BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION
450 N STREET
SACRAMENTO, CALIFORNIA

INTERESTED PARTIES MEETING
PART 5 GENERAL BOARD HEARING PROCEDURES

REPORTER'S TRANSCRIPT
APRIL 5, 2006

Reported by: Juli Price Jackson
No. CSR 5214
Beverly Toms
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For Deloitte Tax: KARRI ROZARIO

For Cooper, White & Cooper: PETER MICHAELS

For MBIA: AL KOCH

FOR BNA DAILY TAX REPORT: LAURA MAHONEY

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MS. RUWART: Good morning everybody. My name is Carole Ruwart with the Board's Legal Department. Welcome to the interested parties meeting on Chapter 5 of the Revised Rules of Practice, General Board hearing procedures.

As an initial matter, I would like to introduce our two court reporters, Beverly and Juli.

If you would please, if you are in the room, provide them with your name or a business card, if you have one, so that they can get the spelling of your name.

And also when you make a comment, at least the first several times, if you could clearly identify yourself so that they can attribute your comments appropriately, that would be very helpful.

As the first matter, I would like to go around the room and introduce everybody. Let's start with the people on the phone.

MR. SHAH: Neil Shah with Board Member Claude Parrish's office.

MS. CROCETTE: Sabina Crocette with Board
Member Yee's office.

MR. HERD: Also Jim Herd with Betty Yee's office. And I think Tonya Reese is on the line as well.

MS. RUWART: Is there anybody else on the line?

Okay, thank you very much.

As I said, I am Carole Ruwart of the Board's Legal Department.

MR. HELLER: I'm Bradley Heller with the Board's Legal Department.

MS. MANDEL: Marcy Jo Mandel, State Controller's office.

MR. DAVIS: Ken Davis, Franchise Tax Board.

MR. LANGSTON: Bruce Langston, Franchise Tax Board.

MR. MICHAELS: Peter Michaels with Cooper, White and Cooper in San Francisco.

MR. EVANS: Gary Evans, Board Proceedings.

MR. LO FASO: Alan LoFaso with Board Member Betty Yee's office.

MR. KAMP: Steve Kamp with Board Member Betty Yee's office.

MR. GILBERT: Arlo Gilbert with Fuel Taxes Division.

MS. SIMPSON: Laureen Simpson with Taxpayer Rights Advocate's Office.

MS. OLSON: Diane Olson, Board Proceedings Division.

MR. FINNEGAN: Patrick Finnegan of the Board of Equalization, Excise Taxes Division.

MS. ZIMMERMAN:
Sarah Zimmerman, SEIU Local 1000.

MS. SIBERT: Jeanne Sibert, Chairman John Chiang's office.

MS. OLSHEN: Joanna Olsen, of Franchise Tax Board.

MR. RIVERA: Gus Rivera, Intel Corporation.

MS. ROZARIO: Karri Rozario, Deloitte Tax.

MR. FOSTER: Ian Foster, BOE Legal.

MR. AMBROSE: Lou Ambrose, BOE Legal.

MR. DALY: Charles Daly, BOE Legal.

MS. RUWART: Great, thank you very much.

For the introduction of the substance of this, I will turn this over to Brad Heller.

MR. HELLER: Thank you very much.

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SECTION 5000.5015.1
COMMUNICATIONS WITH BOARD MEMBERS

5000.5015.1

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MR. HELLER: We're going to be discussing Part 5 today, which is actually now Chapter 5, which will be added to a new Division 2.1 of Title 18 of the California Code of Regulations. And the Part 2 and Part 5 had been revised and incorporate all of the comments that we received from the prior interested parties meeting and also incorporates some alternative language provided by some of the interested parties relevant to the communications with Board Members.

This morning we're hoping we're going to actually -- not hoping, we're going to start with the issue of communications with Board Members, Section 5000.5015.1 on page 25 of the redacted materials.

Then we're going to move from there to the disclosure of information relevant to a Board hearing. That starts with Section 5000.5033.

And then from there we're going to go -- take it from the top and start with the first section in Part 5.

And to begin with in Part -- to begin with Section, 5000.5015.1 on page 25, the first alternative has been staff's original proposal, which incorporates the Board's current policy, which is that Board Members
are open to their constituents, their subordinates and
other governmental agencies, true.

    Go ahead, Peter.

    MR. MICHAELS: Pardon me for the interruption
at the outset here, but when you say, "First
alternative," are these all -- all these alternatives
going be presented to the Board?

Or is there some -- is this an interested
parties meeting like in the past, where alternatives
would be reconciled their differences could be
reconciled and we end up with a consensus on a single
alternative?

    MR. HELLER: Our goal would be to arrive at a
consensus on a single alternative, if that's possible.
And then on top -- then to essentially also to obtain a
full discussion of the alternatives.

What happened at our last meeting was that
alternative language came in just before the meeting. I
don't think all of the interested parties were able to
review all of that and discuss it at that particular
meeting, so, staff agreed at that time to go ahead and
incorporate that alternative language so that it could
be fully discussed at this meeting.

And as far as I know, we really haven't made
any decision on what we're going to present to the Board
Members, but basically at this point we're just trying
to get a full discussion of these different alternatives
so that everybody's point of view can be heard, with the
goal, of course, of reaching consensus, if it's possible.

And then from there we'll work with our executive management to determine what will be provided to the Board Members. And I think that will depend a lot on the kind of comments we receive and how much support we have for the different alternatives.

MR. MICHAELS: One other prefatory comment? Could you just update us on timing? Are we on the same calendar we were on before or are we on a different calendar?

MR. HELLER: For -- let me update everybody on the calendar for the project.

And as of right now we're preparing Parts 1 and 2 to go to the Board Members on April 18th. And that -- those two parts were presented to the Board Members back on January 31st and they had some comments and some revisions they wanted us to consider.

Staff's made -- considered all those comments and made several revisions. And we're going to present those revised chapters on April 18th.

Then we're also preparing Chapter 3 and 4, which are Property Tax and Appeals from the Franchise Tax Board to be presented to the Board Members on May 17th.

And then -- those dates are, I would say, very firm for Appeals from the Franchise Tax Board and slightly tentative for Property Tax.
And as far as Part 5 is concerned, the goal is
to present it to Board Members on June 27th. And as of
right now it appears to be on schedule for June 27th.

MS. MANDEL: I don't remember on the franchise
tax, was there a lot of dispute?

MR. HELLER: I don't think there was hardly any
disputed stuff.

MS. MANDEL: Okay.

MR. HELLER: Actually just some very minor --
minor changes that needed to be made.

MS. MANDEL: This won't affect the calendar?

MR. HELLER: That one is not going until June
and there is -- as far as I know, that's not a written
in stone date. So, it's -- the idea really is for staff
to achieve as much consensus as possible --

MS. MANDEL: Okay.

MR. HELLER: -- before presenting it to the
Board.

MS. MANDEL: But it wouldn't be any earlier?

MR. HELLER: No, it would no speed -- there's I
nothing --

MS. MANDEL: Okay.

MR. HELLER: -- nothing will be speeded up,
absolutely not.

MS. MANDEL: Okay.

MR. HELLER: And also to address another issue
that's come up quite a bit is essentially staff is not
really going to have any cutoff dates for submitting
comments.

As far as when comments can be considered, if they come in early enough, before the deadlines I have just expressed so that we can consider them and actually incorporate some kind of revisions into the language that will be presented to the Board Members, then we can go ahead and do that.

If comments come in after that, we'll still consider them. We're going to go into the real formal rulemaking process after the Board approves the language. So, there'll still be time to receive and consider comments at that point.

And if something really relevant comes along, certainly staff wants to see that and be able to respond as opposed to having a cutoff. So, really it's just a matter of getting things in time for them to be incorporated, not an issue of having a formal cutoff that would prevent anyone from commenting.

So far all comments we have received have been very good and we appreciate that.

So, really from today we're just trying to get a full, well-rounded discussion, whatever comments there may be on the revisions on Part 5.

And with that, I will go back to this particular section, and then present Alternative 1, which I was saying does present staff's original proposal, with just a few modifications, one of which is we determined that there are certain taxpayers who are
neither constituents, governmental agencies nor
subordinates of the Board, so we added "taxpayers" in
there so that it would be clear that for this particular
taxpayer who is a not a voter of some kind can go ahead
and communicate with the Board Members.

And then we also added the little -- we removed
the word "pending" and just clarified some of the
language at the end and added references to communicate
not with Board staff as well.

Then there is a --

MR. HUDSON: What page?

MR. HELLER: Page 25 is the redacted version.

MR. MICHAELS: Redacted which means --

MS. MANDEL: Redlined

MR. HELLER: Not redacted, thank you.

Thank you, Peter.

This is the strikeout, underlined version. And
there is no confidential redacted version out there --
no confidential version, no redacted version.

MS. MANDEL: Drop that no.

MR. HELLER: But anyhow, there's a strikeout
underlined and a clean version.

So, that would be on page 25.

Starting on page 26 is the second alternative.

And this was based on language that was provided by the
Franchise Tax Board's Chief Counsel at the prior
interested parties meeting. And Board of Equalization
staff and Franchise Tax Board staff worked together to
just essentially format that alternative into a
regulation that we just essentially have the same kind
of format and tone as the Board regulations.

That particular -- that alternative essentially
requires all -- all parties to an appeal from the
Franchise Tax Board to have notice and an opportunity to
participate in a communication with the Board Member.
And where a party doesn't participate, it requires that
the -- that the Board Member participating in the
communication prepare a written record essentially
containing the bare facts that a communication occurred
and the subject matter. That would be included in the
record of the oral hearing.

It also requires that written communications
between a party and a Board Member be provided to all of
the different parties.

And as it's also -- all of the provisions are
bilateral and apply equally to the Franchise Tax Board
as well as taxpayers appealing from the decision of the
Franchise Tax Board.

The third alternative, which begins on page 28,
was based on language submitted by SEIU Local 1000, and
it was slightly modified by staff to also -- to take on
the tone of a Board regulation. But it essentially
contains all the same parameters. And the main
parameters were that communications would be
prohibited -- were not prohibited, but basically that
there would be restrictions on communications starting
from the issuance of the public agenda notice. And from that time on there basically would be a record prepared of any communication that would be disclosed on the record of the oral hearing. And those restrictions would not apply once a case was taken off calendar. Then the restrictions would re-apply once it was scheduled for hearing again.

And going with that, we'll go ahead and start out. I guess it would be best to just open up to comments on all three alternatives since they probably could be discussed in total.

And with that, I will open the floor if there is any comments or questions or suggestions?

MS. ROZARIO: Karri Rozario for Deloitte Tax. Just a point of clarification, Alternative 3 applies to both sales tax and SBE hearings and Franchise Tax Board hearings?

MR. HELLER: Yes, thank you for mentioning that.

MS. MANDEL: Does it apply every single time? Anything?

MR. HELLER: Well, Alternative 3 would be applicable to -- basically would be applicable to property tax appeals, business taxes and fees and also appeals from the Franchise Tax Board.

And it does have the added benefit of making the procedures uniform across the board.

MS. MANDEL: What about the sales and use tax
appeals? Any kind of hearing?

MR. HELLER: Would include --

MS. MANDEL: Petition hearing?

MS. RUWART: Appeals hearing is what you're talking about?

MR. HELLER: The local taxes are now incorporated in Part 2. Although they still use the same procedures, they basically are cross-referenced. So, a hearing before the Board would be conducted pursuant to these rules and --

MS. MANDEL: Okay.

MR. HELLER: -- and that would apply if it was adopted by the Board.

MS. MANDEL: Thanks.

MR. HELLER: So, that on -- I'd also like to point out that it essentially provides -- essentially provides for communications with just a -- basically a bare written record explaining that they occurred and the date and time and a bit of the substance.

So, it's probably -- I would say although they are ordered 1, 2, 3, probably I would take Alternative 1 as the least restrictive. Alternative 3 is probably the next most restrictive. And then Alternative 2 would be the most restrictive.

MS. MANDEL: And --

MR. HELLER: That's my opinion, so --

MR. AMBROSE: Lou Ambrose. For Alternatives 2 and 3, is there any consequences to not -- for not
following those?

MR. HELLER: Well, that's been a -- that's a very good question. It's been a big issue with regard to the Board of Equalization adopting its own regulations on communications with Board Members.

Essentially if the Board adopts either Alternatives 2 or 3, then the Board would be basically in a position to enforce its own rules.

And so I think what we would have would be a situation where the Board Members would simply choose to comply with the regulation which they had adopted and follow it.

But there is -- really does not provide for any enforcement mechanism. And there is really --

MS. MANDEL: What -- I guess I was just -- I don't know what other -- what general restriction on -- general impact on a Board member that might be, but I suppose the Board Members will look into it.

MR. HELLER: That's correct.

Essentially, they -- staff -- essentially, at this point, there is no third-party agency that the Board can direct to oversee itself. And if it was to create some entity within the Board, they would still be subject to the Board.

So, I don't think there's necessarily a separate policing mechanism here.

MR. AMBROSE: Not policing, what if somebody found out after hearing, after the decision was -- I
mean, would that be grounds for a rehearing or --

MR. HELLER: I believe -- I think it would be
grounds for a rehearing -- assuming we got a petition
for rehearing within the time period before the decision
became final.

And, obviously, in a property tax matter that
would be final already.

MR. AMBROSE: Right.

MR. HELLER: But essentially -- or as far as
the Appeals from the Franchise Tax Board and business
taxes and fees cases, both of those would be a petition
for rehearing, any irregularity in the proceedings or
error of law would both be grounds for holding a
rehearing. I think the Board's failure to comply with
its own regulation would provide grounds as an
irregularity and provide for a rehearing.

MS. MANDEL: Almost the final --

MR. KAMP: One comment I would make, just
occurred to me, that in federal administrative law there
is a body of cases about ex parte contacts, which are
not permitted.

The presence of ex parte contact has resulted
in rulemaking being invalidated. Now, my question would
be if I suppose this -- if -- would the presence of like
these ex parte -- these Member communications here, if a
case goes to trial de novo, like a State assessee case
or a sales and use tax case in the Superior Court, would
these show up in the Board's records that would wind up
in Superior Court -- and might have an impact on how the
Superior Court judge would view the matter?

    MS. MANDEL: You mean --
    MR. MICHAELS: What are you talking about, showing up, notes about meetings?
    MR. KAMP: Yeah, notes about all these Member communications that are -- that are required to be memorialized by these rules.
    MR. MICHAELS: What if the answer was yes, is that a bad thing?
    MR. KAMP: I don't know. I don't know if it's good or it's bad. I think it's just a fact, but how could it ever be good?
    MR. HUDSON: You call up your Board Member and you say, I'm being mistreated. And they say, "Well, don't make that argument," but they put in their notes, "He complained about this, this and this," and that's now in the notes how could that be good if that comes out at trial?
    MR. MICHAELS: Because it's true, because it's a fact, it's something that happened.
    MR. HUDSON: May not be true, not necessarily true, you know we're talking about a Board Member's notes.
    Have you ever seen a Board Member's notes?
    MR. KAMP: No comment.
    MR. HELLER: Just --
    MS. OLSON: For the court reporters, could you
please introduce yourself --

MR. MICHAELS: Oh, yeah.

MS. OLSON: -- before you comment and please
don't talk over each other.

MR. HUDSON: My point is -- I'm sorry, Tom
Hudson, Bill Leonard's office.

My point in raising that is I think this is an
additional concern with creating a record of Member
communications, particularly if the record includes some
sort of content about your presentation that may be
different from what you present on the record and in
front of everybody.

There'll be questions about Board Member's
notes, about what you said in private. Are they
accurate? Do they really reflect the nature of your
case? Are they creating any kind of a bad record?

MR. HELLER: Well, just as a brief response, I
think to the extent there was a communication that was
then introduced into the record of an oral hearing,
which is essentially what's required both by
Alternatives 2 and 3 then that information certainly
would be in the record of a lawsuit that -- or a claim
for refund that proceeded to the Superior Court.

If there wasn't one it wouldn't necessarily be
in the administrative record itself, but it certainly
would be an issue that I'm sure a claimant could raise
as a basis for not giving the Board deference on its
decision.
But as far as what a specific court might do, I mean I tend to think if the Board's decision was correct on the merits of the case in first place, the fact that there might have been a communication still might be harmless if they made a specific decision.

But I do think it could be -- you know, it could be it quite shocking for a particular taxpayer to find out that all of the information they discussed with their Board Member might be in the record of a public proceeding one day and I definitely agree with that.

MR. KAMP: Steve Kamp, Board Member Yee's office.

I also note that even quite apart from that being be public records anyway, that means they could be disclosed to in anybody who writes that.

MR. HELLER: That's correct.

MR. LO FASO: Al LoFaso, Betty Yee's office -- I think I gave you a card.

I am still unclear what goes on the public record. And I am intrigued by Steve's questions, but I'm assuming that what goes up to the court as part of the record is going to be what's in the record.

And just because it's a public record doesn't necessarily mean it's going to get into the record. I understood that the fact of the communication has to be disclosed in some way, but I'm a little unclear as to what -- where we are on content.

MS. MANDEL: It sounds like it depends. You
can talk about the two provisions, what would have to go into the Board's record of hearing, which would be the official record kept by Board Proceedings, would be whatever that is laid out in the Alternatives 2 and 3, which we can talk about whether they require your actual handwritten notes or whether you have to prepare a document that says, "I spoke to so and so on such and such a day. He talked about case X," or more than that.

And for when you go to court, everything out of the Board of Equalization is trial de novo and people may generally put in everything from the administrative record. But since it's a total trial de novo on evidentiary, not just a trial de novo independent -- you know, sort of review of a record with an independent legal judgment, it's totally new.

So, evidence that may be -- they didn't have any evidence of any kind, even if it wasn't before the Board, can come in on -- on all of the cases that go into court.

But as far as somebody taking the whole record that was before the Board, what would actually be in the record, as opposed to one of the other things people could do, if they wanted to in their tax case is do a Public Records Act request of the Board, which would include things, potentially, other than what is in the record.

So, what's the difference -- what's the specifics of what goes into the public record of the
hearing under 2 and 3?

MR. HELLER: The difference is essentially --

MS. MANDEL: What goes in under 2? What goes

in under 3?

MR. HELLER: There are some substantial
differences.

I think under Alternative 2, from the Franchise
Tax Board's Chief Counsel, I believe it's in
subdivision (b)(2), starting on page 26, that explains
what a record of an oral communication with the Board
Member would look like.

And it basically says it would include a date,
time and location of the communication, a caption of the
subject appeal, so we could identify which appeal was
being concerned, and a description of the communication,
which essentially both Franchise Tax Board staff and I
think Board staff have chosen not to overdefine in an
effort to allow the Board Members to get a comfort level
with what is -- what's sufficient to provide people with
notice for their hearings as opposed to trying to
provide a laundry list of details that may or may not be
relevant to any particular hearing.

And then a copy of any written materials that
are provided in conjunction with the communication. So,
if there's letters or exhibits or something that are
provided while they're discussing the case, and the
names of the persons who are participating.

And then to answer Alan's questions these would
be entered into the record of the oral hearing and
become a public record as part of that and it would also
become a part of the case file, as far as we're
concerned.

And as Marcy indicated, all that would be fair
game as far as a claim, introducing it as evidence, to
the extent it's relevant, and that is in suit in the
Superior Court, since it's a trial de novo.

---o0o--
MS. MANDEL: Okay. Before you go to number 3, what Tom is talking about then gets into this (C)(2) -- (2)(C), Description of Communication.

MR. HELLER: Right.

MS. MANDEL: So, one person might take a lot of notes during a meeting or a phone call and find it easy to slap a caption page on it and put all that in. That might be what they just do.

One person might have a more -- you know, they might have a format where they just have, you know, "Spoke to so and so on such a day, such and such a time by -- by phone or in my office on this appeal. They wanted to talk to me about their concerns of, you know, how they felt staff was wrong."

That's a description of the conversation.

MR. LO FASO: Agreed.

MS. MANDEL: So, that's -- it's -- it depends what goes into that record, depends on -- and that's the part that they left, because how -- how can you specify what the description is?

Some people, you know, take notes. Some people don't take notes.

MR. HELLER: And I think that -- this is Bradley Heller again. Just to add, I mean the idea was to provide some sort of disclosure so that a litigant arriving at a Board hearing would be aware of the communication and whatever important information there would be relevant to that hearing that they now have to
present their case at.

   But as far as trying to, you know, specify

   exactly what information might be relevant on a -- in a

   broad way that would apply to every single case was --

   MS. MANDEL: But if they give you -- if they

   came in and gave -- gave you an Executive Summary or --

   MR. HELLER: Sure.

   MS. MANDEL: -- a picture or something, any of

   that written stuff that they give would --

   MR. HELLER: Right, yes.

   MS. MANDEL: -- go in. I mean, we always -- I

   always get that, anyway. It would go in.

   MR. LO FASO: And presumably this caption,

   these -- these -- this description of this -- this

   written exhibit is given over to Board Proceedings to be

   put in the appropriate file and -- and, question mark,

   also sent to the other party, question mark.

   MR. HELLER: This one would -- would be

   provided to all the parties. Well, it would be a full

   public record, so--

   MS. MANDEL: No, no, no, no.

   MR. HELLER: I'm sorry.

   MS. MANDEL: He -- it is a full public record.

   MR. HELLER: Oh.

   MS. MANDEL: But -- okay, we -- we have a

   meeting with --

   MR. HELLER: Which one are we talking about?

   MS. MANDEL: We're talking about what happens
probably on both of them, but start with FTB.

MR. HELLER: Okay.

MS. MANDEL: I have a meeting with somebody. I do my little description thing. What do I do with it? I give it to Board Proceedings. And then Board Proceedings does what, just stick it in the file?

No, Board Proceedings then gives it to all other Board Members and the parties. That's what he's asking. Where does it go?

MR. LO FASO: Yes, that's what I'm asking.

MR. DAVIS: (b)(2).

It's in number 3.

MS. MANDEL: Number 3?

MR. DAVIS: Number 3.

MR. HELLER: Well, it's really -- yeah, it's basically just entered on the record.

MS. MANDEL: Well, it says, number 3 -- well, you guys, you know where it is.

MR. HELLER: Public Record of the Appeal.

MS. MANDEL: Because that's what Alan's asking.

MR. HELLER: (b)(3) -- it's in (b)(3), on page 27, is that correct?

MR. LANGSTON: Yeah.

MR. DAVIS: Ken Davis --

MR. HELLER: And also --

MR. DAVIS: -- with the FTB. Let me maybe explain the process a little more as at least Brad and I worked through it.
Once the communication log in number 2 is developed, then the -- then you proceed to number 3, and that is, "The public record of each oral communication be provided to all of the Board Members and all will of the parties prior to the oral hearing."

Then the issue is raised, well, what happens if a record is not made of the communication? A Board member forgets, okay. Or it's close in time to the hearing.

Well, then you drop to number 4.

And number 4 is really the catch-all, and that is, "Prior to the commencement of an oral hearing on the deliberation of the matter, the Chief of Board Proceedings shall ask the Board Members whether they received any communications that are required to be placed in the record."

So, that's the catch-all. If there's no oral communi -- if there's no written record prepared then the Chief of Board Proceedings asks prior to the hearing, much like the --

MS. MANDEL: Not the disclosure --
MR. DAVIS: -- the disclosure --
MS. MANDEL: Contribution disclosure.
MR. DAVIS: Yeah, the contribution disclosure statement, and the Board Member just states on the record what the -- time and place and parties and -- and the short subject.

That we understand is also how the -- one of
the other agencies that was referenced by the Chief
Counsel does, as well. The BCDC, Bay Area Conservation
Development Commission.

MS. MANDEL: I just have a question then or
perhaps a point for you to consider when -- if this goes
forward.

The Board Members cannot communicate with
all -- each other on a matter. So, typically -- and I
don't know if that has to do with only -- you might want
to look at the procedures that we have. If something is
on an agenda and we want to do a memo to all the
members, we can't do that, but we do a memo that goes to
Board Proceedings for distribution. And then we're not
supposed to talk to each other about it.

So, you might want to look at the procedures
that were developed there and whether that happens once
it's -- because I -- this idea that this -- this (3)
makes it look like if I do a -- something, then I send
it to all the other Members. And there might be a
restriction on it being done that way --

MR. HELLER: That's true.

MS. MANDEL: -- or only once it's on an agenda
and somehow that should be incorporated. So, if we're
doing these things, if this is what goes forward --

MR. HELLER: Right.

MS. MANDEL: -- we -- you know, we're not
violating anything. That will (inaudible) how we do it.

MR. HELLER: Okay.
MR. DALY: Charles Daly, BOE Legal.
Is the phrase "Board staff" and "Board Member staff" intended to be interchangeable?

MR. HELLER: No. "Board Member Staff" are a specific staff of a Board Member, and "Board staff" is really the staff of the -- of the Board of Equalization. So, there's -- they are not mutually exclusive.

MS. RUWART: They are mutually exclusive.

MR. HELLER: Oh, they are? I'm sorry.

MS. RUWART: They are mutually exclusive.

MR. HELLER: They are mutually exclusive.

MR. MICHAELS: They're not the same.

MS. MANDEL: You didn't get enough sleep last night.

MR. HELLER: I need to bring a dictionary with me next time. I apologize to everyone. Again.

But, yes that's -- there is a distinction there and there should be -- as we go back through it there are some definitions that are provided in, I believe, Section 5000.5002.

MS. ROZARIO: Brad, this is Karri Rozario. "Board Member Staff" is not defined in -- in your list of definitions. It's just "Board Member," "Board Staff". So, we may want to add that definition for clarity.

MS. RUWART: Yes, Tom.

MR. HUDSON: Tom Hudson, Bill Leonard's office. I also -- one thing I have not heard in this entire
process is anything from the proponents on the SEIU proposal. Is there anybody here to talk about that?

MS. ZIMMERMAN: I had my hand up, so glad you asked.

So, one of the things that hasn't actually been raised yet in our proposal -- but first I want to say that this is a great process, and I'm -- I'm excited to be part of it. Here's my card.

