1996 when Proposition 198, the "Open Primary Act," was approved by the California voters. However, Proposition 198 was challenged and litigated up to the United States Supreme Court in *California Democratic Party v. Jones* (2000) 530 U.S. 567, which found the law unconstitutional.

Following the court's decision, the test claim statute was enacted (Statutes 2000, chapter 898) and largely repealed and reenacted the code sections that had been amended by Proposition 198 – generally restoring the language to the law that was in place immediately prior to Proposition 198. However, by amending a few of the Elections Code sections, the test claim statute altered the prior closed primary system to one in which those voters who decline to state a political party affiliation may choose any political party's partisan primary ballot, if that political party allows it. This created a form of open primary.

The Commission concluded that Statutes 2000, chapter 898, as it amended Elections Code sections 2151 and 13102(b), mandates a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following specific new activities:

- Add information to the voter registration card stating that voters who declined to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, § 2151.)
- Allow voters who declined to state a party affiliation to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes such a person to do so. (Elec. Code, §§ 2151 and 13102(b).)

The remaining allegations pled in the test claim were denied by the Commission.

II. ELIGIBLE CLAIMANTS

Any county, or city and county, that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of Orange filed the test claim on April 18, 2002, establishing eligibility for reimbursement beginning July 1, 2000. However, the operative and effective date of the test claim statute was January 1, 2001. Therefore, costs incurred for compliance with the mandated activities are reimbursable on or after January 1, 2001.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a local agency may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. In the event revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a local agency filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Gov. Code §17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any given fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, time sheets, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, calendars, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise reported in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for the increased costs of the reimbursable activities identified below.

A. One-Time Activities

1. Conduct a meeting with the Secretary of State's Office and a meeting with employees from the County elections department regarding the implementation of the *Modified Primary* program.

2. Develop new internal policies and procedures relating to the activities mandated by Elections Code sections 2151 and 13102(b) to allow voters who decline to state a party affiliation to vote a party ballot in a primary election if authorized by the political party to do so, and to add such information regarding the modified primary statutes to the voter registration card.

3. Add information to the voter registration card stating that voters who decline to state a party affiliation shall be entitled to vote a party ballot if the political party, by party rule duly noticed to the Secretary of State, authorizes that vote. (Elec. Code, § 2151.)

4. Add the following information regarding the *Modified Primary* program to the notice and application to vote by mail:

   a. Language informing the voter that if he or she is not affiliated with a political party, the voter may request an absentee ballot for a particular political party for the primary election, if that political party has adopted a party rule, duly noticed to the Secretary of State, authorizing that vote.

   b. A toll-free telephone number, established by the Secretary of State, which the voter may call to access information to identify which political parties have adopted such a rule authorizing decline to state voters to vote their party ballot. The application shall also contain a check-off box with a statement that says "I am not presently affiliated with any political party. However, for this primary election only, I request a vote by mail ballot for the ___ Party." (Elec. Code, § 3006.)

B. On-going Activities

From January 1, 2001 through December 31, 2010, these activities apply to all primary elections. Beginning January 1, 2011, these activities apply only to primary elections for President of the United States or for a party committee and do not apply to primary elections for state elective or congressional offices. (Proposition 14, June 2010.)

1. If authorized by the political party, and upon receipt of the application to vote by mail by decline to state voters, deliver to the decline to state voters the partisan ballot requested for the primary election. (Elec. Code, § 3009.)

   This activity includes and reimbursement is authorized for entering into the computer a request from the decline to state voter to vote a partisan ballot at a primary election following the receipt of the vote by mail application sent pursuant

to Elections Code section 3006 in order to ensure that the proper ballot is delivered.[31]

2. If authorized by the political party, provide partisan ballots at the polls to decline to state voters that request a partisan ballot for the primary election. (Elec. Code, § 13300(c).)
3. Inform and train poll workers before each primary election regarding the option for the decline to state voter to vote a party ballot if authorized, by party rule duly noticed to the Secretary of State, by the political party.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for the reimbursable activities identified in section IV of this document. Each reimbursable cost must be supported by source documentation as described in section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services during the period covered by the reimbursement claim. If the contract services were also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and invoices with the claim and a description of the contract scope of services.

[31] The costs for the administration of the *Absentee Ballot* program (CSM 3713), as required by Statutes 1978, chapter 77 and Statutes 2002, chapter 1032, are not reimbursable under these parameters and guidelines.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include: (1) the overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in 2 CFR Part 225 (Office of Management and Budget (OMB) Circular A-87). Claimants have the option of using 10% of labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distributions base may be: (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.); (2) direct salaries and wages; or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. the allocation of allowable indirect costs (as defined and described in 2 CRF Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) shall be accomplished by: (1) classifying a department's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected; or

2. the allocation of allowable indirect costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) shall be accomplished by: (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[32] is subject to the initiation of an audit by the State Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsetting revenues the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any federal, state or non-local source shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1)(A), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon the request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and

[32] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

guidelines, the Commission shall direct the Controller to modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d)(1), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The statement of decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the statement of decision, is on file with the Commission.

EXHIBIT F
Received
October 4, 2011
Commission on
State Mandates

EDMUND G. BROWN JR. • GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

October 4, 2011

Mr. Drew Bohan
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Mr. Bohan:

County of Orange Request to Amend the Parameters and Guidelines of the Modified Primary Election Mandate

The Department of Finance has reviewed the draft staff analysis of the proposed Parameters and Guidelines presented by the County of Orange (claimant) asking the Commission to determine whether specified costs incurred for activities associated are reimbursable state mandated costs (Claim No. CSM 01-TC-13 "Modified Primary Election").

As a result of our review, it is unclear how the one-time reimbursable activities 4a and 4b, related to the vote-by-mail program, are reasonably necessary for the performance of the activities found reimbursable in the statement of decision. It does not appear that the modifications to the vote-by-mail notice and application are necessary to allow decline-to-state voters to vote a party ballot. Voters are already currently made aware of their right to do so through information on the voter registration card. We recommend that the Commission further review how these activities are reasonably necessary to comply with the mandate.

Pursuant to section 1181.2, subdivision (c)(1)(E) of the California Code of Regulations, "documents e-filed with the Commission need not be otherwise served on persons that have provided an e-mail address for the mailing list."

If you have any questions regarding this letter, please contact Jeff Carosone, Principal Program Budget Analyst at (916) 445-8913.

Sincerely,

Nona Martinez

NONA MARTINEZ
Assistant Program Budget Manager

Enclosure

Received
October 4, 2011
Commission on
State Mandates

Enclosure A

DECLARATION OF
DEPARTMENT OF FINANCE
CLAIM NO. CSM 01-TC-13

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

10-3-11
at Sacramento, CA

Jeff Carosone

EXHIBIT G
Received
September 28, 2011
Commission on
State Mandates

JOHN CHIANG

California State Controller

September 28, 2011

Mr. Drew Bohan
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: **Draft Staff Analysis, Proposed Parameters and Guidelines, and Hearing Date**
Modified Primary Election, 01-TC-13
Election Code Section 2151 and 13102(b)
Statues 2000, Chapter 898
County of Orange, Claimant

Dear Mr. Bohan:

The State Controller's Office has reviewed the draft staff analysis and the proposed parameters and guidelines for the Modified Primary Election program. The SCO agrees with the draft staff analysis and proposed parameters and guidelines.

Should you have any questions regarding the above, please contact Dennis Speciale at (916) 324-0254, or e-mail to dspeciale@sco.ca.gov.

Sincerely,

Jill Kanemasu

JILL KANEMASU, Chief
Bureau of Payments

MAILING ADDRESS: P.O. Box 942850, Sacramento, CA 94250
STREET ADDRESS: 3301 C Street, Suite 740, Sacramento, CA 95816

EXHIBIT H

Executive Office
Archives
Business Programs
Business Filings
Notary Public
Uniform Commercial Code
Elections
Information Technology
Management Services
Political Reform

BILL JONES
Secretary of State
State of California

ELECTIONS
1500 - 11th Street, Room 590
Sacramento, CA 95814
P.O. Box 944260
Sacramento, CA 94244-2600
(916) 657-2166
Voter Registration Hotline
1-800-345-VOTE
For Hearing and Speech Impaired
Only 1-800-833-8683
(916) 653-3214 FAX
Internet: www.ss.ca.gov

July 24, 2002

Shirley Opie, Assistant Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, California 95814

RECEIVED
JUL 31 2002
COMMISSION ON
STATE MANDATES

RE: **Modified Primary Election, 01-TC-13**

Dear Ms. Opie:

Thank you for your letter of May 2, 2002 requesting the Secretary of State review of the test claim referenced above.

I apologize for the late response. However, given the importance of this issue to the elections community, I want to be sure that you are aware of the opinions of the Secretary of State's Office on this claim. .

Chapter 898, Statutes of 2000 had a profound affect on the conduct of elections in California. While the language of the bill sounds simple --- permit "decline to state" voters to vote in party primary elections, if the political party allows it -- the actual administration of this requirement added layers of complexity and cost to the conduct of elections.

Specifically, in order to plan for this new requirement, counties met together for months to hammer out the specifics of implementation. These meetings exposed issues of complexity and implementation that were then transmitted to all county election officials via printed implementation manuals as well as on-site visits with virtually every county to ensure uniform implementation throughout the state.

I want to stress that this uniformity is absolutely critical to the State's interest in a fair election, and without the planning undertaken by the counties there could have been serious equal protection and other legal issues arising over this issue. The planning stage was essential.

"Ensuring the integrity of California's election process."

Second, once the uniform application of procedures was determined, each county was required to review and adapt printed materials, as well as software and computer processes to count and tabulate votes. This included sample ballots, mailed to every voter, applications for absentee ballots, and other materials voters rely on to receive election information, as well as all the software required to lay out and design ballots, count votes, aggregate vote totals, and produce a written record of vote results.

Third, the new procedure in the bill required specific notice to voters of the new options for "decline to state" voters. These materials had to be prepared and distributed.

Fourth, because voters would be treated differently at the polling place, depending on their political affiliation or lack of it, each county had to adapt its pollworker training programs and polling place procedures.

This is not an insignificant task. On the contrary, it is a very difficult task. No matter what procedures are written down and distributed to implement a new law, they are of no use whatsoever unless the people who implement them understand them and are equipped to apply them on election day.

The universe of pollworkers is made up of many elderly persons and others who have followed a given set of procedures for years, and modifying their behavior is both critical and requires repetition and patience. If this training does not take place, or is not successful, the potential for voters to receive the wrong ballot is unacceptably high and could result in legal exposure and jeopardy for the outcome of the election.

This procedure also had the effect of discouraging people from becoming pollworkers because it added one more level of complexity to an already long and difficult day for a population of largely elderly persons. The result was to make it more difficult to recruit and retain pollworkers, requiring more time, resources, and money to make sure the polls were open on election day and staffed by people who could serve the customers (voters).

Fifth, a part of the training process depends on the office staff in the Elections Department understanding the new law and being able to communicate it to the public and to potential pollworkers who call. Providing accurate information to the public and other customers in the election process is critical to the integrity of the process and the confidence the public feels in the conduct and administration of elections.

In short, it is the belief of the Office of the Secretary of State that Chapter 898, Statutes of 2000 does constitute a mandate that is reimbursable by the State.

If you have any questions, please do not hesitate to contact me directly at 916/653-3228.

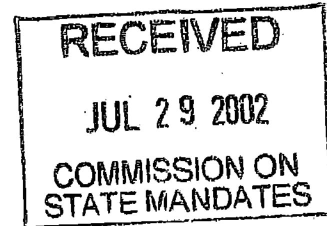
Sincerely,

JOHN MOTT-SMITH
Chief, Elections Division

CC: MS. Pam Stone
DGS Maximus
4320 Auburn Blvd., Suite 2000
Sacramento, California 95841

Acc/chapter898-dts-072

RESPONSE TO DEPARTMENT OF FINANCE



Modified Primary Election
01-TC-13
County of Orange, Claimant
Chapter 898, Statutes of 2000 (SB 28)

The County of Orange is in receipt of the comments issued by the Department of Finance, by its letter to Paula Higashi dated June 28, 2002. The County of Orange disagrees with each and every point made by the Department of Finance. This response will address each point by the Department of Finance in turn.

1, 2 and 3 – Planning meetings in order to obtain information from the Secretary of State (SOS) as to which political parties allow voters who have not designated their political party to vote in primary elections. There was a toll free number to obtain information from the Secretary of State. However, it took substantial effort from local elections staff and the Secretary of State's Office to arrive at the point to know what each political party was planning, and what information should be included in the Secretary of State's toll free number.

Due to the fact that there are 58 counties doing elections in 58 different ways with 58 varying interpretations of statute, the California Association of Clerks and Election Officials (hereinafter "CACEO") designated several members of the legislative subcommittee of the association to meet and develop procedures which were to be used statewide. I was the chair of that committee, and I believe the only meeting which I was unable to attend was one held on September 11, 2001, as I could not get my flight to Redding, California, where that meeting was held.

The committee held several meetings, often monthly, which were open to all counties and vendors in order to figure out the details as to how this matter was to proceed. Present at all meetings was legal staff from the Secretary of State's Office, Steve Trout. When changing the way in which the voters were to be able to cast their ballots, it was important to make certain that no laws or constitutional rights were violated while implementing the test claim legislation properly.

Once all of the procedures were finalized as a result of these meetings, we developed a training manual. Two Registrars of Voters, two Assistant Registrars and a legal counsel from the Secretary of State's Office held five training sessions throughout the state in an order to train election staff from each county on the requirements of the test claim legislation. As the test claim legislation was confusing, it was necessary to make sure that all staff throughout the state were trained. My staff attended the Southern California training session, and I participated in all but the September 11th training.

Thus, whereas a toll free number was available to call the Secretary of State's Office, much planning was conducted prior to the institution of that number, and training

on the confusing requirements of the test claim legislation was held in order to obviate problems which could affect the conduct of the election.

4 – Redesign and republication of the sample ballot and absentee voter application. Given the change wrought by the test claim legislation, it was necessary to review and redesign the sample ballot and absentee voter application once it was determined who gets to vote in what primary. Perhaps some redesign would have been necessary once the Supreme Court found that Proposition 198 was unconstitutional, but the ramifications of the test claim legislation were such that everything had to be reviewed and some redesign was necessary.

5 – Redesign and implement election software. This is not a one-time activity, as refinements continued on through the election. The County of Orange is fortunate in that its software vendor includes redesign to take into account changes in statute as part of their annual lease cost; however, as this is a test claim which affects all counties, other vendors may not accommodate legislative changes without cost.

6 – Additional trained poll workers. While the test claim legislation did not require an additional poll worker, several counties found it necessary to hire additional poll workers due to the complication of the ballot issue. If the voter was registered with a party, they received one type of ballot. If the voter was registered non-partisan and requested a partisan ballot, they were provided one as long as the requested party had agreed to allow non-partisans to vote in their election. However, the Republicans and Democrats still did not allow non-partisans to vote for their central committee candidates. Thus, as a result, there were many more decisions for poll workers to make, and some counties found it necessary to hire one extra poll worker to become an expert in this issue and take care of questions which arose at the poll.

