INTERESTED PARTIES MEETING

REPORTERS' TRANSCRIPT

MARCH 15, 2006

IN RE

RULES FOR CALIFORNIA TAX ADMINISTRATION

AND APPELLATE REVIEW

PART 4, APPEALS FROM ACTIONS

OF THE FRANCHISE TAX BOARD

REPORTED BY:  LAURIE GOWER, CSR 8000
                CAROLE BROWNE, CSR 7351
## INDEX

<table>
<thead>
<tr>
<th>Reference</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4010</td>
<td>Application of Part</td>
<td>10</td>
</tr>
<tr>
<td>4011</td>
<td>Definitions</td>
<td>10</td>
</tr>
<tr>
<td>4012</td>
<td>Jurisdiction</td>
<td>10</td>
</tr>
<tr>
<td>4020</td>
<td>Appeal Filing Requirements</td>
<td>21</td>
</tr>
<tr>
<td>4020.5</td>
<td>Methods for Delivery of Written Documents and Correspondence</td>
<td>22</td>
</tr>
<tr>
<td>4021</td>
<td>Time for Filing an Appeal</td>
<td>28</td>
</tr>
<tr>
<td>4021</td>
<td>Time for Filing an Appeal</td>
<td>31</td>
</tr>
<tr>
<td>4022</td>
<td>Accepting or Rejecting an Appeal</td>
<td>32</td>
</tr>
<tr>
<td>4023</td>
<td>Perfecting an Appeal</td>
<td>53</td>
</tr>
<tr>
<td>4030</td>
<td>General Requirements</td>
<td>54</td>
</tr>
<tr>
<td>4031</td>
<td>General Briefing Schedule</td>
<td>55</td>
</tr>
<tr>
<td>4032</td>
<td>Briefing Schedule for Innocent Spouse Appeals</td>
<td>56</td>
</tr>
<tr>
<td>4033/4034</td>
<td>Elective Simplified Briefing Schedule for Small Tax Cases and Homeowners' and Renters' Assistance Appeals</td>
<td>60</td>
</tr>
<tr>
<td>4035</td>
<td>Discretionary Supplemental Briefing</td>
<td>62</td>
</tr>
<tr>
<td>4040</td>
<td>Right to Oral Hearing</td>
<td>90</td>
</tr>
<tr>
<td>4041</td>
<td>Submission for Decision Without Oral Hearing</td>
<td>101</td>
</tr>
<tr>
<td>4042</td>
<td>appeals Review: Scheduling the Oral Hearing</td>
<td>102</td>
</tr>
<tr>
<td>4042.5</td>
<td>Pre-Hearing Conference</td>
<td>102</td>
</tr>
<tr>
<td>INDEX (CONTINUED)</td>
<td>PAGE</td>
<td></td>
</tr>
<tr>
<td>-------------------</td>
<td>------</td>
<td></td>
</tr>
<tr>
<td>4043</td>
<td>Hearing Summary</td>
<td>114</td>
</tr>
<tr>
<td>4050</td>
<td>Letter Decisions</td>
<td>116</td>
</tr>
<tr>
<td>4051</td>
<td>Summary Decisions</td>
<td>116</td>
</tr>
<tr>
<td>4052</td>
<td>Formal Opinions</td>
<td>116</td>
</tr>
<tr>
<td>4053</td>
<td>Dissenting and Concurring Opinions</td>
<td>119</td>
</tr>
<tr>
<td>4054</td>
<td>Frivolous Appeals Penalties</td>
<td>121</td>
</tr>
<tr>
<td>4060</td>
<td>Finality of Decision</td>
<td>122</td>
</tr>
<tr>
<td>4061</td>
<td>Petitions for Rehearing</td>
<td>137</td>
</tr>
<tr>
<td>4062</td>
<td>Briefing on Petition for Rehearing</td>
<td>138</td>
</tr>
<tr>
<td>4063</td>
<td>Decisions on Petitions for Rehearing</td>
<td>138</td>
</tr>
<tr>
<td>4064</td>
<td>Briefing on Rehearing</td>
<td>138</td>
</tr>
<tr>
<td>4065</td>
<td>Decision upon Rehearing</td>
<td>138</td>
</tr>
</tbody>
</table>

---o0o---
MR. HELLER: Good morning, everybody. Looks like we're all here. Welcome everyone on the telephone. We're here this morning to meet and discuss Part 4 of the Board's -- of the Board of Equalization's Rules for California Tax Administration and Appellate Review. Part 4 deals with appeals from the Franchise Tax Board.

And as a brief update to the whole process on the new rules, our goal here with Part 4 is to go ahead and hopefully reach an agreement on the current language today and then prepare a draft for the Board members to review and approve on May 17th.

If that's approved on May 17th, then we'll go ahead and request permission from the Board to publish notice and begin the formal rule-making process either June 27th or sometime thereafter, once the Board's approved the language for the other parts or has otherwise given us direction on the other parts of the proposed rules.

And staff's goal is to go forward on the formal rule-making process on all of the rules at the same time.
so that we can have one package.

Also, we have another interested parties meeting scheduled for Part 5 dealing with general Board hearing procedures for April 5th, and we're hoping to take Parts 1, 2 and 3 dealing with the business taxes and property taxes to the Board for their approval on April 18th.

And hopefully, if we can reach consensus or close to that on Part 5, we're hoping to take that to the Board for their approval on June 27th.

If everything's approved on June 27th, we'll either ask permission at that time to publish notice of formal rule-making or we'll come back to the Board at a later time, depending on the direction we receive.

This morning we're just looking for comments on Part 4, which, again, deals with appeals from the Franchise Tax Board.

If you can go ahead and just make your comment and then allow the next person to make their comment as well, we'd really appreciate that so we can keep the process moving.

We're going to go basically regulation by regulation so that everybody has a chance to address each regulation and a chance to speak. And if you can just limit your comments so we can hear everyone and
keep things on pace, we'd really appreciate that. Also, we have two court reporters here this morning. And if you can go ahead and state your name before you speak and also possibly provide your business card to the court reporters so that they can keep an accurate record of who's speaking today, I'd really greatly appreciate that.

With that I'd like to just go around the room and have everybody introduce themselves and then I'll go ahead and turn everything over to Ian Foster so that he can introduce Part 4 a little bit and then we'll go ahead and start taking comments after that.

My name's Bradley Heller. I'm an attorney with the Board of Equalization's Legal Department.

MR. FOSTER: Ian Foster, also with BOE Legal.
MS. MANDEL: Marcy Jo Mandel, State Controller's Office.

MR. LANGSTON: I'm Bruce Langston from the Franchise Tax Board.

MS. BORGMAN: Susan Borgman, Franchise Tax Board.

MR. EVANS: Gary Evans, Board Proceedings.
MR. AMBROSE: Lou Ambrose, Board Legal.
MS. RUWART: Carole Ruwart, Board Legal.
MR. LoFASO: Allen LoFaso with Board member
Betty Yee's office.

MR. SHUTZ: Chris Shutz, Board member John Chiang's office.

MS. OLSON: Diane Olson, Board Proceedings.

MS. MAHONEY: Laura Mahoney, MBIA, Daily Tax Report.

MR. MANCIA: Fran Mancia, MBIA.

MS. CARLOCK: Chelsea Carlock, Board Proceedings Division.

MR. SPERRING: Jon Sperring, Price Waterhouse Coopers.

MR. HUDSON: Tom Hudson, Bill Leonard's office.

MS. PENNINGTON: Margaret Pennington, Board member Bill Leonard's office.

MR. KOCH: Al Koch, MBIA.

MR. BESSENT: Carl Bessent, Appeals Division.

MR. SCHREITER: Reed Schreiter, Appeals Division.

MR. DALY: Charles Daly, BOE Legal.

MR. HELLER: And who do we have with us on the phone today?

MR. SHAH: Neil Shah, Board member Claude Parrish's office.

MR. HERD: Jim Herd from Betty Yee's office.

MS. CROCETTE: Sabina Crocette from Betty Yee's
office.

MR. HELLER: Welcome. And with that, I'll go ahead and turn the floor over to Ian Foster.

MR. FOSTER: Thank you, Brad.

Also, a quick note on deadlines. Obviously, we love written comments from everybody. And we would like everyone to have in their written comments to us by April 7th, which is a Friday.

If it's in by April 7th, then it definitely will get considered. If it's in after April the 7th, we will definitely do our best to look at it and consider it, but April 7th is basically the deadline for a guarantee that your comments will be considered and incorporated into it.

I just want to go over real quick, because I think by this time most of us are pretty familiar with most of the Part 4, so I'm just going to go over the major revisions we've had since the last interested parties meeting.

The big one is, we've heard everyone's concerns about mandatory appeals conferences, and in the latest version, appeals conferences are no longer mandatory for franchise, income tax, HRA appeals.

We have redesignated them pre-hearing conferences. They're now discretionary and can be held
at the request of a party or upon order of the Board or Board staff. And they are only in cases when an oral hearing will be held. And then the conference will not result in a decision and recommendation, but the purpose is to build a better record for oral hearing so that there's a more detailed, complete hearing summary.

We also heard a lot of concerns that HRA claimants in the prior version were required to waive their right to an oral hearing. HRA claimants are now no longer required to waive their right to an oral hearing.

Like people with small tax cases, they can elect a streamlined procedure, and if they elect that procedure, that the election will be a waiver of the right to oral hearing, but nobody is required to use that procedure. Everyone can go the normal route and keep their right to an oral hearing.

Also, there was a lot of concern that the prior versions were confusing on petitions for rehearing and rehearing procedures. We have broken those down into what we feel is a more clear, logical format, renumbered it so that hopefully it makes more sense.

And also, the latest versions contain different options on possibly bifurcating appeals in the jurisdictional and substantive issues and different
options on having extensions to the time for filing appeals.

MR. HELLER: Thank you, Ian. And with that, I'm just going to go ahead and just start off with Article 1 of Part 4, "Application, Definitions, and Jurisdiction." That starts with Section 4010, application of the part. Are there any comments on Section 4010? Thank you. We're going to move on to Section 4011, "Definitions." Are there any comments on Section 4011? No comments.

Section 4012, "Jurisdiction."

MR. SPERRING: I have a question on (c)(6).

MR. FOSTER: Jon, if you could quickly state your name again for the reporters?

MR. SPERRING: And I'll give you my card, too.

Jon Sperring, Price, Waterhouse, Coopers.

As I understand (c)(6) -- maybe I'm confused as to its meaning -- it says that the Board of Equalization shall not have jurisdiction to decide whether the Franchise Tax Board failed to comply with any policy, practice or procedures unless such failure directly affects the adequacy of notice or the amount at issue in the appeal.

And I'm just wondering, what's the need for
that? It just seems like -- why are we limiting
people's appeals rights here?

    MR. FOSTER: We're are open to trying to figure
out better ways to say this. What we're trying to get
at is that the Board's jurisdiction is to determine the
proper amount of tax owed by -- if it's an assessment or
due to the appellate if it's a refund claim.

    We have -- we the Board -- the Board doesn't
have jurisdiction to determine basically if someone has
suffered some other wrong at the hands of the Franchise
Tax Board.

    If they feel the Franchise Tax Board was, you
know, overzealous, not nice enough, didn't treat them
well, you know, maybe failed to comply with its own
internal policies or practices, essentially the Board's
own jurisdiction is to determine the proper amount of
tax. So unless the Franchise Tax Board's actions affect
that amount of tax, that's something --

    MS. MANDEL: Or the notice.

    MR. FOSTER: Yeah. Or the notice. Or the
adequacy of the notice. Right.

    MS. MANDEL: There's something wrong with the
notice that you can knock the notice out of the box
without even talking about the tax. Right?

    MR. FOSTER: Right. Yeah.
MS. MANDEL: Okay. Yeah.

MR. FOSTER: Adequacy of the notice of the amount at issue. If what the FTB did doesn't affect either of those, then it's not something that the Board can address or remedy. But we're still open to suggestions on how best to word all that.

MS. MANDEL: And you say "directly"?

MR. FOSTER: Perhaps "directly" is too limiting.

MS. MANDEL: Well, I just -- I don't know. I'm just -- I'm just trying to understand. Somebody would say that anything -- I don't know.

MR. LANGSTON: Can I give you a couple of examples of my experience?

Sometimes we'll get a letter in where the taxpayer says, "Well, I agree that I owe the tax, but I'm unhappy, because I called the FTB and they told me to do this and that and the other, and, you know, they hung up on me" and this and that. And they're really not asking the Board to do anything.

And I think what the point of this is that the appeal has to be focused on what the Board is statutorily allowed to consider; that is, what the amount of tax is, the amount of any penalty, you know, again, whether the notice is issued correctly or so
forth.

And this is -- you know, all of these
regulations are basically interpretations and
clarifications of the law in plainer language.

We do get quite a few appeals in where the
person simply is not stating an issue that can be
answered or really is an issue.

What they're really trying to do is complain
about a particular staff member's conduct or something
like that, which is more appropriately directed to the
Franchise Tax Board's taxpayer advocate or management or
something like that.

So I think that's why we put that in there, so
that we can come back to them and say, "Look, the letter
you sent us is talking about this and that, but it isn't
something we can address on appeal."

MS. MANDEL: Was this your FTB language
suggestion or was this --

MR. LANGSTON: I think this was old language.

MR. FOSTER: After the last interested parties
meeting we came up with this, so yeah.

MS. MANDEL: Okay. Okay.

MR. LANGSTON: Because I believe this is
language that's commonly in letters to taxpayers who
write with appeals that are not -- you know, that
don't -- that don't object to the tax but are just
making general complaints. And I think that's where
this language may have been derived from.

MS. MANDEL: This would also apply, I guess, to
somebody who is complaining that you guys violated IPA.
You think?

MR. FOSTER: Yeah. It could. We put in a
separate subject. It's (c)(4) that specifically relates
to that.

MS. MANDEL: So this is just to cover the
waterfront.

MR. FOSTER: To cover the miscellaneous
complaints about FTB behavior.

MR. LoFASO: Can I just ask, what are we --
what does our appeals division do if we receive an FTB
appeal saying the person was rude on the phone? What do
we do now?

MR. FOSTER: Well, if there is no appeal from
an actual notice of action, denial of refund claim or
something similar, it would be rejected outright,
because there's simply no appeal right.

Now, if the complaint comes along with an
appeal from a notice of action, the issues -- the
underlying tax or penalties or interest would be
addressed, but the decision would also -- would usually
have some -- whether it be a footnote or something in
there saying, "By the way, we can't do anything about
whether FTB's employees were mean to you," or whatever
their complaint was.

    MR. LoFASO: We do that upfront? That's what
    I'm --

    MR. FOSTER: Upfront?

    MR. LoFASO: Well, obviously, I'm the new guy,
so I'm a little vague on it.

    If somebody has a notice of action and they
appeal, and they've said, "Well, I don't disagree with
the money, but I just don't like the way they treated
me. They didn't" -- you know, there was a case a couple
weeks ago where some guy said, "They didn't give me the
thing in writing." That was all the guy was talking
about.

    MS. MANDEL: So if we get in an appeal that
says that, what's the next step at Board of Equalization
with it?

    MR. LoFASO: Yeah.

    MR. FOSTER: If they say they don't -- if the
taxpayer appeals and concedes to the amount at issue --
other folks might want to address this as well -- my
belief is that we --

    MR. SHAH: This is Neil. What about collection
matters? That comes up once in a while, too.

MR. SCHREITER: Getting to Allen's question, if something comes in to Board Proceedings, which is where the appeals come, and the FIT analyst there who receives it sees that it's only a matter of a practice, procedure, policy, something of FTB, they would send a response, a letter response saying, you know, "We can only address these issues. Your appeal does not meet that."

If there's any question about it, then they will sometimes come to the appeals staff and we'll take a look at the letter, see if there's a substantive matter involved. And if there is, then there's an acknowledgement letter which accepts the appeal.

As far as if there are issues in the appeal other than substantive, then, as Ian described, in a hearing summary or in a summary decision that's issued eventually it will make mention of the fact that the Board is only able to address these specific issues.

MS. MANDEL: Before you get to Neil's question, I'd just like to follow up, if someone wrote in the kind of an appeal he's talking about, FTB, the person was horrible, mean, abusive, blah, blah, blah, but I agree with the tax, but boy, they were just horrific," what you said, Reed, would happen out of Board Proceedings,
you know, without casting any whatever on the person who wrote the letter, does that kind of complaint get forwarded at all to the taxpayer rights advocate or taxpayer advocate at FTB or anything like that?