I think there's a lot in the second alternative that we also support, and that there's a lot of -- there are -- that we're ready to look at after today, ways of combining some of those -- the aspects of Alternative 2, as well.

One of the things that wasn't raised or pointed out yet in our proposal on page 28, is my version of Alternative 3(d), was that initially when we had been talking about this -- we've been looking at this for over a year, and there was some thinking about making a postponement automatic if there had been an ex parte communication. And so we moved off of that in this proposal, and then there's a discussion, you know, introducing a lot more flexibility on the Board's part for deciding if there should be a postponement or not.

Because a lot of times there's inadvertent communication, there's small taxpayers that may come up and that, you know, a -- a lack of flexibility then you're either inadvertent, or it could even give the taxpayers control over postponement of hearings. So
that it really was important to introduce that flexibility on behalf of Board Members to make that determination in the recommendation.

MS. MANDEL: And your proposal has to do with inside the agenda -- once the agenda notice is issued?

Huh-oh. So, it's -- it's that close time period.

MS. RUWART: Hello, is there someone new on the line?

MR. SHAH: I'm sorry, no.

MS. RUWART: Okay.

MR. HELLER: Thank you.

MS. ZIMMERMAN: And I think if there is an additional language in terms of additional flexibility for the Board, that's something we all want to hear from the folks who are -- you know, want to include in this -- in this version if it does, if there is a decision to put this before the Board.

I think, also, you know, going to the point that Marcy, I think you were raising, was if there are differ -- there are other particular types of appeals that you think should be exempt from this, that are less regulatory and more administrative, for example, that definitely we would be interested in hearing about that, as well.

I think that -- you know, that -- that it's important to hear some of the concerns raised today and also to respond to them. It sounds like
that example -- the question about whether there's a
need to have examples of particular types of disclosure
has been addressed. And that's not something that we
need to -- to work on.

Anything further? I -- I do think that
something that has -- again, hasn't been raised today,
but we have heard in this process, is that the way the
Board currently operates, often -- once an item gets on
the agenda, is the first time that people really pay
attention it, on both the Board side and the -- the
tax -- the taxpayer side, litigant.

And I think that there is a question of is
there a need for creating more opportunity in a -- at
least in a public way, to have more time than what's
currently available in the hearing, itself. And that
often through an ex parte becomes the place -- the only
place where people get time to review details before the
hearing.

And so, you know, I certainly don't want to say
that this necessarily covers all those aspects because
there may be additions we need to make in terms of
addressing the fact that there's a very short time right
now for Board Members to hear some of those cases that
may -- that we need to look at additional time. But I
think that our problem is that right now we certainly
want this -- the exchange, the documents, the
information, to be made public. And that we don't think
that a completely closed process is the way to address
that issue of getting more time to discuss the merits of a case.

So, that's really what's behind, you know, the interest on this. We certainly also -- you know, we represent, you know, thousands of folks that work for the BOE and the FTB. We're also concerned, you know, to represent taxpayers effectively in this process.

So, you know, we have a lot of different interests.

MR. HELLER: Alan, please.

MR. LO FASO: That gentleman over in the corner wants to speak, so I'll defer.

MR. RIVERA: Gus Rivera of Intel Corporation. I'm also here representing the Silicone Valley Leadership Group. I know, Brad, you probably received a letter in the past from us in -- in support of -- of Alternative 1 and so really I'm here just to reiterate the -- our strong support behind Alternative number 1.

We do believe that, you know, this -- that the Board should be compared to a commission. This is a publicly elected -- these are publicly elected officials. And we feel that the communication should be open and remain as it is.

We know that -- you know, as was just mentioned there's only a few minutes that a taxpayer has and -- to make a case on behalf of the Board, and we want to make sure that, you know, the Board Members are making informed and fair decisions. And we don't want to take
away from that.

MR. HELLER: Yes, I did receive those -- that letter and shared it with all the staff and the Board Members. And I also included a -- pretty -- posted a matrix showing all the comments I received and how they were incorporated in this draft. That was posted on the internet. And it shows those comments and we appreciate it. And go ahead, Alan.

MR. LO FASO: I appreciate it, Brad. I want to go back to Alternative 3 and --

MR. HELLER: Sure.

MR. LO FASO: -- I appreciate how you laid it out, but what I'm concerned about -- well, what I don't understand about Alternative 3 is it says you shall not do it, and here's what it is, but if you do it, ta-da-a, ta-da-a, ta-da, so I guess I'm -- is it really the intent that the communications don't occur, or is it really the intent that if the communications occur they're disclosed and then people have the opportunity to seek more time, et cetera, et cetera?

MR. HELLER: Well, I think really the goal is --

MS. MANDEL: Well, why don't you let her --

MR. HELLER: Go ahead.

MS. MANDEL: -- answer --

MR. HELLER: Sure.

MS. MANDEL: -- because it's their proposal.

MR. LO FASO: Am I -- am I making sense?
MS. ZIMMERMAN: Yes. Absolutely.

MR. LO FASO: Okay.

MS. ZIMMERMAN: You know, I think that the goal is for there not to be the communication during the short period prior to a hearing, without there -- disclosure. So that if that happens, it's not that -- I guess the question is how do you define it. And communication is defined on proxy to a hearing. Which is why we have the postponement. So that, yes, the goal is for there not to be, you know, communication that's not public directly prior to a hearing, without giving all parties a chance to be informed in response.

It's an issue of time -- timing as opposed to keeping people from talking to each other. Does that make sense?

MR. LO FASO: I think so.

MS. ZIMMERMAN: Okay.

Brad, you want to add to that?

MR. HELLER: No, I think that's pretty accurate. That's your, you know -- your own statement about it, so --

MS. ZIMMERMAN: Thank you.

MR. HELLER: Go ahead, Tom.

MR. HUDSON: Tom Hudson, Bill Leonard's office. I guess an issue I'd thought of too much before today, but when we talked about there's really no compliance mechanism to make sure that all the Board Members are actually doing this, that -- that kind of raises a -- a
whole new issue that I never thought about, which is, you know, you have five Board Members and two of them are following this, you know, very strictly and three of them aren't paying any attention to it, is that kind of a fairness issue for taxpayers, that -- you know, if some -- some Board Member says, "Gee, in the last few hours before a hearing I don't have time to write out these long disclosures, who I talked to and what they said and who was in the room when we talked and all that," and they just ignore it.

And what -- what does that do for the -- the process when you have basically two different systems in place?

MR. HELLER: Well, I think one, you know, we definitely -- it definitely would be an issue of fairness if there were Board Members who weren't following the regulation. However, in all my discussions with interested parties I've really taken a position that the Board Members will follow regulations if they duly adopt one, and that generally, you know, I have the good faith to believe that they're going to follow it if it's on the books and they're aware of it. And we're going to have the Chief of Board Proceedings poll them before a meeting to make sure that they're just not forgetting.

But, honestly, there's -- there would be an issue of fairness, and there's not a mechanism to enforce -- necessarily enforce these regulations by
Board staff, if the Board Members chose not to go ahead
and comply with them voluntarily.

    So, I do think there could be a fairness
concern and it could also raise those litigation issues
that we were discussing before, which is that it could
add the element of some -- some, you know, deviation
from our own established procedures. In the different
administrative process that might -- it might deprive us
of some deference at the judicial level. But I think
those are all valid concerns.

    Go ahead, Steve.

MR. KAMP: Steve Kamp from Board Member Yee's
office. Question regarding Alternative 3, subdivision
(b) sub-subdivision (2), and it says, "A communication
is described in this paragraph if: (A) The
communication occurs directly between a Board Member and
an employee of the FTB, a Board employee that is not
assigned to a Board Member staff, or a taxpayer."

    My question is what about if the communication
is made by a member of a Board Member staff acting -- or
made by the Deputy Controller for Taxation?

MS. MANDEL: Well, in -- in the definitions of
Board Member I'm a Board Member for that purpose.

MR. KAMP: Okay.

MS. MANDEL: So --

MR. KAMP: But then the next question --

MS. MANDEL: Or -- or whoever is --

MR. KAMP: Then that's interesting because the
next question I have then, Board Member staff
occasionally communicate on behalf of Board Members.
It's been known to happen. So --

MR. HELLER: That's a great question, too, and
that was something also where SEIU was -- was willing to
be flexible and not try to create a rule that was going
to nail down every possible conversation.

MR. KAMP: Okay.

MR. HELLER: And to really stay within the --
MR. KAMP: All right.

MR. HELLER: -- the spirit of what they're
trying to accomplish. So, they really wanted to say
that they're really concerned with where -- with direct
access to a Board Member.

MR. KAMP: Okay. That's -- that's fair --
that's good. That's good to know that's -- that's your
intent, Brad?

MR. HELLER: Well, I think -- yes, that was my
understanding.

Is that correct, Sarah?

MS. MANDEL: Well, when we get to definitions,
it just makes everything all tangled up because of
course there are quite a number of people who have a
title that involves Deputy State Controller. There are
very -- there are like only two of us who are authorized
to sit on the Board, one of whom does not have that
title, but is the Chief Counsel.

So -- so, I don't know, we'll have to talk
about what we -- you know, what we do.

    I mean, for the purposes when he sits over
here, he is deputized for the State Controller. But if
you were looking at his title -- so we'll have to talk
about that later and figure out how you --

    MR. HELLER: Right.

    MS. MANDEL: -- make sure you're referring to
the people you mean to refer to.

    MR. HELLER: There could be -- I'd be happy to
use whatever language --

    MS. MANDEL: Yeah, okay.

    MR. HELLER: -- is agreeable with the
Controller's office. We definitely want to describe
the -- the participants accurately.

    Let's see. Okay. Well, I think that kind of
rounds out --

    MR. HUDSON: One -- one last question. And as
far as these disclosures that take place at the Board
meeting, itself, what -- from the proponents, I'm
curious what -- what is the purpose of that? If the
Board meeting starts and we hear that there was an oral
communication, and that's the first notice anyone gets.
I'd like to hear more about what the purpose of that is.

    MR. HELLER: Well --

    MS. MANDEL: From the proponents.

    MS. RUWART: If you would like to hear --

    MR. HELLER: Oh, sure, certainly. I'll add
something. This was --
MR. DAVIS: Ken Davis.
I -- I believe the -- the Chief Counsel's intent behind the whole -- the whole proposed regulation, the premise is -- is open -- openness and disclosure to all Board Members and the parties. And so, it's -- so that the -- the Board Members at least hear generally any -- and I use the word "generally" specifically. So, the Board Members hear generally about any outside communications, and that the parties hear about those outside communications, and that the parties at the time of the hearing have an opportunity to comment upon the -- the subject matter of those outside communications.

One of the differences in Alternative 2 versus Alternative 3 is Alternative 2 doesn't -- doesn't provide or is silent as to the postponement of a hearing because there may be some communications that are with outside -- outside the Board hearing room that are -- that are not material.

And -- and so, we didn't -- or so that the regulation was drafted so it was not a requirement to have an automatic postponement. But if the subject matter of the -- of the outside communication was -- was clearly of a major substance, then the -- the party at that time could request a postponement.

But the regulation at least was silent on it. So, the whole goal was really openness and -- to the Board Members and to the parties so that they could
comment at the time of the hearing. But for the hearing
to go forward.

    MS. RUWART: Alan.

    MR. LO FASO: Well, since we're all turned to
2, I -- I want to get a little bit more perspective from
the FTB on participation in general. I mean, I read
this a while back, but as I basically understood it if
Taxpayer X wants to talk to us we call you. Taxpayer
wants to talk to us, come on down, let's have a meeting.
If you come down and talk to us with Taxpayer X we're in
compliance and we're pretty much done.

    That only of course works if you all want to
come down and talk to us. And I'm not fully apprised of
the issues that came up, but just -- just -- would you
just comment on your thoughts about participating under
that provision of Alternative 2?

    MR. LANGSTON: I can address that.

    Yes, I think you're exactly right. The whole
point of the ex parte communication issue is, as in
Court, to avoid the idea that one side has the ear of an
adjudicating person, and the other one is not present to
point out the issues.

    I think in our last -- if you were here for the
Part 4, we talked about the prehearing conferences that
are proposed. And this is the same sort of spirit.

    If there -- if they went to brief a Board
Member beforehand, get both sides of the story. I can't
imagine why a Board Member would not want to do that.
Same thing here, if -- if one side is not able to be there, at least say, "What did you talk about? What evidence did they present?" You know, that sort of thing, because it's going to be relevant in the hearing. So -- so that's the idea behind all this, is -- you know, if -- if these communications are going to happen, then at least both sides should be present.

And I -- I don't think that's unreasonable.

MR. MICHAELS: Has there been any thought given to their requirements that the FPPC and -- well, you would know, Steve, better than anybody, probably -- I may have this wrong, but of lobbyists who have X -- so-called, quote-unquotes, lobbyists who have so many contacts or -- with -- with an elected official or a member of the staff of an elected official have to register and --

MS. MANDEL: Yeah, but that --

MR. MICHAELS: -- fill out all kinds of paperwork. Is there any consideration that by creating these -- we're creating a road map for hundreds of people probably to be now in the radar to become registered lobbyists or get in trouble.

MS. MANDEL: Well, I -- if I remember correctly, maybe -- maybe Steve has looked at this more recently, because I used to be a registered lobbyist, but that was because it has to do with regulations. Not -- not cases, but regulations.

So the definition of lobbyist I think has to do
with legislative matters, which would be -- you know, bills up at the Legislature or regulations. And the -- the issue that comes up where, you know, we used to think, well, there's some people who maybe ought to be registered was on regulatory matters.

But I don't think it has anything to do with things beyond legislative/regulatory matters.

MR. KAMP: Steve Kamp. There is an FPPC definition, it may be a Political Reform Act statutory definition, but I think it's a certain number of contacts per month. It's designed to influence legislative or perhaps governmental action, but it would not surprise me if there is an FPPC advice letter or published opinion that may exempt the practice of law from that.

But, again, it's -- you're -- I think what Mr. Michaels is saying is correct. Is you are leaving out a road map that somebody who may inadvertently end up becoming a lobbyist, and I used to know some law firms that don't want to become registered lobbyists. And they structure their advocacy to do exactly that, or not do exactly that.

MR. HELLER: Well, from staff's point of view, we really did not look at that issue yet. So, as far as we were concerned, we were much more concerned with -- with flushing out the issue how people would communicate with Board Members and did not reach the secondary issue of the consequences of somebody who communicates quite
often with Board Members.

So, it's something we can definitely take a
look at as far as just properly advising the Board
about the consequences.

MR. MICHAELS: Well, there are serious
sanctions for people who are supposed to be lobbyists,
but aren't.

MR. HELLER: Absolutely.

MR. MICHAELS: And so, if we're creating
lobbyists inadvertently we ought to at least do that
eyes wide open.

MR. HELLER: I'll take a look at that.

MS. RUWART: Are there any further comments on
these issues? Yes, sir.

MR. LO FASO: Actually, I have -- I have a
follow on -- with Bruce and Ken. I -- I clearly got
your answer if -- if you're invited to come talk to the
other party, you'll come. Some -- to deal with the
whole of Alternative 2, some factors under this might
prefer to hear from one party in one meeting and another
party in the other meeting, because sometimes people
think that people speak a little bit more freely in
separate venues.

Under that option, if I -- if I understand it
correctly in Alternative 2, can you elaborate on FTB's
views on participation.

MR. DAVIS: Yeah, I -- I think if you're -- if
you're asking how we -- how we think this is to be
applied --

MR. LO FASO: Uh-huh.

MR. DAVIS: -- if the -- if there is a meeting
set up -- if it's a conference call between a party and
a Board Member, or Board Member staff, then FTB would be
invited to be on the conference call.

MR. LO FASO: Here's my hypothetical.

MR. DAVIS: Please. Okay.

MR. LO FASO: Party X wants to talk to us. We
want to meet with Party X on Monday. We're going to
disclose. Will you come meet with us on Tuesday and
talk about what Party X told us about?

MR. MICHAELS: Now -- now who's coming to that?

MR. LO FASO: Party X -- Party X is the
taxpayer.

MS. MANDEL: The taxpayer.

MR. MICHAELS: Yeah, I understand that. But
who's the "will you come" --

MS. MANDEL: FTB.

MR. MICHAELS: I see.

MR. LANGSTON: That's -- I think it's fair to
say that's not provided for in this --

MR. MICHAELS: Correct.

MR. LANGSTON: -- scheme.

MR. LO FASO: No, it's not.

MR. LANGSTON: No, if you read it, it -- it
pretty clearly -- there's -- the -- the idea is that
prior to any oral communication the Board Member shall
contact all parties.

   MR. LO FASO: Correct.

   MR. LANGSTON: And invite them. Well, now you're asking if FTB either declines or you're saying they don't want to invite FTB at all?

   MR. LO FASO: Or they want to invite FTB on another day.

   MR. LANGSTON: Well, that's the same as not inviting them at all to the meeting.

   MR. LO FASO: Fair enough. Fair enough.

   MR. LANGSTON: You know, to -- my feeling is that would be two separate meetings under this.

   MR. LO FASO: Uh-huh.

   MR. LANGSTON: And in theory, at least, to comply with the reg -- with the proposed regulation you would have to -- you would have to invite FTB to the first meeting, invite the taxpayer to the second meeting.

   Now, I -- I don't know -- I mean, we're starting to get into hypotheticals here.

   MR. LO FASO: Uh-huh.

   MR. LANGSTON: -- about what would happen if you communicated to FTB, gee, the taxpayer would really rather you not be there, and they don't -- they agree, they don't want to be there for the next meeting. I think you could be -- you know, that -- that would depend on the facts and circumstances of the case.

   But to be fair -- to answer your question
specifically, no, that is not provided for in Option 2.

MS. RUWART: And, Bruce, can you maybe explain
why that wouldn't -- why his option wouldn't be provided
for. That it sounds like it's at the option of the
Board Member or Board Member staff, they prefer to
receive their information in this format.

What objection do you have to that?

MR. LANGSTON: The -- the thought behind it --
I mean, the basic idea of all parties being present is
so that we could listen to what the taxpayer says and
make comments. Rather than have their comments come in
in our absence, maybe be told about them later or maybe
not.

But in any case, we may -- as with all hearings
and proceedings, I mean that's why both parties are at
the -- at the public -- at the public hearing, is so
that often we listen to what the taxpayer is saying, we
don't wait for questions to be asked of us later. You
see what I mean?

That's -- that was the idea. So, that's really
the answer, is -- so that -- so that both parties could
actually listen to what the other party is saying
as opposed to having it filtered through the Board
Member.

MS. MANDEL: Let me -- let me give you some
practical -- I mean, I -- I appreciate these
alternatives. I understand why they're being presented.
But in real life, I mean if the taxpayer calls for a
meeting, it's easy to see how that would flow through
these different alternatives.

Sometimes you might get a phone call. You
know, I pick up my own phone. Other Board Member staff
pick up their own phones, presumably. They may pick up
the phone and it's, you know, Taxpayer X or
representative for Taxpayer X. "You got a few minutes?
I went to talk to you about -- my case is coming up, you
know, next week."

Under these we'd have to say, "Can't talk to
you now, must hang up the phone, must schedule a time to
bring in the other side or see if the other side" -- you
know, I may be mixing up the examp -- the two
alternatives. But that's what you'd have to do if you
got that call.

But here's another thing that happens. Of
course, I suppose the concern -- primary concern from
Franchise Tax Board is probably really communications
with taxpayers, because that's what they're most aware
of.

But here's an example that happened several --
a while ago. I am somewhere. A legislative staffer
walks up me and says, "Is the such-and-such case coming
up soon?"

"Yeah, it's coming up soon. I don't know when.
It's -- I don't have an agenda that it's on yet,"
but it's -- so, no agenda doesn't bother you.

"Well, I hope they're not making -- are they
arguing -- you know, are they making an argument based on Y?"

"I don't know, I don't think so. I don't -- you know, I don't remember. I don't think so."

"Well, I hope they're not because" and gives me the reason why an argument -- why.

Now, under this -- these scenarios -- well, particularly FTB because no agenda yet, I would have to do the, "I'm not listening." "I can't tell you."

"Call Board Proceedings to see if it's on the agenda."

"And I can't tell you anything about the case," and "I can't" -- "don't tell me anything about the case. I can't hear anything about the case, what you think."

Or anything. And from a relationship standpoint, or just in real life, how these things happen now, this -- this regulation as proposed in these alternatives would apply to all persons.

That means, you know, when some Board Member is up at -- I don't know, pick something, State of the State, they're all there. And, you know, some other Legislators -- person sees them, you know, one of their peers, who says, "Hey, I hear there's blah-di-blah happening at the Board." You know, some case that maybe people know about because there are very few that, you know, rise to that level, but there are some that people sort of know are out there.

They might have -- the Legislator may in fact have been contacted by the constituent. I -- we got a
letter the other day from a Legislator who was contacted
by a constituent. That's what they're there for, so
they dutifully send off letters to the Board saying,
"Oh, you know, here's this nice constituent, can you
look into their problem?"

    MR. MICHAELS: Well --

    MS. MANDEL: I mean, those are all sort of
contacts that may be things that are awaiting hearing
and I don't know how they fit into these --

    ---000---
MR. MICHAELS: Another example that occurs to me, Marcy Jo, and, you know, Tom, I think you did this and Neil's on the line there, he does it and you probably do it too, you are looking for State assessees and an appraisal data report or at a write-up or who knows what and you call somebody in the valuation group and they are a party and you go, "What's the deal with this? Or could you clarify this for me? Come up with a spreadsheet for me? Or could you do this or could you do that?"

Neil, you're on the line there, right?

MR. SHAH: Yeah, it happens.

MR. MICHAELS: Are those -- this is Peter Michaels speaking, Neil.

That's not uncommon, is it, that being the case, Tom, where you call staff here and then hear secondhand, "Well, we just got a call from a Board Member or Board's office and blah, blah, and I wondered, "What'd they say? What didn't they say?"

You know, but I mean --

MR. SHAH: It happens, Peter, sometimes -- this is Neil -- we have to explain to it our Member as to how you the valuation was calculated.

MR. MICHAELS: Yeah.

MR. SHAH: That's why we get the spreadsheet from the staff.

MR. MICHAELS: Yeah, sometimes, you know, you will ask or your peers will ask for something to be
clarified or fleshed out or for some new work product to
be created to make it easier for your Board Member to
make a decision.

That's not at all uncommon. In fact, it
probably happens almost every time we have a State
assessee case.

MS. MANDEL: In business taxes cases if there's
questions of appeals, what they have done on their
decision and recommendation.

MR. MICHAELS: Yeah.

MS. MANDEL: We want to make sure we understand
what's being recommended.

MR. MICHAELS: So, in theory, every time a
Board Member or staff member calls the Valuation
Division, in my example, a buzzer goes on?

MS. MANDEL: Yeah, anyway, those are kind of
some of the real life things -- leaving aside, you know,
situations where just, you know, our Members are out in
public and someone -- you know, they're down in the
Silicon Valley and people know about something that is
going on and someone just happens, "So, what are your
concerns?" Typical question when you are out in the --
meeting people, "What are your concerns?"

MR. DAVIS: Ken Davis.

Let me try and answer. There is a -- there is
probably at least two scenarios in there that I can at
least talk about.

One is the chance meeting scenario. And the
chance meeting, at least when Brad and I were working
through various scenarios, we recognized that is going
to happen, it's going to happen before, it could happen
at a conference, it could happen at any time.

And in that type of instance, it would -- it
wouldn't require the Board Member stop and go call the
FTB and invite it -- invite that person, it just
doesn't -- we want to -- the goal was to work it in a
practical manner. And that is that that would be just a
recorded -- recorded on the log and disclosed to the --
to the parties and the other Board members that there
was this chance meeting at conference where the issue
came up.

And the other type of scenario is what happens
if a legislator or someone else calls. The ex parte
communication, at least, was designed -- provisions were
designed to relate to communications between a party and
a Board Member. And some of the -- some of the APA
regulations really go much, much farther and talk about
if there's an interested party. They define "interested
parties."

We -- this regulation doesn't go that far.
This says if there's a communication between a party and
a Board Member, then the other party should be invited.

MS. MANDEL: That's the -- I'm sorry -- I'm
sorry.

That's so party --

MR. MICHAELS: What are you looking at, Marcy?
MS. MANDEL: I'm looking at the FTB page 26. So, for the advanced notice and opportunity to participate is only party -- is only FTB --

MR. DAVIS: Party to the appeal.

MS. MANDEL: -- party to the appeal?

MR. DAVIS: Yes.

MS. MANDEL: Okay. And so then on the time -- my example, when someone calls me up and says, "Do you have 2 minutes," and it's, you know, Peter, on his case, that's the call that you would say I have to say, "No," I must either -- since I can't figure out how to use the conference function on my phone -- I must set up a time so that I can invite FTB, right?

MR. LANGSTON: Only if it's awaiting an oral hearing. I mean, you're only talking about a limited -- right, isn't that correct?

MR. MICHAELS: Really?

MR. DAVIS: Yes.

MR. HELLER: Only once they're are pending.

MR. LANGSTON: Yeah, only once the hearing's pending.

I mean, this is --

MS. MANDEL: Is that also an agenda?

MR. MICHAELS: Once a hearing had been scheduled?

MR. DAVIS: No, no.

MR. MICHAELS: Once a hearing notice has been -- what do you mean "hearing pending"?
MS. MANDEL: He's not going -- he's not going
to call me unless he's calling me in my capacity as
representing on FTB when something -- he's only going to
call me on it -- just because you are sitting there,
Peter, he's only going to call me on an income tax case
where he's representing the taxpayer once -- at some
point after he's filed an appeal with BOE, if he's
calling me in my BOE capacity

MR. DAVIS: Ken Davis.

In that instance that would -- that would
say -- would require you to say, "Peter, let's see if we
get FTB on the phone".

MR. MICHAELS: But "pending," if I
understand means -- well, I don't understand.

What does "pending" mean?

MS. MANDEL: There's a difference.

MR. DAVIS: Brad can speak to that. There's a
definition that -- it was included in the regulation.

MR. HELLER: Real quickly -- Bradley Heller in
subdivision -- was it (B)(6), it's on page 27,
subdivision (B)(6)(C), it defines pending, it's from the
date the Board receives an appeal.