7 – Additional staff to process the absent voter requests manually. As complicated as the ballot processing was at the polling place, it was even more complicated with absentee ballots. Prior to this legislation, when a voter's application for an absentee ballot was keyed, a mailing label came out which indicated the voter's party affiliation and ballot style. Under the test claim legislation, we had to take time to review the application to determine if the voter was a non-partisan voter who wanted a partisan ballot. Thus, we had to take additional time to determine if the voter was in fact registered non-partisan, and therefore entitled to a partisan ballot, and then make the final determination if the party the voter had requested allowed non-partisan voters to vote their party's ballot. Many voters who were already registered with a party requested another party's ballot, and this required much staff time and explanation.

8 – Training, including training for trainers as well as new and existing staff. This is clearly not a one-time issue. Election departments typically use much extra-help staff for an election. These are employees who do not have civil service status with the county, and are hired just for the period of the election. Additionally, temporary agency staff are also hired for the elections. These individuals are not vested in their employment, and as a result, their employment is not stable, and there is high turnover, and new staff must be

trained. During a primary election, Orange County employs up to 40 extra help staff just to handle absentee ballots alone. Generally, with every election, the extra help employees have never worked an election previously. These individuals need training. Additionally, other units within the elections department hire extra help employees that must be trained, as they are giving out information to the public and are handling critical processing. This training occurs only during primary elections, but occurs for every primary election on the requirements of this test claim legislation because the political parties that choose to allow participation by non-partisan voters can change for each primary election. Additionally, permanent employees needed training on the requirements of this legislation, and will need refresher training prior to the next primary, as this is a function which is not performed on a daily basis, which would reinforce the new requirements and processes.

9 – Update training programs and manuals. The County of Orange concurs that only the incremental costs associated with this test claim legislation should be claimed. However, this may not be a one-time activity. Each political party has the option of changing their decision as to whether to allow non-partisan voters to participate in the modified primary. Thus, the training materials will be needed to be updated each time any political party, or a new political party, makes or changes their determination as to whether a non-partisan voter may vote in that party's primary.

10 – Costs to put out a press release to inform the public of the changes. The County of Orange concurs that there is no mandate within the test claim legislation to inform the public of changes. However, the education of the public is imperative for the conduct of elections. The more educated the voter, the fewer questions and problems which elections staff must address. Confused voters often become angry, and consume more staff time. As it is generally less costly to get public information out on confusing issues such as the test claim legislation than answering each person's telephone call, this item constitutes the most reasonable method to comply with the mandate, pursuant to Title 2, California Code of Regulations, Section 1183.1.

11 – Staff time to answer an increase in the number of telephone calls and inquiries from voters and the media. The Department of Finance merely states that there is no justification for this activity. However, it is not saddled with the requirement of heavy public contact. This activity was a major issue in March. Voters received their sample ballot pamphlets and/or absentee ballots and became incensed that they were not being allowed to vote for whomever they chose, particularly after the passage of Proposition 198. These individuals were insistent that they had been issued the incorrect ballot at the polling place. These individuals were also upset when the person in front of them was able to obtain the ballot of whatever party that person chose. Some individuals who received a non-partisan sample ballot pamphlet, as they had never registered as a member of a political party were insistent that they had not registered as non-partisan, and were upset that they had no candidates on their sample ballot. All of these issues had to be addressed, both when the sample ballots were mailed, as well as at the polling place. This confusion was not caused by the claimant, but by the problems created by the test

claim legislation and the court decision finding that Proposition 198 was unconstitutional. Thus, there is substantial justification for this activity.

12 – Update the sample ballot and absentee voter education materials. The County of Orange agrees that the information is updated each election. However, more work was required because of the changes caused by the test claim legislation. We believe that only the incremental increase in these efforts should be reimbursable.

13 – Increase in the number of ballot types and the number of overall ballots. With both the Republican and Democratic parties not allowing non-partisan voters to vote on their central committee candidates, counties were required to print a separate ballot without any central committee candidates solely for the non-partisan voters. As we had no way of knowing how many non-partisan voters were going to opt to vote a partisan ballot, we had to order additional ballots to prepare for non-partisan voters so they could either vote a party or the non-partisan ballot. This increase in ballot types and number of overall ballots applied both to polling places as well as to absentee voters. This additional cost would not have been incurred but for the test claim legislation. The contention of the Department of Finance is misplaced and demonstrates a lack of knowledge of election process.

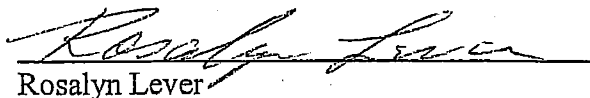
14 – Increase in postage cost for mailing permanent and absentee voter information. The contention of the Department of Finance that there is no justification for this activity is misplaced. This legislation required that we mail a notice to each permanent absentee voter and each mailed ballot precinct voter who registered as non-partisan. The notice advised these voters of their option to vote a party's ballot. In addition to the postage cost, we had to print the postcards as well that were mailed to the non-partisan voters.

In conclusion, the County of Orange respectfully disagrees with the Department of Finance, and suggests that the Commission consult with the Secretary of State's Office regarding the implementation of the test claim legislation.

CERTIFICATION

I, Rosalyn Lever, state:

I am the Registrar of Voters of the County of Orange. In my capacity as Registrar, I have personal knowledge of the facts stated herein, and those facts are true and correct. I declare, under penalty of perjury, that the foregoing is true and correct, and that this declaration is executed this 24th day of July, 2002 at Santa Ana, California.



Rosalyn Lever

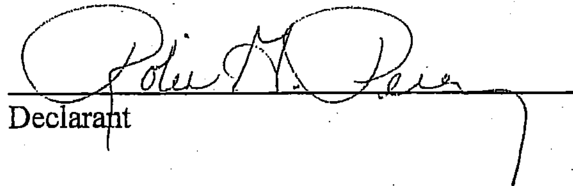
PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On July 29, 2002 I served the Response to Department of Finance, *Modified Primary Election,* 01-TC-13, Chapter 898, Statutes of 2000, by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the Untied State mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 29th day of July, 2002 at Sacramento, California.



Declarant

Ms. Glenn Haas, Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Mr. James Lombard, Principal Analyst (A-15)
Department of Finance
915 L Street
Sacramento, CA 95814

Mr. Andy Nichols
Centration, Inc.
12150 Tributary Point Drive, Suite 150
Gold River, CA 95670

Legislative Analyst's Office
Attention: Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Rosalyn Lever, Registrar of Voters
County of Orange
P. O. Box 11298
Santa Ana, CA 92711

John Mott-Smith
Chief, Elections Division
Secretary of State's Office
1500 11th Street
Sacramento, CA 95814

Dr. Carol Berg
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814

Keith Peterson
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

HEATHER PRESTON, Plaintiff and Appellant,
v.
STATE BOARD OF EQUALIZATION, Defendant and Respondent.

No. S083632.

Supreme Court of California
Apr. 2, 2001.

SUMMARY

After an artist entered into written agreements to provide artwork for use as book illustrations and rubber stamp designs, the State Board of Equalization conducted a sales and use tax audit of her business, and determined that the artist owed sales tax and interest based on the amount of royalties she received from the agreements during the audit period. The artist paid the taxes, and after the board denied her claim for a refund, she filed a refund action. The trial court found that the items of artwork were tangible personal property and entered judgment for the board. (Superior Court of the City and County of San Francisco, No. 979165, Joseph A. Desmond, Judge.) The Court of Appeal, 1st Dist., Div. 3, No. A081437, affirmed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded for further proceedings. The court initially held that although plaintiff, in her refund action, failed to explicitly raise the contention that the transactions were nontaxable transfers of copyrights under federal law, that contention was intertwined with and clearly implied from the contentions in her refund claim, and thus was sufficiently raised for purposes of exhausting her administrative remedies. The court also held that plaintiff's agreements to temporarily transfer her artwork, in order to permit its reproduction, were not completely exempt from taxation, since they created transfers of tangible property for consideration (Rev. & Tax. Code, § 6051). Any transfer of tangible property that is physically useful in the manufacturing process is subject to sales tax even though the true object of the transfer is an intangible property right like a copyright. However, the court further held that plaintiff's agreements to temporarily transfer her artwork were technology transfer agreements that fell within the purview of Rev. & Tax. Code, §§ 6011, subd. (c)(10), and 6012, subd. (c)(10) (exempting from taxation the amount charged for intangible personal property, specifically, a patent or copyright interest, transferred pursuant to a technology transfer agreement). These statutes unambiguously establish that the value of a patent or copyright interest transferred pursuant to a technology transfer agreement is not subject to sales tax even if the agreement also transfers tangible personal property. Finally, the court held that the statutes applied even though the legislation did not become operative until after the end of the artist's audit period. Thus, only that portion of the artist's income attributable to the agreements' temporary transfer of tangible artwork was taxable. (Opinion by Brown, J., with George, C. J., Baxter, and Chin, JJ., concurring. Dissenting opinion by Kennard, J., with Mosk and Werdegar, JJ., concurring (see p. 226).)

HEADNOTES

Classified to California Digest of Official Reports

(**1a**, **1b**) Taxpayers' Remedies § 2--Exhaustion of Administrative Remedies--Sufficiency of Implied Contentions Raised in Refund Claims.

A taxpayer, who was assessed taxes and interest on royalties she received from certain agreements to provide artwork for use in books and rubber stamp designs, sufficiently exhausted her administrative remedies with respect to a contention based on federal copyright law, even though she did not explicitly allege that the transactions at issue were nontaxable transfers of copyrights, in her refund claim before the State Board of Equalization. Her claim did contend that the transactions involved only the transfer of the right of reproduction and not the sale of original artwork, and this sufficiently conveyed her reliance on federal copyright law, since the right to reproduce copyrighted work is one of the rights given to copyright owners by statute (17 U.S.C. § 106). Second, the taxpayer's discussion of Cal. Code Regs., tit. 18, § 1501 (exemption from sales tax for manuscript submitted for publication), adequately raised the copyright issue, since she implicitly alleged that her transactions were not taxable because they involved only the transfer of nontaxable copyrights. The absence of the word “copyright” or an explicit reference to federal copyright law was immaterial. The taxpay-

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er's contention that the transactions were nontaxable transfers of copyrights was intertwined with and clearly implied from the contentions in her refund claim.

(**2**) Taxpayers' Remedies § 2--Exhaustion of Administrative Remedies--Framing of Issues for Litigation.

Before filing suit for a tax refund, a taxpayer must present a claim for refund to the State Board of Equalization (Rev. & Tax. Code, § 6932). The claim must be in writing and must state the specific grounds upon which the claim is founded (Rev. & Tax. Code, § 6904, subd. (a)). The purpose of these statutory requirements is to ensure that the board receives sufficient notice of the claim and its basis. The board then has an opportunity to correct any mistakes, thereby conserving judicial resources. Any lawsuit against the board must be based on the grounds set forth in the refund claim (Rev. & Tax. Code, § 6933). It may not include issues not raised in the claim. The refund claim thus frames and restricts the issues for litigation. Indeed, courts are without jurisdiction to consider grounds not set forth in the claim. However, a taxpayer need not expressly raise a contention in order to meet the statutory exhaustion requirement. Where the contention is intertwined with contentions that were expressly raised in the refund claim, a court may consider that contention even though the claim did not explicitly raise it. That is, unstated contentions that are clearly implied from contentions that were expressly raised in a refund claim are sufficiently stated for purposes of exhaustion.

(**3a**, **3b**) Sales and Use Taxes § 14--Sales Tax--Transactions Subject to Tax--Lease of Artwork for Use in Manufacturing Process--As Transfer of Tangible Property.

An artist's agreements to temporarily transfer her artwork, in order to permit its reproduction, were not completely exempt from taxation, since they created transfers of tangible property for consideration. California law imposes a retail tax on the gross receipts from the sale of all tangible personal property (Rev. & Tax. Code, § 6051). "Tangible personal property" means personal property that may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses (Rev. & Tax. Code, § 6016). Any transfer of tangible property that is physically useful in the manufacturing process is subject to sales tax even though the true object of the transfer is an intangible property right like a copyright. Since the agreements transferred the artwork for use in a manufacturing process performed outside the artist's personal or business premises, they fell within the statutory definition of a taxable lease (Rev. & Tax. Code, §§ 6006, subd. (g), 6006.3). Like printing plates, master recordings and film negatives, the tangible artwork was physically useful and essential in the ultimate production of books and rubber stamps incorporating the copyright in the artwork. As such, the artwork was not like a manuscript, which only furnishes verbal guidance and is not essential to the manufacturing process.

(**4**) Sales and Use Taxes § 15--Sales Tax--Transactions Subject to Tax-- Exemptions and Exclusions--Intangible Personal Property.

Intangible personal property is not subject to sales tax. Such property is generally defined as property that is a right rather than a physical object. Thus, for purposes of the law of taxation, intangible property is defined as including personal property that is not itself intrinsically valuable, but that derives its value from what it represents or evidences.

(**5a**, **5b**, **5c**, **5d**) Sales and Use Taxes § 15--Sales Tax--Transactions Subject to Tax--Lease of Artwork for Use in Manufacturing Process--Exemption for Transfer Pursuant to Technology Transfer Agreement.

An artist's agreements to temporarily transfer her artwork, in order to permit its reproduction, were technology transfer agreements that fell within the purview of Rev. & Tax. Code, §§ 6011, subd. (c)(10), and 6012, subd. (c)(10), which exempt from taxation the amount charged for intangible personal property, specifically, a patent or copyright interest, transferred pursuant to a technology transfer agreement. The statutes broadly define a technology transfer agreement as any agreement under which a person who holds a patent or copyright interest assigns or licenses to another person the right to make and sell a product or to use a process that is subject to the patent or copyright interest. Read as a whole and giving the statutory language its ordinary meaning, the statutes unambiguously establish that the value of a patent or copyright interest transferred pursuant to a technology transfer agreement is not subject to sales tax even if the agreement also transfers tangible personal property. The lone trigger for this exemption is the presence of a technology transfer agreement. Pursuant to the agreements, the transferees manufactured and sold products-i.e., books or rubber stamps-"subject to" the

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transferred copyright interest. The Legislature broadly defined technology transfer agreement to encompass the transfer of any copyright interest which, by definition, includes copyrights in artwork. (Disapproving *A & M Records, Inc. v. State Bd. of Equalization* (1988) 204 Cal.App.3d 358 [250 Cal.Rptr 915], and *Capitol Records, Inc. v. State Bd. of Equalization* (1984) 158 Cal.App.3d 582 [204 Cal.Rptr. 802] to the extent they conflict with Rev. & Tax. Code, §§ 6011, subd. (c)(10), and 6012, subd. (c)(10), and also stating that those provisions supersede *Simplicity Pattern Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 900 [167 Cal.Rptr. 366, 615 P.2d 555].)
[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 296.]

(**6**) Statutes § 30--Construction--Language--Plain Meaning Rule--Legislative Intent.

When construing a statute, the court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. The words of the statute are the starting point. If the ordinary meaning of the language is clear and unambiguous, then the court need look no further. Otherwise, the court may resort to extrinsic sources, such as the legislative history.

(**7**) Patents § 2--Definitions and Distinctions--Patents Versus Copyright:Copyright and Literary and Artistic Property § 6--Rights Protected.

