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San Francisco County Superior Court

DEC 13 2023

CLERK OF THE COURT
BY: Christina Miller
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 304

AMERICAN CATALOG MAILERS
ASSOCIATION,

Plaintiff,

v.

FRANCHISE TAX BOARD,

Defendant.

Case No. CGC-22-601363

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
ADJUDICATION

Plaintiff's Motion for Summary Adjudication on Count Two of its Complaint was noticed for hearing on December 14, 2023. The Court circulated a tentative ruling granting the motion, and the parties submitted on the tentative ruling, which is hereby adopted.

BACKGROUND

On August 19, 2022, Plaintiff American Catalog Mailers Association ("ACMA") filed a Complaint for declaratory relief against the Franchise Tax Board ("FTB"). ACMA is a non-profit trade association advocating on behalf of catalog, online, direct mail, and other remote-selling merchants and their suppliers. (UMF 1.)¹ ACMA has approximately 120 to 140 members located across the country. (Siegel Decl. Ex. 5, 54:3-6; *id.* at Ex. 6, 29:4-8.)

¹ "UMF" refers to the undisputed material facts in FTB's Response to Plaintiff's Separate Statement of Undisputed Material Facts (filed Nov. 30, 2023).

1 ACMA alleges three counts in the Complaint. First, it seeks a declaratory judgment under
2 Government Code § 11350 declaring the Technical Advice Memorandum No. 2022-01 (“TAM”) and
3 FTB Publication 1050 (“Publication 1050”) invalid because they contradict Public Law 86-272 (“P.L. 86-
4 272”) and the United States Constitution. (Compl. ¶¶ 42-47.) Second, it seeks a declaratory judgment
5 under Government Code § 11350 declaring the TAM and Publication 1050 invalid because the FTB failed
6 to comply with the California Administrative Procedure Act, Gov. Code §§ 11340-11361 (“APA”). (*Id.*
7 ¶¶ 48-53.) Third, it seeks a declaratory judgment under Code of Civil Procedure § 1060 that the TAM
8 and Publication 1050 are invalid, or, in the alternative, limiting the application of TAM and Publication
9 1050 prospectively. (*Id.* ¶¶ 54-59.)

10 “California’s franchise tax is imposed on the net income of every corporation ‘doing business
11 within the limits of this state.’” (*Swart Enterprises, Inc. v. Franchise Tax Bd.* (2017) 7 Cal.App.5th 497,
12 503, quoting Rev. & Tax Code § 23151(a).) P.L. 86-272 “confers immunity from state income taxes on
13 any company whose ‘only business activities’ in that State consist of ‘solicitation of orders’ for interstate
14 sales.” (*Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.* (1992) 505 U.S. 214, 223 (“*Wrigley*”).)²
15 The issue posed by this motion is whether the TAM and Publication 1050 are invalid “underground
16 regulations” interpreting that federal statute in violation of the APA.

17 On February 14, 2022, the FTB published the TAM. (UMF 7; see RFJN Ex. A.) Its stated subject
18 was “[d]etermining whether the protections of 15 U.S.C. Sections 381-384 (Public Law [‘PL’] 86-272)
19 apply to fact patterns that are common in the current economy due to technological advancements for
20 purposes of California income and franchise tax.” (RFJN Ex. A, 1.)³ For purposes of the TAM, it was
21 assumed that “the business at issue makes sales to California customers, is commercially domiciled
22 outside of California, and has no other activities in California,” unless stated otherwise. (*Id.*) The TAM
23 set forth twelve hypotheticals or “fact patterns” presenting the issue “whether the business has exceeded
24 the protections of PL 86-272.” (*Id.* at 1-2.) For each, it set forth the FTB’s views as to the answers to two

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26 ² Public Law 86-272 was enacted by Congress under the Interstate Income Tax Act of 1959, which is
codified at 15 U.S.C. §§ 381-384.

27 ³ One of the FTB’s declarants explains that “[a] technical advice memorandum is created when someone
28 at FTB—generally an auditor—seeks guidance from FTB’s Legal Division. A technical advice
memorandum provides guidance based on hypothetical scenarios, each of which is analyzed under
applicable law.” (Kane Decl. ¶ 4.)

1 questions:

2 (1) Are there business activities taking place in California; and (2) Do those activities exceed
3 the protection of PL 86-272 such that the business becomes subject to California income or
franchise tax?