MR. SCHREITER: I don't believe it is.

MR. EVANS: I don't believe it is, either.

MS. MANDEL: Yeah. Because you're just processing the appeal. That just occurred to me, that sort of other side. You never know. Somebody might actually have a legitimate beef about somebody somewhere that ought to get addressed. I was just wondering.

MR. LANGSTON: Most of these people have complained to us as well during the process.

MR. LoFASO: Just to close out on my question, you don't have to respond again, but I guess what I was trying to get to is, I'm not sure what clear authority Board Proceedings has now, but the answer I'm hearing is, if it really doesn't state a case or controversy, in what we understand that to mean, Board Proceedings in a nice way sends it back.

And I'm just sort of curious as to under -- you know, I'm of the "if it's not broke, don't fix it" school. So if Board Proceedings already has that authority now, from whence does it come? And why can't it continue to come from that, is my ultimate question.
But you don't have to respond. That's just where I was going in my question.

THE COURT REPORTER: I'm sorry. Could I have your name, please?


THE COURT REPORTER: Thank you.

MR. FOSTER: Neil, you had a question about collections?

MR. SHAH: Yeah. And that comes up frequently. Like bankruptcy and collections, there's a couple of things that we say, you know, we don't have jurisdiction on.

MR. FOSTER: Again, a collections matter, (c)(3) we address bankruptcy and other collection issues.

The collection issue might be relevant to something like a statute of limitations or interest-abatement case, the timing and manner in which payments were made or collected. But, you know, otherwise, collections would sort of fall under this (c)(6) "Miscellaneous."

If someone's not happy with the way FTB's been garnishing their wages, FTB has every right to garnish your wages if there's a final liability, and there's
nothing we can do about that.

MR. LANGSTON: Plus, there are other avenues for them to pursue complaints. It just isn't appropriate for an appeal to the Board of Equalization.

MS. PENNINGTON: This is Margaret Pennington. Can't we just, in those kind of situations, I would think that it would be a good procedure to at least let the taxpayer know, when we tell them that we can't address those issues, that they can contact the taxpayer rights advocate, Franchise Tax Board, and give them that contact. They can at least -- we can at least do that.

MR. FOSTER: Certainly.

MS. MANDEL: That doesn't have to be in the rule. That's a nice procedure, but we ought to.

MR. EVANS: Gary Evans. And we do that now.

MS. PENNINGTON: Oh, you didn't say that before.

MR. EVANS: Yeah. We get calls that are clearly --

MS. MANDEL: Gary, she's not -- yeah -- calls, but I think she's also talking about on an appeal, the kind of appeal that we --

MR. EVANS: In correspondence we can certainly do that.

MS. BORGMAN: I believe Board Proceedings does
that in other contexts of nonappeal letters, you know, like, say, unpaid liability, and if you say they have to pay and file a claim for a refund and you refer them back to Franchise Tax Board, we can do the same thing with these type of issues.

MR. HELLER: Jon, does that address your issue or do you have any further concerns about that?

MR. SPERRING: No, that's fine.

MR. HELLER: There seems to be consensus that the language is satisfactory. And staff will consider looking at maybe deleting the word "directly" just in case that's a little overly limiting.

MR. FOSTER: And, Jon, if you can think of a better way -- or anyone else -- a better way to rephrase this and try and get at what we're thinking about, please submit a suggestion.

MR. HELLER: Any other comments on Section 4012, any other subdivisions?

MS. BORGMAN: We had a couple of -- Susan Borgman, Franchise Tax Board.

We had a couple of written comments in our submission to you last week on subparagraph (b), and so there's a couple of minor corrections there that we submitted. I don't know whether you want us to go over every little thing.
MR. FOSTER: If we have it in writing.

MS. BORGMAN: You're okay with that?

MR. FOSTER: Yeah, we can trust it, unless you feel like you need to point it out.

MS. BORGMAN: No, no, just want to make sure the process --

MS. MANDEL: And if these are not sort of editorial --

MS. BORGMAN: Uh-huh.

MS. MANDEL: -- but are --

MR. LANGSTON: They're just technical.

MS. MANDEL: Yeah, if they're not totally technical, then you might want to mention, direct people to it, in case someone has a comment on them --

MS. BORGMAN: Okay.

MS. MANDEL: -- here as they look at them today.

MR. HELLER: Okay. Moving ahead, we're now on Page 4, Article 2, How to File an Appeal with the Franchise Tax Board, or, excuse me, an Appeal from the Franchise Tax Board, pardon me, Section 4020, Appeal Filing Requirements.

Any comments on subsection (a)? Subsection (b)?

Okay. We'll move ahead to Section 4020.5,
Methods for Delivery of Written Documents and Correspondence. And in here I would like to point out that Board staff is investigating the E-filing issue at this very moment and should have a uniform recommendation for the Board members for all the different parts on how -- well, if and how they would provide for E-filing of appeals, petitions, and other documents in our administrative review and appellate review programs, and so for right now this is really definitely the mailing, and mailing instructions will absolutely remain, but as far as the E-filing provisions, those are just an example for right now and we'll be addressing that shortly.

MR. HUDSON: I think this may have already been addressed in our previous sessions, but I just want to make sure to say it on the record.

Tim Hudson for Bill Leonard's office.

One thing that's absolutely critical is if we're going to list our physical mailing address, that we also list, you know, how somebody would go about E-filing. And if we're afraid that things like E-mail addresses are going to change over time, then we should, at a minimum, have a website that's in the regulations so that it's kind of on par with the -- with the post office box, so people say, you know, either I can mail
it here or I can go to this website right now and figure out, you know, what file formats are acceptable and what Email addresses are and that kind of thing.

Because the way it's listed here, the concern is that, you know, anybody reading this is going to say, well, I can either send it to this physical address or I can, I don't know, call somebody and maybe two weeks later they'll send me instructions or something.

And it kind of -- the way it has it here, it gives a real preference for getting things by the mail. And we'd like to have the preference be the other way around. We'd like them to Email it right now. And I think the way you do that is to either include in the regulations itself how somebody can E-file or else have a website or something that's listed.

MS. MANDEL: That's a -- that's a good idea. I don't know that you -- because things will change presumably, you might probably can't put it in the reg.

But instructions from the Board, presumably, once we figure out what we can do, and that it's going to be uniform across the Board, that we would have those instructions available in an easy-to-find place.

MR. HUDSON: And have the place --

MS. MANDEL: And then have the website in
here. That's an interesting -- you know, instructions
provided by the Board and that the Board is going to
post them on its website.

MR. HELLER: I think at this point --

MS. MANDEL: It's also that they change from
time to time. Posting to a website with changes is
probably pretty easy to do.

MR. HUDSON: Yeah.

MR. HELLER: And what -- when we were, let's
see, staff brought Part 2 of the rules to the Board
members for their approval back on January 31st, and
they basically -- that's the business taxes provisions.

And it did contain language similar to
subdivision (a), paragraph (2), here where that
basically provides for an "in lieu of electronic
delivery."

And Mr. Leonard did make comments at that
meeting and actually submitted some written comments to
staff regarding that. And staff agreed with his
comments that there should be an affirmative, at least,
equally encouraging alternative. Or not alternative,
but a procedure for filing electronically so that it
certainly wouldn't discourage electronic filing and in
fact encourage it if possible.

And then also staff agreed that we did need to
provide some sort of procedures and have that
information worked out in advance of having a final
regulation. And staff is currently working on figuring
out exactly what those terms are and is very close to
having specific items to provide to the Board members on
what we can accomplish technologically at this stage,
and what it might look like if were to go forward, and
could probably prepare some instructions pretty quickly
after those issues are resolved. So we're hoping to
have some information to be able to provide to the Board
members, hopefully very shortly, and then we'll make all
the different sections uniform so that they encourage
electronic filing if there's some form that we can
approve.

MS. MANDEL: Yeah. And the only -- not that
you have to hold every taxpayer's hand, but on the
supposition that instructions potentially change over
time, that would be posted.

MR. HELLER: Right.

MS. MANDEL: You know, hopefully, if someone
has to file, they would check at the time that they have
to file rather than print it all out and put it in the
thing or check when they get their NPA or their Notice
of Action and then say, oh, my gosh, within the, you
know, 30 or 60 days, we manage to change it. So I don't
know how you sort of --

    MR. HELLER: Yes.

    MS. MANDEL: -- tell them to --

    MR. HELLER: Well, I think those are some of the technical aspects. We are -- actually staff is actually in agreement that we do need to provide at least direction to the website or something to that effect so that if somebody is diligently trying to comply with these terms, they can go ahead and get directed to the right place.

    And then probably that page itself would be updated, but I'm assuming we would have to take into account some sort of lag time for people filing, based on procedures that change periodically.

    But we're really trying to figure out what it is we can actually accommodate at this time and in a secure, you know, professional manner and not just allow things to be coming into our server to any sort of address.

    MS. MANDEL: Willy-nilly.

    MR. HELLER: Willy-nilly, exactly.

    MR. HUDSON: My only point is that you don't necessarily need to work out all of those things, like all the potential file formats you can set. You don't need to work that out prior to publishing this.
regulation. You just need to say, "Here is the website where you'll be able to find the most recent version of that stuff." Courts do this all the time.

MS. MANDEL: Yeah, and it might very well say, "We don't have any instructions yet. Please continue to file on paper."

MR. HELLER: That's correct. And I think --

MR. HUDSON: I've seen Rules of Court that do this all the time where they tell you the website where you can download their forms and everything else, so we're no different than they are.

MR. HELLER: Oh, absolutely. And staff definitely is going to include a web address.

MS. MANDEL: Okay.

MR. HELLER: Really we're just really concerned about whether or not the Board can actually provide for electronic filing in the near future.

And so we're kind of concerned that with having any E-filing instructions, if in fact we're more than a year away from ever posting something to our website or actually being capable of doing that, so we don't -- at the same time we want to be clear; we also don't want to mislead people into thinking that that's coming in a month or two, when in fact it might be further down the road.
So we're just trying to tackle the whole issue, at least to the extent necessary for the Board members to approve any kind of regulation that would have that language and want to address it fully.

So we'll make sure that this, this section, is addressed along with all the other sections that require the filing of documents.

Are there any other comments on this Section 4020? We'll move ahead then. We're on page 6 of the redacted version.

Section 4021, Time for Filing an Appeal. And this is the First Alternative, and it includes extensions to filing deadlines.

MS. MANDEL: I had one question. I mean, I know there's going to be some stuff in front of all these guys about the First and Second Alternatives. I was just wondering in the First Alternative, you do have those 1013 extension periods, why you decided to delete the examples?

MR. FOSTER: We felt that ultimately the examples were better kind of put in Publications as opposed to Regulations, just in the Regulations, and that seemed to be mostly the consensus from the last meeting, that we put all the examples to our heart's content in the Publications.
MS. MANDEL: Well, okay. That gets to my other thing about a lot of what's in Part 5, which is things that don't belong in a Regulation, they belong in a Publication. I think that included examples were put in here -- were the examples in the original regulation, or were they just added to this first go-around?

MR. FOSTER: We put the examples in back in September, I think.

MS. MANDEL: Oh, okay. I just was wondering why they were deleted.

MR. HELLER: Other questions?

MR. SPERRING: John Sperring, Price Waterhouse Coopers.

Question I have on 4021, does "mail" mean "postmark"? Because what we found is that sometimes the letter or the notice, the date is a few days' difference between that and the postmark.

MS. MANDEL: Postmark -- you mean, the Notice of Action has an earlier? Then that's when you say to the client, "I hope you have the envelope," because it's the postmark.

MR. LANGSTON: Whatever is later.

MS. MANDEL: If the postmark is later, the postmark is going to govern.

MR. SPERRING: I'm wondering if we should say
"postmark." That way it's absolutely clear that that's what we're talking about.

MS. MANDEL: But there's not always a --

MR. FOSTER: Well, subdivision (b) --

MS. MANDEL: Well, if you start from (a) on, statutory deadlines run from the date FTB mails for the date indicated on the notice as a deadline, because sometimes I think we had that discussion where their mailing date is like longer. Right?

MR. LANGSTON: Well, that's what the statute requires. The statute says you may appeal for -- the appeal period starts with the later, you know, the date of mailing, or you can always rely on the date shown on the FTB notice, which was intended to clarify so people didn't have to count days. They get a notice. The notice, our notice, now has to say you may appeal this by this day. And that was -- it was designed to avoid confusion. And, I mean --

MS. MANDEL: And, John, I'm sorry.

MR. LANGSTON: Go ahead.

MS. MANDEL: In (c), on page 8, Date of Mailing, "In the absence of other evidence, the postmark date is considered the mailing date."

MR. LANGSTON: Right.

MS. MANDEL: Do you see that?
MS. BORGMAN: Isn't it in here?

MS. MANDEL: You see, when you're reading this stuff after the meeting, you have quicker retention.

Does that answer your question?

MR. SPERRING: Yeah, that would be fine.

MR. HELLER: Any other questions or comments on Section 4021?

MR. BESSENT: That's on the First Alternative?

MR. HELLER: Yes, 4021, First Alternative, excuse me, I'm speaking beginning on page 6.

Moving ahead to Section 4021, Second Alternative, on page 9, Time for Filing an Appeal, and this one deletes the filing extensions.

And just as some background, there's two alternatives because there was -- there was not a complete consensus reached on whether or not the Board had statutory authority to grant those particular extensions. And so there was two alternatives provided.

MS. MANDEL: But the 1013 has been in the reg already.

MR. FOSTER: Yes, it has.

MS. MANDEL: Okay.

MR. FOSTER: And we clarify, in the First Alternative here, keeps the extensions which are in the current reg, but it clarifies that the extension is
based on where FTB mails its notice to and not where the
taxpayer is mailing an appeal from, so there's no longer
discrimination against E-filers as far as the length of
time they have to appeal.

MR. HELLER: Any comments on Section 4021, Second Alternative?

Moving ahead to Section 4022, also the
First Alternative, Accepting or Rejecting an Appeal, and
also as some background on this issue, the Franchise Tax
Board raised an issue with appeals where there may or
may not, well, I should say where there may be a
jurisdictional issue raised and would like the -- would
ask for -- I should say ask for staff to consider an
alternative that would bifurcate an appeal where there's
a jurisdictional issue so that the -- so that the
parties and the Board address the jurisdictional issue
before addressing the substantive issues as to whether
an amount of tax is owed or a refund is due.

And so the First Alternative does not contain
bifurcation, and it basically follows the Board of
Equalization's current procedures, which is to just hear
all of the issues at once, assuming a timely appeal has
been filed.

Are there any comments on Section 4022, First
Alternative?
Okay. Moving ahead to Section 4022, Second Alternative, and this one does contain the bifurcation procedures. Are there any comments on Section 4022, Second Alternative?

MR. HUDSON: Could you say -- is somebody advocating one approach versus the other, because I want to hear the arguments.

MR. HELLER: Well, at this point the Franchise Tax Board, I believe, is advocating the bifurcation procedures.

And would anyone from there --

MR. LANGSTON: Yes, I can tell you, this is sort of a good government, save the work load issue.

If we have a major case, it takes a lot of staff time and effort, and to develop, you have to write a big brief, you know, do the -- and if -- if the appeal, in our opinion, is clearly barred by jurisdictional issues, that is, it was filed too late, the amount at issue hasn't been paid, you know, all of the things we talked about before, and we believe the Board simply doesn't have the statutory authority to hear the appeal at all, or usually it's premature, it is a tremendous waste of the State's time and money to brief the entire case.

You know, it could be a multistate corporation
case that is pages and pages. And, you know, our view is, like pretty much any Court you go to, the first question is, do I have the right to be in court? Once that's decided, then, yes, then you to go the merits of the case.

So this has been an issue. A number of years ago, actually this was more like the process. And then I don't remember exactly when it got collapsed into just arguing all the cases -- all of the issues at once.

And the problem with that is it's sort of not fair to the taxpayer. It's not fair to the Board. Because, then, when it comes time for your hearing, you have to take your limited amount of time, argue the jurisdictional question, argue the merits of your case.

Again, you're charging -- the taxpayer's representative is charging the client for writing up this long extensive legal argument, and if it turns out the case is knocked out on procedural grounds, that was unnecessary, as it turns out.

So we believe that there is a real issue here; that it would be a good idea to where there is a true legitimate issue with whether the Board has jurisdiction to hear the appeal, then we would like this sort of expedited process to get through that first so that we don't waste everybody's time on that.
Comments?

MR. SCHUTZ: This is Chris Schutz.

