

# FINAL STATEMENT OF REASONS

## UPDATE OF INITIAL STATEMENT OF REASONS

**SECTIONS 550, 551.2, and 551.22:** The proposed regulations as originally noticed to the public have been removed from the Final Rulemaking Packet; the Board is going forward with Sections 550, 551.2, and 551.22 in a separate rulemaking packet.

**SECTION 551.21:** No public comments were submitted during the 45-day comment period. However, the proposed regulation as originally noticed was clarified based on feedback provided by the Board's designated Law and Motion Judge, Anthony M. Skrocki.

Subsection (b)(1) was amended to more closely track Code of Civil Procedure section 2023.010, which pertains to actions or tactics that are misuses of the discovery process. Examples of actions or tactics that are misuses of the discovery process were identified. References to misuses or misuse of the discovery process were added in subsections (a) and (j). Clarifying changes were made in subsections (j) and (k) regarding payment of attorney's fees and expenses.

The proposed amendments were adopted by the Board at the June 17, 2015, General Meeting. A 15-day notice modifying the proposed text was issued on June 17, 2015.

During the 15-day comment period, public comments were submitted by the Alliance of Automobile Manufacturers ("Alliance") and the California New Car Dealers Association ("CNCDA"). The Alliance indicated that the amendments to Section 551.21 were unnecessary because they address a situation that occurred only once. The CNCDA took issue with the "substantial justification" standard used to determine whether a party's actions or tactics were a misuse of the discovery process. The CNCDA requested that a "reasonable standard" be used because it is more commonly used and has been tested in a variety of legal settings.

In response to the comments, all changes pertaining to misuse or misuses of the discovery process were deleted. The Board is proceeding with the text originally noticed on February 6, 2015, with the addition of the clarifying changes to subsections (j) and (k) pertaining to the payment of attorney's fees and expenses noticed on June 17, 2015.

The proposed amendments were adopted by the Board at the August 27, 2015, Special Meeting. A 15-day notice modifying the proposed text was issued on August 31, 2015. No public comments were received.

Non-substantive changes were made to the Reference authority in response to discussions with California State Transportation Agency General

Counsel and Deputy General Counsel. Since all references to misuse or misuses of the discovery process were deleted, Sections 2023.010-2023.040 of the Code of Civil Procedure in the Reference authority were also deleted. The Executive Committee of the Board approved these non-substantive changes on September 15, 2015.

### **TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

The following documents and other information which the Board has relied upon in adopting the proposed regulations have been added to the rulemaking file and were available for public inspection and comment from June 17, 2015, through July 2, 2015.

- (1) May 27, 2015, Policy and Procedure Committee Memo.

The following documents and other information which the Board has relied upon in adopting the proposed regulations have been added to the rulemaking file and were available for public inspection and comment from August 31, 2015, through September 15, 2015.

- (1) August 10, 2015, Policy and Procedure Committee Memo regarding the revised text,
- (2) August 10, 2015, Policy and Procedure Committee Memo regarding the public comments, and
- (3) August 27, 2015, Alternative sanctions text.

### **REASONABLE ALTERNATIVES TO THE REGULATIONS AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES**

Prior to the 15-day notice modifying the proposed text, and at a noticed General Meeting held on June 17, 2015, the Board considered and adopted amendments to the regulation that are the subject of this rulemaking action. Ten days prior to the meeting, a detailed agenda including the topic of potential amendments to the regulation that are the subject of this rulemaking action was mailed to all individuals and entities on the Board's Public Mailing list, Electronic Public Mailing list, and website subscription list. The agenda was also posted on the Board's website.

No comments by the public were received at the June 17, 2015, General Meeting, and no further public discussion was held prior to publication of the 15-day notice of modified text. No other alternatives were presented to or considered by the Board.

The Board did not go forward with these amendments and made additional revisions as indicated below.

Prior to the second 15-day notice modifying the proposed text, and at a noticed Special Meeting held on August 27, 2015, the Board considered and adopted amendments to Section 551.21. Ten days prior to the meeting, a detailed agenda including the topic of potential amendments to the regulations was mailed to all individuals and entities on the Board's Public Mailing list, Electronic Public Mailing list, and website subscription list. The agenda was also posted on the Board's website. The Board adopted the proposed amendments to the text.

No comments by the public were received at the August 27, 2015, Special Meeting, and no further public discussion was held prior to publication of the second 15-day notice of modified text. No other alternatives were presented to or considered by the Board.

**COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD THE TEXT WAS AVAILABLE TO THE PUBLIC**

The text was made available to the public from February 6, 2015, through March 23, 2015. The Board did not receive any comments.

**COMMENTS RECEIVED DURING THE PERIOD THE MODIFIED TEXT WAS AVAILABLE TO THE PUBLIC FROM JUNE 17, 2015 THROUGH JULY 2, 2015**

The modified text was made available to the public from June 17, 2015, through July 2, 2015.

**Comment No. 1:**

On July 2, 2015, the Board received public comments from the Alliance. The Alliance believes that amending Section 551.21 is "both unnecessary and needlessly imposes a level of detail far beyond that which is even applicable in typical civil cases." Furthermore, since the June 17 proposed amendments address a situation that only occurred once, "this section clearly does not carry with it a long history of troublesome results and impacts that would give rise to such a substantial modification of the current regulation. It is based wholly on a case of first-blush consideration." Given there are dealers on the Board even though they do not participate in protests, the Alliance contends that "...there is substantial opportunity for the cultivation of certain perspectives and sympathies among Board member peers", which have no place in adjudicating a legal dispute. Since the proposed amendments are punitive measures, the Alliance "hopes that such changes are the result of only long-held, clearly established deficiencies in the current system. Neither of which are present here."