A patent gives an owner the exclusive right to manufacture, use, and sell his or her invention. Thus, the license of a patent interest, by definition, gives the licensee the right to make a product or to use a process. In contrast, copyright protects originality rather than novelty or invention, conferring only the sole right of multiplying copies. Thus, the license of a copyright interest can only give the licensee the right to reproduce the copyrighted material in a product-and not the right to make and sell a product.

(**8**) Administrative Law § 29--Legislation or Rulemaking--Effect and Validity of Regulations.

Although a regulation enacted by a state administrative agency is entitled to great weight, courts will not apply that regulation unless it (1) is within the scope of the authority conferred, and (2) is reasonably necessary to effectuate the purpose of the statute.

(**9a**, **9b**, **9c**, **9d**) Sales and Use Taxes § 15--Sales Tax--Transactions Subject to Tax--Lease of Artwork for Use in Manufacturing Process--Exemption for Transfer Pursuant to Technology Transfer Agreement--Retroactive Application of Statute.

An artist's agreements to temporarily transfer her artwork, in order to permit its reproduction, were technology transfer agreements that fell within the purview of Rev. & Tax. Code, §§ 6011, subd. (c)(10), and 6012, subd. (c)(10) (exempting from taxation the amount charged for intangible personal property, specifically, a patent or copyright interest, transferred pursuant to a technology transfer agreement), and were therefore exempt from taxation, even though the legislation did not become operative until after the end of the artist's audit period. The official statement of intent indicates that the Legislature intended the statutes to apply retroactively, and this interpretation is reinforced by the legislative history. Retroactive application of the statutes does not violate due process because it can only reduce the tax liability of a claimant and therefore cannot impair any vested property right of the claimant. Also, giving the statutes retrospective effect does not constitute a gift of public funds in violation of Cal. Const., art. XVI, § 6. By enacting these provisions, the Legislature intended to provide certainty to business taxpayers and improve the business climate in California. Such an intent is undoubtedly a valid public purpose. Thus, only that portion of the artist's income attributable to the agreements' temporary transfer of tangible artwork was taxable.

(**10**) Statutes § 5--Operation and Effect--Retroactivity.

Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute. Although statutes are generally presumed to operate prospectively and not retroactively, this presumption is rebuttable. When the Legislature clearly intends a statute to operate retrospectively, the court is obliged to carry out that intent unless due process considerations prevent the court from doing so. The court may infer such an intent from the express provisions of the statute as well as from extrinsic sources, including the legislative history.

(**11**) Statutes § 4--Operation and Effect--Effective Date Versus Operative Date.

The effective date of a statute is the date upon which the statute came into being as an existing law. The operative date is the date upon which the directives of the statute may be actually implemented. Although the effective and operative dates of a statute are often the same, the Legislature may postpone the

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operation of certain statutes until a later time. The Legislature may do so for reasons other than an intent to give the statute prospective effect. For example, the Legislature may delay the operation of a statute to allow persons and agencies affected by it to become aware of its existence and to comply with its terms. In addition, the Legislature may wish to give lead time to the governmental authorities to establish machinery for the operation of or implementation of the new law. A later operative date may also provide time for emergency cleanup amendments and the passage of interrelated legislation. Finally, a later operative date may simply be a date of convenience for bookkeeping, retirement, or other reasons.

(**12**) Public Funds § 6--Illegal Expenditures--Gifts of Public Funds-- Exception for Funds Expended for Public Purpose--Retroactive Tax Exemptions.

As a general rule, the Legislature cannot provide relief for taxes that have become fixed and vested. However, expenditures of public funds or property that involve a benefit to private persons are not gifts within the meaning of Cal. Const., art. XVI, § 6, if those funds are expended for a public purpose. The determination of what constitutes a public purpose is primarily a matter for the Legislature, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis. Consistent with this deference to the Legislature, courts have upheld the constitutionality of retroactive tax exemptions that provided relief to unwary taxpayers, promoted the use of alternative energy sources, or prevented undue hardship on employers.

COUNSEL

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BROWN, J.

In this case, we consider whether: (1) a taxpayer who fails to explicitly raise a contention in her claim for refund may still raise that contention in a subsequent lawsuit for that refund; and (2) a copyright interest in artwork, transferred in conjunction with the temporary transfer of the tangible artwork itself, is subject to sales tax. We conclude that a refund claim sufficiently raises any contention that is intertwined with or clearly implied from contentions explicitly raised in the claim. We further conclude that Revenue and Taxation Code [FN1] sections 6011, subdivision (c)(10) and 6012, subdivision (c)(10) (hereafter section 6011(c)(10) and section 6012(c)(10)) apply to the transactions at issue in this case and exempt the copyright transfers from taxation.

FN1 All further statutory references are to the Revenue and Taxation Code unless otherwise indicated.

Factual Background

Heather Preston is a professional artist. From 1981 to 1993, Preston entered into a number of written agreements to provide artwork for use as book illustrations and rubber stamp designs (collectively, Agreements).

Under the terms of the first agreement, dated August 11, 1981, Preston provided Celestial Arts, a book publisher, with eight illustrations for Remember the Secret, a children's book. Celestial Arts received “the right to reproduce the artwork in the book and in publicity and promotion connected ***204** with the book.” In return, Celestial Arts gave Preston “a 5% of cash received royalty on books sold” and paid her $1,500 as an advance against future royalties.

From 1988 to 1993, Preston entered into a series of agreements with All Night Media, a rubber stamp manufacturer. The agreements encompassed 54 designs created by Preston and gave All Night Media “[a]ll rights for the use of [Preston's] artwork on any and all rubber stamp products....” In return, Preston received a flat fee upon publication of the first All Night Media catalog containing the designs and an additional amount in the form of either a flat fee for each publication of the designs in a subsequent catalog or a 5 percent royalty on sales.

In the last agreement, Preston contracted with Enchanté, a book publisher, to supply illustrations for a children's book, The Rainbow Fields. Enchanté acquired “all of the exclusive rights comprised in the copyrights” contained in these illustrations, including

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the "unlimited perpetual right to sell, license, distribute, and otherwise use" these copyrights in any media. In return, Preston received a royalty from Enchanté on all book, calendar and poster sales containing the illustrations and a $7,500 advance on these royalties. Preston also retained the right to reproduce the illustrations "solely for portfolio and self-promotion purposes."

Pursuant to these Agreements, Preston transferred "finished artwork in tangible form ...." The clients "then copied or reproduced images from this finished artwork" for use in their products and returned the tangible artwork to Preston. Aside from those rights in the artwork expressly transferred under the Agreements, Preston retained all other rights in the artwork, including title.

In 1994, the State Board of Equalization (Board) conducted a sales and use tax audit of Preston's business records for the period of January 1, 1990, through December 31, 1993 (the audit period). The Board eventually determined that Preston owed sales tax in the amount of $1,711.82 and interest in the amount of $321.44 based on the amount of royalties she received from the Agreements during the audit period.

Preston paid the tax claimed due and filed a petition for redetermination of her tax liability. One month later, Preston timely submitted a claim for refund. In her six-page claim, Preston raised a number of objections to the assessed tax. For example, she argued that California Code of Regulations, title 18, section 1501 (hereafter Regulation 1501)-which specifically exempts a manuscript submitted for publication from sales tax-precludes ***205** taxation of the proceeds from her Agreements. She also claimed that these proceeds were not taxable because she only transferred "the right of reproduction and the artwork is returned to [her] for [her] files. Hence, a 'sale' of original artwork has not occurred."

After a hearing, the Board concluded that the royalties were taxable gross receipts and denied Preston's petition for redetermination. Preston then paid the interest due. Soon after, the Board denied her claim for refund.

Preston then filed the instant action, seeking a refund of the sales tax and interest that she paid. In her complaint, Preston alleged that "[t]he sales tax paid by plaintiff [Preston] should be refunded because the use rights transferred by her were intangible property." After a one-day hearing, the trial court found that "the items sold by Plaintiff [Preston] were tangible personal property, and not intangible property" and entered judgment for the Board.

The Court of Appeal affirmed. In support, the court concluded that: (1) Preston waived any claim premised on the nontaxability of the Agreements' transfer of copyrights; (2) attainment of the tangible artwork was the true object of the Agreements because they "would have been worthless" without the tangible artwork; and (3) the Agreements transferred "possession ... of tangible personal property for a consideration" as understood in section 6006, subdivision (a).

We granted review to determine whether: (1) an administrative claim alleging that the taxpayer transferred only the right to reproduce and did not sell her artwork sufficiently raises a claim that the transaction involved the transfer of nontaxable copyrights; and (2) a taxpayer who temporarily transfers possession of tangible artwork solely for reproduction in books and merchandise but otherwise retains ownership of the artwork has to pay sales tax.

Discussion

I

(1a) As a preliminary matter, we must determine whether Preston has exhausted her administrative remedies by sufficiently raising the copyright issue in her claim for refund. Although the Board concedes that Preston "alleges that she transferred solely intangible property," it contends she did not sufficiently allege that the transactions were nontaxable transfers of copyrights. Thus, she failed to exhaust her remedies as to any claim premised on federal copyright law. We disagree. ***206**

(2) Before filing suit for a tax refund, a taxpayer must present a claim for refund to the Board. (§ 6932.) The claim "shall be in writing and shall state the specific grounds upon which the claim is founded." (§ 6904, subd. (a).) The purpose of these statutory requirements is to ensure that the Board receives sufficient notice of the claim and its basis. (See *Wertin v. Franchise Tax Bd.* (1998) 68 Cal.App.4th 961, 977 [80 Cal.Rptr.2d 644] ["the purpose of the statute is to put the board on notice of a claim"].) The Board then

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has an opportunity to correct any mistakes, thereby conserving judicial resources. (See *Atari, Inc. v. State Bd. of Equalization* (1985) 170 Cal.App.3d 665, 673 [216 Cal.Rptr. 267] (*Atari*).)

Any lawsuit against the Board must be based "on the grounds set forth in the claim" for refund. (§ 6933.) It may not include issues "*not* raised in the claim." (*Jimmy Swaggart Ministries v. State Bd. of Equalization* (1988) 204 Cal.App.3d 1269, 1290 [250 Cal.Rptr. 891], italics added, affd. *sub nom. Jimmy Swaggart Ministries v. Cal. Bd. of Equalization* (1990) 493 U.S. 378 [110 S.Ct. 688, 107 L.Ed.2d 796].) "The claim for refund thus frames and restricts the issues for litigation." (*American Alliance Ins. Co. v. State Bd. of Equalization* (1982) 134 Cal.App.3d 601, 609 [184 Cal.Rptr. 674, 30 A.L.R.4th 865].) Indeed, courts "are without jurisdiction to consider grounds not set forth in the claim." (*Atari*, *supra*, 170 Cal.App.3d at p. 672.)

Despite these limits on actions against the Board, a taxpayer need not expressly raise a contention in order to meet the statutory exhaustion requirements. Where the contention is intertwined with contentions expressly raised in the refund claim, courts may consider that contention even though the claim did not explicitly raise it. (See *Montgomery Ward & Co. v. Franchise Tax Bd.* (1970) 6 Cal.App.3d 149, 164-165 [85 Cal.Rptr. 890] (*Montgomery Ward*) [considering unstated contentions because they were "intertwined" with contentions raised in the refund claim].) In other words, unstated contentions clearly implied from contentions expressly raised in a claim for refund are sufficiently stated for purposes of exhaustion. (See *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 66, fn. 2 [219 Cal.Rptr. 142, 707 P.2d 204] (*Wallace Berrie*) [taxpayer satisfied the exhaustion requirement by implicitly raising the contention in his refund claim].)

(1b) In this case, Preston more than sufficiently raised the copyright issue in her claim for refund. First, the contention in her claim that the transactions at issue involve only the transfer of the "right of reproduction" and not the " 'sale' of original artwork" sufficiently conveys her reliance on federal copyright law. Because the right "to reproduce the copyrighted work" is one of the rights given to copyright owners by statute (***207**17 U.S.C. § 106), Preston's refund claim, by definition, raises a contention predicated on federal copyright law.

Second, Preston's discussion of Regulation 1501 adequately raises the copyright issue. In her refund claim, she analogizes an illustrator who submits illustrations for publication to the writer in Regulation 1501 who submits a manuscript for publication and asks "[w]hy should one be taxed differently from the other?" [FN2] Because the manuscript example in Regulation 1501 is premised on the nontaxability of a copyright transfer (see *Navistar Internat. Transportation Corp. v. State Bd. of Equalization* (1994) 8 Cal.4th 868, 877 [35 Cal.Rptr.2d 651, 884 P.2d 108] (*Navistar*)), Preston's analogy implicitly alleges that her transactions are not taxable because they involve only the transfer of nontaxable copyrights.

FN2 Specifically, Preston's claim for refund states:

"Concerning book royalties: The facts are that while an illustrator and a writer both work on the same book and are on the same royalty basis, only the illustrator pays sales tax on those royalties while the writer pays none! Is this not totally unfair? An artist uses paper for the same purpose, to convey ideas. Are royalties on a picture book without words taxable and a word book exempt? Both are books. The writer's manuscript is not the only way to convey an 'idea'. 'A picture is worth a thousand words.' For example, a political cartoon may contain no words at all, yet tell a story. This is clearly discriminatory and unfair.

"Unless I am missing something, writers are considered to convey ideas while illustrators are presumed not to. The Board's reasoning is as follows: 'An idea may be expressed in the form of tangible personable [*sic*] property and that property may be transferred for a consideration from one person to another; however, the person transferring the property may still be regarded as the consumer of the property. Thus, the transfer to a purchaser of an original manuscript by the author thereof, for the purpose of publication, is not subject to taxation.' (Reg. 1501.) If the words 'illustrator' and 'illustrations' are substituted for 'author' and 'manuscript' respectively in

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> the above reference, it is obvious that they would equally apply. Why should one be taxed differently from the other? This seems to be the only equitable solution, as there is no honorable reason why they should be treated differently."

The absence of the word "copyright" or an explicit reference to federal copyright law is immaterial. Preston's contention that the transactions were nontaxable transfers of copyrights is, without question, intertwined with and clearly implied from the contentions in Preston's refund claim. Thus, she has satisfied the statutory exhaustion requirements. (*Wallace Berrie*, *supra*, 40 Cal.3d at p. 66, fn. 2; *Montgomery Ward*, *supra*, 6 Cal.App.3d at pp. 164-165.)

Finally, the Board's reliance on its ignorance of federal copyright law is disingenuous. Many transactions involve copyright transfers. Presumably, the Board must deal with copyright issues when determining the tax consequences of these transactions. The Board must therefore have at least a passing familiarity with copyright law. At a minimum, the Board should be able to recognize that a reference to the right to reproduce-the best known ***208** right given to copyright owners-implicates federal copyright law. (See 17 U.S.C. § 106(1).) Indeed, the right to reproduce is embodied in the word "copyright." Accordingly, Preston sufficiently raised the copyright issue for exhaustion purposes.

