



MEMO

**To : POLICY AND PROCEDURE COMMITTEE
BISMARCK OBANDO, CHAIR
KATHRYN ELLEN DOI, MEMBER**

Date: August 10, 2015

**From : WILLIAM G. BRENNAN
ROBIN PARKER
DANIELLE R. VARE**

**Subject: DISCUSSION AND CONSIDERATION OF PUBLIC COMMENTS RECEIVED
AFTER THE 15-DAY NOTICE ON THE BOARD'S PROPOSED RULEMAKING
CONCERNING SANCTIONS (13 CCR § 551.21)**

At the June 17, 2015 General Meeting, the members adopted revised text pertaining to sanctions (see Attachment 1). The revisions sought to more closely track Code of Civil Procedure section 2023.010 (pertaining to misuses of the discovery process). Immediately after the meeting, a 15-day notice modifying the proposed text was issued to allow public comment through July 2 (see Attachment 2). The following summarizes the public comments and Board response:

Alliance of Automobile Manufacturers ("Alliance"):

On July 2, 2015, the Board received public comments from the Alliance (see Attachment 3).¹ 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." (Comments, p. 1) 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." (Comments, p. 1) 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. (Comments, p. 1) 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." (Comments, pp. 1-2)

¹ The Alliance is a trade association that represents 12 passenger car and light truck manufacturers, including: BMW Group, FCA US LLC (formerly Chrysler), Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of America, and Volvo Car Corporation.

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.² (Comments, p. 2)

Response:

In an effort to address the Alliance’s comments, the staff proposes 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 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.).

California New Car Dealers Association (“CNCDA”) Comments:

On July 2, 2015, the CNCDA³ submitted public comments for the proposed amendments to Section 551.21 (see Attachment 4). 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.” (Comments, p. 1) 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.” (Comments, p. 1) 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

² 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 will address the Alliance’s comments.

³ The CNCDA is a statewide trade association that represents the interests of over 1,100 franchised new car and truck dealer members.

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.4th 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 proposes the Board not make any changes in response to CNCDA’s comments.

Recommendation

The staff recommends that the Board adopt the responses to the public comments, which will be incorporated into the final statement of reasons.⁴

This matter is being agendized for consideration at the August 27, 2015, Special Meeting.

If you have any questions or require additional information, please do not hesitate to contact me at (916) 324-6197, Robin at (916) 323-1536, or Danielle at (916) 327-3129.

cc: Glenn Stevens, President

⁴ Government Code section 11346.9(a)(3) requires the Board include in its final statement of reasons: “A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency’s proposed action or to the procedures followed by the agency in proposing or adopting the action...”

The changes to the original text are illustrated in the following manner:

- Text proposed to be deleted for the 45-day comment period is displayed in ~~strikeout~~ type.
- Text proposed to be added for the 45-day comment period is displayed in underline type.
- Text proposed to be deleted for the 15-day comment period is displayed in ~~*italicized double-strikeout*~~ type using a “ – “.
- Text proposed to be added for the 15-day comment period is displayed in *italicized double underline* using a “ – “.

§ 551.21. Sanctions - ~~Bad Faith Actions.~~

(a) In any proceeding before the board or an ALJ, no party or representative of a party shall engage in or participate in any actions or tactics that are “misuses of the discovery process”, frivolous, or that are intended to cause or will result in unnecessary delay.

(b) For purposes of this section, “party” or “representative of a party” includes, but is not limited to, a party’s officer, director, managing agent, dealer principal or the equivalent, or their attorney.

~~(a) The ALJ may recommend ordering a party, a party's representative or both, to pay reasonable sanctions, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.~~

(1) “Actions or tactics” “that are misuses of the discovery process” include, but are not limited to “~~“the making or opposing of motions or the failure to comply with a lawful order or ruling of the board or an ALJ, including a failure to comply timely with a pre-hearing conference order or discovery order”~~”.

“(A) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery;

“(B) Using a discovery method in a manner that does not comply with its specified procedures;

“(C) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;

“(D) Failing to respond or to submit to an authorized method of discovery;

“(E) Making, without substantial justification, an unmeritorious objection to discovery.

“(F) Making an evasive response to discovery;

“(G) Disobeying a board order to provide discovery;

“(H) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery;

“(I) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made.”

(2) “Frivolous” includes, but is not limited to means:

(A) Totally without merit as there is an absence of reasonable support, under the facts or

law, for making or opposing the motion(s), or for the failure to comply; or

(B) For the sole purpose of harassing an opposing party or counsel.

(C) Actions or tactics, whether consisting of affirmative conduct or failure to act or respond, that will result or do result in unnecessary delay or costs, or are otherwise not in good faith.