4 (*Id.* at 2-4.) In an accompanying section entitled “Analysis and Discussion,” the FTB reasoned that P.L.
5 86-272 protections “only apply to orders that are sent outside of the state for acceptance or rejection. If
6 the orders are accepted, they must be filled by shipment or delivery from a point outside the state to
7 maintain P.L. 86-272 immunity.” (*Id.* at 5.) The FTB acknowledged that “the way in which interstate
8 business is conducted has changed significantly” since the enactment of P.L. 86-272. (*Id.*) Yet Congress
9 “has neither created a federal mechanism to provide administrative guidance to taxpayers nor has it
10 updated the statute to indicate how it applies to new business activities.” (*Id.*)

11 In May 2022, the FTB published a revised Publication 1050, entitled “Application and
12 Interpretation of Public Law 86-272.” (UMF 10; see RFJN Ex. B.)⁴ Publication 1050 provides the same
13 reasoning for the updated guidance as in the TAM, namely, the significant changes to the conduct of
14 interstate commerce since the enactment of P.L. 86-272. (RFJN Ex. B, 1.) It states,

15 The contents of this Publication are intended to serve as general guidance to taxpayers and to
16 provide notice as to how this state will apply the statute.

17 (*Id.*) Similar to the TAM, it includes fact patterns as examples of protected and unprotected activities
18 conducted via the internet. (*Id.* at 4-5.) Publication 1050 states that “[a]s a general rule, when a business
19 interacts with a customer via the business’s website or app, the business engages in a business activity
20 within the customer’s state.” (*Id.*)

21 ACMA previously moved for summary adjudication as to Count I of its Complaint, seeking a
22 judicial declaration that the TAM and Publication 1050 are invalid because they contradict P.L. 86-272
23 and the United States Constitution. The FTB conceded in response to ACMA’s motion that the TAM and
24 Publication 1050 were not enacted as regulations in compliance with the APA, and it took the position
25 that the Court could not resolve ACMA’s facial challenge without first deciding whether they are invalid
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27 ⁴ Although the revisions to Publication 1050 were not disseminated until later, the TAM was prepared on
28 the basis of the proposed revisions with the thought that “the guidance [FTB was] preparing for taxpayers
would also aid FTB staff.” (Ramirez Decl. ¶ 7.)

1 underground regulations. (See Tr. (Aug. 17, 2023), 11:2-4 [“the Court can’t actually decide Count I,
2 which is the count at issue on the motion, without reaching the underground regulation issue which is
3 necessary for standing.”]; see also *id.* at 20:4-16.) It also acknowledged that if the TAM and Publication
4 1050 constitute regulations within the meaning of the APA, they would be void. (Aug. 24, 2023 Order,
5 18; Tr., 19:9-12 [“if it is a regulation, we are done, right? I think that is it. It is void and we don’t have
6 any particular taxpayer to apply it to, and that is that.”].)

7 By order filed August 24, 2023, the Court denied that motion, finding that ACMA did not meet its
8 burden on summary judgment to show that the TAM and Publication 1050 are facially invalid in their
9 entirety. (Aug. 24, 2023 Order, 19-26.) In that order, the Court first rejected a series of procedural
10 objections that the FTB raised to ACMA’s claims, including contentions that ACMA lacks standing under
11 Article XIII, Section 32 of the California Constitution, that it lacks associational standing, and that it lacks
12 standing under Government Code section 11350, which authorizes an “interested person” to seek
13 declaratory relief as to “the validity of any regulation.” (*Id.* at 5-12.) The Court also rejected the FTB’s
14 contention that the action is not ripe for adjudication. (*Id.* at 13-15.) The Court found that the TAM and
15 Publication 1050 are generally applicable rules that interpret the FTB’s application of P.L. 86-272 to out-
16 of-state businesses, and therefore are regulations subject to the APA. (Aug. 24, 2023 Order, 15-18.)
17 However, the Court was constrained to deny ACMA’s motion because it was not brought on that ground.
18 (*Id.* at 18.)

19 ACMA now moves for summary adjudication as to Count II of the Complaint seeking a judicial
20 declaration that the TAM and Publication 1050 are invalid underground regulations. (Motion, 1-2;
21 Opening Brief, 1.)⁵ FTB opposes the motion, but offers no authority, reasoning, or facts that would
22 warrant the Court in revisiting its prior ruling.⁶ The Court confirms that ruling and grants the motion.
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26 ⁵ ACMA’s unopposed Request for Judicial Notice is granted pursuant to Evidence Code § 452(a), (c),
27 (d)(1). (See *Taiheiyo Cement U.S.A., Inc. v. Franchise Tax Bd.* (2012) 204 Cal.App.4th 254, 267 & fn. 5
[taking judicial notice of an FTB publication pursuant to Evidence Code § 452(c)].)