If the Board ends up deciding that the taxpayer doesn't have jurisdiction to hear, taxpayer still disagrees, he tries to go to court, the Court reverses what the Board has decided, says, oh, you do have jurisdiction, and now will the Court then hear the merits of the case without the sort of administrative procedure on the merits of the case ever being done? Or would it, do you think the Court would then kick it back to the Board of Equalization to then hear the merits of the case?

MR. LANGSTON: You know, this is a good question. Our view always is that in a suit for refund, the Board of Equalization process is optional. It is not required. I expect the Court would just go ahead and hear the case.

By and large, though, for the same reason that a taxpayer would not have met the jurisdictional requirements for a Board of Equalization appeal, they would also not have met the jurisdictional requirements for a court suit.

MS. MANDEL: But somebody might try to file a mandamus, say the Board's off on the Board's decision.

MR. LANGSTON: Well, and that -- that would be
a -- that would go beyond this regulation, I think.

MS. MANDEL: Yeah.

MR. LANGSTON: That would have to be -- you
know, obviously there would have to be --

MS. MANDEL: Whether that would be appropriate
or not.

MR. LANGSTON: -- some independent authority
allowing them to do that.

Again, I mean, isn't that the same issue if
we -- say we briefed the whole thing. We raised the
issue of jurisdiction, and they lost on that issue and
the Board never considered the merits of the case. I
mean, I don't think it's all that different. So but
that's good point.

I still think, though, that in the vast
majority of cases, where there truly isn't jurisdiction,
this procedure, this Second Alternative, would save both
the State and the taxpayers a lot of time and
unnecessary time and effort, so that's why we proposed
it.

MR. SHAH: And if there's multiple issues, one
with jurisdictional and the others that are going
through you, do you recommend that others go through?

MR. LANGSTON: No, I mean, just the opposite.
The point is if there's no jurisdiction --
MR. SHAH: No, because there are times when an issue, you don't have jurisdiction, like bankruptcy, but they have other issues also that they're raising which the Board has jurisdiction --

MR. LANGSTON: No.
MS. MANDEL: Neil.
MR. SHAH: -- because it's an assessment issue, is it accurate or not.
MS. MANDEL: Neil, I think what FTB is talking about is more the fundamental, a real fundamental jurisdiction over the appeal.

So that if an appeal is late, filed late, but there seems to be a dispute about whether it's filed late, perhaps there's lots of smudgy postmarks or something, or somebody is trying to take an appeal, for example, on a deemed denial of a refund claim or something like that where they say they're in a refund status and they haven't complied with everything you have to comply with before filing a refund claim with FTB, like they haven't paid all the money, that those are -- those kinds of fundamental jurisdiction over the appeal, that they would want those -- and then the person also says, and, besides, the tax is totally wrong and etcetera, that the issue of whether the Board has the fundamental jurisdiction to even hear the appeal be
taken up first. And then if the Board decides it has
jurisdiction, then they do all the work on the other
issues.

Because it's kind of like the person is going
to file the appeal, and effectively what I understand
FTB saying is either through Board Proceedings taking a
look at it and going, yeah, we don't think so, but
there's a dispute, or FTB for whatever reason is
essentially making a motion to dismiss, right?

MR. LANGSTON: Yes, that's exactly correct.

MR. SPERRING: Well, I have a question. This
is John Sperring, Price Waterhouse Coopers.

What if you have, let's say, a refund claim
involves three years? Same legal issue. One year there
was a jurisdiction question on it. Okay. What happens?
You hold the whole thing up while you decide the
jurisdiction on that one year?

MR. LANGSTON: That's your choice.

No, I mean, the -- this happens really quite a
bit. Right now, we just point out, gee, this year,
there's no jurisdiction because it's not fully paid or
whatever.

You know, that's going to be -- it's going to
be different in every case. I mean, it depends what the
case is about, and how serious it is, and what the
issues are, and whether the facts and issues of the
disputed year are relevant or necessary. But, you know,
the basic rule of tax is each year stands on its own,
and you have to establish jurisdiction for each year.

MS. MANDEL: Yes, so he's just sort of asking
if I file an appeal for three years, and one appeal in
one of the years happens to be messed up, are you going
to make this bifurcation?

MR. LANGSTON: We --

MR. FOSTER: John, this alternative regulation
sets forth essentially an untested procedure, so we
didn't want to work out those kinds of details in the
regs and then bind us to a detailed procedure that it
turns out merely may not work, so we left the procedures
in the reg general, and then we can try and work out the
details later on a case-by-case basis.

MR. KOCH: Let me ask what exactly you mean by
"details." Let's suppose, for example, I mean, the
substantive issue is not very large, will not require a
great deal of work. Many a taxpayer may prefer to come
once rather than twice. Is there going to be any way to
get out of the bifurcation through an exercise of
discretion on application by one of the participants?

MR. FOSTER: I think we could write something
in there.
MR. LANGSTON: There shouldn't be, because then it would be completely ineffective. I mean, you sort of destroy the whole provision if you say, "Oh, you can just choose to ignore whether you have the right to be there at all," and force everyone to go through the merits of the case.

I mean, I understand what you're saying, but this was designed to be a relatively -- jurisdictional issues tend to be relatively black and white. You know, they either require a certain piece of evidence or they don't.

You know, you point to the statute that gives you jurisdiction. Did you meet the factual requirements or not?

This was designed to be like -- well, it's given 30 days. And it's really only designed to be where there is a true issue as to jurisdiction.

Now, what we used to do a number of years ago, we used to have a process where we would write a memo where, when an appeal came in, we looked at it and said, you know, this claim for refund amount is not fully paid. We would write a memo back to Board Proceedings with a copy to the taxpayer.

MS. MANDEL: Isn't that because Board Proceedings used to send stuff for verification to FTB?
And they stopped doing that a while ago.

    MS. BORGMAN: Yeah. And that causes a lot of jurisdictional problems.

    MS. MANDEL: And there was a lot of . . .

    MS. BORGMAN: So it forced things into this kind of . . .

    MR. FOSTER: The procedure in these regs, regardless of which alternative is chosen on bifurcation, is the procedure we're writing into here makes sure that jurisdictional issues are addressed up front. So particularly if there is a black-and-white jurisdictional issue, the amount's not paid so there is no claim for refund. You mailed it 80 days after the notice of action. The appeal's not even taken at all in the first place, and nobody wastes their time.

    MR. LANGSTON: But you know, I mean, as Al points out, maybe it should be clear that in some cases we'll just -- in some cases that's pretty much the whole case, jurisdiction.

    MR. KOCH: Jurisdiction.

    MR. LANGSTON: Yes. In some cases, again, it's in a small -- I don't anticipate -- this is primarily for large cases, I think, what we were most concerned about, because in a small case, I can understand that there will be -- you know, it's just as easy to touch it
once, send out the brief, put both issues in the brief.

The problem being, I mean, it really is a -- it really has become a workload and a burden for both the State and the taxpayer to have to do both of these all together. If you really believe there's no jurisdiction to go forward and do the kind of factual development and arguments, it is a major --

MS. MANDEL: Well, are you discovering those after -- when you get the -- when are you discovering --
because I remember when stuff used to go to FTB for verification, and now I think it doesn't, so are you not discovering these until sometime after the taxpayer has done their opening brief?

MS. BORGMAN: A lot of times the --

MS. MANDEL: Don't even have the information.

MS. BORGMAN: Yeah. We don't even have the information until after it's acknowledged now. And Board Proceedings staff may not be aware that there is a jurisdictional issue like full payment or something like that, because they don't have access to that information, and so we find it out after it's been acknowledged and a briefing schedule has been established, so that's when we send jurisdictional --

MS. MANDEL: So under this one, under (a), where it's the Chief of Board Proceedings can determine
if the Board has jurisdiction, including whether it's
timely, they may have to be checking with you again like
they used to to determine.

    MS. BORGMAN: Mm-hmm.
    MS. MANDEL: Okay.
    MR. HELLER: I think also, under both
alternatives it does provide regulatory language to
require the Chief of Board Proceedings to determine
whether there's -- whether the appeal's timely and
whether the Board has jurisdiction. So it is going to
require some sort of procedure through Board Proceedings
to do some sort of verification. Neither procedure
really foresees sending something to the FTB and then
having them object.

    MS. MANDEL: I found those materials this
morning from '96 or '97 when they stopped doing it.
    MR. SPERRING: A question I have for staff.
    What's the -- I mean, one concern I have is the tail not
wagging the dog here. What percentage of jurisdictional
issues are raised for complex cases versus simple cases?
    MR. FOSTER: I don't know that we have
statistics on it. I think a complex case is less likely
to have jurisdictional issues. You would -- I mean, I
would think that a large corporate taxpayer with a
complex multi-state issue would have dotted their I's
and crossed their T's before trying to come over here. They don't always. They're more likely to have done so than a person with maybe just a late filing penalty issue.

MS. MANDEL: What's FTB seeing?

MR. LANGSTON: You know -- and Susan can help me on this -- but some of the jurisdiction issues involve tax shelters, taxpayers who were -- who engaged in the VCI program which specifically prevents them from appealing, people who have been through settlement and have a settlement closing agreement, things like that. That's the only time it's really a major case.

Primarily these are the small to medium cases, the small business, the small taxpayer for who the amount's not fully paid, the amount's still in collection, they're trying to bootstrap themselves into appeals by filing an amended return where they haven't paid the amount due, things like that.

And so I would agree with Jon that in a well-represented, large taxpayer, it's an unusual circumstance, unless they are picking up the pieces of someone who did a bad job before, trying to get in, you know, where -- for example, if a taxpayer failed to protest, you know, and now they want to appeal.

MS. BORGMAN: A deficiency.
MR. LANGSTON: A deficiency. We've had some
where claims were denied and not appealed.

MS. MANDEL: But just because it might be a
small- to medium-sized business doesn't necessarily mean
that what you would -- your point is that doesn't
necessarily mean that the issues, the legal discussion
of factual junk that you put in -- or stuff that you put
in -- "junk" is a sort of technical tax term -- is not
workload-intensive at some level is what you're . . .

MR. LANGSTON: And many of those cases are
actually more -- harder for us to do, because we're
tuned into the big, multi-state cases and the other
issues.

But for someone, you know, pass-through
entities or things like that often requires, you know,
research. And, you know, it's a fair amount of work
both for us and the taxpayer to deal with some of these
issues that, you know, we've put hours and hours and
hours into a case. We argue, and it turns out there was
no jurisdiction. It's sort of a waste of everyone's
time.

MS. BORGMAN: And Board staff, too.

MR. LANGSTON: And Board staff. And the
taxpayer's money, you know. That's where we're coming
from on this.
MR. SPERRING: A question for you, Bruce. Have you seen any head of households where there's a jurisdictional issue?

MR. LANGSTON: Yes.

MR. SPERRING: That would be my concern is that you have a head-of-household person coming up twice: Once for the jurisdiction and once for the issues.

MR. LANGSTON: They only come up twice if we're wrong.

I mean, the other point, too, is, let's be fair. We are not trying to kick people out. I mean, we want to give them opportunities to show us that there is jurisdiction. I mean, we're not -- you know, this is -- but we believe where there is no jurisdiction we don't have the legal authority to grant their appeal. I mean, that's really the bottom-line question.

I mean, the Board only has the authority to hear appeals in certain limited circumstances. And if those circumstances aren't there, this is a way for us to cut to the quick really quickly, find out should this case even be before us, do they have to go back and finish paying or whatever.

So, you know, the other -- so anyway, that's sort of where we have come from. And these jurisdictional cases run the gamut, and they're not just
late appeals. A lot of them have to do with fairly
complex issues where there simply aren't appeal rights
in certain areas.

MS. BORGMAN: Or simple issues like penalties
that aren't paid.

MR. LANGSTON: Yes. That's another good point.

MS. BORGMAN: It runs the whole gamut.

MR. HELLER: I'd like to add, I think, another,
you know, staff efficiency issue that I experienced when
I was at the Franchise Tax Board was, you know, in a lot
of cases where a taxpayer clearly doesn't have
jurisdiction, for instance, like on their claim for
refund with the Franchise Tax Board, Franchise Tax Board
staff at most levels is not going to do a major workup
of the substantive issues in that claim for refund.
It's, like, six years too late.

They're not going to go back, try to pull the
returns and see what we have on microfiche, and then get
an auditor to go look at the reams of documentation that
the taxpayer's providing, when the claim is clearly
late.

And so when the FTB is required to brief an
appeal like that, even though it's not timely, if we're
going to let it go to the Board hearing level, then, in
many cases, staff at the Franchise Tax Board then does
have to pick up that six-year-old claim, go back and
find the information, go ahead and still have an auditor
assigned, have an audit supervisor review their workup,
have them work with an attorney to get them up to speed
so that --

MS. MANDEL: Except in that situation that
you're talking about -- I mean, I guess that's their
choice -- but in that particular situation, the actual
appeal to the Board of Equalization may be timely
because it may be within the time period off the notice
of action on the refund claim or notice of denial on the
refund claim, so that the actual appeal is timely, so
it's not this Board's jurisdiction that's at issue.
It's Franchise Tax Board -- you know, the claim's just
late. You see late claim cases all the time. So I
don't think that's the kind of case that they would be
anticipating, because this bifurcation, as I understand
it, goes to the Board of Equalization's jurisdiction to
hear an appeal.

MR. FOSTER: And the statute of limitations is
not a jurisdictional case.

MR. Heller: That may not be.

MR. LANGSTON: It's mostly payment. It's
mostly where they have not paid something and are
alleging that, you know --
MR. FOSTER: The typical case is of penalty abatement. There's an unpaid late payment penalty. They say to FTB, "Why don't you lift the penalty?"
FTB says, "No we're not going to abate it."
They appeal here. Well, there is no right to appeal here because it's not paid.

MS. BORGMAN: And some of those are caught up front by Board Proceedings, which is great, but some of them aren't, because you don't have access to all of the accounting records. That makes sense.

MR. FOSTER: And that's where it goes to either version of this division's -- Board Proceedings having any authority to determine up front do we have jurisdiction before we go ahead.

MS. BORGMAN: That's good.

MR. HELLER: I think, just to round out the discussion on the other side, you know, Board of Equalization staff is aware that to the extent that staff at the FTB isn't successful in these bifurcated matters and it is going to require Board staff -- Board of Equalization staff to possibly review a whole 'nother set of briefs, possibly hold another appeals conference, then to prepare recommendations for summary for the Board and then still hold another Board hearing for all the Board members to be present again.
So that's really the -- at least one of the primary countervailing concerns that the Board staff has is just, you know, what is the more efficient approach? Both sides have definitely addressed efficiency concerns and then possibly raise other inefficiencies. So it's the reason that we have two alternatives at the moment.

MS. PENNINGTON: This is Margaret Pennington.

So what are we going to do? Are we -- because this clearly would require another procedure. I mean, we can have the regulation here, but there's other procedures that's going to have to be, like you said, Marcie, that Board Proceedings is going to have to follow up with Franchise Tax Board. And if that's already been stopped, this is kind of -- how are we going to know?

MR. HELLER: Well, actually, I probably wasn't clear enough before, but what I was saying, both versions of Section 4022 actually do require Board Proceedings to undertake some activity of trying to determine timeliness and jurisdiction, which is a change to our current procedure, which is just kind of let that go by the wayside for the moment.

So in our subdivisions (a) they both require that the Board Proceedings division do some sort of verification. It's only the Second Alternative that
then says that if we've identified an issue, then we're
going to separate out that issue. We're going to hold
everybody in abeyance. We're just going to deal with
the jurisdictional or timeliness issue.

The other alternative --

MR. FOSTER: And if the bifurcation alternative
is adopted, the bifurcation would only happen if there's
some material dispute. I mean, if you have 30 days to
appeal --

MS. MANDEL: Obviously.

MR. FOSTER: -- and they took 50 days to
appeal, it's just going to be rejected outright and
we're not going to waste everybody's time.

But if there's a question about whether they
got the appeal on the 30th day or the 31st day, you
know, maybe there's a postmark that's hard to read, you
know, then there's some dispute about whether there's
jurisdiction.

MS. PENNINGTON: But who would make that
decision? Wouldn't the Board of Equalization make that
decision?

MR. HELLER: Currently what we have -- the
Chief Counsel is going to take a look at it -- basically
what we'd have is Board Proceedings do the initial look
at jurisdictional and timeliness issues.
If they've identified an issue, then it would go to the Chief of the Board or the Chief Counsel to see if there's a genuine issue that needs to go ahead and get briefed and bifurcated and go to the Board members.