II

(3a) We now turn to the propriety of assessing a sales tax in this case and begin by determining whether Preston's Agreements are completely exempt from taxation because they fail to create transfers of tangible property for consideration. Citing the manuscript example found in Regulation 1501, Preston and amicus curiae Graphic Artists Guild contend the Agreements created *no* transfers of tangible property for consideration because the transfers of artwork were incidental to the transfers of copyrights in the artwork. Thus, *all* proceeds from the Agreements should be exempt from taxation. The Board counters that the temporary transfers of artwork pursuant to the Agreements constitute taxable leases. As explained below, we find that the Agreements are not wholly exempt from sales tax because they created taxable transfers of tangible property.

California law imposes a retail tax on "the gross receipts ... from the sale of all tangible personal property ...." (§ 6051.) A "sale" means "[a]ny transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration" (§ 6006, subd. (a)), and includes "[a]ny lease of tangible personal property in any manner or by any means whatsoever, for a consideration" (§ 6006, subd. (g)). " 'Tangible personal property' means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses." (§ 6016.)

(4) Because these provisions apply only to tangible personal property, intangible personal property is not subject to sales tax. (See *Navistar*, *supra*, 8 Cal.4th at p. 874.) Although there is no statutory definition of intangible property, "such property is generally defined as property that is a 'right' rather than a physical object." (*Id.* at p. 875, quoting *Roth Drug, Inc. v. Johnson* (1936) 13 Cal.App.2d 720, 734 [57 P.2d 1022].) "Thus, for purposes of the law of taxation, intangible property is defined as including personal property that is not itself intrinsically valuable, but that derives its value from what it represents or evidences." (*Navistar*, at p. 874.)

(3b) Despite these definitions, distinguishing between tangible and intangible personal property for taxation purposes has proven troublesome. Much of the problem stems from the fact that the value of a tangible object ***209** often depends on the "intangible rights and privileges" associated with the object. (*Roehm v. County of Orange* (1948) 32 Cal.2d 280, 285 [196 P.2d 550].) Even where the intangible right-i.e., a copyright-is wholly distinct from the material object (see 17 U.S.C. § 202), determining the tax consequences of a transaction involving the transfer of such a right has been difficult because the transaction often includes the concurrent transfer of tangible property. (See, e.g., *Simplicity Pattern Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 900, 906 [167 Cal.Rptr. 366, 615 P.2d 555] (*Simplicity Pattern*) [transfer of film negatives and recordings and their copyrights].)

Regulation 1501 has exacerbated the confusion. Regulation 1501 ostensibly defines the criteria for "determining whether a particular transaction involves a *sale of tangible personal property* or the transfer of

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tangible personal property incidental to the *performance of a service* ....” (Italics added.) It provides that “[t]he basic distinction ... is one of the true objects of the contract; that is, is the real object sought by the buyer the service per se or the property produced by the service. If the true object of the contract is the service per se, the transaction is not subject to tax even though some tangible personal property is transferred.” (*Ibid.*)

The “true object” test described in Regulation 1501, by its terms, applies only to transactions involving “the performance of a service.” The regulation, however, contains an example that does *not* appear to involve the performance of a service. (See *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 96 [130 Cal.Rptr. 321, 550 P.2d 593] [“Service is defined as 'performance of labor for the benefit of another' ”].) In the so-called manuscript example, an author transfers “an original manuscript” to a publisher “for the purpose of publication ....” (Reg. 1501.) This transfer appears to involve the transfer of a copyright-and not the performance of a service. (See *Navistar*, *supra*, 8 Cal.4th at p. 877.) Nonetheless, Regulation 1501 applies the true object test and concludes that the transfer “is not subject to taxation” because the true object of the transaction is the acquisition of an intangible property right. [FN3] In doing so, Regulation 1501 suggests that a transfer of tangible property is not taxable if the transfer is incidental to the transfer of intangible property. ***210**

FN3 The manuscript example in Regulation 1501 states: “[A]n idea may be expressed in the form of tangible personal property and that property may be transferred for a consideration from one person to another; however, the person transferring the property may still be regarded as the consumer of the property. Thus, the transfer to a publisher of an original manuscript by the author thereof for the purpose of publication is not subject to taxation. The author is the consumer of the paper on which he has recorded the text of his creation. However, the tax would apply to the sale of mere copies of an author's work or the sale of manuscripts written by other authors where the manuscript itself is of particular value as an item of tangible personal property and the purchaser's primary interest is in the physical property. Tax would also apply to the sale of artistic expressions in the form of paintings and sculptures even though the work of art may express an original idea since the purchaser desires the tangible object itself; that is, since the true object of the contract is the work of art in its physical form.”

We have, however, rejected such a broad interpretation of the manuscript example. In *Simplicity Pattern*, we held that the sale of “film negatives and master recordings used to make audiovisual” training materials created a taxable transfer of tangible property for consideration. (*Simplicity Pattern*, *supra*, 27 Cal.3d at p. 903.) To reach this holding, we concluded that “a sale” does not become “nontaxable whenever its principal purpose is to transfer the intangible content of the physical object being sold” (*id.* at p. 909), and found Regulation 1501 inapplicable because the “transfer was not incidental to any service” (*Simplicity Pattern*, at p. 912). We also distinguished plaintiff's acquisition of negatives and recordings from the manuscript example in Regulation 1501 because “a manuscript furnishes only verbal guidance,” while the negatives and recordings were physically useful in the manufacturing process. (*Simplicity Pattern*, at p. 909.) Therefore, the negatives and recordings were analogous to printing plates, and the sale of these negatives and recordings was taxable. (*Id.* at pp. 909, 912.)

Since *Simplicity Pattern*, appellate courts have consistently held that a transfer of tangible property physically useful in the manufacturing process in conjunction with a transfer of intangible property rights in that property results in a taxable sale. In *Capitol Records, Inc. v. State Bd. of Equalization* (1984) 158 Cal.App.3d 582, 587 [204 Cal.Rptr. 802] (*Capitol Records*), the Court of Appeal found taxable “royalties [paid] in exchange for ownership of master tapes produced by” independent production companies financed by the plaintiff. Relying on *Simplicity Pattern*, the court concluded that Regulation 1501 did not exempt these transactions from taxation because the tapes “were manifestly useful in the manufacturing process, [and] were not furnished as incidents to any service ....” (*Capitol Records*, at p. 596.)

Applying the same reasoning, the Court of Appeal in *A & M Records, Inc. v. State Bd. of Equalization* (1988) 204 Cal.App.3d 358, 376 [250 Cal.Rptr.

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915] (*A & M Records*), concluded that temporary transfers of master tapes created taxable transfers of tangible property. In *A & M Records*, the plaintiffs obtained an exclusive license to use master tapes and duplicate master tapes owned by its subsidiaries. In return, the plaintiffs paid its subsidiaries royalties "based upon sales of records and tapes ...." (*Id.* at p. 365.) The plaintiffs then leased these duplicate master tapes to record clubs, which used them to produce records and tapes and received royalties from these clubs "on the basis of the number of records and tapes sold ...." (*Ibid.*) Based on *Simplicity Pattern* and *Capitol Records*, the court held that these royalty payments were taxable. In doing so, the court found Regulation 1501 inapplicable because the master tapes "were essential in the ***211** ultimate production of the records and tapes through which plaintiffs made their revenues" (*A & M Records*, at p. 376). Unlike the manuscript in Regulation 1501, "the master tapes are used in the production of records and tapes and are thus not used solely for their intellectual or artistic content." (*A & M Records*, at p. 376.)

Together, these decisions establish that any transfer of tangible property *physically useful* in the manufacturing process is subject to sales tax even though the true object of the transfer is an intangible property right like a copyright. (See *Simplicity Pattern*, *supra*, 27 Cal.3d at p. 912 ["Their [the negatives and recordings] value as physical objects permitted measuring the tax on their sale by the price received for their entire worth"].) The purpose or nature of the transfer and the form of payment are irrelevant. (See *A & M Records*, *supra*, 204 Cal.App.3d at pp. 375-376; *Capitol Records*, *supra*, 158 Cal.App.3d at p. 596.)

Such a conclusion flows logically from the statutes defining taxable and nontaxable leases. Under subdivision (g) of section 6006, "[a]ny lease of tangible personal property *in any manner or by any means whatsoever*, for a consideration" creates a taxable transfer. (Italics added.) Section 6006.3 then broadly defines " '[l]ease' " to "include[] rental, hire and license." Only leases involving the "*use of tangible personal property* for a period of less than one day for a charge of less than twenty dollars ($20) when *the privilege to use the property* is restricted to use thereof on the premises or at a business location of the grantor of the privilege" are statutorily exempt from taxation. (*Ibid.*, italics added.) By broadly defining taxable leases and narrowly defining the exception in terms of the *use* of the tangible property, sections 6006 and 6006.3 establish that the purpose behind and duration of a transfer of tangible property are irrelevant for determining whether a taxable transfer occurred.

Navistar does not dictate a contrary result. *Navistar* merely held that "physical usefulness" was not "a necessary condition to taxation." (*Navistar*, *supra*, 8 Cal.4th at p. 879.) After *Navistar*, transfers of tangible property remain taxable even if these transfers are merely incidental to transfers of intangible property rights.

Thus, the temporary transfers of Preston's tangible artwork are taxable transfers of tangible property. Because Preston's Agreements transferred the artwork for use in a manufacturing process performed outside Preston's personal or business premises, they fall within the statutory definition of a taxable lease. (See §§ 6006, subd. (g), 6006.3.) Like printing plates, master recordings and film negatives, the tangible artwork was physically useful ***212** and essential in the ultimate production of books and rubber stamps incorporating the copyright in the artwork. Without the physical artwork, the contracts were essentially "worthless." (*A & M Records*, *supra*, 204 Cal.App.3d at p. 376.) As such, the artwork is not like a manuscript, which only furnishes "verbal guidance" and is not essential to the manufacturing process. (*Simplicity Pattern*, *supra*, 27 Cal.3d at p. 909.) The Regulation 1501 manuscript example therefore does not govern, and the temporary transfer of Preston's artwork for purposes of reproduction is subject to sales tax. Indeed, Preston has implicitly conceded this point by declining to claim a refund of taxes attributable to her labor costs and arguing for the applicability of sections 6011(c)(10) and 6012(c)(10). Accordingly, we conclude that Preston's Agreements are not entirely exempt from taxation because they involved a transfer of tangible property for consideration.

III

(5a) Even though Preston's Agreements involved transfers of tangible property for consideration, they also involved transfers of intangible property-the copyrights in the artwork-for consideration. The Board contends Preston's transfer of tangible artwork in conjunction with the transfer of copyrights in that artwork renders her transactions taxable *in their entirety*. In support, the Board cites California Code of Regulations, title 18, section 1540 (hereafter Regula-

tion 1540) as amended in January 2000. We, however, decline to adopt the Board's contention, and, instead, hold that sections 6011(c)(10) and 6012(c)(10)-as enacted in 1993-govern Preston's Agreements and apply retroactively to exclude the copyright transfers from sales tax.

A.

We begin by determining whether Preston's Agreements are technology transfer agreements that fall within the purview of sections 6011(c)(10) and 6012(c)(10). Section 6011 defines " '[s]ales price' " (§ 6011, subd. (a)), and section 6012 defines " '[g]ross receipts' " (§ 6012, subd. (a)). These sections are mirror images and identify the items to be included in or excluded from any calculation of the amount subject to sales tax pursuant to section 6051. In 1993, the Legislature added sections 6011(c)(10) and 6012(c)(10). These provisions are identical and *exempt* the "amount charged for intangible personal property"-specifically, a *patent or copyright* interest-transferred pursuant to a "technology transfer agreement" from taxation. (§§ 6011(c)(10)(A), 6012(c)(10)(A).) As explained below, Preston's Agreements constitute technology transfer agreements as understood in sections 6011(c)(10) and 6012(c)(10) and are governed by these provisions if they apply retroactively. ***213**

(6) The rules for interpreting statutes are well established. "When construing a statute, we must 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977 [90 Cal.Rptr.2d 260, 987 P.2d 727], quoting *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [20 Cal.Rptr.2d 523, 853 P.2d 978].) "The words of the statute are the starting point." (*Wilcox*, at p. 977.) If the ordinary meaning of the language "is clear and unambiguous," then we need look no further. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) Otherwise, we may resort to extrinsic sources, such as the legislative history. (See *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 277 [87 Cal.Rptr.2d 222, 980 P.2d 927].)

(5b) Application of these rules yields one inescapable conclusion: Preston's Agreements are technology transfer agreements as understood in sections 6011(c)(10) and 6012(c)(10). We begin by examining the statutory language. Subparagraphs (A) through (C) of sections 6011(c)(10) and 6012(c)(10) state that the amount subject to sales tax does "not include": "(10)(A) The amount charged for intangible personal property transferred with tangible personal property in any technology transfer agreement, if the technology transfer agreement separately states a reasonable price for the tangible personal property. [¶] (B) If the technology transfer agreement does not separately state a price for the tangible personal property, and the tangible personal property or like tangible personal property has been previously sold or leased, or offered for sale or lease, to third parties at a separate price, the price at which the tangible personal property was sold, leased, or offered to third parties shall be used to establish the retail fair market value of the tangible personal property subject to tax. The remaining amount charged under the technology transfer agreement is for the intangible personal property transferred. [¶] (C) If the technology transfer agreement does not separately state a price for the tangible personal property, and the tangible personal property or like tangible personal property has not been previously sold or leased, or offered for sale or lease, to third parties at a separate price, the retail fair market value shall be equal to 200 percent of the cost of materials and labor used to produce the tangible personal property subject to tax. The remaining amount charged under the technology transfer agreement is for the intangible personal property transferred." Sections 6011(c)(10)(D) and 6012(c)(10)(D) then broadly define a " 'technology transfer agreement' " as "any agreement under which a person who holds a patent or copyright interest assigns or licenses to another person the right to make and sell a product or to use a process that is subject to the patent or copyright interest."

Read as a whole and giving the statutory language its ordinary meaning, sections 6011(c)(10) and 6012(c)(10) unambiguously establish that the value ***214** of a patent or copyright interest transferred pursuant to a technology transfer agreement is *not* subject to sales tax even if the agreement also transfers tangible personal property. The lone trigger for this exemption is the presence of a technology transfer agreement. In other words, these provisions exclude the value of a patent or copyright interest from taxation whenever a person who owns a patent or copyright transfers that patent or copyright to another person so the latter person can make and sell a product embodying that patent or copyright. (See §§ 6011(c)(10)(D), 6012(c)(10)(D).)

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In this case, Preston owned the copyrights in the transferred artwork. (See 17 U.S.C. § 201(a).) Under the Agreements, she separately and distinctly transferred one of the rights comprised in a copyright-the right to reproduce. (17 U.S.C. § 106(1).) Pursuant to the Agreements, the transferees manufactured and sold products-i.e., books or rubber stamps-“subject to” the transferred copyright interest. (§§ 6011(c)(10)(D), 6012(c)(10)(D).) Accordingly, Preston's Agreements are technology transfer agreements as defined by paragraph (D).