28 ⁶ The FTB’s futile evidentiary objections, including to the authenticity of the TAM and of Publication
1050 (as to which the Court has taken judicial notice), are overruled.

1 properly granted second motion for summary judgment after denying the first, where although the
2 motions involved similar issues, the two motions “were not identical and involved different legal
3 theories”].) For that reason, FTB’s reliance on *Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1092, where
4 the defendant’s second summary judgment motion “presented the identical issue and relied on the same
5 facts and law that had been raised in a prior motion for summary judgment,” is “unavailing.” (*Nieto*, 181
6 Cal.App.4th at 72.)⁸

7 **II. The TAM And Publication 1050 Are Invalid Underground Regulations.**

8 The ACMA contends the TAM and Publication 1050 are regulations subject to challenge under
9 Government Code section 11350 because they are generally applicable and describe the manner in which
10 the FTB will apply P.L. 86-272 to out-of-state businesses engaged in interstate commerce over the
11 internet. (Opening Brief, 11; see Reply, 3-5.) The Court, again, agrees.⁹

12 “The APA subjects proposed agency regulations to certain procedural requirements as a condition
13 to their becoming effective.” (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324,
14 332.)¹⁰ In particular, if a rule constitutes a “regulation” within the meaning of the APA, “it may not be
15 adopted, amended, or repealed except in conformity with basic minimum procedural requirements that are
16 exacting.” (*Id.* at 333 (cleaned up).) Thus,

17 The agency must give the public notice of its proposed regulatory action; issue a complete text of
18 the proposed regulation with a statement of the reasons for it; give interested parties an
19 opportunity to comment on the proposed regulation; respond in writing to public comments; and
20 forward a file of all materials on which the agency relied in the regulatory process to the Office of
Administrative Law, which reviews the regulation for consistency with the law, clarity, and
necessity.

21 (*Id.* (cleaned up).) “Any regulation . . . that substantially fails to comply with these requirements may be
22 judicially declared invalid.” (*Id.* (cleaned up).) “These requirements promote the APA’s goals of

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24 ⁸ FTB argues that ACMA’s first motion “necessarily addressed,” as a threshold or included issue, whether
25 the APA applied to the TAM and Publication 1050. (Opposition, 17.) It also acknowledges that the
Court decided that issue against it. If it believed the Court had already conclusively resolved the issue,
the FTB could have stipulated to entry of judgment, rather than insisting on re-briefing and re-arguing the
matter anew.

26 ⁹ The FTB refers to the TAM and Publication 1050 together as the “Guidance,” and does not distinguish
between the two for purposes of its analysis. Accordingly, the Court follows the same approach.

27 ¹⁰ In its prior order, the Court criticized the FTB for failing to cite *Morning Star*, the California Supreme
28 Court’s most recent case addressing the meaning of a regulation under the APA. (Aug. 24, 2023 Order,
16 fn. 9.) Remarkably, in its latest brief the FTB again omits to cite that case.

1 bureaucratic responsiveness and public engagement in agency rulemaking.” (*Id.*) As the Court explained,

2 One purpose of the APA is to ensure that those persons or entities whom a regulation will affect
3 have a voice in its creation, as well as notice of the law’s requirements so that they can conform
4 their conduct accordingly. The Legislature wisely perceived that the party subject to regulation is
5 often in the best position, and has the greatest incentive, to inform the agency about possible
6 unintended consequences of a proposed regulation. Moreover, public participation in the
7 regulatory process directs the attention of agency policymakers to the public they serve, thus
8 providing some security against bureaucratic tyranny.

9 (*Id.*, quoting *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568-569 (cleaned up).)

10 A “regulation” is defined very broadly by the APA to include “every rule, regulation, order, or
11 standard of general application or the amendment, supplement, or revision of any rule, regulation, order,
12 or standard adopted by any state agency to implement, interpret, or make specific the law enforced or
13 administered by it, or govern its procedure.” (Gov. Code § 11342.600.) As the California Supreme Court
14 held in *Tidewater*, a regulation subject to the APA thus has “two principal identifying characteristics”:

15 First, the agency must intend its rule to apply generally, rather than in a specific case. The rule
16 need not, however, apply universally; a rule applies generally so long as it declares how a certain
17 class of cases will be decided. Second, the rule must implement, interpret, or make specific the
18 law enforced or administered by [the agency], or govern [the agency's] procedure.