MR. MICHAELS: Receives an appeal.

MR. HELLER: So, it basically starts from the
date that we receive it, because otherwise the Board
would have no notice that it has -- you know, has a
matter before the Board.

MR. MICHAELS: I'm not sure your carve-out
there carves anything out, because until you've filed an
appeal, there is really not a legal incident, I suppose,
well, legal event.

   And the second you do, you can't talk with
anybody any more.

   MR. HELLER: I think you're right.
   I am not saying I disagree.
   MR. LANGSTON: The point I would make, though,
is there are lots of situations where people call and
ask general legal questions. They -- they may not --
they may or may not have a particular case, but the goal
of this was so that you wouldn't talk about the facts of
your case because there is a process to go through to do
that.

   You file your briefs. You file answers. You
have an oral hearing. The idea was once you're in that
process, you follow that process. You don't go outside.
You don't -- you don't, you know, call the Board Members
directly. That -- that's sort of oversimplifying a
little bit, but that's the point of these whole rules is
if you are going to have any integrity and respect for
the process, you follow it. You don't -- you don't go
around it.

   Again, very commonly, we'll talk to Board
Members as at conferences or meetings and discuss
general areas of the law. This was never intended to --
to stop that. I mean, maybe in -- if we get very
specific and a Board Member says, "Oh, gee I've got a
case pending on that particular issue, you know, I don't
want to be influenced."

But -- but I think you're right, there is --
like everything else, there are going to be gray areas,
you know.

MR. MICHAELS: With my example, a State
assessee petition, I mean, nothing -- nothing is
actually joined --

MS. MANDEL: Again, that --

MR. MICHAELS: -- or engaged until the date the
appeal is filed.

MS. MANDEL: The FTB -- what are we calling
this Alternative 2?

MR. MICHAELS: Alternative 2.

MS. MANDEL: My understanding is it only
applies to FTB cases.

MR. LANGSTON: Correct.

MS. MANDEL: The Alternative 3 applies to
whatever kind of case, but has agenda notice as the
trigger, right?

MR. MICHAELS: And what happens if -- if
some -- let's just say you've got some big oil company
that has got a franchise case and someone who is the
president of the trade association -- a trade
association, not a party, but a somebody -- you have a
Shell case and someone from the Western States Petroleum
Association wants to bend the ear of a Board Member or a
staffer, is that offensive here or not?
MR. LANGSTON: See, that's -- I don't know the answer to that.

I would say probably not. If, for example, they said, "We think you shouldn't have a double weighted sales factor for extractive commodities, because, in general, it will hurt the oil industry".

MR. MICHAELS: What about the specific case, "You know you got that Shell case coming up, and you really need to take a close look at that"?

MS. MANDEL: Let's take an example of a case that was recently heard where somebody came -- where a group of companies came in as amici.

MR. MICHAELS: Yes.

MS. MANDEL: Let's say they didn't come in formally as amici, but -- so, it's on an FTB case and let's call them a trade association instead of a group of companies.

And now they are making --

MR. MICHAELS: They want to bend somebody's ear. Can they or not?

And can they bend the same ear that the party itself not can bend?

You know, are you going to just be creating substitute advocates, in a way, you know?

If I -- I'm not saying I would do this, but if I knew that I couldn't talk to somebody, but if I knew that the president of the association that my client belongs to could, well, temptation is there.
MR. DAVIS: Ken Davis.

I think the -- I can't speak for the Chief Counsel, but I think that the intent by -- by Mr. Davies was to first post up a regulation as to how this would be operational with the parties.

And there -- if this was affected, then if there were other circumstances that needed to be addressed, such as the interested parties issue, the sidebar with the amicus --

MR. MICHAELS: Amicus?

MR. DAVIS: -- or trade association, whoever else, then the regulation would have to be amended to address that -- unless at this time the staff wanted to consider putting that issue into the regulation, that is a requirement that interested -- that if there was interested parties involved in a meeting with the Board Member, then FTB should be contacted as well.

MR. MICHAELS: The real parties --

MR. DAVIS: Let me speak to one other circumstance and that was -- just going back so we just -- don't lose it, that is, that if a party was -- saw a Board Member and said, "Oh, there's a hearing coming up."

Okay, what Brad and I -- and Brad went through this, the regulation talks about communications that are not included. And if a party had a chance meeting with the Board Member and just said, "Oh, there's a hearing coming up," there's a carve-out for communication that
relates to a procedural matter that doesn't pertain to
the the issue at appeal.

MS. MANDEL: Oh, that's the same we have for
the Kopp Act.

MR. DAVIS: So that it's not meant to record
every small issue, it's that any substantive issue that
relates to the appeal.

MS. RUWART: Steve?

MR. KAMP: Marcy made a comment and I wanted to
make in comparing Alternatives 2 and 3 about the
different notice periods.

But would the FTB staff be amenable if we used
the pendency Kopp Act ten day notice period, which is
what Alternative 3 does by the way, instead of pendency
of an appeal because pendency of appeal, it takes --
that's a huge amount of time

MR. LANGSTON: I'm not sure what you are
saying.

MR. KAMP: What I saying is instead of using
your triggering point as the pendency of an appeal, use
triggering point as the public agenda notice date.

That's what we use for the Kopp Act and the BOE
and for at least ten years we used that.

That's what Alternative 3 would do.

MR. LANGSTON: So, only if goes to an oral
hearing -- up until -- through all the briefing and
everything, none of this would apply?

MR. KAMP: That's right. But that's the way it
is -- that's the way the Kopp Act is now on everything else.

MR. LANGSTON: Well, we can certainly take that back as a suggestion. I mean, it would severely limit the -- I mean it would -- you know, it would change the nature of the regulation.

MS. RUWART: Charles?

MR. DALY: Charles Daly, BOE Legal staff.

Is it contemplated that either or both of the parties can communicate with the Appeals Section staff other than in the context of prehearing conference?

In other words, somebody wants to talk to me a week before the hearing?

MS. MANDEL: You mean your -- which hearing?

MR. MICHAELS: The Board hearing or an Appeals conference?

MR. DALY: Board hearing.

In other words, somebody calls and wants to talk about the case -- this never happens, this previously has not happened, but it could happen.

MR. MICHAELS: Sure.

MR. LANGSTON: This reg specifically talks about Board Members.

I mean, that's what we're talking about.

MS. MANDEL: But if -- if he was the Appeals conference holder -- well, on a business tax case it certainly can happen, which would affect the

Alternative 3, but on an income tax -- if he wrote
the -- if there wasn't any kind of hearing, but a
conference, but if he wrote the -- what do you call it?

MR. MICHAELS: D & R?

MS. MANDEL: But if he wrote the hearing
summary, you know, sometimes those -- not necessarily
yours, Charles, but you asked the question -- sometimes,
you know, they're not the most -- the greatest.

Sometimes we read those and have questions
about them. And we might, as Board Member -- again this
applies to Board Members, so not Board member staff -- I
guess that means if I have a question, I don't make the
call myself, but it would be possible that in some
offices that -- let's say I didn't have anybody working
for me any more, then I might have a question of why the
appeals officer did a certain thing or wrote it a
certain way and that would appear to be precluded.

Right? Is that your --

MR. DALY: Well, I guess my question is
basically that the regulation appears to contemplate
parties going before Board Member staff, arguing their
case.

Does somebody think it's beneficial to do that?
Is the same thing going to happen to appeals staff --
out of the context of a prehearing conference?

It sounds as though the way this is written
that -- that they're basically equivalent. That you can
talk -- if a party wants to talk about his case, argue
his case, a week before the hearing or during lunch at
the hearing or whatever, that's appropriate.
And if it is appropriate, certain things have
to happen. You have to get everybody together and is
this really intended to deal with communication with
Board Member staff?
The other -- the Appeals Section people are
carved out or --
MR. HELLER: This is Bradley Heller.
I think what Charles is referring is not
actually referring to Alternatives 2 or 3 specifically,
he's actually referring to the language that's included
in all three alternatives.
MR. DALY: Yes.
MR. HELLER: And in the Alternatives 2 and 3
it's contained in subdivision A, which is similar to the
language in staff's proposal.
And what he's referring to is this language in
the second sentence that refers to allowing the persons
to contact a Board Member's and Board staff at any time.
And so, what Charles is actually -- was saying
is he's concerned with whether or not we intended to
allow people to contact any person in the entire Board
of Equalization staff when we wrote that or something
else.
And he's specifically concerned with the
Appeals Division staff. And in there "staff," I
think -- as the person who wrote it at that time --
really was trying to be broad, but did, as has come to
my attention, that there may be reasons why we don't want everyone contacting every person on the Board of Equalization staff.

So, in order to address that issue, we're considering making that "Board Member staff" so it's -- so that it carries through the original intent of the regulation, which was to provide for communications with Board Members.

But basically to address communications with specific just Board staff throughout the agency is kind of probably more on an internal procedural basis than through publications and things since there are certain people who wouldn't be appropriate to contact, such as like our Criminal Investigation Division, which would be covered by this.

You know, we don't want you to just call the person who runs our parking garage and start explaining the appeal to them.

So, I think Charles has a very legitimate concern and, assuming we don't get a lot of objections to it, I think that we'll probably be changing that second reference to the Board staff to "Board Member staff" so it's clearly to contact the Board Member and his or her staff as opposed to calling anyone that you can find a phone number for on in any white pages or any yellow pages, so to speak.

Does that clearly address that?

MR. DALY: Yes.
MR. HELLER: Thank you, Charles.

MR. HUDSON: Tom Hudson, I'm curious if we're intentionally applying all this to homeowners and renters property tax assistance appeals?

The reason I ask is because I tend to get those calls in my office. And, you know, invariably you're talking to an old person in poor health and the more -- the more of an act of Congress you make out of this, the less helpful you are really being to the public.

I mean it's $170 appeal and we're going to spend $10,000 in staff time and I wonder if that would be the intent of the Franchise Tax Board?

MR. LANGSTON: No, I think Board staff can, but the Board Members themselves -- I mean there isn't, right now, a small case exception to this.

And that would have to be separately --

MS. MANDEL: You can have --

MR. LANGSTON: -- provided for.

MS. MANDEL: You could have a call?

MR. LANGSTON: Board staff can certainly talk to them.

MS. MANDEL: Just don't let Mr. Leonard pick up that phone.

MR. HUDSON: Yes, that's a good explanation.

MR. MICHAELS: Wait, is that true?

Then he gives Mr. Leonard advice based on that conversation and it's all invisible?

MR. KAMP: Under Alternative 3 it does apply to
Board Member staff.

    MS. MANDEL: Oh, no.
    MR. HELLER: Under Alternative --
    MS. MANDEL: No, Alternative 2, yeah, you're right.
    MS. RUWART: Brad, would you just explain?
    MR. HELLER: Bradley Heller again.
    And under Alternative 2, if you look at subdivision B, it's on page 26, it does say, "May only communicate with Board Members and their staffs," there again it's referring to Board Member staffs, "during the pendency of an appeal."

    So, it does cover a conversation with the Board Member staff.

    Whereas SEIU's proposal does not cover -- the only communication, if you look here, this is on page 28, subdivision (b)(2)(A), it describes communications that are covered and it has to be directly between a Board Member and employee of the Franchise Tax Board.

    Employee of the Board that's not assigned as Member staff or a taxpayer.

    MR. MICHAELS: Well, there are Board Members who don't talk with the public.

    MR. LANGSTON: At least not while the case is pending, no.

    MR. MICHAELS: At all, period.

    MS. MANDEL: But Tom raises a good point about
the --

MR. MICHAELS: So, you're doing all of your business through his staff.

MS. MANDEL: -- H. R. A. cases are really the sad sack. I mean you are talking people who are or think they should have gotten their H. R. A. are old, poor, disabled people. And sometimes the reason they have a problem with FTB is because they didn't understand what was required of them. They didn't get the right piece of paper, though they thought they got the right piece of paper. And sometimes you handle all those constituent things and sometimes things can get resolved if someone just takes the time to talk to them and listen to them.

I don't know that those are the kind of calls that when they just come in the office you want them to hold on.

MR. LANGSTON: I don't think we would have an objection for carving out that kind of exception to this rule.

MR. KAMP: Steve Kamp for Board Member Yee's office.

I would respectfully suggest that the SEIU do the same thing for Alternative 3.

MS. ZIMMERMAN: It should go on the record that I was nodding for record.

We agree with the small case exception.

MR. KAMP: Steve Kamp again.
For the small case exception, I think clearly
that would cover H. R. A. appeals, but a small case
exception would go beyond that.

MR. LANGSTON: H. R. A. appeals definitely.
MR. KAMP: Yeah, H. R. A. appeals definitely.
I don't know exactly what a small case would be defined
as.

I think you are certain to would solve the
problem by carving out appeals on the Homeowners and
Renters Assistance.

MR. LANGSTON: Yes, I would -- I have no
problem with that.

MR. LO FASO: For the record -- Alan LoFaso.
Alternative 2 context would -- we have a small
case definition in Part 4, I don't know what a small
case is as a business tax case.

I am sure somebody could give it some thought
on this.

MR. HELLER: Sure. As of right now, we've
never tried to create a small case procedure for
business taxes. So there has never been a need for that
particular definition, but -- but it's something we can
look into.

MR. MICHAELS: I am not sure you can do it.
I mean, this has been discussed many times over
the years.

MR. HELLER: Well, I think even regardless of
creating a procedure for them, we could certainly create
a definition applicable across programs that would
useful for this type of regulation to identify ones that
were exempt.

So, we could create a definition of, say, a
dollar threshold or something.

MS. MANDEL: Well, what we discovered many
years ago -- when they with trying to put dollar
thresholds on property tax cases in LA County to limit
time for hearing based on how much money was at stake,
which, you know, was not a relevant connection --
because you could have a small dollar case that involves
a very significant legal issue; you could have a huge
case, you know, some poor little, tiny convenience store
gets a one day observation test that gets projected over
three years and, all of a sudden, they owe a million
dollars. Is that a small case because it's a tiny
little business person with a tiny, little, you know,
700 foot store or is it a large case because, all of a
sudden, this audit process resulted in them owing, you
know, more than than anybody in the room has.

MR. MICHAELS: Or is tied to what the Board has
to hear?

Because the impediment in the past,
historically, was, you know, we can't be distinguishing
between --

MS. MANDEL: Right.

MR. MICHAELS: -- big and small cases because
they're all eligible -- they're all entitled to their
day in the front of this Board, regardless.

MS. MANDEL: And you'll remember that there was a discussion among the Board Members themselves some time ago when there was a concern about how thing were being calendared and there was a proposal about putting large cases first or small cases first -- I can't remember.

And there was quite a discussion about, you know, everybody's equal.

So -- but in terms of this aspect on the communications, whether you would be able to figure out something that made sense beyond H. R. A. is certainly something to think about.

MS. RUWART: Steve, did you have a comment?

MR. KAMP: No, I was just -- Steve Kamp.

No, I was just going to say the same thing Marcy just said, there was a proposal. There was a lot of intense discussion when there was a proposal to calendar cases by dollar amount.

And that was -- the Board did not approve that and some Board Members were very, very concerned about the appearance that would create.

MS. ZIMMERMAN: Just a -- I would like to participate in a follow-up issue and clarification question.

I think that there are two definitions we're talking about, one money in the case and the other is if it's like a business tax, sales tax issue, the size of
the business -- whether it's the amount of sales they
have or revenue generated and that gets you to a totally
different issue where you're distinguishing the size and
capacity of a particular taxpayer as opposed to, you
know, the measure of the case.

MS. MANDEL: Yeah, but --
MS. ZIMMERMAN: I mean if there's a case put on
the record for $170, if the Board had decided it another
way, it could have been a thousand dollars.

MS. MANDEL: Right. And the -- the question
for the communications issue, whether it's appropriate
to have -- let's just call it a small business exception
to the rules, which sort of came on the heels of, hey,
H. R. A. calls up, doesn't make sense to not deal with
that call. That would be the context in which you'd --
if somebody were to consider a "small business" --
putting little quotes around small business --
exception, you know, the guy who -- in my example, the
guy who owns that little convenience store, if he
manages to find my phone number and call me to, whoo-oo,
carry on -- I don't know how you spell that -- is that
is that something that ought to be exempted out the way
we talked about H. R. A.

I don't know, but I was just pointing out sort
of the different types of parameters that could come
into play if somebody were trying to form an exception.

MS. ZIMMERMAN: I am wondering for the next
step in the process, are there any sort of major flags
that go up in terms of considering a small business
exception in the process?

Will folks say immediately, "Absolutely not,
I'll never agree to that it should be all or nothing
right away."?

That's a question.

MR. LANGSTON: Well, remember what we're
talking about here, we're talking about we have an
established process to handle these various appeals and
things.

You're talking about when do you not have to
follow that process, so --

MS. MANDEL: FTB would say okay on H. R. A.
because that -- of the whole type of program.

For FTB cases he's saying they don't really see
the difference based on the size of the taxpayer.

For the -- all of the other kinds of cases is
where the Board is administrator of the tax, so, all of
the Board Members -- I am making this up just to help
you think about it -- not making it up, but I am just
saying it, it's not necessarily the position of me or my
office, but -- you know me, I'm the professor, right?

So, for all of the other types of taxes where
the Board is the administrator the tax, take the sales
tax, the Board Members have certain powers -- all within
their District -- to do different types of things that,
you know, FTB Board Members, you know, don't have.

It's a very different relationship to the
taxpayer as a Member of the Board of Equalization.

So, when that call from the small business guy with the mini-mart comes in to me or Tom or, you know, whoever, in a Board Member office, they're -- yes, they have a petition pending, which is a technical way that they appeal, if you will, their audit.

But they're still going through the process with the person who is administering the tax. It is the Board of Equalization that administers the tax. And so, to that extent, you know, Board Members certainly, at the very least, with respect to businesses within their districts, where they have certain powers, they -- you know, they may feel that that's a very different -- that that may be a very different situation than the type of situation FTB's talking about.

MS. CROCETTE: Marcy, this is Sabina with Betty Yee's office.

How would you define that given -- it seems a little troubling -- I am not saying it can't be done, but given a lot of the quote, unquote, "small businesses" when they come before the Board, they find find out they owe $5 million because, you know, they've got the side business, and they -- you know.

So, I hear what you're saying and I just don't know how we would define that.

MS. MANDEL: Right and it's -- somebody put us on hold again.

You know, I don't know. That gets into that
whole discussion that the Board Members had. And I
don't know that the Board Members, even on the thing
that I was just saying, if that's how Board Members
perceive their role or their rights under, you know,
what the law assigns them to do that they would even
think that for other types of taxes there's a difference
at all between a small business in the sense of mom and
pop or gross receipts or, as Sabina points out, you
know, they could look like, you know, a mom and pop, may
just mean that you didn't -- you are not a corporation
or does mom and pop small business mean you're a
corporation with gross receipts under a certain amount?

But, as Sabina points out, part of what happens
in the sales tax audit is auditors do whatever and my
example where they owe a million dollars off a one day
observation test, that's a tax.

So, their actual gross receipts for that three
year period was something much more humongous. And so
it is -- it's a difficult definitional question if
that's where -- you know, if that's -- if that was
something someone was going to define.

MS. RUWART: May I just interject?
This conversation, I think, obviously should be
continued, but our court reporters need to take a break.
We're probably about twenty minutes beyond
their -- or more beyond their break point.
So, perhaps we should take a fifteen minute
break. Come back at 20 after and resume from there.
And continue this conversation and topic.
Thank you.
(Whereupon there was a brief recess.)

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MS. RUWART: We will reconvene the meeting.

Okay, is there any -- hello. We're going to reconvene.

How long should we go?

MR. HELLER: I don't know. Definitely not more than an hour since we need lunch.

MS. RUWART: Right. So -- okay.

MS. HELLER: If that's a --

MS. RUWART: If -- if there's not a logical breaking point before 12:30 we'll go to 12:30 and then pick up.

Is there anybody new on the phone?

No. Great.

MR. MICHAELS: Is there anybody on the phone at all?


MS. MANDEL: Neil is -- he's --.

MS. CROCETTE: Board Member Yee's office is still on the phone.

MS. RUWART: Okay. Great. Let's -- yes, we were still talking about our three alternatives. Very productive discussion.

Steve, you were picking up where we left off.

Do you remember?

MR. KAMP: No, it's -- do I -- Oh, here's what I was going to suggest is this, in terms of an exception we've already carved out H.R.A. cases. I was going to note that our existing hearing rules make a difference between -- make a -- draw a line between people who are
represented and people who aren't.

And maybe if we drew a -- an excepted --
exempted basically pro pers from this situation -- from
these -- from these requirements. I would note the
corporations, that corporations not be represented by
natural persons, only a natural person could represent
themselves.

However, there are a lot of major taxpayers who
are natural persons. Whether they would represent
themselves, I don't know.

So, it's just another possibility, you know.

MS. RUWART: That's a good suggestion.

MR. KAMP: Yeah.

MS. RUWART: It's a good thought.

MR. HUDSON: I would like to just add to that
that, you know, I guess in the Legislature they always
talk about don't -- amend a bad bill, but to the extent
we want to make any changes in the proposal, I would --
I would suggest that the advantage of -- the advantage
of a rule like that where you've carved out people who
are unrepresented is that they're probably the people
who are very most likely not to have a copy of these
rules, not to understand the process, and so it's a
major workload issue trying to just explain to an
unrepresented taxpayer why you have to schedule the
meeting this way, why you have to invite the Franchise
Tax Board.

So, I think that's -- that's -- that's a great
suggestion for making this much more workable in practice because, you know, the people who have an attorney representing them are much more likely to understand before they talk to you what the rules are.

MS. RUWART: Very good. Any other comments on any of the alternatives? How they might apply? Questions for the proponents?

Very good. Thank you. Brad.

---oOo---
MR. HELLER: Okay, with that we're going to move ahead to the disclosure provisions. And they're in -- start with Section 5-- 5000.5033, and the page number I'm giving you right now is on page 45.

And there were -- I'd say the first alternative is on page 45. And that originally represented the Board's current policies with regard to disclosure of information relevant to a Board hearing. There have been some minor modifications to it that really don't change the substance of it, but do make the language in a procedural aspect conform with the language that was presented in 5000.5033, the second alternative. And that was more in just being more concise and just generally taking some of the ambiguity out of the Board's previous -- previous regulatory language on this disclosure issue.

But, essentially, it really didn't change anything substantively. So, under the first alternative, this is on page 45, the Board will essentially -- essentially just continue to disclose the conven -- the transcript of an oral hearing, the minutes of an oral hearing, and records that are enter -- or documents that are entered into the record of the oral hearing.

All those will become disclosable public records. Other -- no other information is addressed
in -- in that policy or in Regulation 5033, the first alternative.

   Moving to the second alternative is -- is multiple sections, and this is because it -- it calls for expanded disclosure. And so, under that it basically sets out 5033, first or -- 5000.5033 for the second alternative, which essentially now almost mirrors the first -- the first alternatives on which -- and just deals with more specificity with the same -- same documents and same transcripts and minutes.

   Then it moves to another provision, Section 5000.5033.1, which is -- there's only one .1 for the second alternative. And then this one discusses the waivers that are inherent in proceeding to an oral hearing before the Board.

   And then it addresses the fact that by filing an appeal with the Board, the taxpayers -- or filing an appeal from the Franchise Tax Board with the Board constitutes a waiver of the taxpayer's confidentiality with regard to information that both the Franchise Tax Board and the -- and the taxpayer are sharing with the Board.

   It also points out that -- that requesting an oral hearing in a -- in a business taxes matter also constitutes a waiver. And the same with property tax matters.

   And then it goes through and describes what those waivers apply to for those two different programs.
For business taxes purposes it's very limited. It's still basically just -- it's just information that's disclosed on the actual transcript of the oral hearing or information included in -- in the hearing summary prepared for the hearing.

For property tax matters it's -- it's a more extensive list. There's the petition or application and any supporting documents. The briefs that were filed. The hearing summary that could be prepared. And any other information provided to or obtained by the Board that's actually disclosed on the transcript of the taxpayer's oral hearing.

MS. MANDEL: Can I ask you a question right now?

MR. HELLER: Certainly.

MS. MANDEL: Is this Alternative 2 current practice and just more descriptive of current practice? Or is it beyond current practice?

MR. HELLER: Alternative 2 is -- goes beyond current practice with regard to -- especially with regard to --

MS. RUWART: Timing.

MR. HELLER: Well, with regard to timing, for all -- well, I should say with regard to appeals from the Franchise Tax Board it actually is very descriptive of current -- of our current practice --

MS. MANDEL: Okay.

MR. HELLER: -- which is that essentially we do
disclose all the information that we received with regard to a Franchise Tax Board appeal.

MS. MANDEL: Okay.

MR. HELLER: With regard to Business Taxes and Property Tax matters it's -- it's different and in two different ways. One dealing with timing and one dealing with the type of information that's going to be disclosed.

And so, first off for timing purposes, and I was just going to get there, the next Subdivision (d) talks about the effective date of these -- of these waivers.

So, just because someone files -- requests an oral hearing doesn't necessarily mean we're going to disclose all their information.

What this effective date says is that the waivers, themselves, they become effective on the date the Board issues its first public agenda notice showing that the matter's been scheduled for an oral hearing.

So, to the extent that these matters are resolved before a public hearing, in a Business Taxes or Property Tax matter there wouldn't be any need for disclosure there. It would only be with regard to -- to matters that are -- actually end up on a public agenda notice because they've been scheduled for a Board hearing.

In those cases, though, the effective date is then the issuance of the public agenda notice. So, that
the information that I've just described that we would now disclose can be disclosed prior to the actual hearing.

So, now a third party or anyone else who wants to be able to understand what the Board's doing at the particular hearing as far as -- as far as actually seeing a copy of the hearing summary, for instance, and knowing what issues are being presented, would be able to do that at the hearing.

Basically, under our current procedures for Business Taxes, we would only disclose for Business Taxes normally just the transcript of the oral hearing and the minutes of the oral hearing, and any documents that were entered in the record.

