

REGULATORY AGENCY ACTION



STATE & CONSUMER SERVICES AGENCY (Department of Consumer Affairs)

BOARD OF ACCOUNTANCY *Executive Officer: Carol Sigmann* (916) 920-7121

The Board of Accountancy (BOA) licenses, regulates, and disciplines certified public accountants (CPAs). The Board also regulates and disciplines existing members of an additional classification of licensees, public accountants (PAs); the PA license was granted only during a short period after World War II. BOA currently regulates over 50,000 licensees. The Board establishes and maintains standards of qualification and conduct within the accounting profession, primarily through its power to license. The Board's enabling act is found at section 5000 *et seq.* of the Business and Professions Code; the Board's regulations appear in Title 16, Division 1 of the California Code of Regulations (CCR).

The Board consists of twelve members: eight BOA licensees (six CPAs and two PAs), and four public members. Each Board member serves a four-year term and receives no compensation other than expenses incurred for Board activities.

The Board's staff administers and processes the nationally standardized CPA examination, a four-part exam encompassing the categories of Audit, Law, Theory, and combined sections Practice I and II. Applicants must successfully complete all four parts of the exam and 500 hours of qualifying auditing work experience in order to be licensed. Approximately 20,000 examination applications are processed each year. Under certain circumstances, an applicant may repeat only the failed sections of the exam rather than the entire exam. BOA receives approximately 4,000 applications for licensure per year.

The current Board officers are President Ira Landis, Vice President Janice Wilson, and Secretary/Treasurer Jeffery Martin.

MAJOR PROJECTS:

Board Adopts Policy Regarding Rule 11.5 Experience. At its November meeting, BOA adopted an "interoffice communication" as Board policy interpreting section 11.5, Title 16 of the CCR,

which sets forth the type of experience required for CPA licensure under Business and Professions Code section 5083. The policy, which was drafted by the Board's Experience Task Force, provides that "[a]uditing procedures performed in a review engagement shall be considered qualifying Rule 11.5 experience. It should be understood that the applicant may gain such experience on a 'piecemeal basis' over a series of review engagements." The Board directed the Qualifications Committee to incorporate this rule into its policy manual.

This action is yet another step in the Board's lengthy (and apparently ongoing) reinterpretation of the laws related to experience required for CPA licensure. Without the benefit of a change in any statute or regulation, the Board has effectively overhauled the so-called "500-hour" experience requirement embodied in Business and Professions Code section 5083 and CCR section 11.5 over the past three years. In response to pressure by the California Society of Certified Public Accountants (CSCPA), the Board recognized in 1989 that 500 hours of "audit experience" for each prospective CPA simply do not exist in California, and that few CPAs actually perform audits in practice, thereby rendering the 500-hour audit experience requirement (as then interpreted by the Board) a gratuitous barrier to entry into the CPA profession. BOA was persuaded to relax its strict interpretation of the "audit experience" requirement as a condition of CPA licensure. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 50; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) pp. 64-65; and Vol. 10, No. 1 (Winter 1990) pp. 51-52 for extensive background information.)

Although the policy change reflects a widespread consensus on its merits, the manner in which the Board has effectuated it is a matter of concern to some observers. Rather than amending Rule 11.5 through the notice, comment, and formal adoption proceedings required by the Administrative Procedure Act (and by Business and Professions Code section 5083 itself), the Board simply modified "Form E"—the "Certificate of Ex-

perience" which must be completed by the CPA employer(s) of the person applying for licensure. Previously, Form E required an attesting employer to certify that an applicant had completed 500 hours of "audit experience" and that the applicant had "demonstrate[d] satisfactory knowledge" of 17 selected procedures. Following at least a year of debate and 13 drafts of a new Form E, the Board—with the support of CSCPA and the Society of California Accountants (SCA)—approved a change in March 1990. The 500-hour requirement is retained, but the types of experience which may satisfy that requirement are apparently broadened. Under the new Form E, certifying employers are required to testify that the applicant's experience "enables the applicant to demonstrate that he/she has an understanding of the requirements of planning and conducting an audit with minimum supervision which results in full disclosure financial statements."

Since BOA's adoption of the new Form E, the Board's Qualifications Committee (which evaluates the experience of CPA licensure applicants) has expressed confusion on several occasions as to the precise meaning of several key and undefined terms on Form E. At one point in August 1990, the Board simply instructed the QC to "exercise its judgment on a case-by-case basis." The potential for arbitrary decisionmaking led the Board to subsequently direct QC and the Board's Experience Task Force to adopt criteria and definitions to guide the QC's evaluation of applicants' experience. However, these policies are published (if at all) only in the QC's policy manual, which is not generally available either to applicants or to certifying employers.