If there's not -- and this is under both approaches -- in fact, I shouldn't even say bifurcated. I should say, under both approaches, if it looks like there's an issue on timeliness or jurisdiction, then it would go to the Chief Counsel to determine if there's a material issue with regard to those.

If the Chief Counsel determines there's no material issue, then under both alternatives the appeal's going to end there, because we don't have jurisdiction.

MS. MANDEL: With respect to the actual filing date of the appeal, that appears to be something that wouldn't require verification with FTB unless there's an issue -- because if the notice is attached -- I think they used to check those, you know, check those things, but -- and if for some reason there's, you know, some monkeying around with the notice that someone does, you know, I suppose we'll hear about that later, but -- and hopefully that never occurs -- but it sounded like there were other types of fundamental jurisdictional issues that perhaps would only be possibly known by FTB because...
it might not appear on the face of the appeal unless there's certain types of issues that start getting acknowledged as ones that raise, like certain types of penalty abatement that would require, and then the Chief Counsel needs to give Board Proceedings a list of what to watch out for. That's what it sounds like.

MR. HELLER: Yeah. So the difference would only be after we determine there's a material issue, then one just lets that issue stay with all the substantive issues and go to Board at one hearing, possibly one appeals conference. The other one just separates those two.

Do we have any other questions on comments on Section 4022, Second Alternative?

We're just going to go ahead and move forward to Section 4023 and then I'm going take a break after we finish that and we'll finish Article 2 and I'll give our court reporters a chance to take a break as well.

So Section 4023, on page 12, Perfecting an Appeal. Are there any comments on subdivision (a)? Subdivision (b), Time to Perfect the Appeal?

MS. PENNINGTON: In (2), it will be (2), you need to take out the "with."

MR. HELLER: Are there any other comments on Section 4023? Excellent.
Why don't we adjourn for a five-minute break, and we'll return here at a quarter until 11:00 on the clock.

(Recess taken, 10:39 a.m. to 10:50 a.m.)

MR. HELLER: I think we're going to go ahead and reconvene, and we're going to start on Article 3. This is on page 12 of the redacted version, and it starts at the very bottom there and runs to page 13 and it starts with Section 4030, General Requirements.

Do we have any comments or questions on Section 4030?

MR. LANGSTON: I'd like to throw in on subsection (c) that talks about extensions for the briefing period. I think we are going to add a clarification in there to make sure it's understood that that applies to all of the briefing schedules.

MR. SCHUTZ: Chris Schutz.

I had one quick comment, and I made this before, on Part 5(e) that talks about 8-1/2 by 11, double spaced. If you have some sort of E-filing, there may be some need for changes to that requirement.

MR. HELLER: Any other questions or comments on Section 4030?

Go ahead, Al.

MR. LOFASO: Al LoFaso from Betty Yee's office.
Just a quick question on subdivision (b). Is it the Chief of Board Proceedings's job to give the brief to the opposing party or the litigant's job to give the brief to the opposing party? It looks like you changed it, but maybe it's somewhere else.

MR. HELLER: That's how it --

MR. FOSTER: Yeah, Chief of Board Proceedings. I mean, that's essentially current practice now. The old regs state that each party has to provide copies to everyone else, but now we just require that once they be filed, and Board Proceedings people will correct me if I'm wrong, that you just have to file one document and Board Proceedings will make sure that everybody has a copy of it.

MR. LOFASO: Okay. Appreciate the clarification.

MR. HELLER: Okay. Moving ahead to Section 4031, General Briefing Schedule, and for those of you who haven't been through Part 4 before, there's a general briefing schedule. There's also a small tax case briefing schedule that's going to come up next that would apply to an elective schedule for certain taxpayers with small cases or HRA loans.

MR. FOSTER: And there's an Innocent Spouse privilege.
MR. HELLER: Well, that's correct also. So that's why there's a general briefing and that's applicable to everyone who doesn't fall into those special schedules.

So comments or questions on Section 4031, beginning on page 14? Subdivision (a)? Subdivision (b), Opening Briefs? Subdivision (c), Reply Briefs?

Okay. We'll move ahead to Section 4032. It's a Briefing Schedule for Innocent Spouse Appeals. It starts on page 16.

MS. BORGMAN: We did provide some written comments on the Innocent Spouse provisions to provide the Franchise Tax Board with a reply brief to the nonappealing spouse's opening. And we just referred back to the provisions, hopefully to make it a little bit simpler, back to the provisional briefing schedule, general provision on how reply briefs are requested and whatnot.

MS. PENNINGTON: Wait a minute. We have something.

MR. HELLER: Sure.

MS. PENNINGTON: On 18 --

MR. HELLER: Okay.

MS. PENNINGTON: -- we feel that, you know,
they shouldn't have to ask permission to file a brief
for the nonappealing spouse. It's down, No. 2.

MR. HELLER: Where are you?

MS. PENNINGTON: 2 on page 18.

MR. HUDSON: This comes up more than one place,
but currently, like in subsection (3) on page 18, it
says, "The Franchise Tax Board may file a reply brief
only upon written permission of the Chief of Board,
Chief Counsel, or his or her designee." And there's
other places in here where it mentions the nonappealing
spouse needing permission to file a brief.

We don't see why somebody should need
permission to file a brief.

MR. FOSTER: I don't believe the nonappealing
spouse has to ask permission.

MS. PENNINGTON: Am I reading it wrong?

MR. HUDSON: Let me find it again, sorry.

MR. FOSTER: The nonappealing spouse is allowed
to file an opening brief, just like the appealing
spouse, and then also to file a reply brief, just like
the appealing spouse.

MS. PENNINGTON: I think maybe I read it wrong.

I think that -- but it does on the respondent's reply
brief, No. 3, they have to ask permission to respond. I
believe they're talking about Franchise Tax Board has to
ask permission. Why is that?

MR. FOSTER: That is existing practice, that FTB has to ask permission to reply, and we've kept existing practice in the regs.

MS. PENNINGTON: But --

MR. FOSTER: It's not necessarily administratively efficient to allow briefing to go on and on and on when, in the opinion of the appeals staff, there's sufficient on file.

MS. PENNINGTON: Uh-huh.

MR. BESSENT: Otherwise, you could end up with nine briefs.

MR. HELLER: Correct. I think really the main issue, and this is not to address any specific case, but I think historically the idea was that if the Franchise Tax Board replies, then the taxpayer can reply, then the Franchise Tax Board of course would want to reply. And the idea is eventually to try to limit the briefs to some extent for everyone's expense and then also basically to stop the, you know, the taxpayer from feeling like they have to continuously respond, since we do want to make sure that the taxpayer always has the last word on being able to address any contentions raised by the government.

So the idea is if we have looked at a brief
that basically the taxpayer appealed, they filed their
own brief, the FTB responded to that, the taxpayer has
responded, now the FTB wants to file another brief, and
it looks like those, all the issues, had been addressed
in their first brief, that would be the situation where
we would deny them permission to respond.

But in general cases, permission is usually
granted where there's an unaddressed issue or a new
issue has been raised by the taxpayer, which isn't all
infrequent at all, but, generally, where -- you know,
the lawyers do tend to have a tendency to want to
restate their arguments, put them in a new shape to make
sure there's something to rebut that, and I think this
just puts the burden on locating a real issue as opposed
to just making it a practice to always file a new brief.

Okay. Are there any other questions on Section
4032, Innocent Spouse Appeals?

Moving on. I would encourage everyone to
come along and go ahead and view one of these appeals
when we get one soon. It should be very interesting.
I'm really looking forward to it, so...

MR. LANGSTON: Innocent Spouse appeal?

MR. HELLER: Well, I think we're now going to
let the nonappealing spouse be part of the briefing and
hearing process, so it could make for some interesting
fireworks on certain cases. For those of you who have ever worked in family law, you probably know what I mean.

MR. LOFASO: And it's clear that you incorporated some of that in the provisions.

MR. HELLER: Oh, yes, we definitely do. And we're also in the process of addressing similar issues for the Board's own Innocent Spouse program, so it's a fun issue.

We're going to move ahead to page 22, Section 4033. This is the Elective Simplified Briefing Schedule for Small Tax Cases and Homeowners' and Renters' Assistance Appeals.

And as Ian indicated earlier, this was amended so that it's completely elective for all participants, so no taxpayer has to utilize these procedures but they can elect to if they feel it's more efficient.

MR. FOSTER: Just point out there were two alternatives. The First Alternative is to delete the simplified procedure all together, because there was some concern that nobody should even be asked to waive their right to an oral hearing, even be given a chance to electively waive it.

But, then, the Second Alternative I have, we keep the simplified procedure and make it entirely
elective for everybody. Nobody is forced to use it.

    If you use it -- and it also makes clear that
the taxpayer or the HRA claimant has to be clearly
informed if you elect this, that means you don't get an
oral hearing. If you want an oral hearing, you have to
go through the same process as everyone else.

    MR. BESSENT: Ian, is there any estimate as to
what percentage of taxpayers would take this Second
Alternative? Is there -- has there been any guesstimate
as to --

    MR. FOSTER: I don't know how the -- how to
tell that. A lot of people now waive their right to
oral hearing. They do it all the time. But they know
that they always have the opportunity to come back and
get it again later. A lot fewer of them might be
willing to waive that right if they know this is an
irrevocable waiver.

    MR. SCHREITER: I think that since this has
never been a procedure before, we have no way of knowing
of the people eligible for it who would make that
election.

    MR. SPERRING: If you make the election, are
you entitled to a petition for rehearing?

    MR. FOSTER: Yes. You have a statutory right
to a petition for rehearing. We cannot take that away.
It's nice of us to follow the law.

MR. HELLER: Are there any more comments on Section 4033, either First or Second Alternative?

I apologize for speaking the First Alternative.

MR. BESSENT: You were so concise with that First Alternative.

MR. HELLER: Moving ahead to Section 4035 on page 25, Discretionary Supplemental Briefing.

MR. SPERRING: Yeah, we had a concern about that. If staff is going to request supplemental briefing, shouldn't they be required to lay out precisely what it is that they want addressed in the brief, which is probably something that they generally do as practice?

MR. FOSTER: We do, as a matter of practice. Yeah.

MR. SPERRING: Wouldn't they want to put that in the rule?

MR. SCHREITER: I guess one question I have, Jon, is that how could we ask for a supplemental briefing without telling them what to brief?

I think our letters always set forth specific questions or at least an issue that we feel needs to be developed.

And I don't know that it would cause a problem.
for the regulation, although I think it's duplicative of just the very act of asking for further briefing.

MR. DALY: Charles Daly, BOE Legal.

Also, you kind of don't want to be in the position of making a case. There's a line that you don't want to cross. It's subtle and it's a fine line, but you could be clear about what you want without making a case for one party or the other.

MR. SPERRING: Okay. Yeah. I mean, you know, the flip side is, on the practitioner's side and FTB, they're going to err on the side of doing more, because you don't want to -- you know, if it's not exactly clear you're just going to throw in everything, because you don't, you know, want an argument to be left out. So that's -- you know, that would be one nice thing about having specifically what it is the appeals wants, which I do think you usually do, but why not put it in the rule?

MR. LANGSTON: Often, I will point out, supplemental briefing will happen when a new court case comes out, for example, and the Board staff will ask us, "Well, how does this new case affect the argument you previously made?" you know, to give us an opportunity for something that couldn't have been raised, you know, because the case wasn't done yet.
Sometimes we'll get a request for supplemental briefing on an argument that the taxpayer made that, I don't know, we hadn't requested a reply to respond to because we thought it was so obvious, no one could possibly take that, and -- just kidding.

But, you know, so that's the kind of thing that's rarely done. And it's usually, in my experience, only done where there's a new area of law or some new developments in the law and the Board staff just wants to make sure they have, you know, everyone's input on it. So it's rare that we get one of these.

MR. SCHREITER: I think another thing to keep in mind, too, is that the taxpayer and FTB presumably are in possession of all the facts. And Board Appeals people are only in possession of the facts that were given.

And so sometimes if our questions are vague, it may be because the taxpayer and FTB know something that we don't, and not that it's being intentionally hidden. It's just you've been through an entire process, you know, acting. We're new to the process.

And sometimes we may ask questions that you guys have already decided it's not a relevant question, it's already been taken care of at protest but not raised in the briefing, something along those lines.
And maybe sometimes we may ask a question that isn't as specific as it could be or repeat a question that you think is irrelevant. And it seems relevant to us, we think, because of the basis of our knowledge.

MR. HELLER: Jon, would it be -- I think we're all kind of close and we're arguing -- well, we're not arguing, but we're discussing semi-diverging issues.

I think what you're saying is we need some -- just a little bit of language in the regulation that essentially requires staff to identify something so that you as the -- either the FTB or as the taxpayer's representative have some idea what it is that staff's identified as requiring additional briefing so that hopefully what you write back is going to address the issues.

MR. LANGSTON: I think what Reed's trying to say is that we can't be very specific in our regulatory language. We probably have to be very general, like saying we're going to identify the issues to be briefed, either fact issues or evidence or something like that, so that it leaves us with a leeway to be vague in appropriate situations, but it still makes it clear that there's some requirement for staff to not just go, "Additional supplemental briefings is required, you guess what we want," something to that effect, I think,
is what you're requesting. And I think we can work out something.

MS. RUWART: And also -- this is Carole Ruwart. I don't have my copy of Part 5 in front of me, but isn't that where we define what is a brief?

And so if we look at that definition, as I recall, there's actually a couple of sentences in there about, you know, a brief is a, you know, an analysis of the facts and the law and the this and the that. So that's what is being asked for here.

MR. HELLER: Correct.

MS. RUWART: So I guess I'm -- if you're asking for additional briefing or evidence, you're asking for what's already defined in some level of detail in Part 5.

MR. HELLER: Well, I think in Part 5 we described very much what a brief is or what -- well, I shouldn't say "very much." We tried to describe what a brief is. So we made it clear that it is a written document and that it contains arguments and usually refers to evidence to support or rebut a party's position.

And we specifically amended it so that it wouldn't -- it wouldn't make a -- how should I say it? We made it clear that oral arguments could not turn into
a brief; and therefore, if we had a hearing just on
briefs, so we submitted a matter on briefs only, it
would not be an oral hearing within the terms of Part 5.

And that was really designed to help make the
disclosure provisions work more effectively since they
require people to basically request an oral hearing
before the Board in order to execute a waiver, so that
we could disclose additional information.

In this case I don't think our briefing
definition will address it, because it tells you what is
a brief, which I think isn't really -- the issue isn't
what is it, you know. I think we all know that we're
going to have to have some arguments and address some
evidence.

I think what Jon wants to do is he wants us to
say -- let's say we're looking at a Franchise Tax Board
appeal and we're saying, you know what? The taxpayer's
provided invoices about that leak, but it doesn't
actually have the exact invoice from this transaction.

MS. RUWART: So in other words, just a sentence
after the -- after the sentence where it says, "Appeal
Division may request additional briefing or evidence,"
that request shall contain sufficient level of detail so
everybody knows what they're --

MR. HELLER: Correct. So, like, you would know
that it's about this deduction, and we want to know why
this evidence applies or doesn't apply.

And in some cases, as Reed pointed out, it may
be so -- it may be vague as to does this recently
decided, you know, appeal have any application?
Something to that effect. But it's something that would
provide direction so that hopefully both parties don't
diverge on what their idea of the issue is.

And since we're requiring the Board of
Equalization staff to determine that there's some issue
that needs to be briefed, we can probably come up with
some language that would help us identify the issue and
share it with the people who are going to brief it.

MS. RUWART: Okay.

MR. Heller: Does that sound all right, Ian, if
we can do something like that?

MR. FOSTER: Yeah.

MR. SPERRING: I have one question on (c), with
all due respect to the Chair's office. Why is there
what appears to be an asymmetry that staff unilaterally
will request additional briefing, but a Board member
who's not the Chair needs to seek the Chair's permission
to request additional briefing? To us that sort of
seems like an asymmetry there.

UNIDENTIFIED SPEAKER: And I was going to chime
in that we talked about this in the context of Part 3
several weeks ago.

MR. HELLER: Yes, we did talk about this in the
context of Part 3, which actually contains identical
language. And I believe this issue hasn't been resolved
by staff, but we're looking at just allowing any Board
member to make a request without running it through the
Chair's office. Essentially, the Board members are
generally on equal footing.

Our concern really was only about a scheduling
of workload, because the Chair generally -- the Chair
generally has oversight functions over the workload at
Board hearings and the scheduling of hearings, and so I
think that was staff's inclination was to include the
Board Chair so the Board Chair was aware that one of the
Board members was now requesting additional information
that might have some effect on the scheduling process,
but --

MR. FOSTER: That's exactly it. And I can
address the asymmetry, too.