19 (14 Cal.4th at 571 (cleaned up); accord, *Morning Star Co.*, 38 Cal.4th at 334; *Vasquez*, 68 Cal.App.5th at
20 685.) Here, the Court finds that both prongs of the test are met.

21 First, the TAM and Publication 1050 indisputably are generally applicable rules. “The touchstone
22 is whether the rule will apply in more than one set of circumstances, not merely whether it relates to a
23 particular regulated item.” (*Vasquez*, 68 Cal.App.5th at 671.) “The rule need not, however, apply
24 universally; a rule applies generally so long as it declares how a certain class of cases will be decided.”
25 (*Tidewater*, 14 Cal.4th at 571.) The TAM includes twelve fact patterns that apply to a class of businesses
26 that make sales to California customers, are commercially domiciled outside of California, and have no
27 other activities in California other than those mentioned in each fact pattern. (RFJN Ex. A, 1-2; see *id.* at
28 Ex. B, 4-5 [fact patterns in Publication 1050].) Publication 1050 is “intended to serve as general guidance
to taxpayers.” (*Id.* at Ex. B, 1.) Publication 1050 also sets forth “a general rule” that “when a business
interacts with a customer via the business’s website or app, the business engages in a business activity
within the customer’s state.” (*Id.* at Ex. B, 4.) Thus, the guidance articulates general rules that declare

1 how a certain class of cases will be decided.

2 Indeed, the FTB’s own declarants confirm the TAM and Publication 1050 are generally
3 applicable. (McElhatton Decl. ¶¶ 4 [“Our goal was to provide guidance for taxpayers regarding the
4 application of Public Law 86-272 to their business activities in California, including activities conducted
5 via the internet.”], 6 [“In preparing [the TAM], I understand that its intent was to provide guidance to
6 FTB staff addressing audits involving the application of Public Law 86-272 to business activities
7 conducted in California.”], 7 [“Although technical advice memorandums are intended for FTB staff, FTB
8 makes them available to the general public through its website, primarily to provide transparency and to
9 give access to information that taxpayers may find helpful in determining whether and how to file a
10 California tax return.”]; Ramirez Decl. ¶ 4 [“FTB publications are intended to provide accessible, easy-to-
11 understand guidance to taxpayers.”].) Accordingly, the first *Tidewater* requirement is met. (See
12 *Tidewater*, 14 Cal.4th at 572 [“The policy at issue in this case was expressly intended as a rule of general
13 application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular
14 type of employment.”]; see also *Malaga County Water District v. Central Valley Regional Water Quality*
15 *Control Board* (2020) 58 Cal.App.5th 418, 437, 439 [portions of hearing procedure document “consistent
16 with a long-standing practice previously adopted for all similar cases” constituted rule of general
17 applicability; “the fact that modification in individual instances is proper under the regulation cannot save
18 this procedure from constituting an underground regulation.”].)

19 Second, the FTB does not dispute that the TAM and Publication 1050 interpret the FTB’s
20 application of P.L. 86-272 to out-of-state businesses. As stated in the subject line, the TAM’s purpose is
21 to determine “whether the protections of [P.L. 86-272] apply to fact patterns that are common in the
22 current economy due to technological advancements for purposes of California income and franchise tax.”
23 (RFJN Ex. A, 1.) The FTB’s analysis in the TAM is solely focused on interpreting P.L. 86-272 in the
24 context of internet sales. (*Id.* at Ex. A, 3-5.) Furthermore, the first sentence of Publication 1050 begins
25 by stating, “This Publication addresses the application of Public Law (P.L. 86-272).” (*Id.* at Ex. D, 1.)
26 The purpose of Publication 1050 is “to provide notice as to how this state will apply the statute.” (*Id.*)
27 Most notably, Publication 1050 states: “This state intends to apply this Publication uniformly, irrespective
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1 of whether the destination state is determining if it can tax the income of the seller, or whether the origin
2 state is determining if the related receipts are subject to that state's throwback rule." (*Id.*; see e.g., *id.* at
3 Ex. D, 4-5 [describing unprotected and protected activities conducted via the internet].)