(c) A party asserting a violation of this section may, by way of written motion in compliance with Article 1, section 551.19, or oral motion made on the record during reported proceedings, request that the board or an ALJ recommend that the board impose sanctions upon a party, or party's representative, or both.

(d) An ALJ presiding over the matter who believes there has been a violation of this section may on his or her own initiative recommend that the board impose sanctions upon a party, or party's representative, or both.

(b) (e) The board shall not order sanctions, or an ALJ shall not recommend an award of sanctions, without providing the party or party's representative against whom sanctions are sought notice and an opportunity to be heard.

(f) The board or ALJ shall make determinations as to whether the actions or tactics were frivolous based upon the administrative record and any additional testimony or documentary evidence presented.

(c) (g) Whether there has been bad faith by a party shall be determined by the ALJ based upon testimony under oath or other evidence. Any proposed order recommending sanctions by the ALJ or board order imposing sanctions shall be on the record, or in writing, setting forth the factual findings on which the recommended or board ordered sanctions are based, as well as setting forth the factual findings as to the reasonableness of the sanctions, including the reasonableness of any amount(s) to be paid.

(d) (h) A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions is shall not be considered by the board members and is final upon issuance by the ALJ.

(e) (i) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

(j) If the motion for sanctions is granted, the board may order or an ALJ may recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred "as a result of the misuse of the discovery process and also" in bringing and pursuing the motion. However, "payment of" attorney's fees and expenses will not be ordered if:

(1) The movant filed the motion before attempting in good faith to obtain compliance by the opposing party without board action;

(2) The opposing party's noncompliance, nondisclosure, response, or objection was substantially justified; or

(3) Other circumstances make an award unjust.

(k) If the motion for sanctions is denied, the board may order or an ALJ may recommend, after giving an opportunity to be heard, the movant or movant's representative or both to pay the party or party's representative who opposed the motion reasonable expenses and attorney's fees in "opposing the motion for sanctions as well as" bringing and pursuing the

motion for “~~such~~” expenses and attorney’s fees. However, “payment of” attorney’s fees and expenses will not be ordered if the motion for sanctions was substantially justified or other circumstances make an award unjust.

(l) If the motion for sanctions is granted in part and denied in part, the board may order or an ALJ may recommend that an award of reasonable expenses and attorney’s fees incurred in connection with bringing or opposing the motion be apportioned.

Note: Authority cited: Section 3050(a), Vehicle Code. Reference: Sections 128.5, 2023.010, 2023.020, 2023.030, and 2023.040, Code of Civil Procedure; Section 11455.30, Government Code; and Section 3050.2, Vehicle Code.

Clean Version of Proposed Revisions

§ 551.21. Sanctions.

(a) In any proceeding before the board or an ALJ, no party or representative of a party shall engage in or participate in any actions or tactics that are misuses of the discovery process, frivolous, or that are intended to cause or will result in unnecessary delay.

(b) For purposes of this section, “party” or “representative of a party” includes, but is not limited to, a party’s officer, director, managing agent, dealer principal or the equivalent, or their attorney.

(1) “Actions or tactics” that are misuses of the discovery process include, but are not limited to:

(A) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery;

(B) Using a discovery method in a manner that does not comply with its specified procedures;

(C) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;

(D) Failing to respond or to submit to an authorized method of discovery;

(E) Making, without substantial justification, an unmeritorious objection to discovery;

(F) Making an evasive response to discovery;

(G) Disobeying a board order to provide discovery;

(H) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery;

(I) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made.

(2) “Frivolous” includes, but is not limited to:

(A) Totally without merit as there is an absence of reasonable support, under the facts or law, for making or opposing the motion(s), or for the failure to comply; or

(B) For the purpose of harassing an opposing party or counsel.

(C) Actions or tactics, whether consisting of affirmative conduct or failure to act or respond,

that will result or do result in unnecessary delay or costs, or are otherwise not in good faith.

(c) A party asserting a violation of this section may, by way of written motion in compliance with Article 1, section 551.19, or oral motion made on the record during reported proceedings, request that the board or an ALJ recommend that the board impose sanctions upon a party, or party's representative, or both.

(d) An ALJ presiding over the matter who believes there has been a violation of this section may on his or her own initiative recommend that the board impose sanctions upon a party, or party's representative, or both.

(e) The board shall not order sanctions, or an ALJ shall not recommend an award of sanctions, without providing the party or party's representative against whom sanctions are sought notice and an opportunity to be heard.

(f) The board or ALJ shall make determinations as to whether the actions or tactics were frivolous based upon the administrative record and any additional testimony or documentary evidence presented.