So, you would not get the hearing summary. And then those documents we would only disclose to you after the hearing had concluded. So they wouldn't be of use to a person trying to participate or watch the hearing. But it would be useful to somebody who's just trying to figure out or get a good recollection of what -- what actually happened in the proceeding.

For Property Tax, and I think Carol can help me with this but, one, it also -- what disclosure we do do in Property Tax currently happens after the hearing. And this shifts that again to as of the -- the date that the public agenda notice is issued. And then I believe it actually covers pretty much the same documents that would be disclosed --
MS. RUWART: It is intended -- the list in Subdivision (2) is intended to capture the scope of what is currently disclosed at the conclusion of the oral hearing.

MS. MANDEL: Okay. And --

MR. MICHAELS: At the conclusion.

MS. MANDEL: Currently at the conclusion under this proposal.

MS. RUWART: What is currently -- what is currently disclosable -- I suppose technically it's after the hearing has begun.

MR. MICHAELS: Well --

MS. RUWART: But --

MR. MICHAELS: Go ahead.

MS. RUWART: -- they real -- realistically it's after the hearing is over and somebody wants a set of public --

MR. MICHAELS: Yeah.

MS. RUWART: -- records.

MR. MICHAELS: That's for sure.

MS. RUWART: That's what they get. And it's intended to capture that. It's just to move up the date to being ten days before.

MR. MICHAELS: Would --

MS. RUWART: So --

MR. MICHAELS: Would that -- this -- there's a notice that I copied here that accompanies most writeups before a hearing. This is a staff writeup, and it says
on it here, "Unless the Board objects or otherwise
holds, the Board will take official notice of," and then
it lists a whole litany of -- of documents broad --
broadly described that the Board will take official
notice of.

Does that then slip into the actually disclosed
on the transcript of the taxpayer's oral hearing?

    MS. MANDEL: So the A.D.R. and everything.

    MR. MICHAELS: So, the property statement, the
attachments, report, studies, experts, work papers, all
that stuff is -- is public.

    MS. RUWART: Diane, how do you guys
interpret -- I mean, I know how I interpret that, but
how -- do you know what he's asking? When you get a
Public Records request, how -- how do you currently
respond?

    MS. OLSON: You know, I don't know.

    MS. RUWART: Oh, I am sorry. You're -- you're
the wrong person.

    No, I -- I'm --

    MS. OLSON: Gary -- Gary might.

    MR. EVANS: We call Legal.

    MS. RUWART: Yeah. No, my -- my
understanding is that -- is that it is not -- not the
property statement and all that. It's -- all we
disclose is the petition and everything that came
afterwards.

    MR. AMBROSE: Yeah. This is Lou Ambrose.
Yeah, we -- every -- everything the petitioner has submitted and that valuation is put into the record, you know, in support of their -- their response is disclosable.

MS. MANDEL: But that's why --

MS. RUWART: But it's from the petition onward.

MS. MANDEL: But that's why Peter asked the question.

MS. RUWART: Right.

MS. MANDEL: Because with the --

MR. MICHAELS: Right.

MS. MANDEL: -- because with the hearing summary or whatever we -- those different documents we get now, it says at the bottom what he just read, which is that --

MS. RUWART: The official --

MS. MANDEL: -- the Board will take official notice of --

MR. AMBROSE: Right.

MS. MANDEL: -- these four things.

MR. AMBROSE: Right.

MR. MICHAELS: Right.

MR. HELLER: Right.

MS. MANDEL: So, are those items that are actually disclosed on the transcript somehow?

MS. RUWART: Those go into --

MR. MICHAELS: Yeah.

MR. HELLER: Well, we would --
MS. MANDEL: So, that's his question.

MR. AMBROSE: I don't think so.

MS. RUWART: That's --

MR. AMBROSE: I don't think we -- I don't think we can ever disclose the property statement without a waiver.

MS. MANDEL: And his question is whether this rule then would --

MR. MICHAELS: Sweep that in.

MS. MANDEL: -- automatically constitute a waiver. That this rule sets up an automatic waiver.

MR. MICHAELS: Because, I mean, it does say the taxpayer waives its right to confidentiality.

MS. RUWART: Yeah.

MR. MICHAELS: You can choose between --

MR. AMBROSE: Where -- where are you reading from?

MR. MICHAELS: -- due process or trade secrets. Choose one.

MS. RUWART: My -- my understanding is that's not how we've interpreted it in the past. But I can see the issue and so let me go back and just clarify that answer.

MR. MICHAELS: I didn't mean that critical.

MS. RUWART: No, it's a first -- it's definitely a legitimate issue. Let me go back and clarify that.

My understanding is, though, is that we have
not disclosed the property -- anything that was
pre-petition. We've only disclosed things that were
from the petition onward.

MR. MICHAELS: Yeah, there -- the -- I think
institutionally, in the Valuation -- I don't think
there's anyone from Valuation here, but Lou, you'll be a
good voice for them.

They've been really, I think, respectful in the
past and accommodating, but that's not to say that their
successors would be and they generally have taken the
position that if -- if what you file is part of the
property statement that gets filed on March 1st, it's
off limits. But --

MR. AMBROSE: Right.

MR. MICHAELS: -- if you supplement your
property statement with a report that maybe you didn't
even have on -- on March 1st, such as the one we turned
in yesterday, that's not part of your property
statement, and then suddenly it's fair game and there
goes the neighborhood.

MR. HELLER: Absolutely.

MS. RUWART: I will --

MR. AMBROSE: What you -- so, you -- you know
of instances where that's actually gone to the record?

MR. MICHAELS: You know, it's -- it's a -- it's
almost an impossibility for these big regulated
utilities to turn all of the reports and everything in
by March 1st.
MR. AMBROSE: No, I'm not saying that.

MR. MICHAELS: So they get extensions and it's not part of the property statement.

MR. AMBROSE: Right. They -- but the way I read this, it's only something that's filed in support of your petition on your brief. What you're saying -- I mean, what I'm understanding you to say is something that's supplementing or augmenting or whatever, a property statement, which to me, I mean, that's completely different.

MR. MICHAELS: But couldn't you -- I'm not thinking about me so much as -- as you. Could you or could your client or however this is configured, say we'd like to introduce the, you know, study that was turned in here in support of the property statement as Exhibit A. I mean --

MR. AMBROSE: No, because it's yours. Not -- not a third party's.

MR. MICHAELS: But -- but it might make your case. You may see something in there where you say --

MR. AMBROSE: Or because the petitioner had previously submitted it --

MR. MICHAELS: Yeah.

MR. AMBROSE: -- during the --

MR. MICHAELS: Yeah. Because I --

MR. AMBROSE: I think that the practice -- you know, the policy would be that they wouldn't. I mean, just like they wouldn't disclose --
MR. MICHAELS: They're nice. I mean, I don't know if that's really the real deal, or they're just being nice about it.

MR. AMBROSE: I think --

MR. MICHAELS: You know, because --

MR. AMBROSE: I can't recall offhand if -- you know, there's something in writing but, I mean, that's always been the practice.

MR. MICHAELS: Yeah. Well, I mean, it's -- it's just sort of license for mischief but -- in -- in my mind where someone could very, very liberally construe this to include everything that the taxpayer submitted.

MS. MANDEL: It's -- under --

MS. RUWART: Because of that official notice provision.

MR. MICHAELS: Yeah.

MS. MANDEL: Yes.

MR. MICHAELS: It all gets swept into this thing here.

MS. MANDEL: I have a question on the effective date.

MR. MICHAELS: Any attachments, any work papers, any studies, everything.

MS. RUWART: I will reconcile that, yes.

MS. MANDEL: I have a question on the effective date.

MS. RUWART: Yes.
MS. MANDEL: So, this waiver starts with the
public agenda notice --
MR. HELLER: Uh-huh.
MS. MANDEL: -- which is the ten-day notice.
And -- but if the taxpayer -- oh, the -- may be -- the
waivers may be rescinded by the taxpayer at any time
before it becomes effective. Before -- what's the "it"?
Not the taxpayer becoming effective. The waiver?
MR. MICHAELS: The waiver.
MS. MANDEL: Before the waiver becomes
effective if you agree -- so, if a taxpayer waives its
right to an oral hearing after the public agenda notice,
that's not rescinding the waiver.
MS. RUWART: Correct.
MR. HELLER: Correct. It becomes effective,
anyway.
MS. MANDEL: But you haven't made a waiver
until the public agenda notice, so how do you ever
rescind a waiver before it becomes effective? That's my
question.
MR. HELLER: The way it's set up is -- excuse
me, it's Brad Heller. The way that it's set up is the
waiver actually occurs when they -- when they go ahead
and request the oral hearing or file the brief or the
appeal or so on back in the -- in the earlier
provisions.
So, it's -- for instance, under Subdivision (b)
it says, "The filing of a written request for an oral
hearing before the Board pursuant to Chapter 2 shall constitute a waiver."

So, that's the waiver. The waiver is there. They've given us a waiver --

MS. MANDEL: Oh.

MR. HELLER: -- by filing it.

Now later it says that waiver, though, while having given has a future effective date. It's not in effect. We wouldn't now immediately disclose your information to a third party.

MS. MANDEL: Okay, I understand. I see what you're saying now.

MR. HELLER: So, if you go ahead and waive your right before it's effective, then we can go ahead and -- and we will let you rescind the waiver that you gave us and it will never become effective.

MS. MANDEL: Okay. So that probably answers my second question, which was you're on a public agenda notice and before the hearing date your hearing gets postponed for some reason. The waiver is still --

MR. HELLER: It would still be effective.

MS. MANDEL: It's still -- it's not one of these that goes away again and becomes re-effective with a new public agenda notice?

MR. HELLER: Right.

MS. MANDEL: It's just out there.

MR. HELLER: Right. And that's -- yes.

MS. MANDEL: Okay.
MR. MICHAELS: Can you trans -- say that --

MS. MANDEL: In a better --

MR. MICHAELS: I didn't quite get it. So, therefore -- therefore, if you get a continuance --

MR. HELLER: Right.

MR. MICHAELS: -- you're not out of luck or you are out of luck?

MR. HELLER: You would be if you got -- if the -- if you're granted a continuance after the public agenda notices come out --

MR. MICHAELS: The first one.

MR. HELLER: Right, the first one --

MR. MICHAELS: Right. Postponed to --

MR. HELLER: -- then you are out of luck as far as withdrawing your waiver. You cannot rescind your waiver after it's become effective. And it would have become effective when that first public agenda notice was issued.

So, it doesn't allow for us to reschedule that hearing and therefore allow the waiver to be postponed -- postpone its effective date again.

MS. MANDEL: Which is different than a lot of the other places where we have public agenda notices that trigger.

MR. HELLER: It's different than -- I think the main place where we have it as a trigger is in SEIU's alternative proposal for the communications with Board Members.
And in that one it does allow us to essentially
sort of take back --

MS. MANDEL: Oh, I'm thinking of another thing
that's not in regulatory form. I'm thinking of a legal
opinion.

MR. HELLER: Okay. At least that's been -- the
only other thing I think we have in this current package
of regulations that's similar, and that one it does
allow it because I think -- at least in that case we
were focusing on information relevant to the hearing.

MS. MANDEL: Right

MR. HELLER: Here I think it was -- I'm not
really sure, but it's something we could consider if
it's -- it becomes a point.

MS. RUWART: Steve.

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MR. KAMP: Steve Kamp for Board Member Yee's office.

Couldn't a lot of the taxpayers' concerns about confidentiality on things like property statements, the public disclosure only goes to what you submit for consideration by the Board, let's say, for a reassessment hearing or anything that goes beyond the audit process, couldn't that be resolved if the taxpayers just redact everything they don't need as in, say, the property statement to argue their case?

MS. MANDEL: But I think it has to do with what -- what happens on the Board staff side, not what happens --

MR. KAMP: Okay.

MS. MANDEL: Not necessarily what happens on the taxpayer's side.

MR. KAMP: Okay.

MR. MICHAELS: That's exactly right.

Once the taxpayer turns it over, does that mean it's fair game if the taxpayer files an appeal?

MR. AMBROSE: What about -- what about putting in a broad exception, like, you know, "Unless otherwise prohibited by staff," you know, "Disclosure is otherwise prohibited."?

For property statements there is a statutory prohibition for disclosure, right?

MR. MICHAELS: Well, yeah. There seems to be a
disregard of what is prohibited by the statute and in
what other context.

So --

MR. HELLER: Bradley Heller again. It's
problematic language about it and it tends to not convey
any distinct message to the reader.

MR. MICHAELS: Yeah.

MR. HELLER: You don't know if this will be
disclosed.

Now you need to be Brad Heller and go out and
start reading all of the different statutes that apply
to disclosure and reconciling all of the conflicts and
then you still are stuck in Peter's situation of hoping
that I did it in the manner that he would have done that
same research.

So, it's very helpful, I think -- assuming we
can come to an agreement on what is covered a statute or
not, and then to go ahead and explain whether that is
disclosable or not disclosable -- creating some catchall
that might just apply broadly to things.

MR. KAMP: There are some specific statutes
7056 in sales tax, 400 something for State assessees and
there's a a property tax assessor records, things like
that.

You could specifically cross reference those
and probably cover a lot of ground.

MR. HELLER: Well, sort of. I mean -- there
are some technical issues referencing those sections, I
think

MR. KAMP: Yeah.

MR. MICHAELS: Yeah.

MR. HELLER: And essentially what this proposal
does is it essentially establishes a waiver of
confidentiality.

And so what we need to do is define the
parameters of that waiver and not learn -- not look to
what was confidential before there was a waiver.

Because that's -- it essentially gets us back
to our original discussion again there and not dealing
with what's disclosable, but instead -- or what's -- or
what we can disclose but essentially going back to what
are we prohibited from disclosure if the taxpayer hasn't
given us a waiver?

MS. RUWART: Tom?

MR. HUDSON: I want to be clear, the purpose
behind even putting this in the rule sounds like
particularly the alternative that's kind of what we do
now and I want to be sure I can communicate that to my
boss.

Why are we -- why are we specifying this
waiver? Is there a problem we're trying to solve with
this?

MS. MANDEL: Why is the recommendation with
Alternative 2, unlike the last time we talked about --
these were both drafted by staff -- and then the
beginning says that staff's recommendation is going to
be Alternative 2.

So, how does he explain that? Why?

MR. HELLER: Let me explain. There are a
couple of different things that are being accomplished
within this regulation.

But, first off, basically there's not a big
change in current practice or anything that really needs
to explained very much with regards to appeals from the
Franchise Tax Board. They're pretty much treated almost
exactly the way they are currently. There's a little
bit of language that deals with redaction of some
personal information dealing with bank accounts and
things. That would be the only change or really even
not even quite a change, but a codification of some
existing policies that have on Franchise Tax Board
appeals.

For business taxes matters, though, there's a
very big change that that's being proposed here. And
essentially, as Mr. Kamp was pointing out, there are
code sections that prevent Board staff from disclosing
confidential taxpayer information relevant to most of
the business taxes matters. And the Board does need a
waiver from a taxpayer to go ahead and disclose that
type of information.

So, currently, Board has historically -- or I
should say the legal Department has historically
interpreted going and requesting an oral hearing and
appearing at an oral hearing conducted during an open
open session as a public meeting does represent a waiver
of that taxpayer's right to confidentiality with regard
to what they're going to discuss and permit the Board
staff to oppose at that hearing in front of the public.

But what this is does is then say, "Well, what
does that waiver really apply to?" And it goes to,
basically for business taxes purposes, fleshes out that
waiver. And it actually gives some guidance on what
that waiver actually applies to.

As of right now there's -- it's an unwritten
waiver that I would say some litigants are aware of and
others aren't and even some representatives are aware of
and some are not.

So, this does provide clarity as to what the
waiver is and when it's applying and also as to what it
applies to, what kind of information would be disclosed
so no one would come back later on and say, "Oh, my
goodness, somebody got my hearing summary, I didn't know
they would get that."

Now they would know. Same with like a
transcript of the hearing, in fact, for instance.

For property tax purposes it's not a major
change in the amount of information that will be
disclosed, although other than some of the details that
Peter has pointed out, which I think we can still work
on what is exactly supposed to be disclosed, but the
real change there was -- was based on when the waiver
applies. And, basically, prior to this set of rules,
the waiver for a property tax matter would apply after the hearing was conducted so that the same information that we're listing here, or something very similar to it, would be disclosed at the conclusion of a hearing.

This makes -- basically goes into discussing the waiver and making it applicable prior to the hearing so that the information would be available to the third parties and people who wanted to actually see and understand what the Board's doing at that actual hearing in front of the public.

I think those are really the main two things that are being done here. The two -- well, two areas that are being changed and those are the changes that are being made in those areas.

Other than that, it really goes along and does a couple of other things. This kind of leads into -- it codifies an idea that we're trying to protect certain information from identity theft, so it also creates an exception so that the Board can go ahead & redact out information like personal addresses and bank account numbers and things like that.

And then it also it creates a new procedure for the Board to consider matters in closed session. That's in subdivision -- that's in also in the exceptions in subdivision E, paragraph 2 on page 50. And so, basically beforehand, in a prior draft of this proposal, we had basically said that the -- I think the Chair, the Board Chair could take whatever actions are necessary in
his or her discretion to protect sensitive information, or something to that effect, I believe.

And there really was not any broad support for that kind of language or work for such an undefined procedure, at least at the last interested parties meeting.

So, staff -- staff looked at quite a few comments that were received, several very good ones from Peter Michaels as well, that basically pointed us towards the closed session procedures, which are available to the Board under the Open Meeting Act.

And basically then, through that, it says that this waiver that we have been discussing all along won't apply to a matter that is going to be discussed in closed session.

---00o---
MR. HELLER: Then there is another regulation coming up, Section 5000.5033.2. That then goes through how that -- how somebody would request closed session and the procedures for reviewing that request and then that is also based on comments that we received at the last interested parties meeting. We incorporated some judicial standards for specific items dealing with -- where is that now? It's in -- hold on.

MR. KAMP: Page 51 and 52

MR. HELLER: Page 51 and 52, and it basically deals with trade secrets and other confidential or commercial information, which are statutorily -- well, they're statutory terms which have been defined by the courts with regard to the sealing of information in civil proceedings.

And so we incorporated, basically, those same definitions and made it possible for a litigant, or I should a party a Board matter, to request a closed session by going ahead and describing these types of information and providing information that would indicate that it would be relevant to discuss after a particular hearing since we don't think a closed session would be necessary just because a company has a trade secret, but if it's going to be disclosed on the record at an open meeting, that would be a concern.
We want both qualifications to be included in the request. And then it essentially allows the Chief Counsel to review the request and prepare a recommendation for the Board Chair, who then can decide whether or not to have a closed -- schedule the matter for a closed session.

And this basically it's just -- I'll just finish real quick and I will go through some questions.

But essentially what it does is then allows the Board Chair to schedule a closed session. Once the closed session, the Board -- the other Board Members may object to the closed session. And if a motion to hold the matter in an open session passes, by a majority vote of the Members at that closed session, then the matter will be rescheduled for an open hearing.

And this is a mechanism that we came up with which would allow the full Board to decide on whether something should be heard in closed session but, at the same time, they can't do that without being an actual meeting, so, they have to actually be in closed session to actually discuss somebody's confidential information that they don't want disclosed. This is really one of a very few mechanisms that would allow this information to end up in a closed session before all of the Board Members, who could then decide whether they really wanted a closed session to be held, or in the discussion of the merits of substantive matters of the hearing.

So, that's completely new as well.
MS. MANDEL: I have a question?
MR. HELLER: Uh-huh
MS. MANDEL: Is it contemplated that -- that if there were trade secrets, that the entire hearing would be conducted in closed session or that only the part of the hearing with respect to taking that testimony and any discussion of that testimony or that that documentary evidence would be sealed?

Because there's a difference. The one that I was involved in a hearing that had trade secrets, it was while that witness was testifying, we cleared the Appeals Board room. And then once that witness was -- and that part of the transcript was sealed and any documents that came in as part of -- while he was testifying, were sealed. But that the rest of the hearing, of course, we didn't -- it had to do with the specifics of how many cars people rent at different airports and things and we didn't put any of those specifics in any type of briefing or anything. Of course, the Assessment Appeals Board doesn't deliberate in open session, so, that's another difference between the Board. I know at -- when I sat on -- what Board was that, Board of Control, for particularly sensitive cases sometimes they actually discussed some things in closed session. But -- I mean how is this contemplated?

Because it wouldn't --

MR. MICHAELS: Well, even I --

MS. MANDEL: It wouldn't seem that necessarily
the entire hearing --

MR. MICHAELS: No, I've never ever thought
that, nor meant to suggest that.

As far as I'm concerned, the only circumstances
where a hearing should be closed to the public is if
proprietary and confidential trade secret, business
affairs information is front and center, you know, and
there is a bright light being shown on it.

That's not an excuse to close the whole
hearing, it's just a reason to close the hearing during
the discussion of that specific information

MS. MANDEL: And it gets -- because the
Board -- this Board deliberates and makes its decision
in open session, to the extent the Board Members after,
let's say, they closed the part of the hearing that had
to do with the confidential discussion, you know, maybe
that's three minutes of your pitch or two minutes of
pitch or maybe you have a witness or something or some
document. Then when the Board deliberates, presumably
the Board would have deliberate as to that issue, and if
they are going to say anything out loud --

MR. MICHAELS: Depends what they say.

MS. MANDEL: -- they can go into closed session
and say what they have to say.

So, anyway, that was my -- because it didn't
seem like it was either clear or necessarily the whole
thing be closed.

MR. HELLER: Basically staff contemplated doing
the entire hearing during closed session and is
definitely open to these comments.

But, essentially, staff's big concern was that
it's very possible that these -- that this kind of
information permeates the hearing. And we also received
some comments at the prior meeting on Part 5 concerning
the ability to bind a particular Board Member to not
discuss something during an open session. So, that
created the potential for them to be an open session in
deliberative forum with confidential --

MS. MANDEL: It's always hard to control what
comes out of the mouth.

MR. HELLER: -- that there was a risk.

But staff certainly wasn't trying -- certainly
thinks the Board Members can handle that. It's just --
it was the basis for us thinking that the entire matter
should be closed.

We can change that to just for the discussion
of the confidential information.

MS. MANDEL: It would seem if it was -- I mean,
I don't know how we will ultimately decide this -- but
it would seem that there was, you know, two clear
issues, there might be a difference.

But then again, you know, the Board hearings
are so different than a local Assessment Appeals Board
hearing where you actually conduct the full trial. So,
sort of closing it for the half hour the guy is on the
stand in a 2 week Appeals Board hearing is a little
different than what they do up here.

I was just wondering.

MR. HELLER: I think it -- I mean it's something we can prepare alternatives or it's definitely something I think if we go forward with this proposal to the Board Members we want to make clear that there are alternatives, there is potential alternatives, although staff probably will try to come up with a recommendation.

We'll make sure that we -- assuming something does go forward, that the Board Members are briefed that there's -- there are options on whether to close the entire hearing or to only close the portion with the confidential information.

And, I think, staff really could go either way. I don't think we were concerned to try to limit the Board Members or the taxpayers' presentation at all, we were just concerned that once, you know, the Chair decided something was sensitive and confidential that we not take any additional risks.

MS. MANDEL: Okay.

MR. KAMP: Steve Kamp, Board Member Yee's office.

Noting on page 51 of the underlying -- you have at the very top of the page subdivision (A)(2), "The Board may not conduct oral hearings requested during a closed session," and it appears in A, any State assesses reassessment petition.
I assume that is because of a very specific statutory provision?

MR. HELLER: That's correct.

MR. KAMP: If it is -- it's not 721.5, as the definition, it's 733 or something like that and I think you ought to cross-reference that, quote it, because that's why you can't.

And then you say are not going to conduct any closed hearings on an FTB proceeding, which is a reason for that.

MR. HELLER: That's correct.

There's also the same statutory authority that -- the same statutes that the Board has interpreted -- the Board has interpreted the disclosure provisions with regard to Franchise Tax Board appeals as requiring the Board to disclose and treat as public records all of the briefs and all of the documentation.

MR. KAMP: Right.

MR. HELLER: So, to close a hearing would make no sense. So, that's really what was the basis was, although it's not -- I think the Open Meeting Act would allow us to do it in some respect, but then, essentially, all of the information would be public then anyway.

MR. KAMP: My recommendation --

MR. HELLER: I'm not really sure.

MR. KAMP: is to make some references to that authority in here just so for people understand why.
MS. MANDEL: I only one time can remember on franchise tax case being asked what the Board's position is on closed hearings because it was the -- there was -- there was a significant view of something that they would not want public, that they were convinced that if they were in a court they would be able to get it sealed.

And I know that they talked to -- you know, I referred them to Boyer at the time when he was here, and I believe, because of the differences -- it's an option. They don't have to come to the Board. People who know that will simply take their case to the court where they can get it sealed. And that's their choice.

MR. HELLER: Correct.

MR. KOCH: Question, Al Koch.

This is on Alternative 2 and the exceptions. In some matters the name of the taxpayer is regarded as confidential, but not in this. I am just wondering about that.

And the second thing is cap B, I don't quite understand what can be disclosed, in the briefing, I mean.

You wouldn't want trade secrets disclosed in the briefs of the Board, I assume, but this --

MR. HELLER: That's correct.

MR. KOCH: -- this seems to exempt those.

MR. MICHAELS: Al, what are you -- what B are you looking at? What page?
MR. KOCH: I'm looking at (b)(1)(b).

MR. MICHAELS: (b)(1)(b).

MS. MANDEL: What's the page, Al?

MR. KOCH: Page 50.

MR. MICHAELS: (E) -- yeah, (E)(1)(b), I see.


MR. HELLER: Okay, what was (E)(1)(b) designed to do?

Well, essentially, what we were trying to do in subdivision (E)(1)(a) was describe certain information that's typically used in identity theft, and basically point out that the Board's going to try to not be a source for information for identity theft in the future. So, this was information that we were going to redact.

But in discussions with the Franchise Tax Board, it became clear that there were situations where you might need to speak about information that we wouldn't knowingly disclose and we want to make it clear that to the extent that it's relevant to a hearing that it could be used in a manner that won't disclose this information otherwise.