4 Again, the FTB's own declarants confirm the TAM and Publication 1050 interpret the FTB's
5 application of P.L. 86-272. (McElhatton Decl. ¶¶ 4 ["FTB's Publication 1050, [] is directed to taxpayers
6 and addresses FTB's application and interpretation of Public Law 86-272."], 6 ["the fact scenarios
7 presented are intended to provide guidance that an FTB employee may consider when assessing a
8 taxpayer's liability under California and federal law."]; Ramirez Decl. ¶¶ 5 ["FTB Publication 1050
9 addresses FTB's application and interpretation of Public Law 86-272."], 6 ["I understood that our task
10 was to provide guidance to taxpayers regarding the application of Public Law 86-272 to business
11 activities that were not addressed by the previous revision of Publication 1050 but are not common."].)
12 Therefore, the second *Tidewater* requirement is met. (See *Tidewater*, 14 Cal.4th at 572 ["the policy
13 interprets the law that the DLSE enforces by determining the scope of the IWC wage orders."].)

14 The FTB asserts that the TAM and Publication 1050 do not constitute regulations because they are
15 not a "binding" rule. (Opposition, 18.) In particular, the FTB argues that its auditors are not bound by the
16 guidance found in the TAM and Publication 1050. (*Id.* at 18-19.) Likewise, it contends that "Publication
17 1050 provides an explanation of the law governing the Board's analysis, but the auditor (and taxpayer)
18 must look to the law itself." (*Id.* at 19.) It also argues that the guidance is "not binding in administrative
19 or court proceedings." (*Id.* at 20.) However, "the form of an agency rule is not necessarily determinative
20 of whether it qualifies as a regulation. Rather, the focus is on whether, as actually applied, it meets the
21 *Tidewater* requirements." (*Vasquez*, 68 Cal.App.5th at 686.)

22 Contrary to the FTB's argument, for the first prong of the test to be met, the rule of general
23 applicability need not be formal or "binding" on the agency or the public. "[A]bsent an express
24 exception, the APA applies to all generally applicable interpretations of a statute." (*Morning Star Co.*, 38
25 Cal.4th at 335.) Indeed, "a regulation subject to the APA may exist even if the agency never promulgates
26 a *written* policy setting forth the rule at all." (*Vasquez*, 68 Cal.App.5th at 686, quoting *Morning Star Co.*,
27 38 Cal.4th at 336 (cleaned up).)

1 Thus, the term “regulation” applies to a broad range of agency policies and procedures, whether or
2 not they are formal or binding. As the Court observed in *Tidewater*,

3 Examples of policies that courts have held to be regulations subject to the rulemaking procedures
4 of the APA include: (1) an informational ‘bulletin’ defining terms of art and establishing a
5 rebuttable presumption; (2) a ‘policy of choosing the most closely related classification’ for
6 determining prevailing wages for unclassified workers; and (3) a policy memorandum declaring
7 that work performed outside one’s job classification does not count toward qualifying for a
8 promotion.

9 (*Tidewater*, 14 Cal.4th at 571-572 (cleaned up).) In contrast, the Court gave the following examples of
10 policies that courts have held not to be regulations:

11 (1) A Department of Justice checklist that officers use when administering an intoxilyzer test; (2)
12 the determination whether in a particular case an employer must pay employees whom it requires
13 to be on its premises and on call, but whom it permits to sleep; (3) a contractual pooling procedure
14 whereby construction tax revenues are allocated among a county and its cities in the same ratio as
15 sales tax revenues; and (4) resolutions approving construction of the Richmond-San Rafael Bridge
16 and authorizing issuance of bonds.

17 (*Id.* at 572 (cleaned up).) The latter category are examples of “interpretations that arise in the course of
18 case-specific adjudication,” which are not regulations. (*Id.* at 571.) The Court held that the Department
19 of Labor Standards and Enforcement (DLSE) enforcement policy involved in that case, which “was
20 expressly intended as a rule of general application to guide deputy labor commissioners on the
21 applicability of IWC wage orders to a particular type of employment,” was a regulation. The same
22 conclusion follows here, where the FTB concedes that the guidance is intended to guide auditors and the
23 public on the applicability of P.L. 86-272 to particular classes of business activity engaged in by out-of-
24 state businesses. That FTB’s auditors “must apply the law discussed in the Guidance to the specific facts
25 of each taxpayer’s case” (Opposition, 21) does not alter that conclusion. (See, e.g., *Clovis Unified School*
26 *Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 803-804 [auditing rule used by State Controller’s Office to
27 apply generally to the auditing of reimbursement claims, where auditors had no discretion to judge on a
28 case-by-case basis whether to apply the rule, was an invalid underground regulation]; *Capen v. Shewry*
(2007) 155 Cal.App.4th 378, 385-386 [Department of Health Services’s unwritten interpretation of
surgical clinic licensing provision was a regulation, despite staff attorney’s declaration asserting that
Department applies “that understanding to individual factual situations as they are presented”].)

