

TITLE 13. NEW MOTOR VEHICLE BOARD

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the California New Motor Vehicle Board (“Board”), pursuant to the authority vested in it by Vehicle Code section 3050(a), proposes to adopt the proposed regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The Board proposes to amend sections 550, 551.2, 551.11, and 551.12 and add sections 551.19, 551.20, 551.23, 551.24, and 551.25 of Title 13 of the California Code of Regulations pertaining to case management.

PUBLIC DISCUSSIONS PRIOR TO NOTICE

Prior to the publication of this notice, the Board considered an initial draft of the proposed regulations at a noticed meeting held on February 11, 2008. At that meeting comments were received by members of the industry. Based on those comments and those of its members, the Board revised the proposed text. The proposed text was adopted at a noticed meeting held on February 4, 2010. Ten days prior to the meeting, a detailed agenda including the consideration of the proposed text of the regulations was mailed to the Board’s Public Mailing List and Electronic Public Mailing List, a list of approximately 90-100 individuals, entities and governmental agencies who have requested notification by the Board of pending Board matters, and the 38 California New Car Dealers Association Directors. The agenda was also posted on the Board’s website. No comments by the public were received at the February 4, 2010, General Meeting, and no further public discussions were held prior to publication of the notice.

PUBLIC HEARING

The Board has not scheduled a public hearing on this proposed action. However, the Board will hold a public hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days prior to the close of the written comment period.

WRITTEN COMMENT PERIOD

Any person interested, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. Comments may also be submitted by facsimile (FAX) at (916) 323-1632 or by e-mail at rparker@nmvb.ca.gov or nmvb@nmvb.ca.gov. The written comment period closes at 5:00 p.m. on Monday,

December 6, 2010. The Board will consider only comments received at the Board's offices by that time. Submit comments to:

Robin P. Parker, Senior Staff Counsel
New Motor Vehicle Board
1507 21st Street, Suite 330
Sacramento, CA 95811
(916) 323-1536 direct line
(916) 445-1888 main line
(916) 323-1632 fax
rparker@nmvb.ca.gov

AUTHORITY AND REFERENCE

Vehicle Code section 3050(a) authorizes the Board to adopt the proposed regulations. The proposed regulations implement, interpret, and make specific Business and Professions Code section 472.5(b), California Rules of Court, Rules 2.550 and 2.551, Code of Civil Procedure sections 284, 1013a, 2015.5 and 2016.020, Evidence Code section 751, Government Code sections 11425.20, 11425.40, 11435.05, 11435.10, 11435.25, 11435.55, 11435.65, 11440.20, 11440.30, 11450.30, and 68560, et seq., Rule 3-700, Rules of Professional Conduct, and Vehicle Code sections 1504, and 3050-3079.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Vehicle Code section 3050, subdivision (a) authorizes the Board to adopt rules and regulations governing such matters as are specifically committed to it.

The adopted mission of the Board is to: "...enhance relations between dealers and manufacturers throughout the State by resolving disputes in the new motor vehicle industry in an efficient, fair and cost-effective manner. The adopted vision statement provides that the Board safeguard for its "constituency, a fair, expeditious and efficient forum for resolving new motor vehicle industry disputes, which ultimately improves relations and reduces the need for costly litigation and develop methods that further improve the delivery of Board services in a timely and cost-effective manner..."

The Board proposes to amend Section 550 to add a number of definitions that are not currently in the Board's regulations including: administrative law judge ("ALJ"); affidavit; appeal; appellant; day; declaration; electronic; electronically stored information; hearing; motion(s); papers; petition; protest; and service. Furthermore, it proposes adding clarifying language that all of the definitions in Section 550 are supplementary to and do not replace those found in the Vehicle Code and other applicable laws and regulations.

The Board proposes to amend Section 551.2 to encompass motions to quash consistent with the Administrative Procedure Act ("APA") and the Office of Administrative Hearings ("OAH") regulations (1 CCR § 1024), update obsolete references when the

California Civil Discovery Act was reorganized, and reference electronically stored information (Section 1985.8 of the Code of Civil Procedure). The proposed amendments also require service of the request for subpoena on counsel and clarify service of the subpoena.

The Board proposes to amend Section 551.11 to clarify the submission of settlement conference statements. The amendment allows the parties to agree orally or in writing that the statements may only be submitted to the Board for use by the assigned settlement conference judge instead of being served on counsel; these statements would be designated “confidential” by the parties. This proposed amendment is the result of feedback provided by counsel appearing before the Board.

The Board proposes to amend Section 551.12 concerning assignment of ALJs and peremptory challenges to further clarify the process, and shorten the length of time to file a peremptory challenge.