The absence of the word “copyright” in most of the Agreements is irrelevant. [FN4] Although an assignment or license of a copyright requires a “writing” (17 U.S.C. § 204(a)), the writing need not mention the word “copyright.” (See *Schiller & Schmidt, Inc. v. Nordisco Corp.* (7th Cir. 1992) 969 F.2d 410, 413 [finding a valid copyright license even though the agreement did “not mention the word 'copyright' ”]; *Armento v. Laser Image, Inc.* (W.D.N.C. 1996) 950 F.Supp. 719, 733 [omission of “the word 'copyright' is not dispositive”].) Where the wording of the agreement clearly transfers one of the rights or any subdivision of the rights specified in title 17 United States Code section 106, a copyright transfer has occurred. (*Armento*, at p. 733.) All of the Agreements assign or license the right to reproduce Preston's artwork. Because the right to reproduce is one of the exclusive rights comprised in a federal copyright (see 17 U.S.C. § 106(1) [“the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: [¶] (1) to reproduce the copyrighted work in copies or phonorecords”]), the Agreements create a valid copyright assignment. (See *Schiller*, at p. 413; *Armento*, at p. 733.)

FN4 None of the Agreements, except for the one with Enchanté, mention the word “copyright.”

Likewise, the limited scope of the rights transferred in some of the Agreements does not mean that no copyrights were assigned or licensed. “The ownership of a copyright may be transferred in whole *or in part* by any means of conveyance or by operation of law,” and “[a]ny of the exclusive rights comprised in a copyright, *including any subdivision of any of the rights specified by section 106*, may be transferred ... and owned separately.” (***215**17 U.S.C. § 201(d)(1), (2), italics added.) In light of this broad language, “there would appear to be no limit on how narrow the scope of licensed rights may be and still constitute a 'transfer' of ownership, as long as the rights thus licensed are 'exclusive.' ” (3 Nimmer & Nimmer, Copyright (2000) Assignments and Licenses, § 10.02[A], p. 10-21.) All of Preston's Agreements, at a minimum, transferred the exclusive right to reproduce her artwork in a particular book or on rubber stamps. Therefore, the Agreements constitute valid assignments or licenses of a copyright interest covered by sections 6011(c)(10) and 6012(c)(10). (See 17 U.S.C. § 201(d)(1), (2).)

The Agreements also do not fall outside the purview of sections 6011(c)(10) and 6012(c)(10) because they involved the transfer of artwork and not technology. The Legislature broadly defined “technology transfer agreement” to encompass the transfer of *any* copyright interest which, by definition, includes copyrights in artwork. (See 17 U.S.C. § 102(a)(5).) It did not limit the definition to transfers of *high* technology. Indeed, the Legislature could have easily done so by defining “technology transfer agreement” as an assignment or license of “the right to make and sell” a *high technology* “product or to use a” *high technology* process. (§§ 6011(c)(10)(D), 6012(c)(10)(D).) Absent such language, we will not infer such a limitation.

We further reject the Board's contention that Preston's Agreements are not technology transfer agreements because they did not license “the right to make and sell a product ....” (§§ 6011(c)(10)(D), 6012(c)(10)(D).) At oral argument, the Board claimed that Preston's Agreements did not transfer the right to make or sell a product because the transferees could have made or sold their books or rubber stamps without Preston's copyrights. The Board, however, misconstrues the statutory language. A technology transfer agreement need only license “the right to make and sell a product ... *that is subject to the ... copyright interest*.” (*Ibid.*, italics added.) Because copyrights only protect “the *expression* of the idea-not the idea itself” (*Mazer v. Stein* (1954) 347 U.S. 201, 217 [74 S.Ct. 460, 470, 98 L.Ed. 630], italics added (*Mazer*))-a product “is subject to” a copyright interest (§§ 6011(c)(10)(D), 6012(c)(10)(D)), if the product is a copy of the protected expression or incorporates a copy of the protected expression. (See *Mazer*, at p. 218 [74 S.Ct. at pp. 470-471].) Here, Preston's Agreements gave the transferees the right to make and

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sell books or rubber stamps that incorporate a copy of her copyrighted artwork. Thus, the Agreements necessarily licensed the right to "make and sell a product ... subject to the ... copyright interest." (§§ 6011(c)(10)(D), 6012(c)(10)(D).)

Indeed, the Board's contention reflects a fundamental misunderstanding of the difference between patents and copyrights. (7) Patents give an owner ***216** "the exclusive right to manufacture, use, and sell his invention." (*Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 135 [89 S.Ct. 1562, 1583, 23 L.Ed.2d 129].) Thus, the license of a patent interest, by definition, gives the licensee the right to make a product or to use a process. In contrast, "copyright protects originality rather than novelty or invention-conferring only 'the sole right of multiplying copies.' " (*Mazer, supra*, 347 U.S. at p. 218 [74 S.Ct. at p. 471], fn. omitted.) Thus, the license of a copyright interest can only give the licensee the right to reproduce the copyrighted material in a product-and not the right to make and sell a product. (5c) Because sections 6011(c)(10) and 6012(c)(10) expressly exempt the assignment or license of the right to make and sell a product subject to *either* a patent *or* copyright from taxation, they must encompass agreements, like Preston's, that license the right to reproduce copyrighted material in a product to be manufactured and sold by the licensee.

In any event, the legislative history validates our interpretation of sections 6011(c)(10) and 6012(c)(10), even if the statutory language is ambiguous. These subdivisions grew out of the Board's decision in *Petition of Intel Corporation* (June 4, 1992) [1993-1995 Transfer Binder] Cal.Tax Rptr. (CCH) paragraph 402-675, page 27,873 (*Intel*). In *Intel*, petitioner licensed several patents and copyrights to other companies so they could manufacture integrated circuits embodying these patents and copyrights. As part of the license agreements, petitioner transferred tangible property consisting of "written information, instructions, schematics, database tapes, and test tapes." (*Ibid.*) The Board held that these agreements created two separate and distinct transactions for tax purposes. The first transaction involved the transfer of tangible personal property and was subject to sales tax. The second transaction involved the nontaxable transfer of intangible property. In reaching this conclusion, the Board broadly defined "intangible property" as "the license to use the information under the copyright *or* patent." (*Ibid.*, italics added.)

Soon after *Intel*, Assembly Member Charles Quackenbush introduced Assembly Bill No. 103 (1993-1994 Reg. Sess.) (Assembly Bill No. 103)-which eventually became sections 6011(c)(10) and 6012(c)(10). The express purpose of Assembly Bill No. 103 was to "implement a decision of the Board of Equalization (BOE) with regards to an appeal filed by the Intel Corporation." (Assem. Com. on Rev. & Tax., Rep. on Assem. Bill No. 103, as amended Mar. 17, 1993, p. 2; see also Cal. Dept. Finance, analysis of Assem. Bill No. 103, as amended Aug. 17, 1993, p. 1 ["the intent of this bill is to codify the Board of Equalization's (BOE) interpretation of Regulation 1501 as it applied to a technology transfer case [*Intel*] before the Board"].) To implement *Intel*, Assembly Bill No. 103 borrowed *Intel*'s broad definition ***217** of intangible property and exempted any transfer of such property from taxation. (Compare *Intel*, *supra*, [1993-1995 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 402-675, p. 27,873 [holding that "the sale of intangible property which consists of the license to use the information under the *copyright or patent*" was not subject to sales tax (italics added)], with sections 6011(c)(10)(D) and 6012 (c)(10)(D) [defining " 'technology transfer agreement' " as an assignment or license of "the right to make and sell a product or to use a process that is subject to the *patent or copyright* interest" (italics added)].) In doing so, the Legislature presumably intended to adopt the plain meaning of this language and establish that the amount charged for a license to use *either* a patent *or* copyright is not taxable even if the license also transfers tangible property for consideration.

Such an understanding is confirmed by the enactment process. When Assembly Bill No. 103 reached the Senate, some analyses raised a concern that the proposed legislation was more expansive than *Intel*. "[T]he use of 'or' instead of 'and' [in the definition of technology transfer agreement] broadens the Board's Intel decision to include not only those high technology agreements in which relatively little tangible personal property is transferred along with very valuable intangible rights to make and sell a product, but also copyright agreements involving a substantial proportion of tangible personal property. If taxpayers are able to structure a contract so that a large proportion of the value of the tangible personal prop-

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erty is assigned to the intangible copyright-e.g., in a sale of a painting, assigning all but the price of canvas and oils to the intangible copyright to make posters of the painting-their sales tax liability would be reduced.” (Sen. Com. on Rev. & Tax., analysis of proposed amends. to Assem. Bill No. 103, July 7, 1993, p. 3.) To address this concern, the Senate Revenue and Taxation Committee proposed to limit the exemption in sections 6011(c)(10) and 6012(c)(10) to patent “and” copyright transfers. (Sen. Com. on Rev. & Tax., analysis of proposed amends. to Assem. Bill No. 103, July 7, 1993, p. 3.)

The Senate, however, rejected this proposal and made *no* changes to the definition of “technology transfer agreement.” Instead, the Senate actually broadened “the types of [agreements] that qualify for an exemption ....” (Assem. Floor Analysis, Conc. in Sen. Amends. to Assem. Bill No. 103, as amended Aug. 17, 1993, p. 2.) In doing so, the Senate apparently concluded that Assembly Bill No. 103 adequately addressed the concern “by requiring that a 'reasonable price' or 'fair market retail value' of like property be used to value the tangible personal property being transferred.” (Sen. Com. on Rev. & Tax., rev. analysis of proposed amends. to Assem. Bill No. 103, July 7, 1993, p. 3.)

Soon after the Senate declined to limit the scope of Assembly Bill No. 103, the Board voiced its own concerns over the scope of the proposed ***218** exemption. Noting that it “may be more broad than intended,” the Board claimed that the proposed definition of technology transfer agreement would encompass licenses of copyrights in artwork, photographs, film strips and technical drawings. (State Bd. of Equalization, analysis of Assem. Bill No. 103, as amended Aug. 17, 1993, pp. 2-3, italics omitted.) The Board further acknowledged that the bill, as written, “would provide opportunities for the exclusion of a portion of gross receipts” from taxation whenever a “seller of commercial art” separately charges “for the right to make and sell copies of the original artwork.” (*Ibid.*) Several legislative committees echoed these concerns: “[T]he exemption in this bill is somewhat broader than provided under board interpretation, because the bill exempts transactions concerning agreements which license patents or copyright interests, whereas the existing board interpretation concerns licenses of patent and copyright interests. BOE indicates that this bill could exempt many transactions, such as licenses of photographs, film strips or other artwork which currently are subject to taxation.” (Appropriations Com., Fiscal Summary of Assem. Bill. No. 103, as amended Aug. 17, 1993, p. 1; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill. No. 103, as amended Aug. 17, 1993, p. 2; see also Cal. Dept. Finance, analysis of Assem. Bill No. 103, as amended Aug. 17, 1993, p. 3 [“Because this bill refers to patents or copyrights, there is some concern that it may broaden the Intel decision to include not only high technology agreements where tangible personal property is transferred with very valuable intangible rights to make and sell a product, but also copyright agreements involving a substantial proportion of tangible personal property”].)

Thus, the Legislature was undoubtedly aware that the language of Assembly Bill No. 103 exempted *any* patent *or* copyright transfer from taxation, including transfers of copyrights in artwork. Nonetheless, the Legislature enacted this broad language *without* change. (Compare Stats. 1993, ch. 887, § 1, pp. 4826-4828 with Sen. Amend. to Assem. Bill No. 103, Aug. 17, 1993.) This decision to adopt the broad language of Assembly Bill No. 103 despite repeated warnings about its scope strongly signals a legislative intent to apply sections 6011(c)(10) and 6012(c)(10) to copyrights in artwork.

The statement of intent in the 1993 legislation enacting sections 6011(c)(10) and 6012(c)(10) does not support a contrary interpretation. This statement provides that: “It is also the intent of the Legislature that the amendments made by this act not create any inference regarding the application of the Sales and Use Tax Law to other transactions involving the transfer of both intangible rights and property and tangible personal property.” (Stats. 1993, ch. 887, § 3, p. 4831.) This language merely limits the scope of these provisions to those transfers of intangible property expressly ***219** encompassed within the statutory definition of “technology transfer agreement.” In other words, the sales tax exemption created by sections 6011(c)(10) and 6012(c)(10) applies only to the transfer of a patent or copyright interest-and *no other* transfer of an intangible right or property such as a trade secret.

The Board's January 2000 amendments to Regulation 1540, even if they apply retroactively, do not

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alter our conclusion. [FN5] (8) Although a regulation enacted by the Board " 'is entitled to great weight' " (*International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 930-931 [163 Cal.Rptr. 782, 609 P.2d 1], quoting *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 140 [98 Cal.Rptr. 281, 490 P.2d 793]), we will not apply that regulation unless it " '(1) is "within the scope of the authority conferred " [citation] and (2) is "reasonably necessary to effectuate the purpose of the statute." [Citation.]' " (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 322 [87 Cal.Rptr.2d 423, 981 P.2d 52], quoting *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411 [128 Cal.Rptr. 183, 546 P.2d 687].) (5d) The present version of Regulation 1540 makes the transfer of a "copyright, or subpart of a copyright (such as a right to reproduce or to prepare derivative works)" in a photograph or work of art subject to sales tax whenever there is a "transfer by a tangible medium of" that photograph or work of art. (*Id.*, subd. (d)(4).) In doing so, Regulation 1540 conflicts with sections 6011(c)(10) and 6012(c)(10), which expressly exempt the transfer of a copyright interest from taxation even if there is a corresponding transfer of tangible property. As such, Regulation 1540 exceeds the scope of the Board's authority and is invalid. [FN6] (See *Agnew*, at p. 322.)

FN5 Subdivision (d)(4) of Regulation 1540 provides in relevant part: "Charges for the transfer by a tangible medium of a photograph or of finished art for purposes of reproduction are taxable even though there is no transfer of title to the person reproducing the photograph or work of art. Charges for the right to use the photograph or finished art which has been transferred by tangible medium in the production of tangible personal property are taxable. Charges for a license, copyright or subpart of a copyright (such as a right to reproduce or to prepare derivative works) to exploit the photograph or finished art are taxable if they are sold along with the photograph or finished art transferred by tangible media or they are sold by a subsequent contract entered into within one year of the original transfer of the photograph or finished art."

FN6 For the same reason, former Regulation 1540 and Annotations Nos. 295.0460, 330.3540 and 420.0280 issued by the Board (2 State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots. (1999) pp. 3773, 4182, 4578) are invalid to the extent they provide for the taxation of copyright transfers governed by sections 6011(c)(10) and 6012(c)(10). (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 [78 Cal.Rptr.2d 1, 960 P.2d 1031] ["agency interpretations are not binding or necessarily even authoritative"].)