In the scant four pages of its brief that it devotes to the merits, the FTB fails to address any of this

1 authority, but instead relies heavily on a single California case, *Modesto City Schools v. Education Audits*
2 *Appeal Panel* (2004) 123 Cal.App.4th 1365. (Opposition, 19.) However, *Modesto City Schools*, which
3 predated all of the cases cited above, is readily distinguishable. There, the plaintiff asserted that an audit
4 guide utilized by an independent auditor in performing an audit of a school district's independent study
5 agreements was an underground regulation. The court disagreed, observing that Education Code section
6 14503, which was in effect at the time of the audit, "states the audit guide serves as a suggested resource
7 but not the sole resource for performing compliance audits. The auditor possesses the discretion to follow
8 alternative procedures." (*Id.* at 1382.) The court concluded that "[t]he wording of section 14503 clearly
9 establishes the audit guide as an optional resource, not the only acceptable method for performing audits.
10 The audit guide is not a rule of general application, but a tool that an auditor may or may not utilize in
11 performing an audit." (*Id.*) In addition, the court found "[t]he audit guide does not implement, interpret,
12 or make specific the law enforced or administered by the agency. It proposes procedures to be employed
13 in conducting an audit." (*Id.* (cleaned up).) Here, in contrast, there is no statute that states that FTB
14 auditors need not consult the TAM in conducting their work. Certainly, nothing in the FTB's showing
15 establishes that its auditors have the discretion to ignore or deviate from the guidelines set forth in the
16 TAM. Nor does the TAM merely set forth suggested procedures for conducting an audit; rather, it
17 contains rules of general application interpreting P.L. 86-272, the law enforced or implemented by the
18 FTB. Thus, the detailed regulatory guidance involved in the instant case is far closer to the policies
19 involved in *Tidewater, Clovis Unified School District*, and similar cases than to the optional audit guide
20 involved in *Modesto City Schools*.¹¹

21 In short, the TAM and Publication 1050 constitute a regulation within the meaning of the APA.
22 As the FTB concedes, neither was enacted in compliance with the APA's requirements. Accordingly, the
23 TAM and Publication are void. (See *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th

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25 ¹¹ FTB's unexplained reliance on an Alaska Supreme Court decision (Opposition, 20-21) is entirely
26 unpersuasive. Needless to say, neither the Alaska APA nor Alaska law is at issue here. In any event, the
27 court's holding in that case was based in part on the fact that the Alaska Legislature had expressly
28 "chose[n] to authorize the Department [of Revenue] to issue interpretations of oil production tax statutes
without going through the [Alaska] APA's rulemaking procedures. The legislature chose to prioritize the
efficient distribution of Department guidance over the benefits of notice and comment rulemaking."
(*Exxon Mobil Corporation v. Department of Revenue* (Ala. 2021) 488 P.3d 951, 956 (cleaned up).) No
such legislative exemption from the APA is present here.

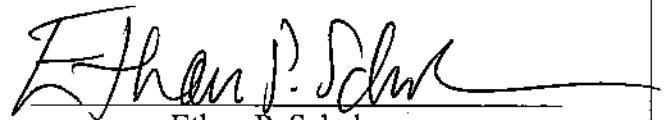
1 542, 556 [“when the APA applies, administrative policies that are not adopted in accordance with its
2 requirements are ‘void’ regulations that are ‘not entitled to any deference.’”], quoting *Tidewater*, 14
3 Cal.4th at 577.)¹²

4 CONCLUSION

5 For the foregoing reasons, Plaintiff’s motion for summary adjudication as to Count Two of the
6 Complaint is granted. As Plaintiff suggests, in view of the Court’s ruling, Counts One and Three of the
7 Complaint are moot, and are hereby dismissed. Plaintiff shall submit a proposed judgment in its favor.

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9 IT IS SO ORDERED.

10 Dated: December 13 2023

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12 Ethan P. Schulman
13 Judge of the Superior Court
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27 ¹² The FTB makes a brief unsupported argument that only unspecified portions of the TAM and
28 Publication 1050 can be invalidated as underground regulations. (Opposition, 21-22.) The argument is
specious. The reasoning and authority discussed above applies to those documents in their entirety.

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, Felicia Green, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On December 13, 2023, I electronically served ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **DEC 13 2023**

Brandon E. Riley, Court Executive Officer

By: 
Felicia Green, Deputy Clerk