So, what -- what (E)(1)(b) says is it says that, (E)(1)(a) doesn't prohibit the party to a Board hearing where the Board Members or the Board staff from referring to the information described in A, in briefs or in the -- in briefs filed pursuant to this division or in any manner that will not disclose a person's actual address, telephone number, Social Security number.
and so on.

So, essentially as long as you come up with a proxy and a manner to refer to them, they would still be able to have a discussion and be referred to --

MS. MANDEL: We could refer to --

MR. HELLER: -- you know, Retailer AA, for instance, as opposed to the retailer's name or --

MS. MANDEL: -- or the one that we had a while ago, sort of slipped through, where we got -- where we had a decision document came out that actually had someone's street address. We got called by someone on the outside who said, "Oooh, don't." So, instead of -- saying -- on residency case, "Oh, well, they have their house at blahdy, blahdy blah, such and such lane, Cota de Caza, just say they have their house in Southern California.

That would be a way of referring to it, if necessary, without --

MR. HELLER: Right.

MR. FOSTER: And that's typically how we do it already in the appeals, we'll say, you know, the house in, you know, Reno versus the house in Los Angeles.

We don't provide any specific addresses.

MR. MICHAELS: I had a question about this CCP definition of trade secrets.

Were there other definitions? Is that -- I have seen definitions myself and researched this. And I'm, I guess, wondering when I read it, you know, I
thought about applying it to some of the folks who I typically represent and whose secrets I protect.

And, you know, the standard here, "unwarranted annoyance," that kind of assumes that there is some level of warranted annoyance.

"Embarrassment or oppression," well -- golly, you know, I don't think PG & E is going to be embarrassed or very convincingly argue its oppressed or even annoyed. Is that going to apply to, you know, big institutional taxpayers or is this, you know, more of definition that's targeted at individuals who don't want their life ruined?

MR. HELLER: Well, I think there was no intent of narrowing the definition to avoid certain taxpayers. And it was actually -- this is the definition that is used in the CCP for -- basically for -- that defines what -- what a Superior Court can seal or take any other action, like to go in camera or anything.

So, it's really a broad definition that courts use to describe all of the confidential information that's subject to their authority to protect.

So, that was really -- I did look at some other -- I looked at the Tax Courts rules and things like that and we're very, very amenable to the way -- the procedures that we have outlined here and their definitions didn't seem to work very well and I feel California law would be better than the very specialized federal tax law.
But to the extent that there is some better language or something that we would be able to define, the only other reason -- I should say I also chose that because it does have a lot of case law underneath those definitions.

MR. MICHAELS: I will take a look.

MR. HELLER: And I did find that in there. So, the case law is tied in there as a part of --

MR. MICHAELS: Good

MR. HELLER: -- well, in subdivision (F), it specifically references the judicial history, so --

MR. MICHAELS: I'll take a look at those interpretations.

MR. HELLER: You're trying to make it something that would have some definitive, you know, measure because the interested parties did make it very clear at the last meeting on Part 5 that they really didn't want -- they didn't want an ambiguous standard, that they wanted something that would be clear and you could tell when something is confidential.

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MR. KAMP: Steve Kamp. I was not -- Steve Kamp from Board Member Yee's office. I would note that this position governs PG&E, for example --

MR. MICHAELS: I don't represent PG&E, by the way.

MR. STEVE: But I -- I want to say -- you're right, you're not. I'm just using this. Anybody who -- it governs anybody who goes into Superior Court.

The other point I would make, though, is I think elsewhere in these -- in Alternative 2 you basically have the Chief Counsel making a recommendation to the Board Chair.

I think -- because this is going to be more work, I know that the Board has requested a budget augmentation for public -- for responding to Public Records Act requests.

I think you might try to use some of those resources for this work.

MR. HELLER: And just real quickly to follow up with that, that -- we did remove -- well, I should say the definition for "Chief Counsel" at the beginning of this part does include the Chief Counsel or his or her designee. So, in every type -- instance where you're seeing "Chief Counsel", the Chief Counsel will be probably delegating the -- the actual function and --

MR. KAMP: But I'm just bringing that up.

MR. HELLER: Yes.

MR. KAMP: Because you had me aware, that is
where you could probably use the resources the Board
supposedly, I believe, would be having.

MR. HELLER: Right. Yeah.

Yes, I think that's very good.

And we're really hoping -- also, I think,
in -- previously, in the prior procedure was all
directed towards the Chair. This gives the Chair some
advice from the -- from the head attorney for the
agency on -- on the judicial standard, whether something
is in fact confidential or trade secret.

And so I think that it represents a -- an
improvement, at least, in that respect, procedurally.

And just --

MR. KOCH: Brad, Al Koch again.

MR. HELLER: Please.

MR. KOCH: I'm afraid I didn't -- I didn't
understand your answer to my previous question.

MR. HELLER: Okay.

MR. KOCH: Are you saying that trade secrets
can be disclosed in -- in the briefs of -- of the Board?

MR. HELLER: Well, the way that this would --

MR. KOCH: Under -- under (e)(1)(B).

MR. HELLER: The way that (e)(1) -- well, let's
put it this way.

MR. KOCH: Because those are public documents.

MR. HELLER: Right.

Well, let's put it this way, they -- they're
public documents -- briefs are public documents only in
certain circumstances.

So if we're talking about an appeal from the Franchise Tax Board or a Property Tax case, then the briefs themselves can become public records. And so you're -- you're absolutely correct with having a concern about any kind of confidential or trade secret information that can be in those.

And what this essentially says here in (e)(1)(A), and I'm back on -- on page 49 here, is that when the Board goes ahead and responds to a Public Records Act request for one of those two types of briefs, we're going to go ahead and redact out the type of information that's been included here.

So, you're not prevented from discussing it in your brief. We're just going to make sure that we don't respond to a Public Records Act request by including that.

And this is what -- I should say that's all that (e)(1)(A) says, is that the Board's not going to provide this information. What -- what (e)(1)(B) says it then goes back to really what your question is, and I think it says -- it says here you're not -- you're not going to -- it doesn't prohibit any party from referring to the information described in this paragraph in their briefs. So, it's specifically saying you can file your briefs and put it in there. And as I explained, it's going to be the Board's staff's job to get it out if there's a Public Records Act request.
And then it says even further that when you get to the oral hearing and you want to, let's say, reference this type of thing outside of a closed session, it permits you to discuss it in a manner that won't disclose the actual name or information or whatever.

So -- so, we're hoping that we can still facilitate the hearing but protect like the -- you know, the Social Security number of everyone's dependence in an Income Tax appeal, for instance, would be our goal. Or -- or partnerships' lists of bank account numbers, or something to that effect would be what we're trying to get at here.

Does that help address the question?

MR. KOCH: Yes. Perfect. Thank you.

MR. MICHAELS: And it -- it does -- you did highlight "in briefs" but, you know, the antecedent there, nothing shall prohibit -- prohibit a Board Member.

Well, Board Members don't write briefs. Board Members don't --

MR. HELLER: That's true. So "Board Members" could be deleted, I would think.

Board staff occasionally write briefs. I think that would work, right?

MR. KAMP: Which -- which page are you referring to?

MR. HELLER: Oh, he's on page 50 now.

MR. MICHAELS: The one that Al was talking
about? (e)(1)(b).

MR. HELLER: (e)(1)(b), it's the very top of page 50.

MR. MICHAELS: "Nothing in this paragraph shall prohibit any party to a Board hearing, Board Members."

MS. MANDEL: Well, but from referring to the information.

MR. LANGSTON: Referring to it.

MR. MICHAELS: Oh.

MS. MANDEL: So, at the Board hearing I -- I should --

MR. MICHAELS: From referring to it, yeah.

MS. MANDEL: -- I -- I should say XYZ --

MR. MICHAELS: Yeah. No, it's correct.

MR. KAMP: Steve Kamp. You also have to --

MR. MICHAELS: It's right the way it is.

MR. KAMP: Steve -- Steve Kamp. You also have to do it in a situation you don't disclose this -- you know, this taxpayer identifying information.

I would also recommend that the word "Board Member Staff" be added to this --

MR. HELLER: Okay.

MR. KAMP: -- because it's left out there. And I'm not quite sure what the intent of doing that was, but, yeah.

MR. HELLER: Okay.

MR. HUDSON: I think how that comes up, yeah.

MR. HELLER: Let's see.
And I think that's pretty much -- it just wraps up, there's a 5000.5033.3, that's the final part of Alternative 2. And that just basically refers to the Board's limited attorney-client privilege and just points out that none of this was intended to waive the Board's attorney-client privilege to the extent that it's provided under the Evidence Code.

In fact, that should be fixed.

MR. MICHAELS: So, is there an attorney -- it's the Tax and Fee Division that represents the Valuation Division. Is there an attorney-client relationship between the Tax and Fee Division and the elected Board?

MR. HELLER: Between the Tax and Fee --

MS. MANDEL: In -- in Legal Department, right.

MR. HELLER: In the Legal Department? I believe so. There should be. Where they -- the entire Legal Department --

MR. MICHAELS: I guess I'm just wondering --

MR HELLER: -- is the attorneys for the Board.

And then --

MR. MICHAELS: So, is there something that could become germane to a case where I'm representing the taxpayer, where an attorney of the Board is -- is precluded from disclosing that to me?

MR. HELLER: Hmm-hmm.

MR. MICHAELS: Because it's advice that the attorney for the -- the Board is giving to the Board to support its initial determination.
MR. HELLER: Uh-huh. Well --

MS. CROCETTE: I'm -- I'm a little confused by that. That -- this is Sabina. I mean, all the arguments that they give us are usually represented -- and I know there's an issue of us calling for further clarification, but are represented in the -- the D & R. So, I -- I'm not completely understanding what you're saying, Peter.

What -- what are you talking about? It's not clear from what you just said.

MR. MICHAELS: Yeah. I -- I was thinking more again in the State assessee context than the D & R context. But in the State assessee context --

MS. CROCETTE: Okay. Well, whatever they call those -- those written things, that's -- that's what I'm referring to.

MR. MICHAELS: Yeah, well --

MS. CROCETTE: What's the name for them in the State assessee scenario?

MR. MICHAELS: Well, there's -- okay, so there's a lawyer who represents the Valuation Division and the Valuation Division is a party, right?

Does that lawyer have some kind of attorney-client privity with the elected Board that would preclude disclosure of work product to the taxpayer whose controversy is in -- is in front of the Board?

MS. MANDEL: Other -- other than the hearing
summary brief document that they file.

MR. MICHAELS: Yeah.

MR. HELLER: There's potentially, I think, a commun -- this is Bradley Heller. There's -- there are potential communications, and my thinking would be normally it would not happen in the context of --

MR. MICHAELS: It happens all the time.

MR. HELLER: -- direct communication with a Board Member on a case, because typically they do provide their rationale and they do indicate what they're thinking when they're -- they're ruling on a particular case at an oral hearing.

But -- but as far as -- and I think normally when staff's trying to communicate on an issue that -- that's sensitive, that we would want to maintain an attorney-client privilege on it's not typically related to a specific case outside of something that's already in litigation and there's other issues related to that. And those are generally discussed with the Board Members in closed session, and also have a whole bunch of other rules.

So I do think there's -- there's some potential out there. I don't know, I can't give you a specific example, though, at this time.

MR. MICHAELS: Okay. Well --

MR. HELLER: I do think there's -- I don't know, it's very -- it's one of those fairies on the tip of a pin kind of issues, but I think there is in fact
some limited group of things that might be there.
And essentially that wraps up Alternative 2 for
disclosure. And so that's the function set out there,
to -- to achieve a little additional disclosure as well
as providing that disclosure in advance of the hearing
so that a person attending an open meeting could go
ahead and understand the proceedings that's being
presented in front of them.

And then also I think it would create just a --
it creates a slightly larger record for people even
after the hearing for Public Records Act request, and
explains how we deal with those.

With that, are there any other questions or
comments on disclosure? Diane.

MS. OLSON: It's not a disclosure, but for some
people that did arrive late, would you let them know
when their public comments --

MR. HELLER: Oh, absolutely.

MS. OLSON: -- would be received?

MR. HELLER: Real quickly, for everybody who
didn't hear me this morning, we're not establishing any
firm deadlines for public comments and staff definitely
wants to hear from all the interested parties and will
do so at any time.

What we're -- our dead -- right now we do have
some deadlines for when staff is expected to submit some
things to the Board. So, if we receive things in time
to be incorporated, that would be appreciated. However,
we're not putting it in firm deadlines and, real
quickly, staff's deadlines for presenting information to
the Board are as follows as of right now.

Parts 1 and 2 dealing with Business Taxes and
the intent for all of the rules are -- are scheduled to
go before the Board on April 18th. And so, any --
really, it's -- we would have appreciated comments
already if there were any, but -- but certainly people
are able to show up at the hearing, as well, and comment
if they'd like or submit written comments up to that
date. And certainly throughout the formal rulemaking
process once we get there.

Also, Parts 3 and 4, dealing with Property Tax
and Appeals from the Franchise Tax Board are currently
scheduled to go before the Board Members on May 17th.

And then Part 5, which we're discussing today,
is scheduled to go before the Board Members on June
27th.

MR. KAMP: So -- Steve Kamp from Board Member
Yee's office. So, consistent with those deadlines, when
should people get their comments in to you?

MR. HELLER: Well, for us, if we can get them
three weeks before those deadlines, then we can
definitely consider them and incorporate any kind of
changes that might be necessary.

MR. KAMP: So, you're saying 21 calendar days?

MR. HELLER: Yes, 21 calendar days as opposed
to business days.
MR. KAMP: Okay.

MR. HELLER: Although, like I said, we're -- we want to hear your comments, so send them in anyway, even if it's beyond that and we'll do our best to incorporate whatever we can.

MR. KAMP: Yeah.

MR. HELLER: There are just limitations on our executive review process and things like that.

MR. MICHAELS: Do you know or does anyone in the room here know what kind of -- do they -- does the Board have a full normal regular docket on the 17th of May?

MS. MANDEL: Yeah, the --

MR. MICHAELS: Oh, Gary -- Gary, he would know. So it's not just a --

MS. MANDEL: I -- I asked him that yesterday.

MR. MICHAELS: What's that?

MS. MANDEL: I asked him that yesterday.

MR. EVANS: It's a full -- it will be a full day.

MR. MICHAELS: So -- okay, so it's not just value setting.

MR. EVANS: No.

MR. HELLER: Oh, no.

MR. MICHAELS: Okay.

MR. HELLER: And I believe all these different dates are full schedule Board meetings with a full calendar, as well. So -- and I believe when we took
Parts 1 and 2 to the Board Members on January 31st, we did make it on to the calendar at about 5:15 or something like that.

MR. MICHAELS: It's just that usually the -- the event that's happening on May 17th used to be the exclusive activity when the Board met.

MS. MANDEL: Oh, that was a long time ago.

MR. MICHAELS: Not that long.

MS. MANDEL: Yeah.

MR. HELLER: But those are the dates --

MR. MICHAELS: You're just old.

MR. HELLER: Sure. For the June 27th, what would that be? I don't know.

MS. RUWART: That's a Tuesday. And approximately 21 days before would be the 6th.

MR. MICHAELS: 6-6-6.

MS. RUWART: 6th of June. Yeah, 6-6-06.

MR. HELLER: Perfect.

MR. KAMP: And the May 17 -- the May 17th will be what? April 27th?

MS. RUWART: Hang on. Probably. 2 -- April 26th is a Wednesday.

MS. MANDEL: Yes, it is.

MR. HELLER: A Wednesday. But once again, you know, staff definitely wants to hear your comments and other Board Members want to see them, as well.

And my -- and, also, as I indicated, and I don't think I said this this morning, but our goal is to
get the Board Members to approve all the language for
all the different parts first. Then to request
permission to go ahead and publish our regulatory notice
and begin the formal rulemaking process with all the
regulations as a packet.

So, we may or may not be requesting permission
to publish on -- at the June 27th Board meeting since we
may or may not have everything approved by that time,
and the Board may want to consider how we go into the
rulemaking process.

Once we do that, there will be also additional
notice and comment periods there, as well.

So, certainly no cutoff coming any time soon.

MR. MICHAELS: And is there a -- a target date
for ultimate adoption? Is it December or November or
January or February or --

MR. HELLER: That's -- I think we're looking --
we're thinking something into the four to six months
from when we start the -- the formal --

MR. MICHAELS: Six --

MR. HELLER: -- formal rulemaking process. So,
if it was starting -- say in August then the end of the
year would probably be somewhere in there.

MR. MICHAELS: So, it's a different Board of
Equalization.

MR. HELLER: Would be getting seated --

MR. MICHAELS: Different Board.

MR. HELLER: -- right around that time period,
yes.

MR. HUDSON: Which I'm sure all of them would agree on everything we talked about.

MR. MICHAELS: You -- you already know who's going to be on the Board, I suppose.

MR. HELLER: Yeah. Correct.

But, anyhow, that is -- that's the plan as of right now. And all of those are just loose dates. They're just intended to give you an idea.

MR. MICHAELS: Yeah, I was mostly just looking at, you know, the transition here. Are we going to be back to square one if this doesn't all get effected by January 6th or whenever date they get sworn in?

I mean, theoretically, we may be back. It may be much ado about nothing.

MR. HELLER: Right.

MS. RUWART: Are there any more comments or discussion about these particular disclosure alternatives? Not to say that we can't pick them up afterwards, but if that's the case I would say now would be a good time to take our lunch break.

We should come back at 1:20 and we'll go through the rest of the detailed sections.

Thank you. See you in an hour.

---00o---
MR. FOSTER: Good afternoon. Looks like we're going to discuss the regulations regarding the Board Members and disclosure and this afternoon we're going to move to on to everything else.

My name is Ian Foster, for those of you who don't know me. I'm an income tax Appeals attorney at the BOE.

And why don't we go around and introduce ourselves again?

MR. HELLER: I'm Bradley Heller, an attorney with the Board's Legal Department.

MR. MICHAELS: I guess -- I know I'm Peter Michaels, Cooper, White and Cooper in San Francisco.

MR. SHAH: What law firm?

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

MR. DAVIS: Ken Davis, Franchise Tax Board.

MR. EVANS: Gary Evans, Board Proceedings.

MR. KAMP: Steve Kamp, Board Member Betty Yee's office.

MR. GILBERT: Arlo Gilbert, Fuel Taxes Division.

MS. SIMPSON: Laureen Simpson, Board of Equalization Taxpayer Rights Advocate's office.

MS. OLSON: Diane Olson, Board Proceedings Division.

MR. KOCH: Al Koch, Tax Counsel, M. B. I. A.

MS. OLSEN: Joanna Olsen of Franchise Tax
Board.

MR. FOSTER: And those of you on the phone, would you please introduce yourselves again for the record?

MR. SHAH: Neil Shah, for Mr. Parrish.

MS. CROCETTE: Sabina Crocette with Board Member Betty Yee's office and Jim Herd is also on the line.

MR. FOSTER: Thank you very much. I suppose we should begin. Do you have any introductory remarks again?

MR. HELLER: Real briefly, this is Bradley Heller.

Just briefly, we did receive written comments from the Franchise Tax Board and we have provided those to the participants here.

We also received a copy of a disclosure -- a settlement disclosure agreement, I believe?

MR. DAVIS: Nondisclosure.

MR. HELLER: Settlement nondisclosure agreement for the FTB to provide an example of the types of terms that taxpayers agree to before they enter into settlement negotiations with the Franchise Tax Board.

And Board staff here at the Board of Equalization will be looking into the Franchise Tax Board's suggestions to change the language regarding -- regarding the admissibility of settlement negotiations and information pertaining thereto and is going to take
a look at that agreement and also raise the same
concerns that the Franchise Tax Board's raised with our
Settlement Department to see what similar issues are
being -- are presented by both agencies and may very
well be changing the language slight to incorporate some
of those suggestions.

But at this point it's being considered and the
notice was made. It seems to be a very relevant
concern.

Other than that, the only other thing I'd
mention is that we're definitely going to look at adding
a definition of "Board Member staff" to the definition
section. So, I'll point that out again.

Otherwise, let's go ahead and start from the
top.

MR. FOSTER: Thank you, Brad.

I will be going through section by section. I
will give a chance for comments on every section. And I
will working off the underlined and strike through
version and the page numbers on that version as well.

---o0o---
SECTION 5000.5001

GENERAL APPLICATION

---o0o---

MR. FOSTER: Let's start with Section 5001.

Any comments on the general application section?

---o0o---

SECTION 5000.5002

DEFINITIONS

---o0o---

MR. HELLER: Section 5002, definitions.

MR. DAVIS: Ken Davis. We only have one real suggestion.

There's is some small, minor issues that we put in our commentary to Board of Equalization, but just --
the word "person" that is in the definition of -- in (M) for the definition extreme hardship and in reasonable cause, we're suggesting that a definition for the word "person" be included in the regulations or that Board staff consider using the Revenue and Tax Code definitions. The reason we're suggesting this is really more for the taxpayer that really does not know the Code, maybe that taxpayer is a sub S corporate taxpayer and will want know what "person" means according to the view of the Code or as applied in the regulations.

MR. FOSTER: Thank you, Ken.

Any other comments on Section 5002 definitions?

MR. MICHAELS: Peter Michaels speaking.
And I understood there was going to be a
definition for Appeals Division also?
I don't know if that goes here or in Part 3.
MS. MANDEL: That was from the discussion we
had on another part of the rule. And there were some --
there were some provisions that were all going to wind
up in the front and --
MR. HELLER: There were, that was for --
MS. MANDEL: Maybe they're not all done.
MR. HELLER: Those were for Chapter 4, it was
our -- Chapter 3, the part dealing with property tax is
what Marcy is referring to.
In here though we did add -- for Part 5 we
added a definition for Appeals staff, since they're
discussed with reference to hearing summaries.
The Appeals Division, I mean we could add a
definition for the Appeals Division.
MR. MICHAELS: Well, you know, just make a note
of it. Carole knows about this. We talked about it the
other day and she knows about it.
And maybe it's picked up somewhere else.
MR. HELLER: This may be the better place to
have it.
MR. MICHAELS: I don't know.
MS. MANDEL: And she had told us, I think, that
all of the definitions were going -- whatever became
Part 1 of the whole thing, when everything got
rearranged, that all of the definitions were going to be
moved up to the front or something?

    MR. MICHAELS: There were --

    MR. HELLER: That was with regard to that --
    just the chapter part dealing with property tax.

    We were talking about restructuring that one
since the structure was a little bit off and moving all
of the definitions that were in that chapter to the
front so that somebody could go to one definitional
section.

    That is being done, but like -- that's going to
be very similar to this part, which has definitions up
front as well.

    But that -- that part that she's working on
will incorporate these definitions where they don't
conflict. So this may be the appropriate place to add
Appeals Division and then she can reference it in that
other part and for all the different programs.

    So, I will make a note of it, as Peter
suggested, and we may go ahead and create an Appeals
Division definition.

    ---000---
5000.5003

BOARD MEETINGS

---000---

MR. FOSTER: Unless there are other comments, moving on to Section 5003, Board meetings.

I am on page 7 right now, by the way, underlined and strike-over version.

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5000.5004

ANNUAL ADOPTION OF BOARD MEETING CALENDAR

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MR. FOSTER: Section 5004, adoption of Board meeting calendar?

MR. KAMP: Steve Kamp, Board Member Yee's office.

I note it says in subdivision (A) it says, "All hearings on property tax petitions shall be conducted at Board meetings held in Sacramento."

I would -- usually that's what the Board does, but I don't know if people remember this we occasionally have held property tax petition hearings in Culver City.

MR. MICHAELS: At LAX.

MS. MANDEL: Torrance, there was one at Torrance.

MR. MICHAELS: Yeah, we've had them all over the place.

We had a value setting in San Diego one year.
MR. FOSTER: Back to 5003?

MS. MANDEL: Yeah.

Is there -- is that in something we have currently? Or is that -- I mean I think that the Board has, because of all of the amount of valuation staff and the fact that the records are here, prefers to do them here, but, yeah, they have been once at other places, so, I --

MR. MICHAELS: Where is this section?

MR. SHAH: 5003.

MR. FOSTER: 5003(a).

MS. MANDEL: Right at the top.

MR. MICHAELS: Monthly meetings?

MS. MANDEL: The last sentence.

MR. MICHAELS: Okay,

"All hearings on property tax petitions,"

uh-huh, right.

Presumably that covers all property tax petitions, all -- not just the State assesses.

MR. KAMP: If I would -- there is another ambiguity --

MR. MICHAELS: Section 11?

MR. KAMP: -- immediately preceding section says, "outside the Sacramento area," whereas other references to Sacramento are just to Sacramento, period.

I don't know why you need to put the word "area" in there.

MS. MANDEL: Because they might live in Davis.
MR. HUDSON: Tom Hudson.

I talked to Bill Leonard specifically about this point. And he specifically asked me to say he doesn't want the rule to say that we can only conduct property tax hearings in Sacramento, even if for practical reasons he might agree, as a practical matter and to save money, that's a good idea, but he want that in the rules.

I just want to make sure that --

MS. MANDEL: Yeah, that's probably one of those details.

MS. HUDSON: -- that's an option, not a rule.

MR. HELLER: Just as a question, do you think it's delete the entire reference or change it so that it's more general?

So that it's generally that we do that or just get rid of it entirely is more idea of it?

MR. MICHAELS: I would get rid of it entirely. You're less constrained by it.

MR. KAMP: I'd like to agree with Mr. Leonard's recommendation, but that's what I would do.

MR. HUDSON: Bill Leonard only told me that he doesn't want it to say only in Sacramento since he represents a lot of places that are not Sacramento and if it's at some point more convenient to meet at LAX, he doesn't the rules to say we can't.

MS. MANDEL: Right. Well, you might -- if you want to, you could ask him whether he wants out totally
or whether generally property tax petitions are held in Sacramento.

But it may be better just to have it out totally, that's what Brad is asking.

MR. MICHAELS: Well, generally most hearings are held in Sacramento

MS. MANDEL: No -- that's true, that's true.