Our previous decisions are consistent with our interpretation of sections 6011(c)(10) and 6012(c)(10). For example, in *Navistar*, we held that the ***220** purchase of drawings and designs and manuals and procedures containing trade secrets were fully taxable as a sale of tangible personal property. We based our holding in part on the absence of a "separate and distinct transfer of an intangible property right." (*Navistar*, *supra*, 8 Cal.4th at pp. 877-878, fn. omitted.) Consequently, we declined to apply sections 6011(c)(10) and 6012(c)(10), because "the transfer of patents and copyrights" was not at issue. (*Navistar*, at p. 880.) In contrast, the Agreements in this case involve the separate and distinct transfer of a copyright-an intangible right distinct from "any material object in which the work is embodied." (17 U.S.C. § 202; see also Civ. Code, § 982, subd. (c) [transfer of tangible artwork does not transfer the "right of reproduction" absent an express written agreement].) Thus, *Navistar* is distinguishable. For the same reason, *Intellidata, Inc. v. State Bd. of Equalization* (1983) 139 Cal.App.3d 594, 598-599 [188 Cal.Rptr. 850], *Albers v. State Bd. of Equalization* (1965) 237 Cal.App.2d 494, 496-497 [47 Cal.Rptr. 69], and *People v. Grazer* (1956) 138 Cal.App.2d 274, 278-279 [291 P.2d 957]-which do not involve the transfer of a patent or copyright-are inapposite.

Michael Todd Co. v. County of Los Angeles (1962) 57 Cal.2d 684 [21 Cal.Rptr. 604, 371 P.2d 340], is also distinguishable. In *Michael Todd*, we held that the value of copyrights may be included in the valuation of a tangible object for purposes of calculating an ad valorem property tax. In the process, we reasserted "[t]he propriety of including nontaxable intangible values in the valuation of otherwise taxable property ...." (*Id.* at p. 694.) We did not, however, hold that "such values are subsumed [in the value of tangible property] as a matter of law." (*Shubat v. Sutter*

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County Assessment Appeals Bd. (1993) 13 Cal.App.4th 794, 804 [17 Cal.Rptr.2d 1].) Thus, *Michael Todd* does not preclude the Legislature from excluding the value of patents or copyrights transferred in conjunction with tangible personal property from the retail sales tax.

Likewise, our decision in *Simplicity Pattern* is consistent with our interpretation of sections 6011(c)(10) and 6012(c)(10). In *Simplicity Pattern*, the plaintiff sold "film negatives and master recordings used to make audiovisual" training materials. (*Simplicity Pattern*, *supra*, 27 Cal.3d at p. 903.) The Board assessed the sales tax on these transactions using the value of the item stated in the inventory accounts on the plaintiff's books. (*Id.* at p. 904.) Because the inventory accounts calculated this value based on the "costs of materials and services" used in producing the items, the Board, in effect, taxed the value of the tangible personal property sold by the plaintiff. (*Ibid.*; *id.* at p. 904, fn. 1.) Thus, by affirming the Board's assessment, we implicitly followed the approach outlined in sections 6011(c)(10) and 6012(c)(10). Indeed, sections 6011(c)(10)(C) and 6012(c)(10)(C) establish that the "retail ***221** fair market value ... of the cost of materials and labor used to produce the tangible personal property subject to tax" may be used to calculate the sales tax on any transfer of tangible property in a technology transfer agreement. To the extent that *Simplicity Pattern Co. v. State Bd. of Equalization, supra*, 27 Cal.3d 900, suggests that copyrights transferred in a technology transfer agreement may be taxed, however, sections 6011(c)(10) and 6012(c)(10) supersede it. [FN7]

FN7 We also disapprove of *A & M Records, Inc. v. State Bd. of Equalization, supra*, 204 Cal.App.3d at pages 375-376, and *Capitol Records, Inc. v. State Bd. of Equalization, supra*, 58 Cal.App.3d at page 596, to the extent they conflict with sections 6011(c)(10) and 6012(c)(10).

Finally, our interpretation is consistent with the manuscript example in Regulation 1501. A manuscript "furnishes only verbal guidance to editors and typesetters" and is not physically useful in the reproduction process. (*Simplicity Pattern*, *supra*, 27 Cal.3d at p. 909, fn. omitted.) Because a publisher that obtains temporary possession of a manuscript does not physically use the manuscript in the publication process, the publisher receives no taxable benefit from this transfer of tangible personal property. (Cf. § 6006.3 [defining a lease in terms of the "use of tangible personal property"].) Thus, under sections 6011(c)(10) and 6012(c)(10), the tangible form of the manuscript has *no* taxable value to the publisher, and all proceeds from this transfer of the manuscript are exempt from taxation. [FN8]

FN8 We note that the manuscript example may no longer reflect the realities of the publishing process. With the advent of modern technology, most publishers ask the author for the manuscript on a computer diskette, which is physically used in the editing and production process. Publishers can also scan handwritten or typed manuscripts directly into their computers. Thus, publishers today may receive some value from the tangible form of the manuscript.

Accordingly, Preston's Agreements are technology transfer agreements, and sections 6011(c)(10) and 6012(c)(10) control the tax consequences of these Agreements if these provisions apply retroactively.

B.

(9a) We now turn to the retroactivity issue. Because the legislation adding sections 6011(c)(10) and 6012(c)(10) did not become operative until April 1, 1994 -several months after the end of Preston's audit period-these provisions do not govern here unless they apply retroactively. Even assuming that sections 6011(c)(10) and 6012(c)(10) "substantially change [] the legal consequences of past events" (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 [62 Cal.Rptr.2d 243, 933 P.2d 507] (*Western Security*)), we conclude they do.

(10) "Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body ***222** enacting the statute." (*Western Security*, *supra*, 15 Cal.4th at p. 244.) Although statutes "are generally presumed to operate prospectively and not retroactively," this presumption is rebuttable. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587 [128 Cal.Rptr. 427, 546 P.2d 1371], fn. omitted.) "[W]hen the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us." (*Western Security*, at p.

243.) We may infer such an intent from the express provisions of the statute as well as from extrinsic sources, including the legislative history. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1210 [246 Cal.Rptr. 629, 753 P.2d 585] (*Evangelatos*).)

(9b) With respect to sections 6011(c)(10) and 6012(c)(10), the pertinent legislative materials reveal an unequivocal legislative intent to give it retrospective effect. In particular, the official statement of intent indicates that the Legislature intended sections 6011(c)(10) and 6012(c)(10) to apply retroactively. Section 3 of the 1993 statute amending sections 6011 and 6012 provides that: “It is the intent of the Legislature in enacting this act to clarify the application of the Sales and Use Tax Law (Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code) to technology transfer agreements, as defined.” (Stats. 1993, ch. 887, § 3, p. 4831.) This statement alone strongly suggests that the Legislature intended for sections 6011(c)(10) and 6012(c)(10) to “apply to all existing causes of action from the date of its enactment,” even if these subdivisions do not, in fact, clarify existing law. (*California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 214 [187 P.2d 702] (*Payne*); see also *Western Security*, *supra*, 15 Cal.4th at p. 243.)

The legislative history reinforces our interpretation of this statement of intent. As explained earlier, Assembly Member Quackenbush introduced Assembly Bill No. 103 in order to implement *Intel*. (See *ante*, at pp. 216-217.) Although several analyses warned the Senate about the breadth of Assembly Bill No. 103 and its apparent expansion of *Intel*, the Senate declined to amend the bill. (See *ante*, at pp. 216-217.) Instead, the Senate *added* the statement of intent language found in section 3 of Assembly Bill No. 103 *after* receiving these warnings. (See Sen. Amend. to Assem. Bill No. 103, Aug. 17, 1993.)

At this point, the Board expressed its own reservations about Assembly Bill No. 103's broadening of *Intel* and the newly added statement of intent language. “Proposed Section 3 of the bill would provide legislative intent language which specifies that this act is intended to clarify the application of the Sales and Use Tax Law with respect to technology transfer agreements, as defined in the bill. However ... the proposed definition of technology ***223** transfer agreements could be interpreted more broadly, and, with this intent language, *could even be extended retroactively*.” (State Bd. of Equalization, analysis of Assem. Bill No. 103, as amended Aug. 17, 1993, p. 4, italics added.) Despite this admonition, the Legislature enacted Assembly Bill No. 103 *without* altering the statement of intent language. (Compare Stats. 1993, ch. 887, § 1, p. 4828 with Sen. Amend. to Assem. Bill No. 103, Aug. 17, 1993.)

Thus, the legislative history makes two things clear. First, the Legislature added a statement giving Assembly Bill No. 103 retrospective effect even though it was aware that the bill may partially change existing law. Second, the Legislature was aware of the retroactivity question during the enactment process and, nevertheless, chose to adopt language giving the statute retrospective effect. Under these circumstances, we conclude that the Legislature intended sections 6011(c)(10) and 6012(c)(10) to apply retroactively. (See *Evangelatos*, *supra*, 44 Cal.3d at p. 1211 [where the Legislature consciously considers retroactivity and adopts language indicating an intent to give a statute retrospective effect, we may infer such an intent].)

The characterization of the legislation as a “tax levy within the meaning of Article IV of the Constitution” does not alter our conclusion. (Stats. 1993, ch. 887, § 5, p. 4831.) By using this language, the Legislature merely acknowledged the normally accelerated effective date of the legislation in accordance with the dictates of article IV, section 8, subdivision (c) of the California Constitution.

Likewise, the postponement of the operative date of the legislation until “the first day of the first calendar quarter commencing more than 90 days after the effective date of this act” does not mean that the Legislature intended to limit its application to transactions occurring after that date. (Stats. 1993, ch. 887, § 5, p. 4831.) (11) “The effective date [of a statute] is ... the date upon which the statute came into being as an existing law.” (*People v. McCaskey* (1985) 170 Cal.App.3d 411, 416 [216 Cal.Rptr. 54].) “[T]he operative date is the date upon which the directives of the statute may be actually implemented.” (*Ibid.*) Although the effective and operative dates of a statute are often the same, the Legislature may “postpone the operation of certain statutes until a later time.” (*People v. Henderson* (1980) 107 Cal.App.3d 475, 488 [166 Cal.Rptr. 20].) The Legislature may do so for

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reasons other than an intent to give the statute prospective effect. For example, the Legislature may delay the operation of a statute to allow "persons and agencies affected by it to become aware of its existence and to comply with its terms." (*People v. Palomar* (1985) 171 Cal.App.3d 131, 134-135 [214 Cal.Rptr. 785].) In addition, the Legislature may wish "to give ***224** lead time to the governmental authorities to establish machinery for the operation of or implementation of the new law." (*Estate of Rountree* (1983) 141 Cal.App.3d 976, 980, fn. 3 [192 Cal.Rptr. 152].) A later operative date may also "provide time for emergency clean-up amendments and the passage of interrelated legislation." (*Henderson*, at p. 488.) Finally, a later operative date may simply be "a date of convenience ... for bookkeeping, retirement or other reasons." (*Ross v. Bd. of Retirement of Alameda County Employees' Retirement Assn.* (1949) 92 Cal.App.2d 188, 193 [206 P.2d 903].)

(9c) In this case, the Legislature gave no rationale for the postponement. Thus, it may have postponed the operative date for reasons *other than* an intent to give sections 6011(c)(10) and 6012(c)(10) prospective effect. For example, the Legislature may have wished to give the Board time to enact new regulations for the 1993 tax year or to settle ongoing tax disputes prior to the implementation of the legislation. The Legislature also may have anticipated possible cleanup amendments in light of the Board's reservations over the scope of sections 6011(c)(10) and 6012(c)(10). (See State Bd. of Equalization, analysis of Assem. Bill No. 103, as amended Aug. 17, 1993, pp. 2-3.) The delayed operative date may also reflect nothing more than a legislative desire to correlate the operative date to the filing deadlines for the 1993 tax year. Indeed, the Legislature's decision to make the legislation adding sections 6011(c)(10) and 6012(c)(10) operative on April 1, 1994 -just before the April 15 deadline for filing 1993 tax returns-equally suggests an intent to apply these subdivisions retroactively to transactions occurring in 1993. In any event, where, as here, compelling indicators of the Legislature's intent to give a statute retrospective effect exist, the mere postponement of the statute's operative date is not enough to negate these indicators. (See *Tevis v. City & County of San Francisco* (1954) 43 Cal.2d 190, 194-196 [272 P.2d 757] [a charter amendment has retrospective effect even though the amendment delayed its effective date].)

Of course, even where the ascertainable indicators of legislative intent call for retroactive application (*In re Marriage of Bouquet*, *supra*, 16 Cal.3d at p. 591), we will not apply a statute retroactively if "there is some constitutional objection thereto." (*Payne*, *supra*, 31 Cal.2d at p. 214.) However, no such objection exists here. Retroactive application of sections 6011(c)(10) and 6012(c)(10) does not violate due process because it can only reduce the tax liability of a claimant and therefore cannot impair any vested property right of the claimant. (See *In re Marriage of Bouquet*, at pp. 591-594.)

Giving sections 6011(c)(10) and 6012(c)(10) retrospective effect also does not constitute a gift of public funds in violation of article XVI, section 6 of the California Constitution. (12) "As a general rule, the Legislature cannot provide relief for taxes which have become fixed and vested." (***225***Scott v. State Bd. of Equalization* (1996) 50 Cal.App.4th 1597, 1604 [58 Cal.Rptr.2d 376].) However, "expenditures of public funds or property which involve a benefit to private persons are not gifts within the meaning ... of the Constitution if those funds are expended for a *public purpose* ...." (*Payne*, *supra*, 31 Cal.2d at p. 216, italics added.) "The determination of what constitutes a public purpose is primarily a matter for the Legislature, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 746 [97 Cal.Rptr. 385, 488 P.2d 953].) Consistent with this deference to the Legislature, courts have upheld the constitutionality of retroactive tax exemptions that provided relief to "unwary taxpayers" (*Scott*, *supra*, 50 Cal.App.4th at p. 1605), promoted the use of alternative energy sources (*County of Sonoma v. State Bd. of Equalization* (1987) 195 Cal.App.3d 982, 993 [241 Cal.Rptr. 215]), or prevented "undue hardship on employers" (*Schettler v. County of Santa Clara* (1977) 74 Cal.App.3d 990, 1004 [141 Cal.Rptr. 731]).

(9d) Even assuming the Board had a fixed and vested right in the sales tax assessed against Preston, the retroactive application of sections 6011(c)(10) and 6012(c)(10) falls within this public purpose exception. By enacting these provisions, the Legislature "intended to provide certainty to business taxpayers" and "improve the business climate in California." (Assem. Com. on Rev. & Tax., Analysis of Assem. Bill No. 103, as amended Mar. 17, 1993, p. 2; see also Sen.

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Com. on Rev. & Tax., Analysis of Assem. Bill No. 103, July 7, 1993, p. 2.) Such an intent is undoubtedly a valid public purpose, and sections 6011(c)(10) and 6012(c)(10)-which clarify and limit the tax burden of businesses-are wholly consistent with this purpose. Therefore, retroactive application of sections 6011(c)(10) and 6012(c)(10) does not create an unconstitutional gift of public funds. (See *County of Sonoma v. State Bd. of Equalization*, *supra*, 195 Cal.App.3d at p. 993.)

Accordingly, we conclude that sections 6011(c)(10) and 6012(c)(10) have retrospective effect and govern the Agreements at issue here. Under these provisions, only the portion of Preston's income attributable to the Agreements' temporary transfer of tangible artwork is taxable. Because the Agreements do "not separately state a price for the tangible personal property" (§§ 6011(c)(10)(B), (C), 6012(c)(10)(B), (C)), the amount subject to taxation is either "the price at which the tangible personal property was sold, leased, or offered to third parties" (§§ 6011(c)(10)(B), 6012(c)(10)(B)), or "200 percent of the cost of materials and labor used to produce the tangible personal property subject to tax" (§§ 6011(c)(10)(C), 6012(c)(10)(C)). We therefore remand for a calculation of the sales tax owed by Preston under the Agreements and the resulting refund owed to her. ***226**

Disposition

We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with this opinion.