Critics have charged, with considerable force, that these policies (as well as the changes to "Form E") interpret both section 5083 and CCR section 11.5 and should be noticed and formally adopted pursuant to the Administrative Procedure Act, and that the Board's failure to follow procedural law places at risk its otherwise defensible change of policy. These critics argue that the import of notice, hearing, and review requirements for rulemaking here avoided are not theoretical. Without proper rulemaking, the Board's new stated "policy" may conflict with the literal statute and existing rules and cause confusion. In addition, where rules are noticed and considered under the required Administrative Procedure Act process, applicants for licensure are on notice as to what is expected of them. Finally, the details of proposed changes in the entry criteria into the profession may warrant adjust-



ment or change based on public comment appropriately made.

Board to Seek Continuing Education Regulatory Changes. At its November meeting, BOA's Continuing Education Committee (CEC) presented the Board with the following three alternatives regarding mandatory continuing education (CE): (1) require all licensees to complete 80 hours of CE during each two-year renewal period; (2) require licensees in public practice to complete 80 hours of CE and those not in public practice to complete 60 hours of CE during each two-year renewal period; and (3) maintain the status quo under section 87, Title 16 of the CCR, which requires 80 hours of CE during each renewal period for an active license status.

The Committee noted that the first alternative would in effect eliminate the "inactive" license status by requiring CE for all licensees who use the CPA or PA designation. CPAs who maintain an "inactive" license typically work for private businesses or corporations, and do not hold themselves out to the public as certified public accountants. Those opposed to the first alternative argued that CPAs employed by private industry are not in a position "deemed to have potential impact on the public health, safety and welfare" under Business and Professions Code section 101.6, and contended that there is no need to require "inactive" CPAs to take CE unrelated to their work or public protection.

However, following discussion, BOA agreed to pursue regulatory changes to require all licensees who use the CPA or PA designation to maintain an active license and complete 80 hours of CE during each two-year renewal period. The Board directed staff to prepare the regulatory amendments necessary to effect this change and present it for Board review at its January meeting. At this writing, the proposed amendment has not been formally noticed in the *California Regulatory Notice Register*.

BOA also discussed CEC's recommendation to add new subsection (e) to section 87, Title 16 of the CCR, to provide that a licensee who is responsible for planning, directing, reporting, or conducting substantial portions of field work on any financial or compliance audit report on any governmental agency shall be required to complete a minimum of 24 hours of qualifying CE in the area of governmental accounting and auditing or related subjects during the two-year license renewal period. A governmental agency is defined as any department, office, commission, authority, board, government-owned corporation, or other independent establishment of any branch

of federal, state, or local government. Related subjects would be defined as courses which improve knowledge of governmental operations, laws, regulations, reporting, or other special requirements applicable to the environment in which the government agency operates. Under the amendment, licensees would be required to disclose the completion of the requisite number of governmental CE hours at the time of their license renewal on a form prescribed by BOA. The Board directed its legal counsel to prepare draft regulatory language to implement this revision. At this writing, the proposed amendment has not been formally noticed in the *California Regulatory Notice Register*.

Finally, the Board unanimously agreed to adopt CEC's recommendation to require registered CE sponsors to maintain records of actual attendance hours and to provide verification of actual numbers of hours of attendance to licensees.

Budget Change Proposals Approved. At BOA's November meeting, Executive Officer Carol Sigmann reported that three of the five budget change proposals (BCPs) submitted by BOA to the Department of Finance (DOF) had been approved. DOF granted mid-year augmentation for BOA's Major Case Program, contingent on the Board implementing a fee bill sufficient to fund the requested level of resources. DOF also approved augmentations for the Board's citation and fine program and its Clearinghouse for Volunteer Accounting Services contract. However, DOF denied the Board's request to augment its Continuing Competency Unit staff, noting that the Board could redirect existing staff; BOA's request for funding to cover its move to new offices was deferred in order to provide BOA with time to develop factual supporting data.

Board to Seek Increased Fines. At its November meeting, the Board voted to pursue regulatory amendments to section 95.2, Title 16 of the CCR, to increase the range of fines imposed for infractions of Board regulations. The Board directed its legal counsel to draft amendments which would establish a range of fines from \$100 to \$2,500; at this writing, the proposed amendment has not been formally noticed in the *California Regulatory Notice Register*.