The reason the Appeals Division was given
authority without having to go through the Board Chair
is because the Appeals Division is going to -- all of
its requests, if any, are going to be done because it's
trying to prepare the file to go to the Board. So the
Board hasn't even seen the file yet.

A Board member's request is going to -- is going to come after something has been calendared. And then if the Board member says, "I want more briefing," that affects the calendaring, that's something the Chair has to know about because the Chair is in charge of setting the calendar and the agenda.

The Chair doesn't want to be surprised the day before the hearing, saying, "What are these extra briefs? There's stuff in here that I'd like addressed," and all of a sudden everything is put over.

MS. RUWART: My notes about what we discussed on Part 3 indicate we didn't come to a conclusion, but one suggestion was that a Board member's request for additional briefing might be made with notice to the Board Chair, Board Proceedings division.

And Chris, you actually commented that such a request should go through the Chair if it affects the scheduling of the Board hearing because --

MR. SHUTZ: That's right.

MS. RUWART: -- the Chair controls the schedule. And so it's not even just a matter of you're at the hearing and you're surprised by the briefs; it's that the fact of requesting an additional briefing likely affects the entire schedule, for which the Chair
is ultimately responsible.

MR. SHUTZ: That's right. If a Board member asks for additional information or documentation, that's not a problem unless it's going to cause a delay in the scheduling.

MR. LoFASO: Do I recall correctly, Chris, that we were talking about requests that were closer to the hearing where it would have more bearing on the schedule as opposed to requests that were further from the hearing where it would have less effect on the schedule?

MR. SHUTZ: Well, that would be -- that would be true. I mean, the closer you get up to the hearing, I mean, if somebody says, "Well, I can provide you that documentation, I'm going to need six weeks to do it," then it's going to affect the scheduling if you actually really want that information. So yeah, it is the closer it gets to the hearing.

MR. LoFASO: So, Ian, we're trying to be respectful to the prerogatives of the Chair. I thought part of our earlier discussion was maybe when it's not so close to the hearing such that it would affect the schedule, is there then the necessity for the Chair to consent?

And I guess that's what we talked about the notice thing to give the Chair some opportunity to weigh
in but not require somebody who wanted supplemental briefing earlier in the process to have to wait for that consent when it doesn't serve the same functional purpose.

MR. SHUTZ: Right. It's better not to put some sort of timing date on it, like ten days prior to hearing, but just say if the briefing is going to require postponement of a calendared case, then it needs to go through the Chair as far as the postponement request.

MR. HELLER: Chris, are you saying go through the Chair as notice or as needing approval or . . .

MR. SHUTZ: Well, yeah. It's going to need approval from the Chair, I think, if it's going to be postponed from the calendar.

MR. LoFASO: The postponement needs approval, but the supplemental brief doesn't necessarily need approval.

MR. SHUTZ: Right. Exactly.

MR. HELLER: Okay.

MS. RUWART: So what happens when the brief -- supplemental briefing process starts and it would result in a postponement of a Board hearing, and the Chair is requested to postpone and the Chair says, "No. We want to hear it on schedule." Are we setting ourselves up
for potential conflict?

    MR. HELLER: Yes, we are.
    MR. SHUTZ: Yeah. So . . .
    MR. EVANS: If I can chime in? Gary Evans.

Members get briefing after an FTB case has been scheduled for oral hearing. So the hearing notice is out, so the hearing's been scheduled, briefing is out, and so this is when somebody is going to ask for supplemental briefing.

    So as a timing issue, you know, I throw that out as information, I guess, more than anything else. So anytime that a supplemental is asked for, it's going to be after a hearing's been scheduled, so the Chair's going to have to be involved, or so it would seem.

    MR. SHUTZ: Right.
    MR. LoFASO: Unless the matter's been put over for some reason. But it's on the member's radar screen because it's been put over, which is to say they're aware of it, but it's got a longer timeline.

    MS. RUWART: That means there may have been a -- oh, I see what you're saying.
    MR. SHUTZ: There may have been a postponement for some other reason, like they didn't show up, but Board staff already looked at it and they want further briefing anyway.
MR. KOCH: Al Koch. Under some of the existing rules there's required to be a space of 30 days between determination of briefing and hearing. I don't see that in here now.

MR. FOSTER: No. Those don't exist in the current income tax rules. I mean, there is the -- you know, there's the notice period for hearing, which the parties can waive, and they will still be able to waive that.

And, in fact, the new rules would ensure that there is some space between briefing and hearing by requiring that the briefing is all complete and the Appeals Division has gotten the file all together before the hearing's even noticed.

MR. KOCH: What is the notice of hearing requirement? 45 days, is it?

MR. FOSTER: Is it 45?

MR. EVANS: 60.

MR. KOCH: 60 days. Okay.

MR. SHUTZ: Just two quick comments. One, I think that you could just put something in the language like if a request for briefing -- if it will require a postponement, then the Board Chair needs to approve that and without bifurcating the postponement versus the briefing. That might be a little bit too much.
And I think that sometimes briefing is requested from Appeals staff and that also requires postponement, somebody looks at it, whatever, through gatekeeping, will look at it again and say, "Oh, you know what? We missed this issue when we first prepared the hearing summary. You know, we really need to have additional briefing." Or somebody will have a further thought looking at the hearing summary.

So there are times, I think, when Appeals staff requests for additional briefing and it's going to require the postponement of a case.

MR. KOCH: Al Koch again. I guess you're saying -- you're assuming that there's some standard for determining when a hearing would have to be postponed. What is that standard?

MR. HUDSON: It could be waived, too. What is it?

MR. HELLER: Postponements.

MR. SHUTZ: If any Board member -- it says in here the Board member can set forth whatever deadlines, or if the Board member says, "Oh, I want further briefing on this. I'll give you 30 days to do it," and the Board hearing's 15 days away, then that would require a postponement.

MR. KOCH: Obviously.
MR. SHUTZ: Obviously.

MR. KOCH: But let's suppose it goes the other way, that the hearing is 45 days away, and 30 days are allowed for the briefing, there still would not be sufficient time for that brief to be circulated to everybody concerned.

MR. SHUTZ: Isn't there a time limit, Gary, as far as when briefings can come in and be -- so that they can be circulated to everybody?

MR. EVANS: Yes and no.

MR. SHUTZ: Okay.

MR. EVANS: We can -- I think in all the discussions that are involved here, 15 days is the shortest time before Board hearing. But again, it's can the information get to the members and staff and to be digested timely?

There are times when briefing is received closer to a Board hearing and is accepted, so I guess it goes both ways. Obviously, it depends on the issue, complexity of the issue, those kinds of things.

MR. KOCH: Yeah. I just say that I think the way briefs are made available to staffs is not clear to me. I think there's a screen that people get. And I'm not sure how much time they have to look at these things.
But certainly, I feel there should be at least 30 days, because sometimes staffs are so busy on everything that they have to do and we all know that they're overworked.

MR. EVANS: I think, generally speaking, there is a 30-day period that --

MR. KOCH: Not always.

MR. EVANS: Not always, but generally speaking, there's plenty of time for everybody to do their work.

MR. KOCH: Not always.

MR. LANGSTON: So what's the suggestion? What are people talking about?

MR. HELLER: Real quick, though, I just wanted to add, there was a question on deferrals and postponements. And so just before we moved forward, I thought I'd address that.

But essentially the current draft of Part 5, which was posted on our website on Monday and which doesn't deviate that much from our original draft, basically allows for the Chief of Board Proceedings to grant 90-day deferrals or a postponement in his or her sole discretion, and then for a period exceeding 90 days with the consent of the Chief Counsel.

And then it has basically a list of different grounds including any other facts or circumstances.
determined by the Chief of Board Proceedings or the Chief Counsel that constitute reasonable cause.

So certainly requesting additional briefing by the Appeals Division or a Board member would give the Chief Counsel and the Chief of Board Proceedings authority to grant an exception and the Chief of Board Proceedings to draft a 90-day extension in his or her own discretion.

And then it has other deferrals and postponements for various specific reasons, including settlement negotiations, whether it's related to litigation pending in other courts and so on.

I think, my understanding is, if you want to cancel or postpone a specific meeting date, that does absolutely require the approval of the Chair to change an actual scheduled meeting. But as far as a specific case being on a specific calendar, that case can be deferred. At least that's my understanding. So I think we have some leeway in deciding how much notice or what we want.

But I think it's -- my feeling is that it's always good to have notice, especially the Board Proceedings division, and then certainly to have them provide it to all the Board members who would certainly want to know if additional briefing has been requested.
from any of the parties in any of the proceedings so that they can be aware and they can adjust their schedules and their preparations accordingly.

But they do currently have the discretion to just go ahead and let the Chief of Board Proceedings postpone the hearing, assuming we've got a -- one of the Board members making a request. But as far as, like, cancelling a hearing date or something to that effect, that would need the concurrence of the Board Chair.

MR. HUDSON: I've got a question. Tom Hudson, Bill Leonard's office.

I have a comment and then a question for people more experienced with this, but it seems to me like my comment is that maybe we're putting form over substance here. I mean, if you're going to have a Board hearing where one of your Board members is saying I want information on this, my vote is going to be based on this issue, and we're saying, well, we may or may not want to allow you to get more information on that issue even if it affects your vote, all these other deadlines and all these other briefs are kind of meaningless if the Board member is saying this is the key fact for me, it may not be for the chair, but it is for me.

And I just think we should keep that in mind when we're setting these rules, that if you've got a
Board member, and this is pretty rare in my experience, but if a Board member is saying here is the key issue for me and it wasn't addressed in the briefing, then our process should be designed to have that issue come forward and have that Board member make their decision on facts and not based on something that was never briefed.

But with that comment in mind, I wanted to hear from somebody with a lot more experience than me about are any of these -- you know, how many requests do we get? Is this a major scheduling problem where we're having Board members ask for this?

In my limited experience, it almost never happens, and it's just almost a nonissue to worry about it screwing up the hearing schedules.

MR. HELLER: Right.

MR. FOSTER: I've only seen it happen in a few instances, but the few instances in which it did happen caused a lot of confusion. So we wanted to make sure that there was some sort of procedure to address that.

MR. HELLER: I think in business -- I mean, my experience isn't so much within the Appeals Division for franchise income appeals, but in business tax cases we almost never see a request for briefing coming from the Board members. We do -- we do get contact when there's
additional information or something that's just clarification that somebody needs personally but not typically a request for additional briefing.

Those typically come, usually, during a hearing where an issue is raised. And the Board member, one of the Board members or many of them determine that something hasn't been properly briefed or isn't being clearly discussed, or evidence hasn't been presented that could be made available, and then they order additional briefing after the hearing.

And we still have those procedures in here, but what we're really trying to do is provide some additional discretion for someone who really just feels that a hearing won't be fruitful if we go forward without having information that we already identified as being necessary.

So I think right now staff really are leaning, and we have discussed this at an interested parties meeting on property taxes, and our leaning is toward allowing every Board member to essentially request additional briefing individually.

But we're -- and so I think we're headed in that direction, and we'll try to work with the Chair's office to see whatever things we can work out as far as keeping the Chair notified and determining any instances
where the Chair would be required to make a decision to postpone or reschedule something so that there's proper notice and there's a procedure for the Chair to make that determination.

But as far as just simply determining whether additional briefing is required to make a request, I think staff is pretty much in agreement that every Board member has equal, you know, equal right to request that information and have access to it.

MR. FOSTER: And we'll make sure that the Chair is, you know, equally -- equally has to be notified when appeals is -- if appeals is requesting something late when it's already been calendared and it's going to affect scheduling, obviously then appeals can be required to notify the Chair's office.

MR. BESSENT: Carl Bessent.

I think the question that Al was raising, the logistics of the situation of the 60 days from the time that, what, the briefs are handed out to all the Board members until the Board hearing, and if the Board staff -- how many of them are going to have the request done the first day? And how much time are you going to give the parties in that briefing? If you give them 30 days, well, then, you're already under 30 days, you know, even if they get it done the first day. And then
that needs to be evaluated.

And so it would almost seem like at any Board -- at any Board member's request, you're going to -- you're going to be having to put it into a postponement.

MS. MANDEL: And as a practical matter, if a Board member or office requests it, is it going to come up before the hearing? I guess it might. I just have a hard time envisioning it. Usually you might have some questions you ask them, but otherwise it seems like it's going to be when you brief the big guy and he goes, well, what about whatever, and then you ask at the hearing, well, I think we need briefing. Hard to see it coming, just because of how much stuff gets processed through. It's hard to see it happening before.

MR. BESSENT: But it seems like if it is going to happen, then that should be mentioned to the Chairperson so that it can be deferred so that we're not running into a time crunch and then that Board member can get it resolved. But the Board Chair would have to be notified of the -- of that.

MR. HELLER: Right. And I think along those lines we think all the Board members probably should be notified, since everybody has got the same scheduling issues. It's just the Board -- the Chair has other
duties, but all the Board members need to know the
schedules.

    MS. MANDEL: Oh, yeah, if someone is going to
ask for additional briefing that's going to bump the
case, the other offices are not going to want to put a
lot of work into the case unless they feel like reading
to see whether they want to add to the additional
briefing.

    MR. HELLER: I think that explains it.

    MS. RUWART: Can I ask a question?

    Carole Ruwart.

    How does this interact with Section 4042, which
talks about scheduling the oral hearing and the Appeals
Division review? Because we had some discussion, when
we were discussing the property taxes, about this new
thing, and thinking about whether, for our property tax
programs, it made sense to not set the oral hearing date
until all the briefing was complete.

    And I understand that doesn't take care of the
issue of the late requested Board member's supplemental
briefing, but that aside, if you never schedule a
hearing until all of the loose staff and party requests
for briefing are complete, then maybe you minimize the
number of times you have this problem.

    So how is that -- how does Section 4042
interact with this scheduling of 4035 and some of the
comments we just had about the interaction with the date
of the hearing that's requested?

MR. FOSTER: 4042 basically says that the --
this is what I intended to say. If I can phrase it
better, and I'm happy to take suggestions, what I
intended with this entire structure of all these regs is
that we would go through the normal briefing schedule,
whether it's the general one or the Innocent Spouse or
simplified one, although it wouldn't really apply to
simplified because there's no oral hearing, but you go
through the normal briefing schedule. Briefing is
concluded.

The way it works now under the current
regulation is then the briefing is concluded and then an
oral hearing is noticed and scheduled and then the
Appeals Division gets the file. And the problem we have
is the Appeals Division gets the file and often says
this is not really complete, but it's too late for us to
do anything about it because the hearing is coming up
and we've got a deadline to get out a hearing summary,
and we end up with an incomplete hearing summary that
poses a lot of questions that could have been answered
earlier.

So what the new procedure is designed to do is
say when the briefing is concluded, the file will go to
the Appeals Division. And the Appeals Division will
look at it and say, okay, this addresses everything
adequately. Go ahead and schedule it.

Or appeals would say, no, there's a ton of
outstanding questions. Let's use the 4035 authority for
supplemental briefing, let's do the extra briefing,
let's get all these questions answered; or let's go to
4042.5, which is a prehearing conference, and say these
can be better answered if we all sit around a table and
hash it out. Or maybe you need a combination of both of
those.

And only after all that is done and you note
the file is complete and appeals has got all the
information that it needs to complete a complete hearing
summary that addresses all the factual and legal
questions, then we notice the oral hearing.

Does that clarifying it?

MS. RUWART: So what you're saying is 4035(b),
the staff requests for supplemental briefing, all of
that presumably occurs before the oral hearing is
scheduled?

MR. FOSTER: Yes.

MR. HELLER: Uh-huh.

MS. RUWART: Whereas, (a) and (c), Board
requests and the individual Board member's requests may
or may not occur, in fact probably won't occur, until
after the hearing is scheduled?

    MR. FOSTER: Uh-huh.

    MS. MANDEL: Did you give any thought to the
ordering of these, just, you know, for simplicity sake?
If staff is always going to be before, or did you want
to -- or was it -- was it just --

    MR. FOSTER: You mean, ordering the regs?

    MS. MANDEL: No, ordering the (a), (b), (c)?

    MS. RUWART: In 4035.

    MS. MANDEL: I mean, just based on what you
said.

    MS. RUWART: If you do it that way --

    MS. MANDEL: It's confusing if staff is always
going to be, you know, sort of before any of this gets
at the hearing, it's a good idea that you suggest that
the Board might consider it.