The Board proposes to add Section 551.19 to fill a gap in the Board’s case management procedures concerning motions. Motions are routinely filed before the Board but there are no regulations that address the format, i.e., oral or written, whether an opposition or reply brief is permissible, or whether the hearings are in-person or telephonic. Government Code section 11440.30(a) of the APA provides that “[t]he presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe the exhibits.” Subsection (b) goes on to provide that “[t]he presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party objects.” The proposed regulation exempts the Board’s hearings from this optional provision of the APA and clarifies that all motion hearings are conducted by telephone, television, or other electronic means unless otherwise determined by the ALJ. However, in the event of live testimony, the hearing shall be conducted in person before the ALJ.

The Board proposes to add Section 551.20 to also fill a gap in the Board’s case management procedures. The APA addresses protective orders as does OAH’s regulations (1 CCR §§ 1024, 1030). The proposed regulation encompasses motions seeking closure of a hearing, a motion to seal designated portions of the record, and other protective orders. The motions can be oral or written but must be made as early as practicable. The regulation also requires the ALJ to set forth on the record the facts, legal basis, and findings that support any protective order.

The Board proposes to add Section 551.23 to ensure that parties and their counsel are aware that language assistance, accommodation for a disability, hearing impairment amplification, and other special accommodations are available at Board proceedings. This regulation is consistent with OAH’s regulation concerning the same (1 CCR § 1032). It is also consistent with the APA. Additionally, it specifies that an interpreter used at the hearing must have an oath on file with the Superior Court and be certified and registered in

accordance with the Government Code. To allow for flexibility in Board proceedings, if an interpreter certified pursuant to Government Code section 11435.20 cannot be present at the hearing, the Board shall have discretionary authority to provisionally qualify and use another interpreter.

The Board proposes to add Section 551.24 to formalize how proof of service can be accomplished in Board proceedings. This regulation is consistent with Section 1013a of the Code of Civil Procedure and current Board practice that provides for service via facsimile and electronic mail.

The Board proposes to add Section 551.25 because there is nothing in the Board's statutes or regulations which address substitution or withdrawal of counsel. This regulation is being proposed to ensure the parties and counsel are aware of the parameters permitting a change or withdrawal of counsel. The regulation does not allow a change of counsel alone to constitute grounds for a continuance of any previously scheduled dates in the proceeding. It is consistent with the Rules of Professional Conduct and the Code of Civil Procedure.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Board has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary costs or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.

Cost impacts on representative private persons or businesses: The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Adoption of these regulations will not:

- (1) Create or eliminate jobs within California.

- (2) Create new businesses or eliminate existing businesses within California; or
- (3) Affect the expansion of businesses currently doing business within California.

Significant effect on housing costs: None.

Small Business Determination:

The Board has determined that the proposed regulations will have no effect on small businesses. This determination was made because no small businesses are legally required to comply with the regulation, are legally required to enforce the regulation, or derive a benefit from or incur an obligation from the enforcement of the regulation. The proposed regulations merely clarify case management for franchised new motor vehicle dealers and their franchisors (new vehicle manufacturers or distributors) who choose to file a protest, petition or appeal with the Board.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Board must determine that no reasonable alternative it considered, or that has otherwise been identified and brought to the attention of the Board, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period.

CONTACT PERSONS

Please direct requests for copies of the proposed text (the “express terms”) of the regulations, the initial statement of reasons, the modified text of the regulations, if any, or other information upon which the rulemaking is based to Ms. Parker at the following address:

Robin P. Parker, Senior Staff Counsel
New Motor Vehicle Board
1507 21st Street, Suite 330
Sacramento, CA 95811
(916) 323-1536 direct line
(916) 445-1888 main line
(916) 323-1632 fax
rparker@nmvb.ca.gov

The back-up contact person for these inquires is:

Polly Rigggenbach, Staff Counsel
New Motor Vehicle Board
1507 21st Street, Suite 330
Sacramento, CA 95811
(916) 323-1282 direct line
(916) 445-1888 main line
(916) 323-1632 fax
prigggenbach@nmvb.ca.gov

AVAILABILITY OF THE STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its offices at the above address. As of the date this notice is published, the rulemaking file consists of this notice, the proposed text of the regulations, the initial statement of reasons, and all the information upon which the proposal is based. Copies may be obtained by contacting Ms. Parker, the contact person, or Ms. Rigggenbach, the back-up contact person.

AVAILABILITY OF CHANGES OR MODIFIED TEXT

After considering all timely and relevant comments received, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Board adopts the regulations as revised. Requests for copies of any modified regulation should be addressed to the Board contact person or back-up contact person at the address indicated above. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available to the public.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Ms. Parker or Ms. Rigggenbach at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout font can be accessed through the Board's website at www.nmvb.ca.gov.