Board Adopts Cheating Policy. At its November meeting, BOA unanimously agreed to adopt an examination security and cheating policy, which states that the Board may deny, suspend, revoke, or otherwise restrict a license on the ground that an applicant or licensee has subverted or attempted to subvert the Uniform Certified Public Accountant exami-

nation or the administration of that examination by engaging in misconduct, including but not limited to copying from or looking at the examination book, papers, or other material of another examinee; allowing another examinee to look at or copy from one's examination book, papers, or other exam material; use or possession of notes or aids of any sort, except those provided by the Board, in the examination site; communication of any kind between candidates in the secured examination area; having an impersonator take the exam on one's behalf, or impersonating another to take the exam on his/her behalf; making notes of the examination material or removing the material from the examination site; and any other conduct prohibited by Business and Professions Code section 123.

The policy also states that any examinee observed by an examination proctor, Board member, or Board staff engaging in misconduct may be expelled from the examination and referred to BOA's Administration Committee for review; the expulsion order will include all remaining subjects of that examination; depending on the circumstances, the examinee may lose the privilege of examination for the next regularly scheduled exam; misconduct may result in formal denial of an application for licensure; and for current licensees, disciplinary action may be taken including suspension, revocation, or other restriction of a license.

Finally, the policy states that any examinee engaging in disruptive behavior of any kind that interferes with the standard administration of the examination, fails to follow the instruction of the examination proctors, Board members, or Board staff, or who writes before the exam has begun or after time has been called shall be sent a letter of admonition, which will be incorporated into the examinee's file and will remain on file until all examination subjects have been passed. In addition, the Board's policy states that, depending on the circumstances, the examinee may be expelled from the examination, even for a first-time failure to follow instructions or any other of the stated type of misconduct.

LEGISLATION:

SB 869 (Boatwright), as amended April 30, would revise existing educational prerequisites for admission to the examination for a CPA certificate by, among other things, revising Business and Professions Code section 5081.1(a) to require 45 hours of instruction in a four-year institution in accounting, commercial law, economics, finance, and related business administration subjects



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and, effective January 1, 1997, 55 semester units in those subjects; providing for qualification by examination by BOA rather than by an agency approved by the U.S. Department of Education; and, as of January 1, 1997, requiring applicants for admission to the CPA exam to have completed at least 150 semester hours of education in a four-year institution and a baccalaureate or higher degree, or be a public accountant. This bill is pending in the Assembly Committee on Consumer Protection, Governmental Efficiency, and Economic Development.

AB 1142 (Chacon), as amended July 1, would provide that licensees engaged in the practice of public accountancy shall display their Board licensee designation and other specified information in a manner determined by BOA to be appropriate. This bill is pending in the Senate Business and Professions Committee.

LITIGATION:

In *Ross A. Johnson v. Board of Accountancy, et al.*, No. CV- S-91-1250 LKK-JFM (U.S. District Court, Eastern District of California), Johnson, a CPA, seeks a declaration that Business and Professions Code section 5061 and sections 56 and 57, Title 16 of the CCR, constitute an unconstitutional restraint of his commercial speech rights in violation of the first and fourteenth amendments to the U.S. Constitution, his right to substantive due process and equal protection of the laws under the fifth and fourteenth amendments of the Constitution, and his rights under 42 U.S.C. section 1983. Johnson also seeks a preliminary and permanent injunction prohibiting BOA from taking any disciplinary action against him for alleged violation of section 5061 or CCR sections 56 and 57.

Business and Professions Code sections 5051 and 5061 and CCR section 56 prohibit a licensed CPA from accepting commissions while using the CPA designation on signs, advertisements, letterhead, business cards, publications directed at clients or potential clients, or financial or tax documents of a client, but permit a licensed CPA to accept commissions so long as he/she does not hold him/herself out as a CPA. Business and Professions Code section 5051 and CCR section 57 prohibit a licensed CPA from holding him/herself out as a CPA and simultaneously engaging in the practice of unspecified businesses or occupations which, according to the Board, impair the CPA's independence or objectivity, or create a conflict of interest in rendering professional services under any circumstances.

Plaintiff Johnson has been licensed as a CPA in California since 1974, and owns the firm of Ross A. Johnson & Co., Certified Public Accountant, in Sacramento. Plaintiff alleges that his practice consists primarily of tax consultation, bookkeeping, compilation of financial statements, and financial planning; he has not engaged in any audit or attest work since 1988. Johnson, who is also licensed as a real estate broker, an insurance broker, and a securities dealer, alleges that as a result of his tax consultation work, he occasionally arranges for the sale of mutual funds, limited partnerships involved in leasing and oil and gas production, unit investment trusts, and real property to his clients, for which he receives a commission. According to the complaint, Johnson "offers these services to his clients because he believes that his clients benefit from not having to pay both a CPA for financial advice and a broker or other agent who sells them the stocks, bonds or other investments based upon the financial advice given by the CPA"; plaintiff also notes that all of his clients have consented to his use of their tax return information to provide them with other financial advice, and are specifically informed of and consent to the fact that plaintiff will receive cash commissions for the sale of investment securities and financial products.