    MR. FOSTER: Right.

    MS. MANDEL: Then does it help if you just, if
you --

    MR. FOSTER: I'm open to reordering it.

    MS. MANDEL: -- reorder them?

The Board, you know, the Board is not going to
do it except on a Board order at a meeting, right?
That's what you're talking about, the full Board voting
to do it.

MR. FOSTER: Okay. So you would put --

MS. MANDEL: Maybe --

MR. FOSTER: -- you would put staff first.

MS. MANDEL: Maybe put, yeah. I mean, unless
you thought that you'd do it this way so Board members
don't go, ha, ha, staff asking for stuff.

But just in terms of, you know, not confusing
people about the timing.

And I don't know how you type any of those.

MR. FOSTER: I hadn't put much thought into the
order.

MS. MANDEL: Then it doesn't raise some of the
questions maybe that you're getting.

MR. SCHUTZ: Although we're talking about that
staff may request briefing even later than what's in
4042.

MR. FOSTER: Yeah, I mean, the way it's
written, staff can still request briefing after the
hearing has been noticed because staff might not catch
something until then, for whatever reason, maybe we're
just dumb or maybe someone didn't raise it, I don't
know.

MS. MANDEL: No, but you're going to -- a staff
request for additional briefing is going to act on presumably all the way up until the moment they walk into that Board hearing room.

MR. FOSTER: It's possible.

MS. MANDEL: The moment they walk into the Board hearing room, staff is going to jump up and say, oh, you know, last night I was reading the file, and I noticed there's this humorous thing that needs additional briefing we would suggest, but presumably you found that before they go to the Board Chair.

MR. FOSTER: Right.

MS. MANDEL: But it's just that a staff request would come before a Board request, because the Board request is only going to happen at a noticed meeting where something somebody --

MR. FOSTER: We could reorder that.

The staff request is almost always going to come before the hearing is even noticed, the way it's written now.

MS. MANDEL: Yeah.

MR. FOSTER: But we wanted to leave the option for staff to request after it's noticed, and we're going to write in there that if staff requests something that's going to affect the calendaring, then they have to go to the Board Chairman to make sure it's postponed.
MR. HELLER: Okay. Are we -- are there any further comments on Section 4035 before we move forward? I think staff is going to take another stab at it, at clarifying those procedures and dealing with postponements where they're necessary.

Okay. I'm going to move ahead now to Article 4 on the top of page 26, Requesting and Scheduling Oral Hearings. Section 4040, Right to Oral Hearing.

Are there any questions or comments on subdivision (a)?

MS. RUWART: May I ask a quick question?

MR. HELLER: Certainly.

MS. RUWART: In your added language, "an untimely request may be accepted and acknowledged upon a showing reasonable request." What does the "and acknowledged" add to it?

MR. FOSTER: Um --

MS. RUWART: Is that just to make sure that Board Proceedings writes them back?

MR. FOSTER: Well, the previous sentence says, "Upon the receipt of a timely request, the Chief of Board Proceedings shall send written acknowledgement."

It's just to make sure that written acknowledgement still happens.

MS. RUWART: Okay.
MR. HELLER: Okay. Subdivision (b), are there any comments or questions?

MS. MANDEL: I have a question.

Conducting oral hearings, if there's a court order, how do we find out about the Court order?

Presumably somebody tells us.

MR. FOSTER: Yeah, typically they spell us -- or tell us.

MS. MANDEL: They let us know.

MR. FOSTER: Yes.

MS. MANDEL: And then if we have separate hearings, do they get a transcript? Do they have an opportunity to apply for something, a separate hearing?

I know we haven't even had to do one of those yet. I'm just kind of wondering -- did we do one that was separate?

MR. EVANS: Yes.

MS. MANDEL: Oh, and --

MR. EVANS: We held the first hearing.

MS. MANDEL: Were they on the same day and then just shuttled back in the room?

MR. EVANS: No, different days, different cities. Hold the first hearing, don't make a decision. Hold the second hearing, and don't make a decision. And take the transcripts from those two and go to a
nonappearance and make the decision.

    MS. MANDEL: And people get the transcript of
the other hearing in case they say that the person is
totally lying or putting in some evidence that --
    MR. LANGSTON: I'm not sure we want to do that.
    MS. MANDEL: Okay. I was just wondering.
    MR. FOSTER: That could sort of resolve it.
    MS. MANDEL: It's never ending. It's never ending.
    MR. LANGSTON: No, it's like we hear this story
and then we hear that story, and then we decide.
    MS. MANDEL: Okay.
    MR. LANGSTON: Because otherwise --
    MR. FOSTER: Hopefully, they've already told us
in writing before.
    MS. MANDEL: It was just a question I had. I
don't remember seeing one.
    MR. HELLER: I would point out though also
basically any taxpayer or interested person can contact
the Board and request a copy of the transcript from an
oral hearing, so we're not preventing anyone from
getting one, but we just don't have a procedure for it.
    MS. MANDEL: Okay. Thank you.
    MR. HELLER: Okay. Any further comments or
questions on subdivision (b)?
Moving ahead to Section 4041 on page 27.

MR. SPERRING: I'm sorry, I had a question on (c).

MR. HELLER: (c).

MR. SPERRING: What's the rationale for moving away from the Board to giving to the Chair to deny -- basically denying a second hearing?

MR. FOSTER: Because if it goes to the Board, then you have granted a second hearing.

MR. HELLER: Uh-huh.

MS. MANDEL: Well, the Board has --

MR. FOSTER: Because the Board can only meet.

MS. MANDEL: I mean, just to, you know, just for the purposes of speculation, the Board has in the past on some things, like welfare exemptions claims or over at FTB, you know, there were previously procedures for certain things where the Board would decide whether to grant a hearing.

Now, some Board members in the past, who aren't here anymore, sort of got away from those, that they were just like, oh, somebody wants to have a new hearing. But there were the --

MR. SPERRING: Well, I guess this hearing I'm thinking about is someone comes back on a petition for rehearing. Okay, that's a consent item. Okay. Let's
say the staff recommends denied.

    Okay. And one of the members disagrees and
    says, no, I think this person should come back, or I
    think we should grant it, okay, and I move that we give
    them an oral hearing.

    MS. MANDEL: Right.

    MR. SPERRING: They should be able to do that.

    MS. MANDEL: Well, they do that on a petition
    for rehearing.

    MR. FOSTER: This is not petitions for
    rehearing. This is a second appeal.

    For example, an appeal from a notice of action
    that the taxpayer loses, then they go back and pay it,
    file a claim for refund, exact same issue, exact same
    year, it's just now a refund year. They appeal a refund
    claim.

    MR. SPERRING: So you're doing that and saying
    the Chair can just unilaterally say no hearing on that,
    on a refund claim?

    MR. FOSTER: Well, then, what would happen is
    it would go to the Board on a nonappearance calendar,
    and the Board would still -- any Board member could then
    pull it from the consent calendar.

    MS. MANDEL: Wait. This would go -- discretion
    to deny an oral hearing would go on the consent
calendar?

MR. FOSTER: It would then -- a summary decision would be recommended.

MS. MANDEL: We did -- I do remember one or more cases where people came on a claim for refund having previously been on petition. They had additional evidence and information.

MR. SPERRING: Prevail.

MR. FOSTER: Well, if it's additional evidence and information, the Chief Counsel is unlikely to recommend to the Board Chair that they deny the hearing.

MR. LANGSTON: It wouldn't be the same facts then.

MS. MANDEL: Right, or slightly different arguments.

MR. FOSTER: And what we've seen a couple of times, which is -- which would be a total abuse of the process, is an interested -- the way an interested abatement statute is written, you can file eight million appeals if you want to. You can request interest abatement. FTB denies your appeal. You just request interest abatement again. FTB denies again and you appeal again. So there's no limit in the statute on how many times you can do that.

Does the Board even want to -- do they want to
grant an oral hearing every time that happens?

MR. HELLER: I think the other issue, I think, and this comes up in practically everything where we want the Board members themselves to, as a Board, to decide an issue, is that it then requires a separate hearing on the issue of whether to even have a hearing, if we want the Board to decide it.

If we want just the Chair to decide it, then the Chair can do that without a notice of meeting, but the Board members would have to have -- let's say we want to be efficient by not having a hearing to discuss something that we don't need to have one on. We now have to be inefficient and have a hearing to discuss whether we're going to have a hearing.

MS. MANDEL: Well, unless they all end up on the consent calendar or something for denying them, I don't know.

MR. HELLER: Well, if they ended up on the consent calendar, then in fact they've been denied an oral hearing at that point too because there's no --

MS. MANDEL: But if they wind -- no, different consent calendar. I meant consent agenda or, you know, some other place on the Board agenda for the day, because if they wind up -- if you deny the oral hearing request, and you put them on our consent calendar, which
is where we have all the cases, well, I guess, then what
you're saying is they went there, a member could pull
it, as long as we were informed that they wanted a
hearing, and it was denied under this thingy.

Then somebody would pull it. It would come
back as an adjudicatory matter, at which point someone
would say, "I want to grant them a hearing or try to get
the motion for it." That's the alternative you're
talking about how it would come up as long as, you know,
there's still discretion of the Board to do that.

But when I say "consent calendar," I meant
like, you know, the administrative session, you know,
here is the laundry list of ones where we're going to
deny.

MR. HELLER: Okay.

MS. MANDEL: I'm not saying what way we would
think it should be written, but if somebody wants to be
able to do a hearing, grant a hearing before all the
write up is done, I don't know.

MR. HELLER: Yes, my comment was not to the
effect that staff has made a determination as to who is
the best possible people to make a determination. We're
just trying -- we're just -- I was expressing our
concern about the -- -- if we're trying -- if, let's
say, under facts that we all agree that a hearing
wouldn't be appropriate. Let's say that the taxpayer, like, it's the exact example that Ian gave where the person's on the tenth request for interest abatement.

In that case, if we don't have a procedure where someone other than the full Board makes a decision at least initially that it does have to go to the full Board for them to decide and then essentially provide an oral hearing where the taxpayer can then appear and argue whatever issues they want.

So even if we did -- the Board voted to deny an oral hearing, it wouldn't have very much effect after we had just essentially provided one. So that was really staff's major concern not to affect the Board's authority.

Go ahead, Carole.

MS. RUWART: We have a sentence somewhere in our Part 3 that may be helpful here. It says something like, "The item shall remain on the agenda for Board action." And while that's redundant, it also clarifies that all that's being denied here is the oral hearing. It still must be decided by the Board. There's still recourse.

We're trying to make this -- these rules helpful to people who are not familiar with the process. It helps people not misread this and say, "I'm not
getting an oral hearing of my case. I have no chance of
an oral hearing."

So maybe a sentence like that would be helpful.

MR. HUDSON: That's important.

MR. HELLER: I think that's good. And then the
other thing is, we -- staff did try to limit this
factually. And we did require -- basically required a
consensus opinion from the Chief Counsel, the Board
Chair and the Chief of Board Proceedings that a brief
would be required.

And we really put a standard in there really
saying that really all the facts, laws and years at
issue all have to be the same.

So to the extent that a taxpayer really does
say, "I've got new evidence," then those parties -- or
the people who are required to make a decision on this
are not going to be able to meet the requirements and
the standards set forth in the regulations.

So to the extent that we're just talking about
somebody who's been up on a protest or a denial on an
assessment has been upheld, that pays the amount, comes
back on a claim for refund and now says, "By the way, we
did find those extra files," this wouldn't apply to that
type of person.

But somebody who probably came up with a, "No,
nothing's really changed. I just want another oral
hearing to argue again," that would be a chance where we
could achieve that type of a consensus.

    But I think Carole's suggestion is great.
    Go ahead, Chris.

    MR. SHUTZ: Without going into the minutia of
our procedures, we could also put something in along the
lines of a summary decision will note that a hearing was
requested and denied so that the Board members are aware
that this person did request an oral hearing, but for
whatever reason it was denied, and then they at least
can make note of that.

    MR. HELLER: That's good, mm-hmm. And that
way -- yeah.

    MS. RUWART: One additional comment. As I keep
reading, I see that Section 4041(b) talks about when
you're submitted for decision and your request is
denied, maybe that sentence I suggested could
incorporate a reference to 4041(b) and link the two
together.

    MR. HELLER: Okay. That's good. Does that
sound like that addresses some of your concerns, Jon?

    MR. SPERRING: Yeah. I'm fine.

    MR. HELLER: Okay. I'm certain that Marcie
will hold us to task, as well as other people.
Okay. I'm going to go ahead and move forward to Section 4041 on page 27. And let's see. Subdivision (d) will be added at different alternatives. Otherwise, subdivisions (a), (b), and (c) are part of Alternative 1.

And we're going to -- by the way, I'm going to go ahead and continue until noon and then we'll go ahead and take a break for lunch at noon. And hopefully we can wrap up in another hour or so after lunch.

Section 4041, Submission for Decision Without Oral Hearing, are there any questions or comments?

MR. HUDSON: I thought you did that.

MR. HELLER: We kind of overlapped a little bit. We jumped over 4041 to 4042 back on page 29 a while back, and then we jumped back.

So real briefly, though, I'll just go over it, but it's the submission for decision. And it actually explains when a case will be submitted for -- when an appeal from the Franchise Tax Board will be submitted for decision without an oral hearing.

And it basically just states the grounds when one is not requested or it's denied under the provisions of the regulation we just discussed or when the appellate just simply fails to respond to the hearing notice. Eventually we'll cancel a hearing without a
response.

Are there any questions or comments on Section 4041? Okay. Thank you.

We'll move ahead now and we're going to skip over -- there's quite a few deleted sections, although keep in mind there is a subdivision (d) of Section 4041 that might become relevant if we're going to adopt a Second Alternative -- or excuse me -- if we adopt the Second Alternative for 4033, which we discussed quite a ways back, and that was the bifurcation --

MR. FOSTER: That's the simplified briefing.

MR. HELLER: Oh, simplified briefing. Okay.

MR. FOSTER: Waiver of oral hearing.

MR. HELLER: So if the Board adopts a simplified briefing schedule, then we will point out in this regulation as well that an oral hearing wouldn't be rescheduled because the taxpayer's waived their oral hearing. And now you don't have to remember anything about 4041.

Section 4042, which we previously discussed, I'll bring it up one more time. It's on page 29.

"Appeals Review: Scheduling the Oral Hearing."

Questions or comments? Okay. Moving ahead.

Section 4042.5, "Pre-Hearing Conference."

MR. SPERRING: Yeah. I just had one quick
comment on (c), and that is, I think this notion that the appeals conference should be held at Board headquarters, okay, is sort of devoid of the reality that two-thirds of the state lives south of Tehachapi. And I do understand that we do allow electronic conferencing, you know, by phone or whatnot, but, I mean, if someone wants to do it in person, we really should have one in Culver City when we have the Board hearings, or down in San Diego.

It just seems -- I had a client once that was 87 years old. She couldn't travel, you know, very far. Certainly not on an airplane.

And I just -- again, you know, most of my clients are corporate folks. They can fly all over the country.

But again, you know, it's the citizens of the state that the BOE is responsible to, and I think you guys should be cognizant of the fact that two-thirds of the state lives south of Tehachapi.

MR. LANGSTON: Can we -- I think that's a good point. But can we kind of informally -- when are these conferences going to be held? Certainly not in every single case.

MR. FOSTER: No.

MR. LANGSTON: It seems to me in most of your
cases that are fully briefed and well developed, you know, the facts are out there. You know the taxpayer's position. You know the State's position.

My sense was, this was only going to be done where there remains something that's unclear, that instead of -- you know, as opposed to asking for supplemental briefing, the Board staff feels, "Gee, it sure would be nice to be able to just sit down, talk to the person. Do you understand what 'head of household' means? Does the child live with you or not?" You know, that kind of stuff.

MR. FOSTER: Sometimes we feel it would be more productive to sit down with the person ourselves and try to explain things, have all the parties and representatives there. Currently we don't have that authority. And, you know, we often wish we did.

The taxpayer in particular may get a letter asking for further briefing that, from our standpoint, if they would just answer the letter, it would be totally adequate. But they might be intimidated by it, might not understand what we're asking for.

But also, there could be some complex multi-state cases where it could be helpful to sit down and go over things. With both parties present, you might be able to get some concessions out of one or both
parties and narrow the issues down so that there's less
for the Board to have to worry about, if everybody could
sit down together and the appeals attorney was sort of
mediating the whole thing.

So we're anticipating a relatively small number
of cases. Again, because this is a new procedure, it's
hard to estimate any kind of hard numbers as to how
often we think this is going to happen.