George, C. J., Baxter, J., and Chin, J., concurred.

KENNARD, J., Dissenting.

California imposes a tax on the sale of tangible personal property but not on the sale of intangible personal property. Here, plaintiff Heather Preston temporarily transferred her original artwork to a publisher for reproduction in children's books. Is such a transfer a sale of intangible property and thus not taxable, or is it a sale of tangible property and therefore taxable? The majority holds the latter. (Maj. opn., *ante*, at pp. 208-212.) The majority also concludes that the technology transfer agreement tax statutes (Rev. & Tax. Code, §§ 6011, subd. (c)(10), 6012, subd. (c)(10)) [FN1] are retroactive and that plaintiff's transfer of her artwork is taxable under those statutes. (Maj. opn., *ante*, at pp. 213-215, 221-225.)

FN1 All further statutory references are to the Revenue and Taxation Code.

I disagree on both points.

I

Unlike the majority, I agree with plaintiff that the transfer of her original artwork to a publisher for reproduction in children's books was a transfer of intangible property and therefore not taxable. As plaintiff points out, this transfer, for tax purposes, is indistinguishable from an author's transfer of an original manuscript to a publisher. A Board of Equalization regulation expressly recognizes the latter transaction as a transfer of intangible property and thus not taxable. (Cal. Code Regs., tit. 18, § 1501 (regulation 1501).)

Regulation 1501 provides in relevant part: "[A]n idea may be expressed in the form of tangible personal property and that property may be transferred for a consideration from one person to another; however, the person transferring the property may still be regarded as the consumer of the property. *Thus, the transfer to a publisher of an original manuscript by the author thereof for the purpose of publication is not subject to taxation. The author is the consumer of the paper on which he has recorded the text of his creation.* However, the tax would apply to the sale of mere copies of an author's works or the sale of manuscripts written by other authors where the manuscript itself is of particular value as an item of tangible personal property and the purchaser's primary interest is in the physical property. Tax would also apply to the sale of artistic expressions in the form of paintings and ***227** sculptures even though the work of art may express an original idea since the purchaser desires the tangible object itself; that is, since the true object of the contract is the work of art in its physical form." (Italics added.) The majority too recognizes that, under this example, the author of the manuscript is exempt from taxation. (Maj. opn., *ante*, at p. 211.)

Like the author in regulation 1501's example, plaintiff artist expressed on paper her creative efforts, which she transferred to a publisher for reproduction in children's books. The paper was merely the medium of transfer. Just as the "author is the consumer of the paper on which he has recorded the text of his crea-

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tion" (reg. 1501), plaintiff artist is the consumer of the paper (tangible property) on which she has recorded her artistic expression (intangible property).

The distinction between an author's creative expression in the form of words and, as here, an artist's creative expression in the form of illustrations for a book should make no difference for purposes of taxation. In both, the creative expression represents intangible property. In both, the vehicle for the artist's expression is the paper, which is tangible property. I therefore agree with plaintiff that the transfer of her artistic renderings to a publisher for reproduction in children's books should, for tax purposes, be treated the same as the transfer of an author's manuscript to a publisher.

The majority's holding to the contrary would lead to anomalous results. Consistent with the manuscript example mentioned in regulation 1501, an author's transfer of a manuscript to a publisher would be exempt from taxation. Yet an artist's transfer of original drawings to the publisher for reproduction as illustrations in the same book would be taxable. Because the transfer of property determined to be tangible even though valued in part for its intangible content is taxed on the full value of the transaction (*Simplicity Pattern Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 900, 912 [167 Cal.Rptr. 366, 615 P.2d 555]), an author of a manuscript who also happened to draw the illustrations for the book would, under the majority's holding, have to pay taxes on both the transfer of the manuscript and the artwork if the transfer to the publisher occurred at the same time; but if the illustrations were transferred at a different time, only the transfer to the publisher of the illustrations for the book would be taxable.

According to the majority, plaintiff's original artwork is distinguishable from an author's original manuscript because artwork, unlike a manuscript, is physically useful in the manufacturing process and essential to the ultimate production of books, whereas a manuscript furnishes only "verbal guidance." The majority, however, provides no support for this broad assertion. The majority also asserts that plaintiff's transfer agreements with the ***228** publisher would be "essentially 'worthless' " without the "physical artwork." (Maj. opn., *ante*, at p. 211.) But so would an author's agreement with the publisher to transfer a manuscript without ever providing the manuscript.

To summarize, I see no meaningful difference between an author's transfer of a manuscript to a publisher (nontaxable under the majority's holding) and an artist's transfer of drawings to a publisher for a book's illustrations (taxable under the majority's holding). If the author is not subject to taxation, then neither should the artist here be.

II

Even if I were to agree with the majority that the transfer here is distinguishable from a manuscript under regulation 1501, that artwork is "technology," and that the transfer is governed by the technology transfer agreement statutes (maj. opn., *ante*, at p. 225), I would conclude, contrary to the majority, that these statutes are not retroactive.

At issue are plaintiff's transfers of illustrations to the publisher for the period January 1, 1990, to December 31, 1993. Thereafter, the Legislature enacted the technology transfer agreement statutes at issue and directed that they become operative on April 1, 1994. (Stats. 1993, ch. 887, § 5, p. 4831.)

A statute is presumed to operate prospectively unless there is "an express declaration of retrospectivity or a clear indication" that the Legislature intended otherwise. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 [279 Cal.Rptr. 592, 807 P.2d 434]; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 153 [233 Cal.Rptr. 308, 729 P.2d 743].) Here we have neither.

The majority insists, however, there is a clear indication of the statutes' retroactivity. In enacting the statutes, the Legislature expressed its intent to "clarify the application of the Sales and Use Tax Law ... to technology transfer agreements, as defined." (Stats. 1993, ch. 887, § 3, p. 4831.) I do not share the majority's view that because the Legislature used the word "clarify" when it enacted the technology transfer statutes, it must have intended their retroactive application. Nor does the statutes' legislative history support such an intent by the Legislature.

From the Legislature's decision to postpone the operative date of the statutes to April 1, 1994, 90 days after their effective date (Stats. 1993, ch. 887, § 5, p. 4831), one can reasonably infer, as I do, that the Legislature intended the technology transfer statutes

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to apply prospectively. As the ***229** majority notes, a statute's operative date may be postponed to give people time to comply with the statute, to allow government agencies to formulate implementing procedures, or to allow for the passage of related legislation. (Maj. opn., *ante,* at pp. 223-224.) This enables individuals and entities to adjust to future applications of new law.

Here, the statutes in question established new law. The Legislature enacted those statutes in the wake of the Board of Equalization decision in *Petition of Intel Corporation* (June 4, 1992) [1993-1995 Transfer Binder] Cal.Tax Rptr. (CCH) paragraph 402-675, page 27,873. (Maj. opn., *ante,* at pp. 216, 222.) The Legislature, however, broadened the types of agreements qualifying for a tax exemption beyond those recognized in *Intel*. (Maj. opn., *ante,* at pp. 216-218.) Given this change in the law, the Legislature's postponement of the statutes' operative date to a date 90 days after the statutes' effective date tends to support an intent to have the statutes apply prospectively rather than, as the majority concludes, retroactively.

Because there is no clear indication that the Legislature intended to give retroactive effect to the technology transfer agreement statutes enacted after the tax period at issue, I conclude that those statutes are inapplicable here.

Conclusion

For the reasons stated above, I would reverse the judgment of the Court of Appeal.

Mosk, J., and Werdegar, J., concurred. ***230**

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H

THE PEOPLE, Plaintiff and Respondent,
v.
ORLANDO S. CAMBA, Defendant and Appellant.

No. A072883.

Court of Appeal, First District, Division 1, California.
Nov 4, 1996.

[Opinion certified for partial publication. FN* **]**

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I. and II.

SUMMARY

Following a jury trial, defendant was convicted of second degree murder (Pen. Code, § 187, subd. (a)), and the trial court reduced his presentence credits pursuant to Pen. Code, § 2933.1, enacted as an urgency measure and applicable to violent offenders. (Superior Court of Solano County, No. C39225, James F. Moelk, Judge.)

The Court of Appeal affirmed. In the published part of the opinion, the court held that the urgency clause of Pen. Code, § 2933.1, was passed in compliance with the requirement of Cal. Const., art. IV, § 8, subd. (d) that it be passed by a separate roll call vote of each house of the Legislature. That was done with the Assembly Bill at issue, and although the bill subsequently returned to the house of origin, in amended form with § 2933.1 added, the single roll call vote concurring in the amendments and the urgency section was valid. The Constitution does not require a second separate roll call approval of the urgency section of a single bill, even one drastically altered by amendments. The court further held that the legislative determination of urgency in the enactment of the bill, originally written to protect the public from repeat offenders who would otherwise be released by reducing presentence credits (Pen. Code, § 2933.1), but ultimately amended to apply to all violent felony offenders, was nevertheless valid. If the Legislature states facts constituting an emergency so that its action cannot be said to be arbitrary, courts cannot say that the Legislature has not performed its constitutional duty. (Opinion by Swager, J., with Stein, Acting P. J., and Dossee, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(**1a**, **1b**) Statutes § 4--Operation and Effect--Effective and Operative Dates.

In the absence of an urgency clause, a statute enacted at a regular session of the Legislature becomes effective on January 1 of the following year (Cal. Const., art. IV, § 8, subd. (c)(1)). In the usual situation, the "effective" and "operative" dates are one and the same, and with regard to ex post facto restrictions, a statute has no force and effect until such effective-operative date. In some instances, the Legislature may provide for different effective and operative dates. The operative date is the date upon which the directives of the statute may be actually implemented. The effective date, then, is considered that date upon which the statute came into being as an existing law. An enactment is a law on its effective date only in the sense that it cannot be changed except by legislative process; the rights of individuals under its provisions are not substantially affected until the provision operates as law. The Legislature may establish an operative date later than the effective date, since the power to enact laws includes the power to fix a future date on which the act will become operative.

(**2a**, **2b**, **2c**, **2d**) Statutes § 11--Enactment--Urgency Measure-- Separate Roll Call Votes--Validity.

The urgency clause of Pen. Code, § 2933.1, was passed in compliance with the requirement of Cal. Const., art. IV, § 8, subd. (d), that it be passed by a separate roll call vote of each house of the Legislature. That was done with the Assembly Bill at issue, and although the bill subsequently returned to the house of origin in amended form with Pen. Code, § 2933.1, added, the single roll call vote concurring in the amendments and the urgency section was valid. The Constitution does not require a second separate roll call approval of the urgency section of a single bill, even one drastically altered by amendments. Courts cannot impose a restriction upon legislative authority that has not been clearly expressed by the Constitution.

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(3) Statutes § 11--Enactment--Invalid Urgency Clause--Validity of Remainder.

If the urgency clause of legislation is found constitutionally unsound, the remainder of the statute is nonetheless valid, and it takes effect at the regular time appointed by law.

(4) Statutes § 11--Enactment--Urgency Clause--Necessity--Legislative Determination.

Authority is conferred on the Legislature to determine when urgency measures are necessary, and when such necessity has been determined as provided by the Constitution, the judgment of the Legislature is final, and will not be interfered with by the courts unless no declaration of facts constituting such emergency is included in the act or unless the statement of facts is so clearly insufficient as to leave no reasonable doubt that the urgency does not exist. The recitals of necessity and public interest in legislation must be given great weight and every presumption made in favor of their constitutionality.

(5) Constitutional Law § 39--Distribution of Governmental Powers-- Legislative Power.

The California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, that body may exercise any and all legislative powers that are not expressly or by necessary implication denied to it by the Constitution. Secondly, all intendments favor the exercise of the Legislature's plenary authority. If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. The restrictions and limitations imposed by the Constitution are to be construed strictly, and are not to be extended to include matters not covered by the language used.

(6) Statutes § 11--Enactment--Urgency Clause--Necessity--Legislative Determination.

The legislative determination of urgency in the enactment of a bill to protect the public from repeat offenders who would otherwise be released by reducing presentence credits (Pen. Code, § 2933.1), even though ultimately enacted to apply to all violent felony offenders, was nevertheless valid. If the Legislature states facts constituting an emergency so that its action cannot be said to be arbitrary, courts cannot say that it has not performed its constitutional duty, even though they may disagree with the Legislature as to the sufficiency of declared facts to constitute a sufficient reason for immediate action. Thus, given the limited nature of judicial review, it must be concluded that the mistaken reference to repeat, rather than all, offenders does not render erroneous the Legislature's finding and declaration of the need to protect the public by immediately implementing the credit reduction scheme of § 2933.1 to forestall the early release of dangerous criminals under previously existing law.

(7a, 7b) Statutes § 4--Operation and Effect--Effective and Operative Dates.

The operative date of a statute (Pen. Code, § 2933.1) (reduction of presentence credits for violent offenders) enacted as an urgency measure was not delayed until Jan. 1, 1995, by language stating: “This section shall only apply to offenses ... that are committed on or after the date on which this section becomes operative.” Use of the word “operative” rather than “effective,” did not indicate a legislative intent to delay the implementation of the statute to avoid any possible confusion in the courts caused by an immediate change in the law, as the proposed change in credit calculations was a relatively simple and straightforward task. The language merely provided that offenses committed before the “operative” date of the statute were excluded from the credit reduction scheme; it did not defer the operative date of the law. Nothing in the statute indicated a legislative intent that it was to become operative later than as provided in the valid urgency provision.

COUNSEL

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, and Catherine A. Rivlin, Deputy Attorney General, for Plaintiff and Respondent.

SWAGER, J.

Appellant was convicted following a jury trial of second degree murder (Pen. Code, § 187, subd. (a)), with personal use of a firearm (Pen. Code, §§ 1203.06, subd. (a)(1), 12022.5), [FN1] and sentenced to a total term of 19 years to life in state prison. On appeal, he objects to the trial court's exclusion of evidence of the

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victim's gang affiliations, prior violent acts and drug use. He also challenges the reasonable doubt instruction given by the court, and the reduction of his presentence credits pursuant to section 2933.1, subdivision (c). We find that no prejudicial errors were committed and affirm the judgment.

FN1 All further statutory references are to the Penal Code unless otherwise indicated.

Facts

On November 12, 1994, appellant left work at AVP Limited in Cordelia at 11:15 a.m. with his brother Bernard Camba, and his friends Adonis Paragus and Eric Paculan. [FN2] Their destination was a former residence on Kidder Avenue. Bernard drove the car, appellant was in the front passenger seat, Adonis was seated behind the driver, and Eric was seated behind appellant. A .38-caliber revolver which appellant had purchased for protection from ***861** "gangs" was in the glove compartment of the car. [FN3] Appellant thought he had unloaded the gun that day while he was at work, but must have loaded it again before he left.

FN2 Appellant's brother and his friends will be referred to by their first names to avoid confusion.

FN3 At trial, the audioand videotapes of appellant's confessions, given to the police in two separate interviews, were played for the jury; they comprise the bulk of the prosecution's case against appellant.