According to Johnson, section 5061 and CCR sections 56 and 57 prohibit CPAs who use the CPA designation from engaging in certain lawful business practices, while permitting CPAs who do not use the CPA designation to engage in the same practices, resulting in discriminatory treatment toward similarly situated CPAs. Further, Johnson contends that the prohibitions fail to take into consideration that a client of a CPA might, after full disclosure, waive or consent to the activity proscribed by law (the acceptance of a commission by the CPA), and the preference of and savings to clients of obtaining accounting services and other services from the same person. On behalf of BOA, the Attorney General's Office contends that section 5061 does not prohibit or infringe "speech" protected by the Constitution, but conduct (the acceptance of a commission) which the Board believes impairs an accountant's ability to be independent and objective. The AG argues that Johnson is attempting to intertwine the "commissions statute" (section 5061) with the "holding out" statute (section 5051) in order to create a commercial speech cause of action where none exists.

Argument on Johnson's preliminary injunction motion, as well as BOA's mo-

tion to dismiss, was scheduled for February 21.

The *Johnson* case is not the only commercial speech case pending against the Board. *Moore v. State Board of Accountancy* is still pending in the California Supreme Court. In that case, plaintiff Bonnie Moore challenges the validity of section 2, Title 16 of the CCR, which prohibits non-CPA accountants from using the words "accounting" or "accountant" to describe themselves or their services. Moore contends that section 2 violates her constitutionally-protected commercial speech rights; on behalf of Moore, *amicus curiae* Center for Public Interest Law argues that the Board—consisting of eight BOA licensees and four public members—is constitutionally disqualified from adopting and/or enforcing section 2, as its effect financially benefits the CPA profession. In addition, both plaintiff and CPIL contend that the rule is inconsistent with the relevant statutes, because the legislature has expressly allowed non-CPAs to perform accounting functions, and has never prohibited them from calling themselves "accountants." (See CRLR Vol. 11, No. 1 (Winter 1991) pp. 14 and 48; Vol. 10, No. 4 (Fall 1990) p. 51; and Vol. 10, No. 1 (Winter 1991) p. 53 for background information.)

RECENT MEETINGS:

At BOA's November 22-23 meeting in Los Angeles, the Board discussed the legislature's plan to transfer \$7.4 million from BOA's reserve fund to the state general fund. Board members noted that this substantial reduction in reserve funds could adversely impact the Board's ability to provide essential services, and directed staff to review the impact of the loss on Board programs. Although the legislature is calling this a one-time transfer, Board President Ira Landis expressed concern that raising BOA fees to restore the reserve fund might only lead to another transfer of BOA funds to the general fund.

Also at its November meeting, the Board unanimously agreed that in the event that a BOA committee or task force member is the subject of a complaint for professional misconduct, that person would be asked to step down from active participation in committee or task force affairs at the filing of an accusation. If earlier intervention is indicated, a meeting will be held among the Administrative Committee Chair, BOA's Executive Officer, and (in the event of a major case) the liaison Board member or (in the event of a non-major case) the Board President to evaluate the circumstances. A unanimous decision would be required



to remove a person from a committee or task force; in that event, BOA's Vice President would relay the decision to the person involved.

At the November meeting, BOA unanimously agreed to adopt a resolution to establish a \$100 biennial renewal fee for "inactive" retired licensees over 65 years of age and directed staff to determine the proper means for implementing the resolution.

Also at BOA's November meeting, Executive Officer Carol Sigmann announced the resignation of Assistant Executive Officer Karen Scott; according to Sigmann, the recruitment procedure to hire Scott's replacement has already begun.

FUTURE MEETINGS:

May 15-16 in Los Angeles.
 July 31-August 1 in San Francisco.
 September 18-19 in San Diego.
 November 13-14 in San Francisco.