MR. Heller: So, I mean -- anyway, staff, I think, though, you know, is -- could be amenable to either -- either alternative of just deleting it entirely or retaining the idea of letting people have notice that they're generally in Sacramento.

But that the Board -- that doesn't constrain the Board's authority to hold them somewhere else.

But, either way, the staff would be all right with that.

MS. MANDEL: Don't the other hearings -- don't you -- isn't our process if you have another kind of case that you -- you request the hearing somewhere else if you want it somewhere else, you request a hearing in San Diego?

MR. Heller: That's correct.

MS. MANDEL: But this falls -- this other thing falls into our sort of general -- don't make it so specific that you tie up the Board's ability to handle the process as it sees fit, right?

MR. Heller: Maybe I could suggest that staff will tentatively plan on deleting the language unless we
hear otherwise from other interested parties or our
executive management to the contrary.

So as of right now I will make a note to delete
it. And then if anybody has other comments, they can go
ahead and submit them and we'll see if there's other
alternative language that has some support.

MR. FOSTER: Very well. Section 5004.

MS. MANDEL: So, the Board Chair has discretion
to --

MR. MICHAELS: Where does this one start? Oh,
I see, okay, the Board.

MS. MANDEL: -- set up any meeting any other
time?

MR. KAMP: Steve Kamp for Board Member Yee's
office.

Looking at subdivision (c),
"The Chief of Board Meetings may cancel a
portion of a Board meeting."

I know that's what we've been doing, but I
wonder if that shouldn't be at the discretion of the --
you know, that they can recommend that the Chair cancel
it, as opposed to just --

MR. MICHAELS: Unilateral?

MR. KAMP: Yeah.

MS. MANDEL: Especially since now you've taken
out, "for lack of workload."

MR. MICHAELS: That's never been an issue.

MS. MANDEL: Well, that's usually when they
get --

MR. HELLER: So, we like, "The Board Chair may cancel."?

Then we internally --

MR. KAMP: Or you can say the Chief of Board Proceedings or the Board Chair may cancel, yeah.

MR. EVANS: Excuse me, Gary Evans.

Typically the Chief of Board Proceedings has been given the discretion for lack of work to cancel a day -- not the entire meeting. So --

MR. KAMP: That's right.

MR. HELLER: A portion.

MR. EVANS: I mean I seriously --

MR. KAMP: It says here a portion of a Board meeting.

MR. EVANS: When we set the Board meeting, it's generally two days for Sacramento because --

MR. KAMP: Maybe we should just keep this --

MR. EVANS: It's a portion.

MR. KAMP: -- and raise this -- raise this at our office and we may not have any issue, but this -- I see that.

MR. HELLER: I will mark that there is an issue.

MR. FOSTER: Gary, isn't the current practice typically for Board Proceedings to check with the Chair before canceling a day?

MR. EVANS: We do mention it.
MR. MICHAELS: And is "cancel" actually what's happening here? Is it a postponement?

MS. MANDEL: No, cancel.

MR. MICHAELS: If the the meeting is cancelled, it will never happen.

MS. MANDEL: Well, remember May?

We have May 17 and 18 is what the Board originally adopted when we adopted the calendar.

And then there was lack of workload for two days, so --

MR. MICHAELS: It's officially cancelled?

MS. MANDEL: -- they sent us a note saying, "We're not going to -- we're canceling May 18th."

And if you look on the Board's website and you pull up our whole calendar for the year, you won't see May 18 any more.

MR. MICHAELS: So, the -- and you'll see a part of a meeting could be cancelled, but not the entirety?

MR. HELLER: Well, that was the idea.

Well, the provision was designed to only reflect that the Chief of Board Proceedings authority.

So, the Chief of Board Proceedings, as Gary was pointing out, has historically had this discretion to cancel a portion of a meeting and that's what it was originally intended to describe is just that, a Board --

MR. SHAH: Maybe "upon consultation with the Chair," or something?

MR. HELLER: I think that's always been, I
mean, I don't believe that the Chief of Board
Proceedings has ever cancelled a portion of a meeting
even without consulting with the Board Chair, but -- but

MS. MANDEL: Not be --

MR. SHAH: There might be reasons for them to
do it.

MR. HELLER: There could be a situation where
that would happen and this doesn't specify that they
would be required to.

So, there is some concern there.

Essentially then it's always been a vote of the
Board to cancel an entire meeting. So, if we had
scheduled the 17th and 18th and we want to cancel the
entire meeting, then that would take a vote of the
Board.

MS. MANDEL: Right, that's happened when the
Board meeting days are on.

MR. HELLER: That's essentially because the
Board itself is adopting the calendar. So, it's up to
them to decide to change the calendar.

We'll go ahead and I will make a note of the
issue regarding whether or not the Chief of Board
Proceedings should be consulting with people or whether
that authority should just rested in the Chair.

And I will wait to hear back from Mr. Kamp with
further concerns.

I won't take any actions right away.

MR. FOSTER: Any other comments on 5004?
SECTION 5000.5005
RIGHT TO ORAL HEARING
---00o---

MR. FOSTER: Section 5005, right to oral hearing on page 8.

MS. MANDEL: I have to figure out why I put an arrow here.

Oh, under (c) you have to make a request for oral hearing within 30 days of the D & R.

I expect that if people made their request for a hearing in their original petition -- didn't we talk about this?

MR. MICHAELS: Yeah.

MS. MANDEL: Do they have to keep asking?

MR. MICHAELS: Yeah.

MS. MANDEL: So, if they made their original request and then they don't make one after the D & R, it's still counts?

MR. MICHAELS: They still get the hearing.

MR. HELLER: Yes, it still counts.

We have added language that we'll come to later.

MS. MANDEL: I mean, assuming that they lost.

MR. HELLER: That actually would say to -- that would basically say to -- there is language that we have added that directs staff to inquire to -- of a taxpayer where they have not submitted an additional request, but did raise a request in their petition, and to inquire of
them whether they still want that oral hearing.

So, there is a procedure to fix that situation.

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SECTION 5000.5005.1

ACKNOWLEDGEMENT OF REQUEST FOR ORAL HEARING

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MR. FOSTER: Page 9, Section 5005.1, acknowledgement of request for oral hearing

MR. HELLER: This is the same.

If you look in subdivision (a) -- this Bradley Heller.

The subdivision (a) actually talks about the confirmation of a previously requested hearing. So, says if Board staff receives a written request for oral hearing, which would be the one we were just describing, or confirmation that a previously requested oral hearing was still desired, it would cover people who had requested one previous, like in the petition, for instance, then we'll issue the letter acknowledging the request.

MS. MANDEL: Al?

MR. KOCH: I guess my question is why the 30 day? I mean, it sounds like it could be any time. Why has the 30 days notice been dropped, the acknowledgement?

MR. HELLER: Well, dropped the 30 days?

MS. MANDEL: Well, because isn't this whole thing here new, the 5005?
MR. HELLER: Well --

MS. MANDEL: Where you put the -- because it's all underlined and you move the 30 days over here (indicating)?

That's what it looks like.

MR. HELLER: Well, I think he's asking -- Al, you're referring to acknowledging the request within 30 days, correct?

MR. KOCH: Yeah.

MR. HELLER: Okay.

MR. MICHAELS: Well --

MR. KOCH: To give the taxpayer comfort that something has happened.

MR. MICHAELS: I mean, it says, "approximately 30 days," it's a bit vague to start with.

You know, locally you always get an acknowledgement, but it might not be within 30 days.

MR. KOCH: Well, that's not the --

MS. MANDEL: Well, you can't -- if within 30 days after the Appeals -- after the D & R, that's the time that you're supposed to ask for -- write in for a hearing, so, those would sort of not -- those would cross, not mesh or something.

MR. HELLER: I think -- I don't know. I think the real concern is just the first version of this section we had required basically we said the Appeals Division would acknowledge -- sorry, the Board Proceedings would acknowledge the request for an oral
hearing within 30 days, essentially, that's what that was.

MS. MANDEL: That Board Proceedings --

MR. HELLER: I believe the language is right, Board Proceedings staff. So, it's, "Approximately 30 days after receipt of the Appeals Division decision on petition or appeal the taxpayer shall receive a letter from Board Proceedings Staff."

Yeah, I think -- you know what, I think that whole thing was deleted because the whole -- I think the whole way it was set up just did not --

MR. MICHAELS: It was sideways.

MR. HELLER: It didn't make a whole lot of sense as originally written because I think what it was trying to direct us to do wasn't clear in and of itself, what the original direction was.

And so I clarified the language to make it clear that what we were trying to do was actually acknowledge the receipt of these requests, which I don't think was completely clear.

And then I did delete the time frame, but I don't think there was an intention to give staff more time or something like that. But I think it was just a part of clarifying the language.

So, I think it's something we could probably put a 30 day time limit back in, but I think it was originally approximately anyway, so --
MS. MANDEL: Well.

MR. HELLER: -- certainly wouldn't be a case where we'd move forward and not acknowledge it before --

MR. KOCH: What's the rule under Chapter 4? I don't remember.

MR. HELLER: Chapter 4?

MR. FOSTER: Chapter 4?

MR. HELLER: I don't think they talk about it.

MS. MANDEL: I think you have to make it in your appeal, don't you?

MR. FOSTER: Yeah, in Chapter 4 you have to make the request before the end of briefing on the appeal.

You can make it after that if you have reasonable cause.

MR. HELLER: But I believe all of the chapters do play into this provision.

This is the provision that deals with the Board Proceedings Division now acknowledging that you have requested an oral hearing, which could have been done at any time.

But it's now Board Proceedings who's going to a schedule the oral hearing. So, at some point they have to acknowledge that there has been a request and it's been scheduled for the --

MR. KOCH: Yeah, the process or the procedure the cities have been working under is a little different because they have to -- they opt in or out, depending
upon a date -- the date the inquiry was filed.

So --

MR. HELLER: Okay.

MR. KOCH: -- once they're in -- or if they're not in, then they don't have the right to a hearing.

That's the difference.

MR. HELLER: And so if there's one that had opted in, then that one we would still acknowledge, I think, kind of on the same approach.

MR. KOCH: Yeah.

MR. HELLER: And say, "By the way, you've now left the, say, Appeals level --"

MR. KOCH: Yeah.

MR. HELLER: "-- discussions and we're scheduling you for an oral hearing. We're now acknowledging."

MR. KOCH: Does not apply here anyway.

MR. HELLER: And, so, you know, I think it's something if people are really concerned on staff maybe not issuing acknowledgements promptly enough, that we may be able to take a look at the language, but right now I think we've been doing pretty well and since we never move forward with an oral hearing before we've acknowledged it, it doesn't really deprive the taxpayer, other than just maybe the fact that interest might accrue if we were to take our time, but it's something that's always a concern with everything that we do, so --
MS. MANDEL: I have a question on the very last sentence where -- so then, "acknowledgement letters," indicates, okay, we're going to give you the oral hearing and it's going to be in Sacramento, Culver City, or wherever.

Then the taxpayer contacts Board Proceedings when it gets it if the hearing location must be changed.

MR. MICHAELS: What are you looking at, Marcy?

MS. MANDEL: I'm looking at that same 5005.1 acknowledgement, the last sentence says that,

"The taxpayer --"

MR. MICHAELS: Okay.

MS. MANDEL: -- when you get the acknowledgement letter, of course, you know, if they sort of wait a while and then realize, oh, my God, but I was just sort of looking at the "must be changed."

MR. DAVIS: Actually -- I'm sorry, Ken Davis. We actually put in the change here, even thought this wasn't -- didn't apply to us, I think that we wanted to just give some assistance to the Board staff.

I think the sentence really is read with the sentence before that, that is, once the acknowledgement letter goes out, it will indicate the oral hearing and if granted it will provide the location.

And then it goes,

"Taxpayers shall contact the Board Proceedings Division upon receipt of the acknowledgement
letter."

And then we changed -- we are suggesting the change, "to request a change in location," meaning if it's -- if they really want a different location, they need to send something back in.

MS. MANDEL: Yeah.

MR. DAVIS: I think that's the intent.

MS. MANDEL: Yeah.

MR. HELLER: It was, and it was just -- I don't know.

MS. MANDEL: It was late at night.

MR. HELLER: It's original language that was in the first proposal and still managed to hang on.

I do think that the FTB language is an improvement and it carries out what we were intending, which is that you can request a change of location.

MS. MANDEL: Okay.

MR. MICHAELS: Does it say anything about what happens to that request that suggests your request could be approved or disapproved?

MR. HELLER: It's --

MR. MICHAELS: You don't want someone saying, "Hey, it says, you know, I have right to hearing in --"

MS. MANDEL: That's why I was sort of wondering about the "must be changed."

MR. HELLER: That's correct.

Our intent wasn't to obligate the Board to hold
a hearing every place that a person receiving an
acknowledgement letter might want it to be held.

So, I do think we're going to look at accepting
the FTB's language, which essentially says, "If a
request for," excuse me, it's just to contact the Board
Proceedings to request a change.

MR. MICHAELS: To request?
MR. HELLER: Right.
MR. MICHAELS: To request? I am tighten it up
slightly rather than "to request."

MR. HELLER: To request.
MR. MICHAELS: That could be read by somebody
as meaning that it's you just have to ask.

MS. MANDEL: Ask and you shall receive.
MR. MICHAELS: I'd like to request Gene Pitney.
MR. HELLER: I don't know.
MS. MANDEL: I understand that.
MR. HELLER: We'll have to take a look at the
language and see if we can't improve on the FTB
suggestion. There's some room for that.

MR. MICHAELS: Could I ask a question about the
references here, please?

It looks like --
MS. MANDEL: Yes.
MR. MICHAELS: -- it looks like somebody threw
everything, including the kitchen sink in and just block
copied and pasted the same references, all inclusive,
for each section.
MR. HELLER: Right. And, unfortunately, I would be more than happy to explain that, but this is Chapter 5. It actually applies to, essentially, every single program that we have at the Board. And it does need to refer to the statutes that authorize the Board to be even conducting this process for every single program.

And, unfortunately, that is a lot of programs and they have a lot of statutes and they all have, in fact, individual ones that authorize each type of review. So, for instance, if you wanted to discuss how we handle a claim for refund of a business taxes matter, that claim for refund has special statutes that authorize the Board to handle that claim for refund that are separate from its petition authorizations, its rights to look at a protest, its ability to hear or request for relief from interest or penalty.

MS. MANDEL: I think we need a Part 10.2, like we finally did at Franchise Tax, a separate --

MR. HELLER: I agree.

MR. MICHAELS: But --

MS. MANDEL: -- administrative provisions for each.

MR. HELLER: I agree. So, it's really referencing the provisions that are being interpreted to -- that basically are interpreted as this is part of the Board's process --

MS. MANDEL: Would it --
MR. MICHAELS: Was there any selectivity? Did anyone go through and say, "Well, this one -- you know, this one really doesn't apply to the acknowledgement of the request?

MR. HELLER: I really --

MR. MICHAELS: Or did everything just kind of get thrown in?

MR. HELLER: Everything really didn't get thrown in.

Generally -- generally, we looked at the whole. Marcy?

MS. MANDEL: Well, I just have a suggestion that -- if there is so many of them, that can you maybe put -- would it make sense to put, "Relating to the Sales and Use Tax law," then have all those sections, "Relating to Cigarette Tax law," have those sections?

So that somebody who wants to go look up where you are getting the authority, if they have a particular kind of case, presumably they might actually recognize section numbers as being in the general area, but that will assist with Peter's questions.

MR. HELLER: Well, I think -- I mean, staff can certainly try to explain which ones of these sections apply to which programs and then identify what they're -- you know, which part of each program the section is referring to.

For purposes of OAL that's not the format that they would want the note section to be published in.
MS. MANDEL: Okay.

MR. HELLER: But certainly for presentation to the Board or to prepare something else that would help interested parties, staff can do that.

But the truth is that I actually did this myself. I went through, essentially, line by line, looking through each Code trying to figure out, well, what is it that we're authorized to do, where does that come from?

If we're interpreting something, what is it that we're interpreting?

And in many of these cases it is, unfortunately, there is a bunch. In fact, if you look at like the business tax, like, for instance, like sales tax, there is provisions for all of the interest abatement and all of the requests for relief because of a disaster or because of reasonable reliance.

And then the right to petition, the right to petition for -- against a jeopardy assessment, the right to file an application for administrative hearing -- these are all things that if you are requesting a hearing, we're going to have to acknowledge that request.

And, as far as I could tell, those are the most likely references for what it was we were doing and it was not the intention to throw the kitchen sink in.

MR. MICHAELS: No, you were meticulous and I'm sorry it came across the wrong way.
But I mean --

MR. HELLER: That's okay.

MR. MICHAELS: -- there's stuff that -- is there stuff -- should we -- or is it the case that the references are the same in every single section here?

Or are there some that are in some, but not others and some that are in others but not some?

MS. MANDEL: I think there are differences among them.

MR. HELLER: There are, yes.

MR. FOSTER: For example, income tax being my area of expertise, Section 19047 says, "The Board shall hear and determine an appeal." That's all it says.

And so all of these regulations are interpretations of how to hear and determine the appeal. So, it's inputted as a reference for every one of them.

MR. AMBROSE: Well, that's the authority.

That's not the reference.

Isn't the authority -- the authority's different than the reference.

MR. LANGSTON: When you're doing a regulation, you have to -- and, actually, I mean it's kind of okay to dump everything in because OAL will bounce it back if one of the code sections is not in there.

But I never heard them bounce it back if there's an extra code section in there.

MR. MICHAELS: But the flip side is that we're trying to make these user friendly.
I appreciate what Brad's doing and he -- you know, it probably should end up carrying the day, but we're trying to make this user friendly and, you know, the typical petitioner or the sort of less experienced lawyer for a petitioner, you know, might well say, "Well, you know, we better look every one of these things up here and --"

MS. MANDEL: That's why --

MR. MICHAELDS: "-- vet them all and make sure they're all true."

That's what I would do.

MS. MANDEL: -- that's why --

MR. KAMP: Steve Kamp for Board Member Yee's office.

I think I have -- it may work, may not work. Instead of having a list of numbers, that will make everybody's eyes glaze over, why not break the references up by tax program or fee program?

MS. MANDEL: Yeah. And just for -- I mean I know that there is at least one Board Member that I have heard say, "What exactly is your code section reference for that reg or that statement in wherever?"

And, so, that's --

MR. MICHAELS: A reasonable question.

MS. MANDEL: It behooves staff to have been so meticulous, but making it user friendly, like we've been talking about, is -- I don't know that OAL would have an objection to --
MR. HELLER: How about if -- I will contact OAL see if they would allow us to prepare our note section in a manner that has those sorts of annotations in it so that you can tell which programs and code sections apply to you.

MR. KAMP: I don't see why they wouldn't because --

MR. HUDSON: Great idea.

MR. KAMP: You're not taking any information out, you're just -- I could tell you from -- like the 1200 group are all insurance tax law.

MR. HELLER: Right.

MS. MANDEL: It's a trivia quiz.

MR. KAMP: You could -- I don't see why OAL would object to that.

MR. HELLER: I don't know either.

MS. MANDEL: But we should just check before we do the whole package and find out that they get their whatevers --

MR. MICHAELS: My reaction was more from the recipient's point of view, you know, where you say, okay, I got us -- or they say they got the authority under -- holy, moly.

I don't know what their authority is.

MR. HELLER: I agree. As a recommendation too and to finish up the thought, if O. A. L. does have an objection of some sort to adding it to the notes section, then staff can go ahead and prepare a separate
document that shows it so that there is a
cross-reference guide for the interested parties and the
Board Members.

So, even though it may not -- the final
regulation published in the California Code of
Regulations may or may not contain it, it would --

MS. MANDEL: But it would be then in whatever
we publish, like in our law guides where we have the reg
we would add --

MR. HELLER: Certainly.

MS. MANDEL: -- stick it in there as a -- not
an official part of the official regulation, but --

MR. HELLER: Certainly. It would be
information we had a record of from our administrative
process as well.

So, that the --

MS. OLSON: Diane Olson, yes, in submitting the
regulations OAL has a format.

We actually already produced our own format and
we have to change the regulations when we send them to
OAL, we put our authority references at the top, they
want it at the bottom and they won't accept our he
regulation until we change it. So --

MS. MANDEL: Yeah, they're pretty particular.

MS. OLSON: Yes.

MR. HELLER: I mean we'll be -- staff has no
problem calling them and finding out specifically and
doing something to address this, regardless.
Please go ahead, Tom.

MR. HUDSON: Tom Hudson.

Maybe this is getting a little too petty, but if I read --

MR. MICHAELS: Tom Petty.

MR. HUDSON: -- seeing the way things are worded here in the subsection (a), you say the Board has to send the acknowledgement letter saying whether or not it's been granted and, if granted, what the location is.

You don't really say a date or time,

approximate time and --

MS. MANDEL: Well --

MR. HUDSON: -- that's implied by the fact you granted it?

MS. MANDEL: -- I don't know if the acknowledgement letter is the time that Board Proceedings schedules the hearings.

MR. EVANS: No.

MR. HUDSON: Okay.

MS. MANDEL: Do you?

MR. HUDSON: You don't say -- you just say a location, you don't say a date?

MR. EVANS: The acknowledgement letter indicates that we have got your request for an oral hearing. This is the site we're going to have it.

We'll let you know 60 days prior hearing the date and time.

MR. HUDSON: I'm glad I asked. I am learning
more about this every day.

Thank you.

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SECTION 5000.5005.2

CONSOLIDATION FOR HEARING OR DECISION

MR. FOSTER: Unless there is objection, moving on. Page 10, Section 5005.2. Consolidation.

MR. MICHAELS: Well, I'm lying in wait here. Peter Michaels speaking, ready to ambush.

(e) --

MR. HELLER: Okay.

MR. MICHAELS: -- seems to have created -- it seems to be fundamentally different from what we've looked at before. If I recall correctly, this seems to -- before, as I recall, the taxpayer had the -- the -- the right to -- the word that's used here is "deconsolidate." I'm not sure if that's a word, but, anyway, the taxpayer had the right unilaterally to say, "Look, I don't want the case to deconsolidate and that was -- that was the end of it. It would not be consolidated.

And that seems proper to me. Now, instead, it says that the Chief of Proceedings shall submit the objection by a taxpayer to the Board Chair and the Board Chair will apparently have unilateral discretion to deconsolidate or not. If the Board Chair says we're not deconsolidating, if that's a word, that's the end of it.

And that's very different from the taxpayer opting out. And I repeat, you're going to have -- at least in the area that I practice most freq -- regularly, is -- it's common for there to be issues that
taxpayers share, but it's -- it's highly uncommon for
there to be a perfect absolute congruence of interests
on every issue.

And, Lou, you're welcome to take a different
view, but --

MR. AMBROSE: I -- I agree with everything you
said.

MR. MICHAELS: You know, you're going to have a
lot -- you're going to have power companies or phone
companies who have a lot in common, but they've got
enough that's not in common for a consolidation to be
potentially objectionable.

MR. FOSTER: Perhaps we can look at that by tax
program, too, because we've had Income Tax cases where
you might have 50 people where the facts and issues are
exactly identical. You know, you have 50 partners in a
partnership --

MR. MICHAELS: Yeah.

MR. FOSTER: -- and all get some distribution
and then the issue is the same for all of them. And if
they all demanded to have their own hearing, it would be
a nightmare.

MR. KAMP: Steve Kamp from Board Member Yee's
office. I'm also going to raise with our office the
question of whether -- like in Subdivision (d) the Board
Chair -- or no Board Member has any role and Subdivision
(e) the Board Chair can deconsolidate. How much role
the Board Members, Board Chair, BPD, and Chief Counsel
should have.

So, I'm just going to raise the issue. I'm not saying anything is going to happen, but I'm going to mention it.

MR. HELLER: Okay. And just to finish up, I think, Peter, I'll go ahead and note your comment. And I think what you're suggesting is there just be essentially if there is an objection to consolidate received that their -- that the cases not be consolidated.

MR. MICHAELS: Well, Ian's point is well taken, too, and, you know, if someone really wanted to wreak havoc, they could collude to have 50 separate cases on the exact same partnership. And I guess that's their right at present.

MS. MANDEL: Well, they --

MR. MICHAELS: So, it wouldn't be changing anything that's already in -- in existence, is it?

MS. MANDEL: And they -- and they -- they may each have their own counsel.

MR. MICHAELS: Yeah.

MS. MANDEL: I mean, we may be partners in a big partnership and I don't like the guy you hired and you don't like the guy I hired --

MR. MICHAELS: Right.

MS. MANDEL: And I want my guy to be able to make his pitch equally as you want your guy to --

MR. MICHAELS: Exactly, yeah.
MS. MANDEL: -- be able to make his pitch.

MR. MICHAELS: Yeah.

MS. MANDEL: So, you never know.

MR. MICHAELS: Right.

MR. SHAH: Well, Brad, this is Neil. We had the opposite experience. We had a case that come up, it was a Sales Tax case, and we asked if -- if the Board split up the two cases, although I think one of them was a claim for refund, the other one was an assessment. And we were told that Appeals had wrote -- wrote it up in that manner and couldn't split -- split it up at the hearing.

There were two separate representatives. One was an assessment, one was a claim for refund. The claim for refund was a customer of the taxpayer. And we were told, sorry, it can't be done.

MR. HELLER: Well --

MR. SHAH: In (b) it says the Board Members could -- I guess, may request a consolidation or object to a consolidation, and we did that.

MR. HELLER: Okay. Let's see. Well, right now the -- Subdivision (d) does provide that if the Chief Counsel determines that consolidation is inappropriate, the matter won't be consolidated regardless of the parties' consent.

But other -- any other standard -- I don't think it's -- I don't know, it really -- I don't think we've focused on an issue of being able to deconsolidate
previously consolidated cases.

MR. MICHAELS: Well, it got changed.

MR. HELLER: The taxpayer --

MR. MICHAELS: I mean, it was in there another
way before. I mean, I -- I can pull it up. I have it
here. It was -- it was written differently.

And -- and don't typically, like a -- a black
line like this would show where it got crossed out.

We probably have on -- somewhere in here
what -- what used -- what it used to say, don't we?