As they proceeded on Pennsylvania Avenue in Fairfield, the victim, Walter Low, walked across the street and nearly collided with the rear of the car. Low appeared to "want to bump" the car, so appellant retrieved the gun from the glove compartment and ordered his brother to "[m]ake a U-turn" to "scare" Low. As they turned the car around, the victim "just kept on saying something and throwing signs out there that he wants to be bad or something." Appellant displayed the gun, but Low "still didn't run"; instead, the victim motioned to appellant to "come on." Appellant believed Low was "throwing" gang signs, so he pointed the gun at the victim. Without really aiming and just wanting to "scare the guy," appellant pulled the trigger. He was not aware the gun was still loaded.

Appellant heard the gunfire and saw Low fall to the ground. He was "shocked" and said, " 'Let's go, let's go.' " Bernard drove straight home, and appellant disposed of the gun in a lake.

Low was killed by a single shot fired from "indeterminate range" and location which entered his heart and passed through two large blood vessels. At the scene of the shooting, no gun or knife was found in the victim's possession, although a screwdriver was discovered "laying next to" his jacket, as if it had been removed by paramedics.

Appellant's testimony at trial differed in material respects from his confession. Appellant testified that Eric, not he, owned the gun. On the day of the shooting, Eric showed the gun to him at work. He had "never seen a gun before," so he asked Eric if he "could hold it."

Appellant also testified that after they almost collided with the victim on Pennsylvania Avenue, *Eric* said Low was "doing some gang ... signs" and directed Bernard to turn the car around "to talk to the guy." Then, as they "headed back towards ... Low," Eric pulled out the gun and placed it on the back of appellant's shoulder. Appellant thought Eric "was going to shoot the guy," so he grabbed the gun and said, "What are you trying to do." Suddenly, Adonis said, "He's coming, he's coming. He got a gun, he got a gun." Low did not appear angry. Appellant observed Low reach inside his jacket, and the others exclaimed that the victim was "reaching ... for a ***862** gun." He feared that Low was armed because he looked like a gang member, and appellant's family had been harassed by gang members in the past. Appellant closed his eyes and "pulled the trigger" of Eric's gun. He did not intend to hit the victim, only to "scare him." He also did not expect the gun to fire. He lied in his confession to protect his brother and his friends, Adonis and Eric.

Discussion

I. , II. [FN*]

FN* See footnote, *ante*, page 857.

. . . .

III. *Sentence Credits.*

Appellant's final contention is that the trial court erred by modifying his sentence credits to reflect only 15 percent of the actual days of confinement served

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prior to his conviction pursuant to section 2933.1, which was approved as Assembly Bill No. 2716, 1993-1994 Regular Session, on September 21, 1994, [FN6] rather than 50 percent as specified previously in section 2933. Section 2933.1, when enacted, included an urgency clause, rendering it effective immediately "to protect the public from dangerous repeat offenders who otherwise would be released ...." (Stats. 1994, ch. 713, § 1; Assem. Bill No. 2716 (1993-1994 Reg. Sess.).) (1a) In the absence of an urgency clause, a statute enacted at a regular session of the Legislature becomes effective on January 1 of the following year. (Cal. Const., art. IV, § 8, subd. (c)(1); *People v. Henderson* (1980) 107 Cal.App.3d 475, 488 [166 Cal.Rptr. 20].) Appellant maintains that section 2933.1 does not govern the calculation of his sentence credits for two reasons: First, it was not properly enacted as urgency legislation under the California Constitution, and therefore did not take effect until January 1, 1995, *after* his offense was committed; and second, even if section 2933.1 may be considered a validly enacted urgency measure, it was not "operative" by its terms immediately upon enactment.

FN6 The effect of section 2933.1 was to reduce appellant's sentence credits from 378 to 57 days served. He admits a mistake in the calculation of 198 conduct credits by the trial court rather than the correct 188 days under section 2933. Therefore, he asks us to correct the abstract of judgment to award him a total of 566 days of sentence credits.

A. *Enactment as an Urgency Measure.*

(2a) Appellant's claim that the urgency provision of section 2933.1 cannot be given recognition is based upon article IV, section 8, subdivision ***863** (d) of the California Constitution, which provides: "Urgency statutes are those necessary for immediate preservation of the public peace, health, or safety. A statement of facts constituting the necessity shall be set forth in one section of the bill. In each house, the section and the bill shall be passed separately, each by rollcall vote entered in the journal, two thirds of the membership concurring...." (3) If the urgency clause of legislation is found constitutionally unsound, the remainder of the statute is nonetheless valid, and it takes effect "at the regular time appointed by law. [Citations.]" (*People v. Phillips* (1946) 76 Cal.App.2d 515, 521 [173 P.2d 392].) (2b)Appellant insists that when the history of the legislation is considered, the urgency clause was not properly passed by a separate roll call vote of each house of the Legislature, and the urgency statement was "no longer relevant" when it was enacted.

We are severely constrained in our review of the section 2933.1 urgency clause. (4) "Authority is conferred upon the legislature to determine when urgency measures are necessary, and when such necessity has been determined as provided by the Constitution, the judgment of the legislature is final, and will not be interfered with by the courts unless no declaration of facts constituting such emergency is included in the act or unless the statement of facts is so clearly insufficient as to leave no reasonable doubt that the urgency does not exist. (*Hollister v. Kingsbury* [(1933)] 129 Cal. App. 420 [18 Pac. (2d) 1006].)" (*Livingston v. Robinson* (1938) 10 Cal.2d 730, 740 [76 P.2d 1192]; see also *Davis v. County of Los Angeles* (1938) 12 Cal.2d 412, 420-421 [84 P.2d 1034].) "The recitals of necessity and public interest in legislation must be given great weight and every presumption made in favor of their constitutionality (*Monterey County Flood Control & Water Conservation Dist. v. Hughes* [(1962)] 201 Cal.App.2d 197, 209 [20 Cal.Rptr. 252])." (*Azevedo v. Jordan* (1965) 237 Cal.App.2d 521, 526 [47 Cal.Rptr. 125].)

(2c) We find no procedural defect in the legislative approval of the Assembly Bill No. 2716, 1993-1994 Regular Session, September 21, 1994, urgency provision. In the form originally passed in the Assembly, both Assembly Bill No. 2716 and a statement of urgency were separately approved by roll call votes, but neither the bill nor the urgency clause attached to it were then related to reform of prison credits. When the bill was amended in the Senate to add Penal Code section 2933.1, the urgency section was revised to refer to the need to protect the public from the early release of repeat offenders-a statement apparently taken from legislation which had been considered but not enacted the year before-and again both were approved by separate roll call votes. Upon the return of Assembly Bill No. 2716 to the Assembly, the Senate amendments adding section 2933.1 to ***864** the Penal Code "and declaring the urgency thereof, to take effect immediately," were passed by a *single* concurrence roll call vote of more than two-thirds of the membership, apparently in accordance with the Joint Assembly and Senate Rules. [FN7]

FN7 We have taken judicial notice of rule 27

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of the 1995-1996 Joint Rules of the Senate and Assembly, which provides: "When a bill which has been passed in one house is amended in the other by the addition of a section providing that the act shall take effect immediately as an urgency statute and is returned to the house in which it originated for concurrence in the amendment or amendments thereto, the procedure and vote thereon shall be as follows: [¶] The presiding officer shall first direct that the urgency section be read and put to a vote. If two-thirds of the membership of the house vote in the affirmative, the presiding officer shall then direct that the question of whether the house shall concur in the amendment or amendments shall be put to a vote. If two-thirds of the membership of the house vote in the affirmative, concurrence in the amendments shall be effective. [¶] If the affirmative vote on either of such questions is less than two-thirds of the membership of the house, the effect is a refusal to concur in the amendment or amendments, and the procedure thereupon shall be as provided in Rule 28."

We observe that the version of the Joint Rules of the Senate and Assembly provided to us by respondent are for the *1995-1996* legislative session, rather than the *1993-1994* session during which section 2933.1 was enacted. We therefore cannot be certain that section 2933.1 was passed in compliance with rule 27 as it was then effective, and give it little weight in assessing the validity of the vote.

Nothing more is demanded by the Constitution for mere concurrence in amendments to a bill which was already separately passed by each house as an urgency measure. (5) " '[T]he California Constitution is a limitation or restriction on the powers of the Legislature. [Citations.] Two important consequences flow from this fact. First, ... that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. [Citations.] ... [¶] Secondly, all intendments favor the exercise of the Legislature's plenary authority: "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used. " [Citations.]' [Citations.]" (*California State Employees' Assn. v. State of California* (1988) 199 Cal.App.3d 840, 845-846 [245 Cal.Rptr. 232]; see also *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1453 [29 Cal.Rptr.2d 103]; *State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 755 [16 Cal.Rptr.2d 727].) (2d) As we read article IV, section 8, subdivision (d), each house must approve in two separate votes any bill and its accompanying urgency section. (See Ops. Cal. Legis. Counsel, No. 12227 (Apr. 29, 1957) 2 Assem. J. (1957 Reg. Sess.) pp. 3663-3664.) That was done with Assembly Bill No. 2716, 1993-1994 Regular Session, September 21, 1994, and although the bill subsequently returned in amended form to the house of origin, the single roll call vote concurring in ***865** the amendments and the urgency section was valid. Article IV, section 8, subdivision (d) does not require a *second* separate roll call approval of the urgency section of a single bill, even one, such as Assembly Bill No. 2716, 1993-1994 Regular Session, September 21, 1994, drastically altered by amendments. We cannot impose a restriction upon legislative authority which has not been clearly expressed by the Constitution.

(6) We also find no flaw in the legislative determination of urgency in the enactment of Assembly Bill No. 2716, 1993-1994 Regular Session, September 21, 1994, to protect the public from *repeat* offenders who would otherwise be released, even though as ultimately enacted Assembly Bill No. 2716 applied to *all* violent felony offenders. " '[I]f the legislature "states facts constituting an emergency so that its action cannot be said to be arbitrary, courts cannot say that it has not performed its constitutional duty, even though they may disagree with the legislature as to the sufficiency of declared facts to constitute a sufficient reason for immediate action." (*Baker v. Hill* [(1929)] 180 Ark. 387 [21 S.W.2d 867, 868].)' (*Davis v. County of Los Angeles, supra*, 12 Cal.2d at pp. 422-423.)" (*Behneman v. Alameda-Contra Costa Transit Dist.* (1960) 182 Cal.App.2d 687, 692 [6 Cal.Rptr. 382].) Given our exceedingly limited reviewing function, we must conclude that the mistaken reference to repeat, rather than all, offenders does not render erroneous the Legislature's finding and declaration of the need to protect the public by immediately implementing the credit reduction scheme of section

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2933.1 to forestall the early release of dangerous criminals under previously existing law.

B. *Effective Date of the Statute.*

(7a) Even if the urgency clause of section 2933.1 is found valid, appellant argues that the operative date of the statute was still January 1, 1995. He relies upon subdivision (d) of section 2933.1, which specifies: "This section shall only apply to offenses ... that are committed on or after the date on which this section becomes *operative*." (Italics added.) Appellant maintains that use of the word "operative" in subdivision (d) of section 2933.1, rather than *effective*, indicates a legislative intent to delay the implementation of the reduction of sentence credits to avoid the confusion in the courts-and associated miscalculation of credits-inevitable with an immediate change in the law. We disagree.

(1b) " 'Under the California Constitution, a statute enacted at a regular session of the Legislature generally becomes effective on January 1 of the year following its enactment except where the statute is passed as an urgency measure and becomes effective sooner. [Citation.] In the usual situation, the ***866** "effective" and "operative" dates are one and the same, and with regard to ex post facto restrictions, a statute has no force and effect until such effective-operative date. [Citation.]' (*People v. Henderson* (1980) 107 Cal.App.3d 475, 488 [166 Cal.Rptr. 20].) [¶] In some instances, the Legislature may provide for different effective and operative dates. (*Cline v. Lewis* (1917) 175 Cal. 315, 318 [165 P. 915]; 57 Ops.Cal.Atty.Gen. 451, 454 (1974).) '[T]he operative date is the date upon which the directives of the statute may be actually implemented. The effective date, then, is considered that date upon which the statute came into being as an existing law.' (*People v. McCaskey* (1985) 170 Cal.App.3d 411, 416 [216 Cal.Rptr. 54]; see also *People v. Righthouse* (1937) 10 Cal.2d 86, 88 [72 P.2d 867].)" (*People v. Jenkins* (1995) 35 Cal.App.4th 669, 673-674 [41 Cal.Rptr.2d 502].)

" 'An enactment is a law on its effective date only in the sense that it cannot be changed except by legislative process; the rights of individuals under its provisions are not substantially affected until the provision operates as law.' ([*People v. Henderson* (1980) 107 Cal.App.3d 475,] 488 [166 Cal.Rptr. 20].) ... [T]he courts have recognized the power of the Legislature to establish an operative date later than the effective date .... [Citation.]" (*Estate of Martin* (1983) 150 Cal.App.3d 1, 3-4 [197 Cal.Rptr. 261].) " '[T]he power to enact laws includes the power to fix a future date on which the act will become operative. [Citations.]' [Citation.]" (*Johnston v. Alexis* (1984) 153 Cal.App.3d 33, 40 [199 Cal.Rptr. 909].) Our task is to ascertain and promote the legislative intent of the enactment. (*Id.* at p. 41.)

(7b) With the enactment of section 2933.1 the Legislature did not specify different effective and operative dates, or otherwise postpone implementation of the law until occurrence of a contingency, as with the restitution statutes found to have delayed legal effects in *People v. Palomar* (1985) 171 Cal.App.3d 131, 135-136 [214 Cal.Rptr. 785], and *People v. McCaskey* (1985) 170 Cal.App.3d 411, 418 [216 Cal.Rptr. 54]. Section 2933.1, subdivision (d) merely provides that offenses committed before the "operative" date of the statute are excluded from the credit reduction scheme; it does not defer the operative date of the law. We find nothing in the statute which indicates a legislative intent that it is to become operative later than as provided in the valid urgency provision. (*People v. Jenkins, supra,* 35 Cal.App.4th at p. 675.) To the contrary, the statement of urgency found in Assembly Bill No. 2716, 1993-1994 Regular Session, September 21, 1994, conflicts with any delayed implementation of the statute. We do not consider the Legislative Committee Analysis of unrelated legislation in 1996, prepared nearly two years later-and which refers to sentences for crimes committed after January 1, 1995, as incurring the 15 percent credit limit of section 2933.1-persuasive in determining the operative date of the statute. ***867** (*Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52 [276 Cal.Rptr. 114, 801 P.2d 357].) We also do not think any postponement of operation of the statute was necessary to prepare the trial courts for the change in credit calculations, a relatively simplistic and straightforward task. We conclude that section 2933.1 was operative, as expressly provided, when it was enacted on September 21, 1994, and was properly applied to appellant's sentence by the trial court.

The judgment is affirmed.

Stein, Acting P. J., and Dossee, J., concurred.

A petition for a rehearing was denied December

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2, 1996, and appellant's petition for review by the Supreme Court was denied February 19, 1997. Kennard, J., and Werdegar, J., were of the opinion that the petition should be granted. ***868**

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