BOARD OF ARCHITECTURAL EXAMINERS

Executive Officer: Stephen P. Sands
 (916) 445-3393

The Board of Architectural Examiners (BAE) was established by the legislature in 1901. BAE establishes minimum professional qualifications and performance standards for admission to and practice of the profession of architecture through its administration of the Architects Practice Act, Business and Professions Code section 5500 *et seq.* The Board's regulations are found in Division 2, Title 16 of the California Code of Regulations (CCR). Duties of the Board include administration of the Architect Registration Examination (ARE) of the National Council of Architectural Registration Boards (NCARB), and enforcement of the Board's statutes and regulations. To become licensed as an architect, a candidate must successfully complete a written and oral examination, and provide evidence of at least eight years of relevant education and experience. BAE is a ten-member body evenly divided between architects and public members. Three public members and the five architects are appointed by the Governor. The Senate Rules Committee and the Speaker of the Assembly each appoint a public member.

MAJOR PROJECTS:

Board Amends Reciprocity Regulation. On November 5, the Office of Administrative Law approved BAE's amendment to section 121, Title 16 of

the CCR. The amendment grants reciprocity to architects who pass NCARB's Architect Registration Examination as administered by the Committee of Canadian Architectural Councils. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 58 for background information.) The amendment went into effect on January 1, 1992.

Budget Change Proposal Approved. The Department of Finance recently approved BAE's budget change proposal which will provide the Board with an additional \$230,000 in fiscal year 1992-93; these funds will enable BAE to microfilm all of its licensing and other vital records. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 58 for background information.)

FUTURE MEETINGS:

To be announced.

ATHLETIC COMMISSION

Executive Officer: Richard DeCuir
 (916) 920-7300

The Athletic Commission is empowered to regulate amateur and professional boxing and contact karate under the Boxing Act (Business and Professions Code section 18600 *et seq.*). The Commission's regulations are found in Division 2, Title 4 of the California Code of Regulations (CCR). The Commission consists of eight members each serving four-year terms. All eight members are "public" as opposed to industry representatives. The current Commission members are Willie Buchanon, William Eastman, Ara Hairabedian, Bill Malkasian, Jerry Nathanson, Carlos Palomino, and Robert Wilson. Citing health reasons, Commissioner Thomas Thaxter, M.D., resigned his seat in November, leaving one Commission seat open for appointment.

The Commission has sweeping powers to license and discipline those within its jurisdiction. The Commission licenses promoters, booking agents, matchmakers, referees, judges, managers, boxers, and martial arts competitors. The Commission places primary emphasis on boxing, where regulation extends beyond licensing and includes the establishment of equipment, weight, and medical requirements. Further, the Commission's power to regulate boxing extends to the separate approval of each contest to preclude mismatches. Commission inspectors attend all professional boxing contests.

The Commission's goals are to ensure the health, safety, and welfare of boxers, and the integrity of the sport of

boxing in the interest of the general public and the participating athletes.

MAJOR PROJECTS:

Commission Hires New Executive Officer. Following Executive Officer Ken Gray's resignation in July 1991, the Commission conducted an extensive search to fill the vacancy. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 59; Vol. 11, No. 3 (Summer 1991) p. 59; and Vol. 11, No. 2 (Spring 1991) p. 55 for background information.) On October 18, the Commission held a special meeting devoted to interviewing six semi-finalists for the position. At this meeting, the Commission interviewed former Commissioner Raoul Silva, Assistant Executive Officer Steve English, Chief Athletic Inspector Rob Lynch, Referee Rudy Ortega, Arthur Tyler, and Richard DeCuir. Following the interviews, the Commission chose Richard DeCuir, Rob Lynch, and Rudy Ortega as finalists. However, since all Commission members were not present, the Commission agreed to wait until its next meeting to make the final decision.

On November 15, the Commission selected Richard DeCuir as its new Executive Officer, even though some members were unable to attend the meeting. DeCuir, formerly the Assistant Executive Officer at the Board of Dental Examiners for seven years, stated that he is anxious to computerize the Commission's records and ready to deal with the tight budget restraints faced by the Commission.

Legislative Subcommittee Conducts Interim Hearing on Boxing Bills. On November 1, the Senate Business and Professions Committee's Subcommittee on Sports heard testimony regarding AB 647 (Floyd), AB 648 (Moore), and AB 649 (Floyd). (See *infra* LEGISLATION for more information on these bills.)

Much of the testimony centered on the professional boxers' pension plan and AB 649's provision which would specify that participation in the plan is voluntary instead of mandatory. The measure is supported by Los Angeles boxing promoters, who contend that California is losing fights to other states because too many boxers are forced to contribute to a pension plan they do not want to fund. The opposition to AB 649 was led by Center for Public Interest Law Director Robert C. Fellmeth, who originally spearheaded the pension plan concept when he chaired the Athletic Commission in 1982. Professor Fellmeth argued that because boxers depend upon promoters for their