MR. HELLER: What it used to say would be there
if it was -- I mean, it should show redacted.

MR. MICHAELS: Well, it should be crossed out
somewhere.

MR. HELLER: Yeah.

MS. MANDEL: Was it in --

MR. HELLER: I think he's saying on the
Property Tax.

MR. HUDSON: I have a question for Ian. This
is Tom. Tom Hudson.

(Conversation off the record.)

MR. HUDSON: We're trying to -- where somebody
wanted to deconsolidate, you know, 50 members of a
partnership and they wanted to break it up and actually
have 50 hearings, has that ever happened in your
experience? Is that -- I just wondered if --

MR. FOSTER: I don't --

MR. HUDSON: -- the whole theory of hearings --
MR. FOSTER: I don't specifically --

MR. HUDSON: -- If you're going to force them into it if they don't want to be consolidated.

MR. FOSTER: I don't specifically remember it happening, but I -- I do know that we have -- I don't -- I specifically remember receiving an objection after it was consolidated, but I do know we have consolidated cases where the parties may or may not from the beginning had wanted to be consolidated.

But in order to make better use of the Board's resources we just went ahead and consolidated them.

MR. MICHAELS: That's never really been a driver before.

MR. FOSTER: In H.R.A. cases it happens a lot, where we get an appeal of 100 people who all live in the same building, and the issue is whether the building was exempt from property tax. There's no point in holding 100 hearings on that issue.

MR. KOCH: A suggestion. Al Koch. I wonder if this could be worked out only if -- if there is an objection to consolidation if it shouldn't then go to a prehearing conference, and try to work out who is representing whom and, et cetera, et cetera.

MR. MICHAELS: Yeah, that --

MR. KOCH: And who may have the ability to exercise a right to be separate.

MR. MICHAELS: That would work well except in State assessee cases --
MR. KOCH: Oh.

MR. MICHAELS: -- because those are on, you know, a track -- a statutory track where they have to be decided by December 31st.

Do you agree, Marcy -- or Lou? You couldn't -- you couldn't clear this hurdle of consolidation State assessees, I don't think, through a prehearing conference, particularly.

MS. MANDEL: No, we -- we had --

MR. AMBROSE: I don't know if you could or not, but I agree that it -- it would be -- the time would be pretty tight. You know.

MR. MICHAELS: Might work for everybody else.

MR. HELLER: Right.

MR. AMBROSE: But I mean, typically, we've always consolidated, you know, like your cases or -- you know, Pete Hladik's or whoever's.

MR. MICHAELS: Well --

MR. AMBROSE: That's pretty common practice.

MR. MICHAELS: Well, yeah, I know. I mean, it's -- okay, if there's one owner that has four properties, it makes sense to have all four properties of that one owner --

MR. AMBROSE: Right, yeah.

MR. MICHAELS: -- heard at the same time.

MR. AMBROSE: Yeah.

MR. MICHAELS: It's also very common, for example, for two owners of four properties each to have
very similar situations. And this would contemplate
consolidating all eight.

And, you know, what we've done in the past is
actually to have two hearings. One for Company A with
the four subsidiaries, and the other for Company B.

MR. AMBROSE: Yeah.

MR. MICHAELS: This would --

MS. MANDEL: But even on the --

MR. MICHAELS: -- possibly bring it all
together.

MS. MANDEL: Even on the four subsidiaries, we
have -- there was a hearing last year that as soon as I
saw it, I was like, "Oh, this is going to be a nightmare
to be consolidated together." And -- and it was
consolidated together and went forward together and
while the hearing was going on it was very confusing
because there were so many separate properties, each of
which had sort of different issues.

And somebody even, you know, said, "Ooh, I
didn't realize, maybe this one shouldn't have been
consolidated. So, it's kind of -- it's --

MR. HELLER: Well, I think staff can -- you
know, I think we'll definitely take a look at trying to
make -- for one make all of the provisions dealing with
consolidation in the various programs as uniform as we
can relevant to the programs.

And then I guess we'll try to look at how to
deal with this. Although, you know, we -- we're leaning
away from the idea of trying to have a -- you know, like
a true hearing on consolidation just because --

MR. MICHAELS: Well --

MR. HELLER: -- of the resources and everything
on that. So --

MR. MICHAELS: Yes, I know.

MR. HELLER: But to the extent there is an
objection that needs to be decided we will see what we
can do.

MR. MICHAELS: Could you maybe put something in
that -- I'm thinking out loud, so this may not even
sound very good once it comes out, but could you put
something in maybe that says that, you know, the -- you
know, the Chair or the Chief of Proceedings, you know,
can make a judgment about consolidation if it appears
the request is frivolous or some such?

Because that would be your example there where
people are just trying to play games as opposed to some
legitimate thing where there are two different lawyers
or there's trade secrets or who knows what that, you
know, is not frivolous.

MR. HELLER: Okay.

MR. HUDSON: That's a good word to use because
there's kind of an existing standard on, you know, that.

MR. LO FASO: Frivolity.

MR. HELLER: Frivolity, yes.

MR. DAVIS: Although (f) -- Ken Davis. (f)
provides the standard for consolidation.
And it's -- request for written -- "A request for consolidation should establish the relevant facts and issues to be heard before the Board." Let's see --

MR. MICHAELS: What page are you on, Ken?

MR. DAVIS: It's on -- on 10.

MR. MICHAELS: Okay, thank you.

MR. DAVIS: And, actually, we're suggesting that this paragraph (f) go up into (b) because it relates to what -- what a request is all about.

But it's to establish the rele -- that the relevant facts and issues to be heard before the Board are similar in each matter and no right of any party is prejudiced.

MR. MICHAELS: Right. Well, that --

MR. DAVIS: It doesn't hit your frivolity issue.

MR. MICHAELS: But it also -- there's an awful lot of sort of room for mischief there, and no right of any party is prejudiced by the consolidation.

Well, just -- if it's up to the Chair, and the Chair has said, "Balderdash, we're not to close the session to the public, I don't care if they're" -- I mean, and no -- it's going to be then a basically subjective unilateral judgment by one person that no right's prejudiced. And reasonable people could differ about that.

MR. DAVIS: And -- and it looks like in (c),
though, a party has a right to object to the consolidation at the first instance.

MR. MICHAELS: Right. But that --

MR. DAVIS: And then they get a second chance at it after -- after there's a resolvage.

MR. MICHAELS: Where's the second chance?

MR. DAVIS: Well, if you go to the -- the (b) is a request. Any party may request.

MR. MICHAELS: Yeah.

MR. DAVIS: And then if I'm -- if I'm reading it right, then (c) is, "Requests for and objections to consolidation" --

MR. MICHAELS: Right.

MR. DAVIS: -- must be submitted to the Board Proceedings. So --

MR. MICHAELS: And then (d), --

MR. DAVIS: (d) is --

MR. MICHAELS: -- here's what happens when you do that.

MR. DAVIS: No, here's -- I think (d) is -- oh, yeah, so you've got a request and then you've got objections and then you got determination by the Chief Counsel.

MR. MICHAELS: Right. One way or the other.

MR. DAVIS: One way or the other. And then afterwards then you've got the -- another objection and request --

MR. MICHAELS: Right
MR. DAVIS: -- a truly request to
deconsolidate.

MR. MICHAELS: You're correct. So, there's a
second bite there, but that under this the Board Chair
has the unilateral authority to do whatever the --

MR. DAVIS: Yes. I mean, I --

MR. MICHAELS: -- Chair wants.

MR. DAVIS: -- don't disagree.

MS. MANDEL: That's what it says.

MR. HELLER: And I think the only benefit --
you know, the additional benefit there is you're getting
the Chief Counsel and the Board Chair's determinations
as opposed to just the single person, as you were
saying, just one person who may have a different opinion
than you.

MR. MICHAELS: Well, again, I mean it used to
say "if the taxpayer objects", and I guess I'm
suggesting that if the taxpayer's objection is
not frivolous or, you know, gamesmanship, that --

MR. HELLER: So I --

MR. MICHAELS: I guess it's still, for me,
not -- you know, the fact that there -- there is a
second person, there's a Chief of Proceedings and the
Chair, two heads, you know, balance -- yeah, that's good
and all, but it's still worse than it was before.

MR. HELLER: Right. And so, let me just ask a
quick question.
But, Peter, you -- you would prefer something that really said an objection, we would deconsolidate if there was an objection to consolidation, or whatever the appropriate term for consolidation.

MR. FOSTER: So long as the objection was not frivolous.

MR. MICHAELS: Yeah. I mean, I'm fine with all the belts and suspenders --

MR. HELLER: All right. Okay.

MR. MICHAELS: -- there or some demonstration of why there -- it should not be consolidated.

MR. HELLER: Okay.

MR. MICHAELS: I'm fine about having to demonstrate that. I'm all for efficiency.

MR. HELLER: Okay, well, I think we -- maybe if we -- as a suggestion, maybe something that says -- I'm just trying to flush out the frivolous idea, and so, something that says we received -- we received an objection stating the information that we're saying -- saying why -- why a right of some parties is prejudiced and that -- that the explanation is not frivolous, then it will be granted. Something to that effect.

MR. MICHAELS: Yeah, that's --

MR. HELLER: So that it's really putting forth some burden on the person who wants to not be consolidated. But giving us a slight standard, but -- but at the same time putting -- basically not being in favor of granting that kind of objection where it does
arise.

MS. MANDEL: Yeah.

MR. HELLER: If that makes sense.

MS. MANDEL: Then you have that frivolous standard of -- whatever it is -- purpose of delaying --

MR. HELLER: Yeah.

MS. MANDEL: Yes, there's some magic thing about --

MR. MICHAELS: Embarrassment -- what was it, --

MS. MANDEL: No, no, not that one.

MR. MICHAELS: -- annoyance.

MR. HUDSON: I'm just curious, would it ever be considered frivolous if somebody had -- was represented by a different counsel? Is that the kind of thing we could flush out and say it's not frivolous if you have different counsel and the reason you don't want to consolidate is because you want to present a different case?

MS. MANDEL: Well --

MR. MICHAELS: You mean, there's a presumption that if there are two different lawyers --

MR. HUDSON: Yeah, presumption if you're obtaining a different lawyer that -- that it's not frivolous.

MR. HELLER: Well, I think -- just quickly, I mean my feeling would be assuming that you can state that, then you -- you would meet the standard I was just kind of trying to express, and I don't think we --
assuming staff goes along those lines, as soon as you
point out that you can't present your case in the manner
you want to and you're not going to be able to -- to do
your presentation at the hearing, I think that would
meet the -- like any, you know, interest of a party as
being prejudiced by consolidation. And that that ground
stated isn't frivolous.

So -- so, I think we would be able to cover the
situation you're talking about but, you know, we could
go through and try to be very specific. But I think
it's kind of a dangerous activity to go down of, well,
we said that if your -- your attorney wants to change it
to this extent, that's grounds. But what if your
attorney really just wants to argue with the other
attorney about some point of law, is that enough? We
didn't express that.

I think we might be better off having -- if we
could find something that's acceptable to everybody
that's more general that we can use in application, I'd
recommend staff trying to do that first and making it so
that it covers all the scenarios that we're concerned
with.

MR. HUDSON: And the -- the other thing I hope
is a consideration -- this is where I'm showing my
ignorance again, but to the extent that we don't have a
history of the kind of problem that Ian was talking
about, where we have that kind of gamesmanship going on,
maybe the simplest rule is just if you don't want to be
consolidated we're not going to consolidate you.

And that's -- that's a simple, easy to apply rule. Maybe we should start at the simple rule and then -- then, you know, maybe we could complicate it only to the extent we need to for some kind of gamesmanship that's actually going on.

MR. HELLER: I think that's a great comment, actually.

And I think that would -- might make other people happy, as well, and make things consistent between programs.

So, we'll definitely look at that and try to come up with the -- the most -- the simplest solution that -- that satisfies all of our concerns.

We'll definitely need more work on the section.

---oOo---
SECTION 5000.5006

NOTICE OF BOARD HEARING AND RESPONSE


---oOo---

SECTION 5000.5007

DISMISSAL, DEFERRAL AND POSTPONEMENT OF HEARING


Dismissal, Deferral and Postponement.

MR. MICHAELS: So, this -- I'm just trying to put the commas here. Under 5007 I sort of connect the commas here. Dismissal, deferral and postponement of hearings. Would that be a dismissal of a hearing?

MS. MANDEL: Dismissal of a case. Dismiss a matter, under (a).

But -- but Peter is giving you a grammar thing in your heading.

MR. HELLER: So, deleting the word "of hearing" probably?

MR. LO FASO: I'm sorry. The question is whether "of hearing" modifies only postponement and deferral, but not dismissal? Is that the question?

MR. FOSTER: I think so.

MR. HELLER: I think, yes.

MS. MANDEL: And of course down in (b) you're talking about briefing as well as hearing. So, --

MR. MICHAELS: And are the word -- is the word -- earlier or elsewhere the words "acceptance" or
"accepting" and "rejecting" are used, here we're using "dismissal" -- are those synonymous --

MR. HELLER: Either --

MR. MICHAELS: -- rejecting and dismissing?

MR. HELLER: And -- thank you for asking that question, Peter. But essentially the accepting and rejecting petitions and appeals language is not in this part at all. That language is contained in Parts 3 and 4 and has to do with Property Tax petitions and also appeals from the Franchise Tax Board.

And those provisions are very specific to those programs. One, because the Board has to establish jurisdiction over appeals from the Franchise Tax Board.

And so, the -- the process of accepting that appeal has greater importance there in other programs. And for Property Tax purposes there's essentially time constraints that deal with whether we're accepting or rejecting and we need to do that very quickly in order to get the process moving forward.

So, that's discussed in those two different parts dealing with those topics.

Here we're talking about something where there -- a petition, a claim, appeal, has long been -- has been accepted long before this point in the process.

So, there's no exception or rejection.

Here we're dealing with something where -- where the -- the matter that's going before the Board could be dismissed or the hearing or briefing could be
deferred or postponed, was what this was intended to do.
And I think the change to the -- the title to make it
clear that it's not just about hearings would make --
would help, as well. But it's essentially taking --
dealing with later on in the process.

And then also for those of you who are
interested as far as Business Taxes matters are
concerned, we didn't include any language about
accepting and rejecting petitions and appeals in that
context, because the Board has quite a bit more latitude
to treat things as administrative protests. And we've
really used that function as opposed to saying we're
going to reject your pro -- your petition and we're
going to treat it as something else, is what we're going
to do instead.

So, that's the reason why that language isn't
there in case anyone is concerned. But -- but that
would be why we have what we do in Section 5007.

MR. MICHAELS: Excellent.

MR. EVANS: If we could go back to 5006 for a
second.

MR. FOSTER: You bet, Gary.

MR. EVANS: In the (d), Waiver of Notice, the
second sentence says if the 60-day notice period is
waived, a modified briefing schedule. Would the 45-day
notice period, as well?

Or do you want to do the same thing?

MR. HELLER: In (d).
MS. MANDEL: (d), on page 12.

MR. EVANS: Page 12.

MR. FOSTER: It's because the first -- the first sentence has both periods and second sentence just references one.

MR. HELLER: I think we would want to modify the briefing schedule for both. So, 60-day and/or -- or 45.

MS. MANDEL: Well, would the 45-day -- is there briefing in those matters after the 45-day notice? Maybe that's why you don't have it. Maybe those ones are all --

MR. HELLER: Peter, you'd know better than me, but I think -- aren't they tied to the hearing date, the briefing schedule still?

MR. KOCH: Isn't briefing completed by that time? At least in the 60 days.

MR. HELLER: I don't think so.

MR. EVANS: Usually.

MR. KOCH: Usually.

MR. AMBROSE: Not -- not for a State assesseee, though.

MS. MANDEL: Okay. Okay.

MR. HELLER: So, it wouldn't hurt to have the authority to be able to modify it.

MS. MANDEL: Yeah, if there is a briefing schedule.

MR. HELLER: Okay. Yeah, it just says "any
briefing schedule as appropriate." So, it's not requiring any specific modification.

    MS. MANDEL: Right.

    MR. HELLER: So, thank you, Gary.

    MR. FOSTER: Anything else on 5006 or 5007?

    ---oOo---
SECTION 5000.5008

REPRESENTATION AT HEARINGS

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MR. FOSTER: Page 16, 5008, Representation.

MR. HELLER: I would like to point out here quickly we did add some language in subdivision (d) that was recommended by the Franchise Tax Board, that would prohibit somebody who's disbarred from practicing before the Franchise Tax Board from representing an Appellant from the Franchise Tax Board before the Board, which we thought was very good of them and appropriate to point out.

The rest of the changes, I think, were very minor and dealt with the authorized representative.

MR. EVANS: In section (a), it says that the authorized person must be at least 18.

MR. HELLER: Yes.

MR. EVANS: So, if a taxpayer has their --

MS. MANDEL: Child speaking for them? Or are they even allowed to do that?

You know, comes in and the parents can't speak well enough --

MR. EVANS: Can't speak very well.

MR. MICHAELS: You're talking about someone who's under 18 that's speaking for the parents?

MS. MANDEL: Yeah.

MR. EVANS: Correct.

MR. LANGSTON: They would be representing.
This comes from your regular old power of attorney requirement that a person to represent another must be an adult or capable of representing another. That's -- that's where the 18 comes from, I think.

MS. SIMPSON: Exactly.

MR. HELLER: We do have provisions also to provide any of these people with an interpreter through the Board as well.

So, to the extent it became a problem, we could still reschedule a hearing and provide an interpreter for somebody who couldn't provide a family member who was of majority age.

MS. MANDEL: What he's saying is that that family member would --

MR. LANGSTON: They wouldn't be the representative. They wouldn't be -- if someone's interpreting, it's still the person speaking in the foreign language that is, you know --

MR. HELLER: Correct.

MR. LANGSTON: -- making the testimony. The interpreter is not, hopefully, representing them. They're just translating

MR. HELLER: Right, absolutely.

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SECTION 5000.5009

POWER OF ATTORNEY

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MR. FOSTER: Section 5009, power of attorney.

MR. HELLER: And this one I would point out -- Section 5009, staff added some language at the end of subdivision (c) that was requested by Abe Golomb dealing with the ability to accept a substitute power of attorney.

And it essentially does provide staff with the discretion to accept one. It still requires all of the same terms.

But I believe there have been a few cases where a particular staff member just didn't like that it wasn't on our form and we're trying to alleviate that kind of conflict.

MR. MICHAELS: That will work.

MR. HELLER: It's a try.

MR. FOSTER: If there's an IRS form submits?

MR. HELLER: That would be correct, we could accept an IRS form that contained the same information that is being requested here or that's included on our form or just a form that was drafted by an attorney or other representative with the power of attorney.

As long as it has the same provisions.

MR. LANGSTON: Or a general power of attorney for a person who is incapacitated or in the hospital or something, that's also -- we see that sometimes.
MR. HELLER: Yes.

MR. HUDSON: Tom Hudson. Wait a minute, you brought up a great point.

I don't see here where a general power of attorney would work.

MR. LANGSTON: Well --

MS. MANDEL: Under (c),

"Any written document containing all of the provisions."

MR. HUDSON: Yeah, all of the provisions, that's the whole point.

MS. MANDEL: Oh, that includes tax -- the tax matters.

Then I guess you would say, well, if it's a general one, it generally covers everything under the sun.

MR. HUDSON: But it doesn't -- but a general power of attorney would never mention some of the things on here that we're mentioning, like, you know, account numbers and things like that.

MR. LANGSTON: Well, that's a good point.

MR. LO FASO: I mean what --

MR. HUDSON: I've seen the space on the general power of attorney forms that ask for taxpayer ID number or Social Security number, but I haven't seen a space on there where it says, well, "We want the account number," and some of these other things we're asking for -- telephone number.
MR. LANGSTON: What sometimes happens is, say a taxpayer in the hospital will have a son or daughter who has a general power of attorney, they will sign the tax power of attorney appointing someone else.

I suppose they could appoint themselves with all of that information. The -- the tax year and taxpayer information is primarily to verify that they are actually representing them for that year, you know, and they're the right person and all that.

I'm not sure that goes to the legal effect of the power of attorney as much as sort of the clerical recordkeeping, making sure that they're representing them for this particular matter as opposed to some other matter.

But, isn't there -- I think there is a general out clause anyway that you don't really need a power of attorney at all and it's only if there is a question they're going to ask for these.

Isn't that still in the --

MR. HUDSON: That's not what this says, it says, "May require."

MR. HELLER: It said may require.

MR. LANGSTON: "May require," because, I mean, it's unusual that they actually do require it.

MR. HELLER: Generally -- our general practice is that, you know, normally a representative is very clear who he is representing who in most cases, it's just situations where we're contacted out of the blue by
somebody who says, "You know what, I'm representing this business. I want to see their file."

That would be a great example where we would say, "Well, please go ahead and send us our form power of attorney so we're clear that this person has actually signed something saying you're allowed to look at it."

And then also -- expanding on what Bruce was saying -- also we do request the tax periods be identified because taxpayers often do have representatives representing them for different periods on different matters, especially, I think -- and I'm not an expert on this -- but I think with some of the Corporate Governance rules that are out there, a lot of big companies have different people -- different entities handling their compliance, like return filing requirements as opposed to handling their controversy work, and so, we need to know who is who and which ones are allowed to see what from which periods.

Those are reasons we're requesting it, although, I think, you know, there -- I would tend to think we would still accept the general form power of attorney or we would be able to let that person sign something else.

MR. LANGSTON: The Chief Counsel could make that determination under the new rules.

MR. HUDSON: But here's to make it painfully obvious, you know, the only problem here with subsection (c) is the word, "All," it says, "All of the
provisions required by subdivision (b)."

That is the one word that is the problem here. Can't they just say, "Containing substantially," you know kind of the substantial compliance concept?

You know, if they have everything but the fax number, the telephone number, account number or something, isn't that fine?

MR. LANGSTON: Really, (c) is two separate things.

The is first sentence of (c) is saying you can use a different form.

The second sentence should really be its own subsection, which is the general out clause. That would also solve the problem by saying, "If an issue arises," that, you know, if they don't have one of these forms then that -- I think that would also solve the problem.

MR. HUDSON: We have, you know, the standard form, I'm trying to remember the last time I saw one, I think I saw it actually printed in -- where is it in the State law?

It was more than a decade that I last looked it up, but there is actually a statutory form for power of attorney that doesn't contain these things, and, oh, my gosh, if somebody used the statutory form it seems like they should be covered.

MR. LO FASO: But alternatively, in sentence 1 it is what does the staff have to accept.

And sentence 2 is if the staff accepts, then
there is the question of what the Chief Counsel decides.

If there was a lack of a permit number,
couldn't the say, "Could you write your permit number on
the top of that and then I can give it to Chief
Counsel"?

MR. HUDSON: It's got to be notarized by the
that filled it out.
I don't think you can just add things to a
power of attorney form without the --

MR. HELLER: Our form powers of attorney don't
require notarization.

MR. LANGSTON: No, they don't.
MR. HELLER: The Board's do, but I think the
statutory form might, I'm not positive.

MR. HUDSON: It implies it. It's prominently
on there the last time I saw it, but --

MR. MICHAELS: Also I agree with Tom that
there is sort of a -- there is sort of a common sense
everyday linkage between a power of attorney and having
it notarized, whether it's necessary or not.

MR. LANGSTON: We never have ours notarized.

We dropped that like 15 years ago.

MR. HELLER: How about -- oh, I'm sorry.

MR. LANGSTON: I'm just saying we don't as a
practice any more because it's the representative that
gives us the power of attorney, not the taxpayer and it
was burdensome.

MR. MICHAELS: It's different over here then.
MR. HELLER: But, any way, I do think we can a
change the -- I don't see any reason why we couldn't
change subdivision (c) to refer to a written document,
including a general power of attorney, or I should say a
statutory general power of attorney --

MR. HUDSON: Yeah.

MR. HELLER: -- let's say, containing
substantially all of the provisions and then still have
Chief Counsel make a decision if there's any kind of
dispute that arises, even regarding like the specifics
of what -- what hearings you are entitled to.

MR. LANGSTON: I have no problem with that.

MR. HELLER: That way we can bring in people
who just, for instance, are like the representative of
the incapacitated individual.

MR. HUDSON: Yeah, the grandma's in the
hospital kind of thing.

MR. LANGSTON: Or if they leave one of the
fields blank and you're ready to go, and, you know, it's
no fax number.

MR. FOSTER: FTB is not going to challenge our
jurisdiction for lack of a fax number?

MR. LANGSTON: Exactly.

MR. FOSTER: You said that on the record,
Bruce.

MR. LO PASO: Could you notarize that, please?

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SECTION 5000.5010
CONTRIBUTION DISCLOSURE FORMS
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MR. FOSTER: We'll keep going for another ten minutes or so and then take a break.
So turn to page 18, Section 5010?
Section 5011?
MS. MANDEL: Actually on this 5010, just a cross reference of -- you have defined the Board -- you have defined Board Member to include the Deputy State controller and the Kopp Act stuff is -- I'm not sure that it's matching.
MR. KAMP: Also --
MS. MANDEL: And all the Kopp Act forms just name the five Board Members.
I suppose if you had a Deputy State Controller who was actually running for office, it would be an odd thing, but I don't even know that that is technically under the Kopp Act.
You might want to just check your references on that -- on how that all fits together.
MR. KAMP: Steve Kamp from Board Member Yee's office.
I also think that the Kopp Act does -- does not refer to contributions to the Board Member, but committees controlled by the Board Member.
Because that's how you have to intermediate contributions under the Political Reform Act.
The elected candidate never takes them directly, it goes to the committee that the candidate controls.

You may want to check that out.

MR. MICHAELS: What do you want changed?

MR. KAMP: It just like it says here, "every contribution to Board Members."

MR. HUDSON: Yeah.

MR. KAMP: That's personal use, almost you are saying.

That never happens. It's to a committee that the Board Member controls

MS. MANDEL: I don't know what our forms say that was sent out, but we just have to watch and clean all that up.

MR. HELLER: I will go ahead and do that, Steve.

I do think, though, we were hoping -- we did make that change in subdivision (d) to bring in the Kopp Act itself.