(g) Any proposed order recommending sanctions by the ALJ or board order imposing sanctions shall be on the record, or in writing, setting forth the factual findings on which the recommended or board ordered sanctions are based, as well as setting forth the factual findings as to the reasonableness of the sanctions, including the reasonableness of any amount(s) to be paid.

(h) A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions shall not be considered by the board members and is final upon issuance by the ALJ.

(i) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

(j) If the motion for sanctions is granted, the board may order or an ALJ may recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred as a result of the misuse of the discovery process and also in bringing and pursuing the motion. However, payment of attorney's fees and expenses will not be ordered if:

(1) The movant filed the motion before attempting in good faith to obtain compliance by the opposing party without board action;

(2) The opposing party's noncompliance, nondisclosure, response, or objection was substantially justified; or

(3) Other circumstances make an award unjust.

(k) If the motion for sanctions is denied, the board may order or an ALJ may recommend, after giving an opportunity to be heard, the movant or movant's representative or both to pay the party or party's representative who opposed the motion reasonable expenses and attorney's fees in opposing the motion for sanctions as well as bringing and pursuing the motion for expenses and attorney's fees. However, payment of attorney's fees and expenses will not be ordered if the motion for sanctions was substantially justified or other circumstances make an award unjust.

(l) If the motion for sanctions is granted in part and denied in part, the board may order or an ALJ may recommend that an award of reasonable expenses and attorney's fees incurred in connection with bringing or opposing the motion be apportioned.

Note: Authority cited: Section 3050(a), Vehicle Code. Reference: Sections 128.5, 2023.010, 2023.020, 2023.030, and 2023.040, Code of Civil Procedure; Section 11455.30, Government Code; and Section 3050.2, Vehicle Code.

NEW MOTOR VEHICLE BOARD

1507 21ST Street, Suite 330
Sacramento, California 95811

June 17, 2015

NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED REGULATIONS (13 CCR § 551.21)

Pursuant to the requirements of Government Code section 11346.8(c), and Section 44 of Title 1 of the California Code of Regulations, the New Motor Vehicle Board ("Board") is providing notice of modifications to proposed regulation (section 551.21 of Title 13), which was the subject of a Notice of Proposed Rulemaking published in the California Regulatory Notice Register on February 6, 2015.

To more closely track Code of Civil Procedure section 2023.010, which pertains to misuses of the discovery process, subdivisions (a), (b)(1)(A)-(I), and (j) are being modified as indicated in the attached text.

As drafted, subdivision (k) does not address expenses and fees incurred in opposing the motion for sanctions if the motion for sanctions is denied. It only addresses expenses and attorney's fees for bringing the motion seeking such expenses and attorney's fees. This was not the intent of the amendment so Section 551.21 needs to be modified accordingly.

If you have any comments regarding the proposed modifications, the Board will accept written comments between June 17, 2015, and July 2, 2015. All written comments must be submitted to the Board no later than 5:00 p.m. on July 2, 2015, and addressed to:

Robin P. Parker, Senior Staff Counsel
New Motor Vehicle Board
1507 21st Street, Suite 330
Sacramento, CA 95811
rparker@nmvb.ca.gov

All written comments received by July 2, 2015, which pertain to the indicated modifications will be reviewed and responded to by the Board's staff as part of the compilation of the rulemaking file. Please limit your comments to the modifications of the text.

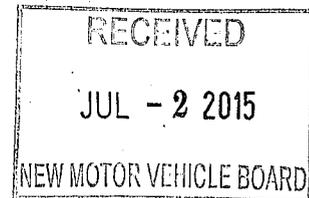
If you have any questions or require additional information, please contact Robin Parker at (916) 323-1536.

Attachment 2



AUTO ALLIANCE
DRIVING INNOVATION®

July 2, 2015



Mr. Robin P. Parker
Senior Staff Attorney
California New Motor Vehicle Board
1507 21st St., Suite 330
Sacramento, CA 95811

Re: Notice of Modifications to text of proposed regulations (13 CCR §551.21 and 22)

On behalf of the Alliance of Automobile Manufacturers, I write to comment on the above referenced rulemaking being proposed by the California New Motor Vehicle Board ("Board"). The Alliance is a trade association representing 12 of the world's leading passenger car and light truck manufacturers, including: BMW Group, FCA US LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of American, and Volvo Car Corporation.

§551.21 – Sanctions.

The current process for the imposition of sanctions in cases before the Board appropriately tracks the California Code of Civil Procedure §2023.010. This course of practice has worked well for many years and our members believe amending §551.21 is both unnecessary and needlessly imposes a level of detail far beyond that which is even applicable in typical civil cases. As stated in the Board's Initial Statement of Reasons¹, the necessity of the proposed change to §551.21 is to address a situation that was "the first time a motion for sanctions was filed pursuant to §551.21." Therefore, 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.