The Alliance also commented on Section 551.22, which pertains to Proposed Stipulated Decisions and Order ("PSDO") and closely mirrors Vehicle Code section 3050.7. The Alliance suggested additional language allowing for oral argument by parties should a PSDO be brought before the Board due to a member's objection. According to the Alliance, fairness dictates that given the

parties have mutually agreed to the PSDO there should be an opportunity for the parties to address the Board members' questions.

Response:

In an effort to address the Alliance's comments, the staff proposed going back to the version of Section 551.21 that was originally noticed for public comment on February 6, 2015. There were no public comments received regarding this version and it still addresses a number of inconsistencies identified by the *McConnell Chevrolet Buick* motion.

The opportunity to provide public comment on Section 551.22 ended on March 23, 2015. Even though the June 17 proposed amendments did not pertain to this section, the staff addressed the Alliance's comments. The suggestion regarding Section 551.22 is unnecessary since public comments are allowed and encouraged throughout the Board's meetings except on Proposed Orders/Decisions/Rulings pursuant to the Bagley-Keen Open Meeting Act (Gov. Code § 11120, et seq.).

Comment No. 2:

On July 2, 2015, the CNCDA submitted public comments for the proposed amendments to Section 551.21. In particular, the CNCDA took issue with the "substantial justification" standard used to determine whether a party's actions or tactics are misuses of the discovery process. The CNCDA recommends a "reasonable justification" standard be used in this context because it is a more commonly used standard and "has been tested many times in a variety of legal settings." The higher standard proposed by the Board could, according to the CNCDA, result in too great of a burden being placed on the parties. According to the CNCDA, "[s]anctions are serious, and should be reserved for truly problematic, deliberate and unacceptable behavior. Otherwise, zealous advocacy of a client's interests can be unduly suppressed due to the chilling effect of potential sanctions for being 'wrong,' despite having a reasonable justification for conduct or arguments." The CNCDA maintains that "substantial justification" is not defined and subject to ambiguity. It urges the Board to adopt the "reasonable justification" standard because it is more appropriate for sanctions and provides the most clarity to all parties.

Response:

The standard of "substantial justification" has long been a part of the Board's statutes in Vehicle Code section 3050.2, which states the powers and duties of the board. Specifically, Section 3050.2(b) states, in part, "...The executive director may, at the direction of the board, upon a failure to comply with authorized discovery without substantial justification for that failure, require payment of costs incurred by the board, as well as attorney's fees and costs of the party who successfully makes or opposes a motion to compel enforcement of discovery..." (Underline added.)

In addition, this standard has been described and subsequently upheld in California Appellate Court, specifically in the case of *Nader Automotive Group, LLC v. New Motor Vehicle Bd.* (2009) 178 Cal.App.4<sup>th</sup> 1478, 1480, 1483. In the *Nader* case, the dealer claimed that Vehicle Code section 3050.2 was unconstitutional because it gave no standard which the Administrative Law Judge could apply. However, the Court disagreed stating that, just like Vehicle Code section 3050.2, Code of Civil Procedure section 2031.310(h) used a “substantial justification” standard. This section provided the Board staff guidance in drafting the June 17 proposed amendments. The *Nader* court also pointed out the case of *Tetra Pak, Inc. v. State Bd. of Equalization* (1991) 234 Cal.App.3d 1751, which interpreted the standard to mean “the entity's position in the proceedings was clearly reasonable, i.e., it had a reasonable basis in law and fact.” (*Id.* at 1763) Ultimately, the *Nader* court found the “substantial justification” standard in Vehicle Code section 3050.2 to be constitutional.

Given the long-standing history and authority stated above, the staff proposed the Board not make any changes in response to CNCDA’s comments. At the August 27, 2015, Special Board Meeting, the members adopted the staff’s recommended response to the public comments.

**COMMENTS RECEIVED DURING THE PERIOD THE MODIFIED TEXT WAS AVAILABLE TO THE PUBLIC FROM AUGUST 31, 2015 THROUGH SEPTEMBER 15, 2015**

The modified text was made available to the public from August 31, 2015, through September 15, 2015. The Board did not receive any comments on the modified text.

**COMMENTS RECEIVED DURING THE PERIOD DOCUMENTS AND INFORMATION ADDED TO THE RULEMAKING FILE WERE AVAILABLE TO THE PUBLIC**

Documents and information added to the rulemaking file were available for public inspection at the Board’s offices from June 17, 2015, through July 2, 2015, and the public could comment upon these documents and information from June 17, 2015, through July 2, 2015. The Board did not receive any comments on the documents and information added to the rulemaking file.

Additional documents and information added to the rulemaking file were available for public inspection at the Board’s offices from August 31, 2015, through September 15, 2015, and the public could comment upon these documents and information from August 31, 2015, through September 15, 2015. The Board did not receive any comments on the documents and information added to the rulemaking file.

### **LOCAL MANDATE DETERMINATION**

The proposed regulations do not impose any mandate on local agencies or school districts.

### **ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS**

No alternatives were proposed to the Board that would lessen any adverse economic impact on small business.

### **ALTERNATIVES DETERMINATION**

The Board has determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The amendments adopted by the Board are the only regulatory provisions identified by the Board that accomplish the goal of clarifying 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. No other alternative has been proposed or otherwise brought to the Board's attention.