But it's only going to be in oral hearing
cases, which are already a minority of our total
workload, and it's going to be a minority of the oral
hearing cases, because if the record is well developed
and there's nothing outstanding, and the party requests
a pre-hearing conference, the Appeals Division has the
authority to say there's no need to hold that. It's
going to be a waste of everyone's time. There's nothing
that can be answered there that hasn't already been
answered.

MR. LANGSTON: Well, and isn't it fair that in
many cases we expect that after the pre-hearing
conference the taxpayer may not want a hearing? I mean,
you know, a lot of these where it's just all you need to
do is provide your child care receipts and you're
entitled to the credit.

And why I'm saying this, I've been to lots of
hearings where the taxpayer gets up there and clearly
didn't understand some basic issue that was going on,
traveled all the way to the hearing; and really, if
there had been this kind of procedure, it would have --
even over the phone maybe -- it would have saved, you
know, them -- I'm talking more about the small taxpayers
now as opposed to the large ones -- but that -- to me,
that is the value of this.

MS. PENNINGTON: Absolutely. This is Margaret
Pennington. That's one of the things Mr. Leonard has
brought out. He feels that this type of appeals
conference would probably eliminate a lot of these
people actually coming before the Board members. It's
just like in sales and use tax appeals conference, it
eliminates a lot of cases.

And I think that, you know, the location would
probably be similar to how they do sales and use tax, so
we don't have to inconvenience the taxpayer to travel,
you know, travel all the way to Sacramento when they're
down in LA.

MR. FOSTER: Yeah. And Jon and Margaret, to
both of you, your point is well taken on the location,
and we will consider that.

The way it's written now, it provides the
Chief Counsel with the authority to say you can hold it
outside of Sacramento. Maybe that's a little too limiting. We'll think about it. Maybe "extraordinary circumstances" puts too much of a limit on it. The reason we had put that in there, generally it has to be in Sacramento, are basically budgetary concerns.

We're adding a new procedure that's going to cost the Legal Department money that the Legal Department may or may not have right now to spend. So that's why the Chief Counsel was put in, so he or she could say, "Okay, we can afford to do that, and this person really needs it, let's go ahead and do it."

MR. EVANS: We currently have four teleconference locations. Can we name those in here?

MR. FOSTER: Are they going to be the same forever?

MS. OLSON: They change.

MR. HELLER: We're probably better off not identifying specific locations.

MR. LANGSTON: That would be a publication or instruction thing, because, again, as they change, I imagine after these come out, there will be a revision to your regular old -- your appeal publication, and this would be in there. And then also instructions on how to choose where you want to go and that kind of stuff.

MS. RUWART: May I comment about the location
of the conference? We did have an extensive discussion
of this as part of the property taxes procedures in the
context of welfare claim organizations, nonprofits.

And we -- and I believe I can say there was a
consensus that "extraordinary circumstances" was too
much. "Reasonable cause" might be too loose. And we
agreed to try and find something in the middle.

The one suggestion that I thought was good was
"for good cause." And right now I'm inclined to
incorporate that into our revisions.

So we -- just as a side note, I am trying to
track the changes in Part 3 to the extent that they were
similar to your changes. But maybe that would be a good
solution.

MR. HELLER: Chris.

MR. SHUTZ: Is it an issue of sending somebody
from Appeals down there and not sending somebody from
the FTB and the FTB can be on the phone? Because I
think that was what the welfare exemption -- I mean,
ocasionally you have people who do sales and use tax,
they go all over the place. If somebody goes to --
somebody from sales and use tax goes down there, they
can also do welfare exemption.

I don't know how much cross-training there is
with FIT and sales and use tax and appeals, but there is
some -- somebody who has knowledge in all three areas
and FIT goes down there for sales and use tax purposes,
it's possible that they could be there for those cases
without having extra expenses because they're going to
be down there anyway for the sales and use tax hearing.

MR. DALY: Charles Daly, Appeals.

One thing to address that question Jon raised
earlier, one thing that may be helpful about the appeals
conference and the complicated situation is, if you just
don't understand the transaction, if you don't
understand what's going on, you can narrow this down.
If you have two people in front of you, you can ask
intelligent questions about legal issues in which you
want additional briefing. And it's helpful in that
respect.

MR. HELLER: Just face to face as opposed to
telephonically?

MR. DALY: Well, I mean, that's an interesting
question about alternatives to having the oral hearing.
But I guess one justification for having an oral hearing
is if it's sufficiently complex, you have everybody in
front of you, you can just hash it out rather than
getting complicated telephone arrangements and that kind
of thing.

MS. PENNINGTON: Sales tax also does telephone
conferences. I've sat in on those. So, I mean, that is an option.

MR. BESSENT: They also do video conferences.

MS. PENNINGTON: Yeah. So that would be some of the options.

MR. HELLER: I think staff can definitely -- I mean, our feeling -- our biggest concern really was just, you know, staff resources as far as the number of people that we have and, you know, not wishing for a lot of new staff, which we may or may not get.

So I think we would be -- I think staff's fine, and we've already been thinking about this for property tax of dividing that last sentence of subdivision (c) so that it basically provides a greater discretion without requiring extraordinary circumstances.

Maybe something like "reasonable cause" or maybe something that just takes into account the staffing needs or something to that effect as opposed to focusing on reasonable cause, which I think, for us, we generally wouldn't mind providing a hearing if we can afford to get there and have staff.

MR. FOSTER: I as an appeals attorney would prefer to sit down across the table than do it over the telephone.

MS. OLSON: This is Diane Olson, Board
Proceedings.

There is an issue with Taxpayer Bill of Rights in there, and I don't know exactly which statute it is, but the taxpayer does have the right to pick the location of the hearing, so it's something that you might look into.

MR. FOSTER: We looked this up, Diane, and that provision only applies to sales tax appeals.

MS. OLSON: To sales tax? Okay.

MR. HELLER: So we can make income tax payers show up anywhere we'd like.

(Laughter.)

MR. HELLER: So I think staff's going to -- we're definitely going to look at it. We're going to try to revise it so the standard becomes something that's can be more easily -- that will make this procedure more easily exercisable or that ties it more to just our staffing concerns so that we can still address staff's concerns and provide the greatest possible number of locations that are convenient to taxpayers.

And as we said, I think the hope would be that staff will spend a lot less time preparing Board members for Board hearings if we can resolve more issues at these conferences. So it may all balance out in the
long run.

MR. BESSENT: So it's not only the Board of Equalization staff, but it's also the Franchise Tax Board staff, because they probably don't have that in their budget, either.

MR. HELLER: Correct. And so, I mean, I think, you know, the way the regulation's written, we could have certain participants who choose to come to the location, other ones that would like to participate telephonically. And I'm sure we can work with you and with the FTB staff or the taxpayer, whichever one chose to do whichever alternative.

We're definitely aware that the FTB would have staffing concerns, and that was another reason why we originally didn't try to scare the FTB into thinking that they might be hiring 10 or 15 new attorneys to do appeals conferences all over the state. But you never know. Good job security for a lot of people.

But anyway, we definitely will take a look at that. That was an excellent comment. And we'll try to coordinate it with Part 3 as well, so we'll use the same appropriate standard.

Any other comments on Section 4042.5?

MR. SHUTZ: Just real quickly, this is a comment I made before. "Report" is probably not good,
because you can have a summary decision and may report
on what occurred. It could be, like, prepare a
transcript instead.

    MR. FOSTER: Yeah. We intended "report" to
mean --

    MR. SHUTZ: Like a transcript. I know. But it
might be considered a report if you quote extensively
from the hearings -- some pre-hearing conference.

    MR. HELLER: Any other comments on
Section 4042.5? No other comments?

    Looks to me like we still have a pretty
substantial amount to cover before we're finished. And
it's now noon.

    MR. SPERRING: Can you do 4043?

    MR. HELLER: I think we can do 4043.

    Certainly.

    MS. RUWART: I think there's a group that has
this room at noon. I'm not sure about that.

    MR. HELLER: Diane?

    MS. OLSON: No. They'll have to find other
accommodations today.

    MR. HELLER: Excellent. So wave to them while
we go to lunch.

    All right. We'll go ahead and cover 4043.

There was a request and then we'll go ahead and break at
the beginning of Article 5. And then hopefully we can return and wrap things up pretty quickly after lunch.

Section 4043, beginning on the bottom of page 30, are there any questions or comments?

MR. SPERRING: Yeah, I had one. I didn't see a mention -- maybe I'm missing it -- the parties shall receive a copy of the hearing summary. And I think that's important.

MR. FOSTER: Yeah, it does say it'll provide a copy to each party, in subdivision (b), the end of subdivision (b).

MR. SPERRING: Oh, okay. Thank you.

MR. HELLER: Excellent. I'm glad that we stayed. Perfect. And with that we'll take an hour for lunch and we'll meet back here at 1:00 p.m.

(Lunch recess taken, 12:01 to 1:07 p.m.)

MR. HELLER: Okay. Well, thank you all for coming back this afternoon. Before we begin, I guess we'll go around the room and just quickly introduce the people that are here and also do so on the teleconference. And so once again, my name is Bradley Heller. I'm an attorney with the Legal Department.

MR. FOSTER: Ian Foster, also with the BOE Legal Department.

MR. LANGSTON: I'm Bruce Langston from the
Franchise Tax Board Legal Department.

MS. BORGMAN: Susan Borgman, Franchise Tax Board Legal.

MR. EVANS: Gary Evans, Board Proceedings.

MS. RUWART: Carole Ruwart, Board Legal Department.

MR. LOFASO: Al LoFaso, Betty Yee's office.

MS. OLSON: Diane Olson, Board Proceedings division.

MS. CARLOCK: Chelsea Carlock, Board Proceedings division.

MR. HUDSON: Tom Hudson, Board Member Bill Leonard's office.

MR. BESSENT: Carl Bessent, Appeals Division.

MR. SCHREITER: Reed Schreiter from the Appeals Division.

MR. DALY: Charles Daly, Appeals Division.

MR. HELLER: And do we have anyone participating with us by teleconference?

MR. SHAH: Neil Shah, Board member Claude Parrish's office.

MR. HERD: And also Jim Herd and Sabina Crocette from Betty Yee's office.

MR. HELLER: Welcome.

MR. FOSTER: Chris won't be back.
MR. HELLER: Other people won't be back.

Anyhow, we're going to pick up where we left off, and we're now on page 31 of the redacted version, and we're starting with Article 5, Decisions, Opinions, and Frivolous Appeals Penalties. And the first section is Section 4050, Letter Decisions.

Are there any comments or questions on Section 4050?

Moving ahead, we're going to move to Section 4051, which begins on the very bottom of page 31. And that's entitled Summary Decisions. Any comments or questions on Section 4051?

We'll move ahead. We're going to Section 4052, Formal Opinions. This begins on the bottom of page 32.

MR. LOFASO: I guess it's a good point to chime in, Brad, with a question that I asked you before we started, which relates to the explanatory materials in the -- I guess it's the grid that seem to suggest that it's the use of the criteria as opposed to the guidance of the -- as opposed to Board discretion determines whether the Board adopts or doesn't adopt a formal opinion.

And I'm not sure the regs -- the proposed regs say that, but I'm just curious as to the background on that and what the intent was.
MR. FOSTER: Well, they -- first of all, I'll back up a little bit on it. The criteria listed in subdivision (d) of 4052 set forth the criteria, and those criteria are adopted from the California Rules of Court and also from our Appeals Rules and Development.

The State Bar had suggested that the Board should be absolutely bound by those criteria, and if one of them were met, it must adopt a formal opinion.

MR. LOFASO: Oh, that's a different thing from only being able to do a formal opinion if it's within them. It's having to do a formal opinion.

MR. FOSTER: Right. The way it's written now, it says you can do a formal if -- you know, you can do a formal, you don't have to do a formal, you can do a formal if it meets these criteria.

The State Bar wanted to say, if it meets the criteria, then you must adopt a formal.

MR. LOFASO: So my next question is two -- (A), is that what we're proposing to do, and, (B), is that going to cause an increase in formal opinion?

MR. FOSTER: We are not proposing to do that.

MR. LOFASO: Okay. Okay.

MR. FOSTER: We have -- staff determined that we can't, through regulatory language, even if we wanted to, force the Board to adopt formals that it doesn't
want to adopt.

MR. LOFASO: Okay.

MR. HELLER: And just a follow up, I was --

when I was speaking with Al before the meeting this

morning, we were just looking at the grid that was

provided that shows the matrix of comments and staff's

responses to the comments on Part 4. And basically

right in there, it does say that staff rejected the --
or basically did not adopt the suggestions of the State

Bar's tax section.

And so we did make it clear that we

didn't -- that staff didn't intend to bind a Board

member by it. But the language does provide basically a

standard for people to use in making their own
determination, but it would still require an affirmative

vote of the Board members in order to publish the
decision.

And as we'll get to even further in the next

section, we do provide for dissenting opinions as well,

which would only require the approval of the dissenting

Board member.

MR. LOFASO: Okay. Thank you for that

clarification.

MR. FOSTER: Sure.

MR. HELLER: Are there any other comments or
questions on Section 4052?

Moving to Section 4053 on page 34, as I said, it's Dissenting and Concurring Opinions, and this is an entirely new procedure that the Board never had before.

MR. SHAH: Does the Legal Department write up the dissenting opinion kind of like the formal, like appeals?

MR. FOSTER: We decided not to specify in the regulations who should write it. The Board member might want him or herself to write it, they might want one of their staff write it, they might prefer to have appeals staff write it.

MR. SHAH: Okay.

MR. HELLER: And this one, I think our staff's concerns were since we've never had dissenting or concurring opinions, we didn't want to provide too much detailed instructions in advance and start to curtail the Board members, after creating a procedure to specifically allow them to voice their opinion and their rationale for supporting or opposing a decision, so essentially we would be fine with the Board's member staff writing and submitting it, or the Board could direct other staff, Board members could direct other staff to aid them in preparing a dissenting or concurring opinion as well.
Are there any other comments on Section 4053, Dissenting and Concurring Opinions?

MR. HUDSON: One quick question, with regard to subsection (c) where it says, "The dissenting or concurring opinion shall be deemed to be adopted on the same date," and then it goes on to say, "published as a supplement to the formal opinion." I don't know what that means. What do you mean "as a supplement"?

MR. FOSTER: I'm open to language to try to describe that. What I'm trying to get at is to make sure that it's published in such a manner so that when you look up the formal, it's clear that there's also a dissent, or likewise when you find the dissent, you're clear that it doesn't stand on its own but it's part of a formal not, you know, you're flipping through your book and some time later in there you find this other dissent and mistake it for something else.

MR. HUDSON: I'm just wondering if we even need the word "supplemental" in there, just published as part of the formal opinion. And then that's clear to everybody if there's a link on the Internet where you click to this to get that opinion, then the concurring opinion or dissenting opinions, if there are any of them, would come up as part of the same document so there's no chance of somebody --
MR. FOSTER: Okay.

MR. HELLER: Sounds like staff will go ahead and adopt that suggestion.

Are there any other questions or comments on Section 4053? Okay.

We can move ahead to Frivolous Appeals Penalties, Section 4054, begins on the very bottom of page 34 and runs on to page 35.

We don't currently have a regulation on frivolous appeal penalties, do we?

MR. FOSTER: Correct, we have no -- the Board has not adopted a whole lot of formal criteria for when to impose the penalty and what amount to impose.

MR. HELLER: Uh-huh.

And so in here also it basically does set forth criteria, but there are factors, and we don't require any penalty to be imposed or not imposed, based on any specific factor being present or not present.

So it provides some guidance, but still retains a quite a bit of discretion in the Board.

MR. HUDSON: I'm curious about something.

Tom Hudson again for Bill Leonard's office.

I don't remember seeing this language for any of our other tax programs in the other parts, and that's because that Revenue Tax Code Section is specific?
MR. FOSTER: Specific to Revenue and Taxation Code. It's the nature of the cases, yes.

MR. HELLER: Although staff would probably be open to a legislative proposal for other programs. It's an attractive penalty.

And I believe we do have some repeat appealers who don't tend to have a good basis for their arguments and other programs as well.

But let's see. That is the statutory basis.

MR. HUDSON: Thank you.

MR. HELLER: Are there any other comments on Section 4054, Frivolous Appeal Penalty?

Okay. Moving ahead to Section -- or moving into Article 6, Petitions for Rehearing and Rehearings. Starting with Section 4060, Finality of Decision. Are there any comments or questions on Section 4060?

MS. RUWART: Ian, maybe I'm misreading this. I am sure I am.