Furthermore, while automakers are statutorily subjected to the jurisdiction of the Board and participate in its proceedings in good faith, there remains a consistent, inherent concern of bias application of the law when the governing body to who we are subjected includes motor vehicle dealers. Regardless of the fact that dealers may not participate in protest cases, there is substantial opportunity for the cultivation of certain perspectives and sympathies among Board member peers, that have no place in the adjudication of a legal dispute. The Alliance approaches attempts to enhance Board authority, particularly as it relates to the imposition of punitive

¹ California New Motor Vehicle Board website, [Initial Statement of Reasons](http://www.nmvb.ca.gov/regulatory_actions/regulatory_actions.html), http://www.nmvb.ca.gov/regulatory_actions/regulatory_actions.html; accessed June 30, 2015.

Alliance of Automobile Manufacturers

BMW Group • Fiat Chrysler Automobiles • Ford Motor Company • General Motors Company • Jaguar Land Rover • Mazda • Mercedes-Benz USA • Mitsubishi Motors • Porsche • Toyota • Volkswagen • Volvo
803 7th Street N.W., Suite 300, Washington, DC 20001 • Phone 202.326.5500 • Fax 202.326.5567 •

ATTACHMENT 3

measures, with trepidation and the hope 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 requests that the proposed changes to §551.21 of Title 13 not be adopted.

§551.22 – Adoption and objection to Proposed Stipulated Decision and Order.

The proposed addition of §551.22 to this regulation closely mirrors a similar provision found in Cal. Veh. Code §3050.7 and is not objectionable to Alliance members. We would however suggest additional language allowing for oral argument by the parties should a stipulated decision and order be brought before the full Board due to an objection of a Board member. Given that the affected parties have mutually agreed to the decision, fairness dictates that their perspectives should be considered by the Board and there be an opportunity for any questions to be answered.

Thank you very much for the opportunity to comment on the California New Motor Vehicle Board's proposed rulemaking.

Sincerely,

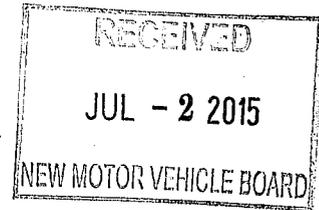
A handwritten signature in black ink, appearing to read "Amy Brink", with a large, sweeping flourish extending to the right.

Amy Brink
Senior Attorney



California New Car Dealers Association

VIA E-MAIL



July 2, 2015

Robin Parker, Senior Staff Counsel
New Motor Vehicle Board
1507 21st Street, Suite 330
Sacramento, CA 95811

RE: NOTICE OF ADDITION OF DOCUMENTS AND INFORMATION TO RULEMAKING FILE dated June 17, 2015

Dear Ms. Parker,

Thank you for the opportunity to provide written comments on the New Motor Vehicle Board (Board) proposed amendments to Section 551.21 of the Vehicle Code, relating to Bad Faith Actions & Sanctions.

The California New Car Dealers Association (CNCDA) is a statewide trade association that represents the interests of over 1,100 franchised new car and truck dealer members. CNCDA members are primarily engaged in the retail sale and lease of new and used motor vehicles, but also engage in automotive service, repair and part sales. We are writing to express a handful of concerns regarding the proposed amendments to Vehicle Code Section 551.21.

The "substantial justification" standard should be replaced with "reasonable justification."

Sections 551.21(b)(1)(A), 551.21(b)(1)(E) and 551.21(b)(1)(H) use "substantial justification" as a standard to determine whether a party's actions or tactics are misuses of the discovery process. CNCDA takes issue with the proposed use of "substantial justification," and recommends the Board change the standard to "reasonable justification."

"Substantial justification" is an arguably higher standard than "reasonable justification," and therefore may result in too great of a burden on parties before the Board or an ALJ. Sanctions 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.

Further, "substantial justification" is not defined, and so is subject to the ambiguity discussed above. Conversely, "reasonable" is the more commonly used standard in our legal system and a standard that has been tested many times in a variety of legal settings. It is the standard relied upon in section 551.21(b)(2)(A), in fact. CNCDA requests that staff adopt the standard that is both more appropriate for sanctions and is provides greater clarity to all parties.

CNCDA thanks you for the opportunity to provide comments on the Board's proposed regulations. Please contact CNCDA's Director of Legal and Regulatory Affairs, Monica Baumann, at (916) 441-2599 or mbaumann@cncda.org if you have any questions or would like to discuss these proposed revisions further.

Sincerely,

A handwritten signature in black ink, appearing to read 'Monica Baumann', written over a horizontal line.

Monica Baumann
CNCDA Director of Legal and Regulatory Affairs