Could you just explain 4060, the preliminary language, when you say, "And each party files no more than one petition for rehearing."

MR. FOSTER: Yeah, it's simply to clarify that you can only file one petition for rehearing.

MS. RUWART: Something about the grammar of it, when I was skimming it quickly, maybe just break that
off into a separate sentence. "Each party shall file no more than one petition for rehearing."

MR. FOSTER: Okay.

MR. HUDSON: Can I also ask a question that came up when a taxpayer called me. Earlier, we said we're supposed to send them our letter decision within that, you know, within three days now, I guess. But somebody called me up a while back, and they hadn't gotten anything from the Board, and actually it had been, you know, three weeks. I was kind of surprised that they hadn't heard anything yet.

And I'm just wondering, it says "the date of the decision," but the date of the decision is really the date the Board voted, as you pointed out earlier. And so in that circumstance, if somebody hadn't heard anything from the Board for three weeks, and in this case the Board hadn't sent it yet is what I was told, I called to find out why they hadn't heard anything, and it just hadn't been mailed out yet, I'm wondering if there might need to be some sort of commonsense adjustment to that. If we didn't make our three-day deadline for getting it in the mail, it turned into three weeks, are they still going to be held to the 30-day rule?

MR. FOSTER: I believe under the statute
there's still the 30 days; it's 30 days from the date of
the Board's determination.

MR. SCHREITER: The statute references the
Board's determination, so that's the background for the
importance of us getting that letter out.

MS. BORGMAN: And isn't that why there's the
petition for rehearing? You have the pro forma petition
for rehearing; you allow that because the delays happen,
you know, just part of the natural occurrence, every
once in a great while. Not often, but sometimes.

MR. FOSTER: Right. Under the new rules,
there's a specific provision to allow you to perfect, so
if they realize on the 29th day, they can fax something
in that says, "This is my petition for rehearing and
please let me supplement," and they'll be given 15 days
to do a supplement.

MR. BESSENT: Now, if we go back to that 4053
where you have the dissenting and concurring opinions.

MR. FOSTER: Uh-huh.

MR. BESSENT: And they're supposed to be issued
30 days, you know, by 30 days after the formal opinion,
well, let's say they come out on day 30 and you file
your petition for rehearing, and then all of a sudden,
when you get the dissenting opinion in the mail, you
realize that that raises all sorts of arguments that you
would like to include.

MR. FOSTER: That is a sticky point. But again
the statute says that's 30 days from the date of the
Board's determination, so when the Board votes to adopt
a formal opinion, that 30 days starts then.

MR. LOFASO: But does your request for
rehearing have to sort of notice and say we want to
petition for rehearing, without necessarily including
all of the arguments? Or does that say that you have to
do it within 30 days and have to include all of your
arguments?

MR. FOSTER: No. Under the regs, under the
proposed regs that we're looking at, you could, as Susan
put it, file a pro forma. It could be just one sentence
saying, "I want a petition for rehearing." Now, that's
an incomplete petition, so then you would have 15 days
to supplement it with your arguments and evidence.

MR. LOFASO: So you could have additional time
to use the arguments raised in the dissent; on the other
hand, maybe you need to know that's an opportunity you
need to avail yourself of; on the other hand, you do
know -- do you know that someone is going to do it?
Does someone have to announce at a Board meeting, "I
reserve the right to dissent," such that you knew?

MR. FOSTER: The dissent has to be ordered at
the Board meeting, yes. It can't be done with a phone call later on.

MR. LOFASO: Okay.

MR. HUDSON: Is it that big a deal to just add a sentence in here to clarify so the taxpayer knows that, something to the effect of, and I'm not drafting it, I'm just saying it, but even if you hadn't received notice of the decision from the Board, you're still required to meet this 30-day deadline?

I'm thinking of the specific situation I had where somebody called and said, "I haven't heard for three weeks." And I was surprised he hadn't, so I checked into it, and they said, well, here is the deal. But it seems like we are being a little bit unfair to people if we're not making it clear to them that you still have 30 days.

MR. BESSENT: They may have thought they won.

MR. HUDSON: Right, that's my point. They hadn't already left the hearing. Actually they didn't know if they won or not. Sort of a basic unfairness problem, you know.

MR. LANGSTON: Didn't we say somewhere that a formal opinion only becomes final when it's issued, not when the vote is done?

MR. FOSTER: Well, when the -- when the -- it
depends on how the formal comes up. If the formal comes up as a nonappearance matter from appeals, appeals decides to keep it, we think this would make a good formal, we write it as one, put it before the Board, the Board adopts it. That's the day of the decision.

If there's an oral hearing, and at the hearing the Board says, "We want a formal," then what happens is appeals goes back and drafts the formal, then it comes back, and when -- then the date on which they vote to adopt the written opinion is the date of the decision.

MR. LANGSTON: And so -- and that is 4052(c), and why that's important --

MR. FOSTER: Uh-huh.

MR. LANGSTON: -- is because obviously it's not possible to know whether you want to file a petition for rehearing until you see the grounds. And especially the State, FTB sometimes is not as interested in the particular taxpayer as the principle that's being set forth in a formal opinion and will file a petition for rehearing if there's a formal opinion which goes against, you know, what we're doing in other cases and so forth.

Whereas if it's just an unpublished decision, may make the decision not to file a petition for rehearing, because it's nonprecedential, and, you know,
often the unpublished decisions are less -- you know, they're shorter, and there's less analysis in them.

So and I'm -- I think the taxpayer has the same right; that you should be able to, you know, have the decision for the good -- or the -- what you're going to appeal from, and they're good for 30 days or a good part of it.

And you can only have dissenting opinions from a formal decision.

MR. FOSTER: Correct.

MR. LANGSTON: So --

MR. HELLER: Uh-huh, yes.

MR. LANGSTON: -- I'm not sure what people were concerned about.

What you were concerned about is they didn't get the decision, you know, in time. That had to be an informal, you know. It's not a -- not a published decision.

MR. HUDSON: Right. But they wouldn't know. That's the whole point.

What happens, the Board does this, "We'll take it under submission." These people get up and leave. They don't know what the vote is.

This particular taxpayer was sophisticated enough to know he had 30 days for the rehearing. That's
why he called me, because he knew that they had 30 days. And he said, "Well, you know, our clock is running, and we need to know what the decision was."

And I was just shocked that it in the ordinary course of business hadn't gotten to them. They didn't know if they'd won or lost yet.

MR. LANGSTON: It's not always decided at that day.

MR. HELLER: No, it's not always decided. Sometimes it's taken under submission and decided at other Board meetings.

But I think like just on Tom's issue, the rules that we have proposed, are proposing for Part 5, which are now on the Board's website, and are going to be discussed in three weeks, basically require Board Proceedings staff to issue notice of the Board's decision within three business days after it's decided, which would, depending on the circumstances, it could be a day that they actually decide a case without formal decision or the date they adopt a formal opinion if they're going to adopt one.

So regulatory from our procedural standpoint, there should not be a case in the future where an appellant wouldn't get notice while the 30 days is still running; however, you know, to the extent that somehow
Board staff fails to like -- fails to carry out its own procedures, and that taxpayer doesn't get any -- somehow doesn't get notice, we are constrained by statutes, and that really has been our great concern as far as --

MR. HUDSON: And all I'm suggesting is the work restraint we can't do anything about. All I'm suggesting is let's put in one sentence that just says that, you know, if we missed our deadline and you didn't get your notice, your 30 days is still running, and it gives them a warning.

MR. LANGSTON: No, wait a minute. That's what the statute says you can't do.

MR. HELLER: What?

MR. LANGSTON: Statute says it isn't -- the statute says you have 30 days from the decision.

MR. HELLER: Correct.

MR. LANGSTON: The date the case is decided. You can't come back and say you have -- you didn't get your notice of it for 30 days so now you have another 30 days.

MR. HUDSON: I'm not suggesting that. I'm just saying to tell them if you didn't get anything from the Board, you still --

MR. HELLER: You still have to file.

MR. HUDSON: We need to make it explicit to
them, if you didn't get anything from the Board --

MR. LANGSTON: Oh, okay, I agree. You still have to meet the 30 days.

MR. HUDSON: So you'd better get something in, even if it's pro forma.

MR. LANGSTON: Right.

MR. BESSENT: Even if you don't know the decision.

MR. HUDSON: Right. It seems crazy, but we're stuck with the laws.

MR. HELLER: Yeah, maybe we can cross-reference the deadline, the issue notice to, so that taxpayers are aware they should be receiving something within that three business days. So if they're not seeing something come, that they're on notice, one, that they're going to have to file, two, that they can be inquiring why didn't I get this, and we can go ahead and be able to provide it to them.

MS. BORGMAN: Is Part 5 three business days for all business decisions?

MR. HELLER: No, just three business days for all -- for all Franchise Tax Board decisions, yes.

MR. FOSTER: Yes.

MR. HELLER: I'm sorry.

MS. RUWART: Ian, may I go back to something?
I want to make sure I understand about the concurring and dissenting opinions.

MR. FOSTER: Uh-huh.

MS. RUWART: Since the -- since a matter is not decided until the formal opinion with its concurrences and dissents is adopted, then there should be no need for any mention of the concurring or dissent request at the hearing, so long as it eventually gets adopted. The only thing that -- I was just reading through, it doesn't seem to be anywhere in here that requires -- you said -- you said that the Board would request a concurring or a dissent at the hearing, and they wouldn't be able to do it with a phone call, but you don't have anything in there that says that.

But also I'm thinking there's no reason for it to be that way, because the taxpayer's 30-day clock doesn't start running until the formal opinion with any concurrences or dissents, if there are, is adopted. So I just wanted to make sure I'm clear.

MR. FOSTER: A couple of things. That was the drafting.

A prior version did clarify that the request for the concurrences or dissents had to be made at a Board meeting. And the rationale for that was so that it's on a public record so the public is on notice that
something is coming.

And I inadvertently omitted that in the new version, so I'll fix that.

MR. HUDSON: Ian, does that make sense that you have to say that you're going to dissent, when you don't know what the language is yet that you're dissenting from?

MR. FOSTER: No. The way it had read before I inadvertently deleted it was that you could order the preparation of the dissenting opinion either at the meeting where the formal is ordered prepared or at the meeting where the formal is adopted. So you could wait to see the formal first. Or you may not need to wait to see it if you know what the rationale is for the formal and you know what your rationale is for the dissenting, you could order it sooner.

And it is also, Carole, to clarify it, it is the date on which the formal is adopted.

MS. RUWART: Uh-huh.

MR. FOSTER: Not the date on which the dissents -- the dissents and concurrents are going to relate back.

MS. RUWART: If they are adopted separately.

MR. FOSTER: Yeah.

MS. RUWART: So you have a provision where you
could adopt a formal, which is the majority vote essentially, and concurrents and dissents could come afterwards.

MR. FOSTER: Right.

MS. RUWART: Okay. Thank you.

MR. HELLER: All right. Just the date of adoption would relate back.

MR. FOSTER: Uh-huh.

MR. LANGSTON: I have one, sorry to belabor this point, but let's just suppose you have two Board members that join in one opinion. You have a third Board member who wants to concur in the result, but for a different reason, and then you have two Board members who are going to dissent.

MR. FOSTER: So you have a plurality opinion.

MR. LANGSTON: You have a plurality opinion. Then is the published opinion going to come out that day, and then you have 30 days to -- I guess I'm -- what I'm asking is, does there have to be -- in order for an opinion to be published, does there have to be three members agreeing to that text of that published opinion --

MR. FOSTER: There has to be --

MR. LANGSTON: -- for it to be precedential?

MR. FOSTER: -- a majority of those present and
MR. HELLER: So it's possible.

MR. LANGSTON: Okay. What I'm worried about is we're going to get cases where they agree in the result, which is what you have in some Supreme Court cases, and then you've got all of these sort of separate rationales so that when the next case comes, we don't know what the rule is.

MR. HUDSON: That's why they don't publish more opinions, because that's frequent.

MR. LANGSTON: Well, and I'm not really suggesting -- maybe I'm just -- I'm just pointing that out.

MR. LoFASO: It's a very interesting problem. I used to work for an administrative agency that lived and breathed by written decision alone. That's the Public Utilities Commission.

And the rule was explained to me in an arena where there's a lot of written decisions is that if you vote for the written decision and you concur, which says, well, I don't agree with this, I don't agree with that, what matters is your vote, and the vote is for the written decision, and as a matter of precedent, to the extent that there's precedent, is the thing that was voted on, if it has a majority of votes supporting it,
stands as the decision alone.

MR. LANGSTON: Well, that makes sense. So that would fall under 4053(d) where it says "may be cited and relied" -- and that's what I seem to remember from Appellate Court practice, so -- interesting.

MR. FOSTER: Yeah. And as a practical matter, for the date of the decision, it would be whenever there are three votes on the same day to resolve the appeal in a particular manner.

MR. HELLER: Right.

MR. FOSTER: Or two, if there's only three people present.

MR. HELLER: You could end up with quite an odd --

MR. LANGSTON: Oh, that wouldn't happen.

MR. HELLER: -- situation where you could -- in fact, you could even have five concurrences essentially or two majorities. But anyhow -- but we'll see.

I think, you know, this is a brand-new procedure, so to the extent, you know, I think there will be a learning period for everybody to see how it functions.

And I tend to think, you know, at least from staff's point of view, we pretty much -- we don't anticipate the Board members requesting a formal opinion.
to be prepared where they don't have an agreement of a majority of Board members on a result, which doesn't -- it wouldn't prohibit them from doing that, but just -- staff's expectation at this point, from experience, the Board's been, you know, I would say, generally refrains from issuing formal opinions because it's so difficult to get at least a majority of the Board members to agree on the exact same reason for granting on exactly the same evidence and being able to, you know, clearly state that in a written document in some fashion that could then provide precedent and be valuable to be relied on by other people in the future.

So to the extent that we're coming forward with one where essentially you wouldn't even have a majority of the Board members supporting the, quote, majority opinion, my guess would be you probably wouldn't publish something, because the usefulness would be very limited.

But the procedure is not designed to prevent that. It's just our expectation. But we'll go ahead and move on and we'll see if my expectations are correct or not.

Moving ahead now to -- we're on Section -- we're moving ahead to Section 4061. This is the Petitions for Rehearing. Does this have to do with bifurcation, too?
MR. FOSTER: No. That has to do with extensions for filing appeals.

MR. HELLER: Okay.

MR. FOSTER: So if the Board decides to adopt the alternative on filing deadlines that includes extensions, that will also apply to the petitions for rehearing.

MR. HELLER: Are there any questions or comments on Section 4061, Petitions for Rehearing?

Okay.

Moving ahead. Section 4062 -- this is on page 39 -- Briefing on Petition for Rehearing. Any comments or questions on Section 4062? Okay. We're going to move ahead.

Section 4063, page 40, Decisions on Petitions for Rehearing. Are there any comments or questions on Section 4063?

Moving ahead, Section 4064, Briefing on Rehearing. Moving ahead. Are there any questions on Section 4064?

Okay. Moving ahead, our final section today is Section 4065, Decision upon Rehearing. Are there any questions? No?

MR. EVANS: Why did you call Article 6 "Petitions for Rehearing and Rehearings" when you only
talk about petitions for rehearing?

MR. SCHREITER: The last couple of sections are about rehearing.

MR. HELLER: Right. There's a briefing on the rehearing. That's Section 4064.

Okay. That wraps up everything we were supposed to cover today. Are there any general questions or anything else staff can help address before we adjourn for today?

Okay. Well, thank you all for coming today.

We appreciate all of your input.

And once again, as Ian indicated earlier, I believe we're going to be able to accept written comments on Part 4 through April 7. And after that we'll be going ahead and trying to prepare a final draft to be presented to the Board members in May.

And, of course, if we receive written or oral comments during that interim period, we'll certainly try to consider them if we can, but we may be constrained by time and our due dates for finalizing documents.

So once again, thank you all very much. We appreciate having you here today.

(The proceedings were adjourned at 1:37 p.m.)

---o0o---
REPORTER'S CERTIFICATE

State of California )
) ss
County of Sacramento )

We, LAURIE GOWER and CAROLE BROWNE, certify that on March 15, 2006 we recorded verbatim, in shorthand, to the best of our ability, the proceedings in the above-entitled hearing; that we transcribed the shorthand writing into typewriting; and that the preceding 139 pages constitute a complete and accurate transcription of the shorthand writing.

Dated: March 29, 2006

Laurie Gower, CSR #8000

Carole Browne, CSR #7351