So, we're saying that those -- those definitions are going to apply to this section.

MS. MANDEL: Okay. So, that might take care of it.

MR. HELLER: But to the extent we create an inconsistency, we need to go check, make sure of that.

So, I'll do that. And I will check to make sure that the use of the term Board Members, as defined
in this part, doesn't conflict with the Kopp Act's
treatment of a Deputy Controller who might be defined as
a Board Member --

MR. KAMP: Yeah.

MR. HELLER: -- under this part.

MR. FOSTER: Anything else on that section?

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SECTION 5000.5011

HEARING SUMMARY

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MR. FOSTER: Section 5011, hearing summaries.
MR. MICHAELS: An objective.
MR. FOSTER: Yeah.
MR. HELLER: We received a comment from Mr. Al Koch suggesting that hearing summaries be objective, which I believe has always been our policy, but maybe something that wasn't always carried through. And staff did insert the word "objective." I think it's, you know, try to define the term objective.

MR. MICHAELS: Good.
MR. HELLER: But --
MS. MANDEL: What they've done --
MR. MICHAELS: You couldn't.
MR. HELLER: We're trying to send the message to, you know, the conference holders and staff and the Appeals Division that the Board needs to hear both sides clearly. And they need to clearly state the taxpayer petitioner's argument clearly and also identify whatever relevant evidence has been entered in objective fashion. So, we really have no problem adding that.

MS. MANDEL: We did not want to go there.
MR. AMBROSE: I had a comment. This is Lou Ambrose.

If the proposed changes to the property tax appeals rules, you know, are going to take effect,
there's going to have to be an exception carved out for
those too because, obviously, if you -- the hearing
summary is going to be prepared after the appeals
conference, which is 30 days prior to the hearing or,
you know, no later than.

So --

MR. MICHAELS: Don't the rules in that section
trump the -- this, expressly trump it?

MR. AMBROSE: Well, that's what I thought, but
then I saw this exception here at (c), so --

MR. MICHAELS: (c)?

MR. LO FASO: The user friendly cross
references are appropriate.

MR. FOSTER: Chapter 4 says that it trumps
Chapter 5 where there is a conflict, but we've still
gone through Chapter 5 and made that clear everywhere
there is a conflict to refer people to Chapter 4.

MR. HELLER: We can -- we will definitely -- as
of -- the property tax provisions have kind of been in
flux recently and how the final stages in the process
are going to look is still not 100 percent clear to me.

When it is clear, we will definitely make sure
that either of the provisions -- well, what we'll do is
several things, make sure that the provisions in Part 4
are clear, and Part 3, which deals with property tax,
are clear, and explain what is actually going to happen.

Then I think we'll go ahead -- to the extent
that they're different from what the general rule is in
subdivision (a) here and we will create a subdivision, I
guess (e) now or renumber (c) and (d) so that there is a
cross reference for property tax appellants to know
which procedures apply to them.

And that's -- there may, in fact, be more than
one procedure in the property tax now for different
programs within property tax.

So, that's something we'll have to deal with.

It wasn't -- I don't believe any information was
available when I was working on this -- it's not for
sure.

But that was the -- there was no intention of
trying to create a conflict and to the extent there is
one, definitely want to want to get it out before
presenting it to the Board Members -- definitely try to
do that.

MR. KOCH: Question?

I don't remember what's different in Chapter 4
on the hearing summary.

MR. FOSTER: Chapter 4 describes the hearing
summaries prepared after the Appeals Division has
reviewed the file, requested additional briefing, and, if
it needs to, held the prehearing conference, if it
needs to, as opposed to here, subdivision (a) of 5011
sets a deadline, but in --

MR. KOCH: Okay.

MR. FOSTER: -- Chapter 4 you have a different
sequence of events.
MR. KOCH: Okay. Now, let's suppose that the hearing summary is sent out 40 days before.
And the taxpayer believes it's either not objective or not complete. What happens after that?
MR. MICHAELS: Maybe you should add, "fair and balanced"?
MS. MANDEL: No, no, we had that conversation.
MR. KOCH: Don't go too far.
MS. MANDEL: That's a pejorative term.
MR. HELLER: We did provide language in that second sentence of subdivision (a) allowing that the taxpayer submit information to to the Chief of Board Proceedings.
MR. KOCH: Yes, I understand.
MR. HELLER: But as far as -- we did not explain how that would work as far as many -- currently it's really within the discretion of the Appeals Division to determine whether or not their hearing summary, one, is objective, and whether it accurately conveys the information, especially in the case where there's an objection from one of the parties.
And my experience is that they generally just made the change. I don't -- there's has been very few cases where they want to get into a factual dispute.
MR. MICHAELS: It's usually a typo.
MR. HELLER: In most cases, or there's even cases where there was just a misunderstanding of the conference holder, who, you know, otherwise wrote a --
you know, some letter in the file that was already clarified to the auditor that didn't mean what the auditor originally said.

But they're still looking at some other documentation, carrying that forward. That's been incorporated to the Appeals -- or I should say hearing summaries, occasionally that has been taken out.

But we could flesh out those procedures but we really felt that that was an area where common sense would probably play a role. And since we're making them -- requiring them to be objective, I don't believe that the Appeals would want something that didn't appear to be objective on its face to go to the Board Members after having received notice that there was something incorrect and choosing not to incorporate that extra information.

So, that's our feeling for now. So, we're not planning on adding any procedures, but we'll definitely keep it mind and we may need to in the future if we do have lot of issues.

Although we are hoping our hearing summaries will be better in the future. And that's been part of this whole process was trying to get all of the briefing done and giving our Appeals Division staff the ability to get additional information before preparing their hearing summaries.

So that, hopefully, the quality of the summaries, the quality of the information presented to
Board Members will increase over time and there will be less confusion -- at least that's our hope.

MR. KOCH: Well, at least the experience that we've had is that Board Proceedings is really looking to Legal.

And Legal is our opponent. And so sometimes it doesn't come out objective. And so maybe that won't be true any longer, right?

MR. HELLER: I think that staff is hoping that by adding the word "objective," that it would be addressing that issue to some degree.

MR. KOCH: I understand and appreciate it very much.

MR. HELLER: As far as, though, the procedures, right now, the way that the Board's currently set up, the Board Proceedings Division is a part of the Legal Department.

So, the Board Proceedings and the Appeals Division both report to Chief Counsel. And so, to the extent that there was some sort of dispute it would be the Chief Counsel who would mediate on that, but --

MR. KOCH: I understand.

MR. HELLER: To extent that they're all kind of a part of the same group, that's absolutely true, they're all part of the of Legal Department.

I can understand some -- a lack of comfort with the procedure, but it's what we have right now.

MR. EVANS: When it says that, "The Board
Proceedings shall mail," does that include e-mail or any other kind of electronic --

MR. HELLER: "Shall mail"?

I don't believe we have not intended that to that include electronic mailing at this time.

MR. KOCH: It's an otherwise provision of it if you are e-mailed?

MR. HELLER: For us -- at this point, as far as communications going from Board Proceedings to the taxpayer and other parties as far as scheduling the hearing itself, we haven't incorporated any -- any regulations allowing for any e-transmissions specifically.

I think taxpayers can certainly, you know, enter into agreements to accept notice any way they want to, but, I think -- right now, our biggest concern is -- this is really my concern, as one of the few people who have looked at the issue so far, but it's really there -- we would prefer to make sure that -- that we have a hard copy that we can prove that it was mailed, that it was sent to the taxpayer at the correct address if we're going to hold their hearing and right now I don't know that there is a comfort level with e-mailing these types of information to the extent where a taxpayer could say, "Well, my e-mail service was down. I never got that. I don't know what that is."

MR. HUDSON: Isn't this whole thing moot as it says, "Or otherwise provided"?
Is that what you're talking about?

MR. LO FASO: Yes.

MR. HUDSON: So, already under existing language you've got there it could be e-mailed and that's fine.

MR. HELLER: I think so. But I mean -- yes, "otherwise provided," I'm still trying to indicate it wasn't intended to create a big e-mailing.

MS. MANDEL: That's for --

MR. HELLER: You're correct.

MR. KOCH: It should be both, really. If it's e-mailed then they could -- would confirm with a letter.

MS. MANDEL: And I only see, "or otherwise provided," in the modifications to a hearing summary, not that the actual hearing summary itself is mailed.

MR. HUDSON: Good point.

MR. HELLER: That was dealt with because modifications can happen -- literally be finished the day of the hearing. We have had that situation.

And so in that case we wouldn't have to want to mail it to the taxpayer while they're there and won't get it for five more days and their hearing's that morning.

That was, I think, really what we were thinking of, not to create this expanded methods for transmitting information. We really are concerned that Board Proceedings maintain the paper trail of all its communications.
MR. KOCH: Now you're really bothering me.
You're saying that you can amend the summary of
the hearing the day of the hearing?
MR. HELLER: Essentially.
MS. MANDEL: Sometimes they correct them, it
happens.
MR. MICHAELS: Typos, it happens.
MR. KOCH: Typos I have no problem with.
But rewriting --
MS. MANDEL: Usually, it's typos.
MR. KOCH: -- I mean if you submit a
modification request, it comes back, it's modified?
MR. FOSTER: Sometimes the Appeals Division
will.
MR. KOCH: Is that the end of it? Or can it
get modified again?
MR. MICHAELS: Are you saying -- Al, are you
saying --
MR. KOCH: I am only -- I'm only talking from
experience.
MR. MICHAELS: But are you saying you asked
for -- you are saying, "Hey, this isn't objective, this
is subjective, I'd like it modified."
Is that what you are presenting?
MR. KOCH: Yeah.
MR. MICHAELS: Okay. So, they say, "You are
right, it is subjective, it's not objective."
Then that's your scenario? Then you see the
objective version the day of the hearing?

MR. KOCH: Or you don't see it until the day of
the hearing.

MR. MICHAELS: Well, if it's objective, I guess
it's no harm.

MR. KOCH: I don't know whether to correct it
or not.

MR. MICHAELS: It's been repaired.

MR. HUDSON: Okay. I don't know if we need to
have the discussion now, but as long as we've gotten
into this, why don't we just say in the first sentence,
"Shall mail or otherwise provide the taxpayer and the
Department," and like that?

So, we put "or otherwise provide," in the
first sentence too? That way if somebody wants, you
know, hand delivery, they come to the counter and say,
"I'd like to get it. I'm here."

Or you can e-mail it to them.

MR. HELLER: I would still suggest that that's
not really -- well, it's something we can consider, but
I think -- my biggest concern here is when you hand
something to someone, you don't have the record of
mailing it that we -- that I am interested in.

MS. MANDEL: Tom?

MR. HUDSON: If you're interested in creating a
record, then e-mail is the best possible way.

MR. LO FASO: But just to be clear, I
appreciate what you're saying, but it's a matter of
discretion versus a matter of requirement, which is to say, if you are going to -- do you -- are you saying you don't want to give Board Proceedings discretion to do something without a record, even though Board Proceedings knows it's wise to have the record and most of the time they'll do it?

MR. HELLER: Well, I am really not trying to deprive people of discretion.

I'm just really concerned that we don't end up at hearings where there's a taxpayer who says they never received anything.

Board Proceedings is say, "Yeah, yeah, you came to the window," or, "Yeah, yeah I sent you an e-mail."

Then that guy goes, "Well, I never received your e-mail".

MS. MANDEL: We had that some years ago. There was a big blowup in the Board room a few years ago where somebody said they didn't get something or when was something done and we had to drag the Board Proceedings staff down to the Board room and, "When was this mailed?", et cetera, et cetera, et cetera.

Now we get that little thing before the Board meeting that has, "Here is all of the stuff," when things were mailed, when things were done because there was a big blowup about whether something was sent and received.

That might be what you are recalling and being concerned about
MR. HELLER: That is.

MS. MANDEL: Giant blowup.

MR. LO FASO: That's fair, I am -- Brad answered my question that he wants to require it and I'm typically in favor of flexibility, but I think you've overcome my presumption.

Thank you for your comments.

MR. MICHAELS: I understand too.

I mean, you've sort of got a traditional view that the main file has to have a hard copy of the document, there's got to be some central file that has sort of the traditional, old-fashioned version of everything.

MR. KOCH: Showing that it was mailed.

MR. HELLER: Correct.

MR. KOCH: The problem I had is we never received it at all until we heard it. And that's not atypical of the hearings we have had.

MR. HUDSON: Brad, that goes to my point, if you had e-mailed it to him, you would know --

MR. KOCH: I don't know that we've ever received a separate one for any of our hearings.

MR. HELLER: Well, I think --

MR. AMBROSE: Lou Ambrose, what record do you have if you just mail it and it's not done certified or --

MS. MANDEL: Right, he could still say -- just say it never came back.
MR. HUDSON: If the key is tracking when it was sent and who got it and when did he open it and all that sort of stuff, e-mail provides a better record.

So, I don't want to just use the rule to prevent e-mail, even though it's the superior means of communicating this kind of thing.

MR. HELLER: Well, I think -- I'm more than happy to go ahead and work with Board Proceedings staff to figure out whatever Gary Evans or anyone else there thinks is an appropriate means that they think they can implement in some kind of a structured format that's not going to lead to problems down the road.

My biggest concern -- and it's really -- I've never -- you know, I have full faith all of our employees will carry out whatever procedures that will be put in place, I am just still a little leery -- people think that electronic everything is the most efficient, most secure way to do things, but it does have limitations.

Things disappear. People can't access computers entirely for entire days at some times and that means that electronic records we're looking for won't be accessible.

So, I'm very concerned of just jumping both feet into electronic transmissions until we have established what it is we're doing.

So, I don't have a objection, though, to try to do it in some manner that we all -- you know, especially
Board Proceedings, could just feel that they're comfortable with the procedures so that when they're called before the Board they can establish whatever is necessary, then I don't have a problem with it.

I have never tried to take away the discretion to do things in a more appropriate manner.

MS. MANDEL: That's whose head it's going to be on.

MR. HUDSON: Mail or otherwise provide, we're not -- we don't need to have this discussion now, that's something they can discuss as a policy matter any time that they want.

They don't have to go through the regulatory process. You might just want to have both sentences say, "Mail or otherwise provide," and then we can save that discussion for them -- see what kind of security they can -- their comfort level is if they have to e-mail or hand deliver documents.

MR. HELLER: Well, I'm -- the only caveat I'll say is I'm going to have a discussion with them first, then I will change the language, assuming that they have something that they can recommend other than just mailing, which, I am pretty hopeful that they will have something else.

But I just want to make sure that there's something before -- because I know like -- I hate to present the Board Members with language that seems to convey that we're going to do something, if, in fact,
staff really doesn't have any plan of doing something different.

So, I want to make sure that we do have that alternative and that there is some other way of providing, then I will put the language in so that we don't end explaining that, "Well, it's just good feeling language."

But I do think those are all great comments and we do want to make this -- our goal is to get this information to the taxpayer as quickly as we can so they can act on it.

And we just want to create a record. So, I think we can definitely move forward and try to do something that gives more strength.

MR. FOSTER: We need to take a break for about fifteen minutes or so.

MR. MICHAELS: Could you give us a preview of what lies ahead?

We've done a lot of the stuff in the back here, but I'm am just trying to get a grasp of what's left.

MR. HELLER: We're going to be going into additional briefing, which deals with situations the a briefing provided in normal briefing procedures, that are in the different chapters, has still not provided all of the information that might be appropriate to the Appeals Division or Board Members.

We're dealing with preparation for Board Hearings and the issuance of subpoenas; the presentation
of the evidence at the specific hearings; witnesses.

MR. MICHAELS: Is that where it ends?

Because this is where the stuff we talked about
before gets just picked up.

Is there any more after page 24 that --

MR. HELLER: After page 24 we do restart again

and that will be on -- that will start with page 29,

with Article 3.

MS. MANDEL: All that stuff I've marked on

here.

MR. HELLER: That's dealing with the public

agenda notice.

MS. MANDEL: This is all of the stuff

(indicating).

MR. HELLER: Day of the oral hearing -- all

kinds of things, yes, Board meeting --

MR. EVANS: Fun stuff.

MR. HELLER: Quite a few more, call to order,

order of business and allocation of arguments for the

hearing, time for the hearing, public comments.

MR. MICHAELS: Okay, thanks, you answered my --

at least for my purposes.

MR. HELLER: Unfortunately, there is still

quite a bit of information.

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SECTION 5000.5012

ADDITIONAL BRIEFING

MR. FOSTER: Okay, we are going to get started again. Section 5012 on page 19. But first Brad wanted to say something.

MR. HELLER: Right. Real quickly since it's getting late in the day, I just wanted to point out that, you know, if there's any comments that anybody wants to hold or anything that they -- they just forget to ask or make a comment about today, that we -- you know, we're accepting written comments for quite a long time to come and I'm available by telephone and e-mail and everything else, as well, if you'd like to discuss anything with me outside the meeting.

And with that we're just going to go ahead and see how -- as far as we can get today. Hopefully we can conclude everything today, as well.

MR. MICHAELS: And there are no other -- or no future interested parties meetings about this project planned, is that correct?

MR. HELLER: There are none planned as of right now. There could be changes to the schedule, though, and there might be additional meetings, although I don't expect there to be. But I wouldn't swear there wouldn't be one.

MR. FOSTER: Page 19. Section 5012, Additional Briefing. No questions?

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SECTION 5000.5013

PREPARATION FOR BOARD HEARING AND SUBPOENAS

MR. FOSTER: Page 21, Section 5013, Preparation for Board Hearing and Subpoenas.

MR. MICHAELS: I -- Peter Michaels. I gather that this section or the subdivision about subpoenas was added at the suggestion of somebody.

MR. HELLER: I believe that was --

MR. MICHAELS: I don't need to know who it was.

MR. HELLER: Yes, it was a suggestion --

MR. MICHAELS: Yeah.

MR. HELLER: -- and I think it was language that we had omitted that is in the current Rules of Practice --

MR. MICHAELS: Right.

MR. HELLER: -- that were similar to it.

MR. DAVIS: And that's correct, that -- that came out of your -- the current version of the rules.

MR. HELLER: I believe the FTB can take credit for that, as well.

MR. FOSTER: Right.

MR. MICHAELS: And this Preparation for Board Hearing and Subpoenas section, does that apply to Property Taxes?

MR. HELLER: I believe so.

MR. MICHAELS: Additional time, a party may request additional time to present a complex matter.

MR. HELLER: Uh-huh.
MR. MICHAELS: Really?

MR. HELLER: That is correct. There is no distinction and that it wouldn't have it apply to Property Tax matters. Of course, you know --

MR. MICHAELS: Too bad Lou is not here. That's not going to work very well. I mean, you know, just --

MR. HELLER: Well --

MR. MICHAELS: -- because of the -- the calen -- the stat-- the calen -- the calendar is totally, as you know, driven by statute. And the Board doesn't have any real flexibility there.

MR. HELLER: As far as --

MS. CROCETTE: I have a question. This is Sabina. Is that really relating to a change in the date or having more time for presentation?

MR. KAMP: Yeah --

MR. HELLER: This one is additional time for presentation.

MS. CROCETTE: Which is --

MR. MICHAELS: Oh, you're quite right, Sabina. I'm sorry, I -- I looked at the caption which says, "Preparation," and you're right, this is just asking for long -- more time to make -- make your case. Thank you.

MR. HELLER: Right. And it's suggesting that the request be submitted before the hearing so that we can make the agreements.

MR. MICHAELS: That -- that's totally fine. I
misread it.

MR. HELLER: Perfect.

Al.


MR. HELLER: It would depend on the program that you're looking at, but each program's briefing schedule is contained in its chapter. So --

MR. KOCH: Yeah.


MR. KOCH: Okay. And how does it work, if you'd refresh my recollection, on Business Taxes?

MR. HELLER: On Business Taxes right now would be based on the issuance of the hearing -- well, the Notice of Hearing. And I believe there's actually going to be -- we're -- we're considering submitting two alternatives to the Board Members, but as of right now the two alternatives that are proceeding, one has the issuance of the -- of the Notice of Hearing 60 days before the hearing.

It gives the taxpayer until 45 days before the hearing to file its opening brief, which is not required.

It gives the Department 15 days from then, which would be until 30 days before the hearing, to file a reply.
It gives the taxpayer then 15 more days or 15 days before the hearing to file its reply or its response to the Department's reply. And that would be the general briefing schedule.

But there's also an alternative that staff I believe intends to recommend to the Board Members, which would require that Notice of Hearing to go out 75 days before the hearing.

Then that would give the taxpayer 20 days or until 55 days before the hearing to file its opening brief and give the Department 20 days, which would be up until the 35 days before the hearing to reply.

Then give the taxpayer only 15 days, like the other rule, to file a response to the Department's reply. Since they're generally limited in scope.

And then that would also end up providing the Appeals Division with an extra 20 days to consider that additional briefing in preparing its hearing summary.

MR. KOCH: Okay. Now, the request for additional briefing excludes the taxpayer or the petitioner, whoever it is, because they just filed their reply brief.

So, presumably they don't need to file anything else. Or at least if they did, they wouldn't know.

MR. HELLER: Well, what this -- MR. KOCH: Now -- now, if -- if the -- if the staff files a request for additional briefing, and that's granted, does the taxpayer have the ability to
reply?

MR. HELLER: To -- oh, I think in this case -- let me -- let me go back a little bit.

Really, what the additional briefing is designed to do would be in a situation where we've completed the briefing process as prescribed by the particular chapter. So, for instance, we're at the under our normal current rules in a Business Taxes appeal, let's say we get to the 15 days before the hearing and the taxpayer has just filed its reply or its response to the Department's reply.

At that point the Appeals Division or the Board Member staff can take a look at the briefing that's been submitted to that point. And if they determine that there's insufficient briefing or evidence, then they can request additional briefing from either party.

And so, in that case then they would go ahead and specify what briefing they want. And as far as -- as replying to those, there is no specific provision that would say if additional briefing is requested from a specific party that the other party gets to reply to that brief. That's not currently provided in -- in this regulation. And it really just has the Board and the Chief of Board Proceedings specify a briefing schedule.

So, to the extent that they want to have a reply they can certainly order a reply and then can set any schedule they want for a response. So --

MR. KOCH: If the burden of proof is on the
taxpayer or the -- the petitioner, whoever it is, I
would think it would be normal for them to be able to
reply. We actually had that circumstance come up in one
of our cases where the Board was allowed to file a
second reply brief because an amicus had filed a brief.

So, then we were allowed to respond to that, as
well. And I think that is appropriate.

MR. HELLER: Well, I think in this one -- I
don't -- we'll definitely take your comment under
advisement. And I think -- you know, in this case we're
really just talking about something where there's been
plenty of briefing, everybody has been represented, but
for some reason there's some small item, usually,
missing or some specific fact or something that want --
that the Board just wants addressed in a short period of
time before the hearing.

So, there's competing considerations there, but
I think definitely we want to consider making sure --

MR. KOCH: I certainly would, yeah.

MR. HELLER: -- that the taxpayer has due
process and an ability to respond to any information
that might be presented.

MR. KOCH: I also think I'd like the 75 days
better because the longer the Board Members and staffs
have to review the materials, the better it is.

MR. HELLER: I agree. And that's this staff
member's recommendation.

MR. KOCH: Right. Yeah.
MR. HELLER:  Okay.

MR. FOSTER:  Any other comments on 5012 or 5013?

---ooOo---
SECTION 5000.5014

PRESENTATION OF EVIDENCE OF EXHIBITS

MR. FOSTER: Section 5014, on page 22.

MR. MICHAELS: Actually, I -- oh, yeah, 5014.

Perfect.

Yeah, on (a) it -- it says here, "Settlement offers and information in -- discussed in settlement negotiations are not -- not generally considered relevant evidence."

There, I guess, are exceptions or -- when it says "not generally" -- how come it says "not generally" as opposed to "not"?

MR. HELLER: Well, let me -- I'll address that and then we'll continue the discussion. But essentially this particular language -- this particular language, you know, the -- the issue of settlement discussions was raised with staff and staff tried to prepare -- I tried to prepare language that would -- would convey the idea that settlement negotiations or information regarding settlement negotiations is generally -- is just simply generally not relevant.

However, we used the language that it has there to convey the idea that -- that I am not the final arbiter of what's relevant and to the extent that a Board Member determines something to be relevant then they're the trier of fact and they're deciding what's relevant.

So, that was what the intention of that
language was, was to give -- still continue to give the Board Members the discretion to decide whether something is relevant as opposed to the regulation doing so.

MR. MICHAELS: Yeah. And -- and I mean, I could just see someone saying -- I mean, is this license to say, well, you know, we came real close in -- in a hearing we came real close to settling this case, and if the staff had gone along with our, blank, you know, we would have settled it.

You know, that's almost goading a Board Member into saying, well, I move that we just -- you know, adopt that and than let's see what -- if it sticks or not.

MR. HELLER: Absolutely. Well, it was not intended to sanction that, it was intended to -- to discourage it, in fact, was the intention.

However, it may not be accomplishing its goal and I'll let -- quickly let Ken Davis discuss some comments that FTB made to improve it.

MR. DAVIS: Let me -- the FTB is -- we want to weigh in on this. And particularly our Settlement Bureau wants to weigh in on it.

And -- and, Peter, we're concerned exactly for the -- the same reason you're -- you're stating, and that is the language seems to imply that settlement offers can be -- possibly be presented in Board proceedings, or Board -- settlement discussions. Can be brought up at Board hearings. And that the Board
Members would then give it no weight.

We're concerned about that because the -- the Settlement Bureau has a settlement program, which is -- which was adopted by the Legislature in 1992, and has been a very successful component of -- to help taxpayers as well settle matters for civil disputes.

Last year brought in -- or it settled over $1.5 billion in -- in settlements. And we're concerned that this might -- that the language as presented might undermine or -- or damage a key component of the Settlement Bureau's program. That is the confidentiality of settlement discussions.

And the way the settlement program works, and we've -- at the suggestion of Brad we've included the -- the start -- one of the starting documents to the program, which is a non-disclosure agreement. If a person wants to go into the settlement program, they sign a non-disclosure agreement not to discuss the statements that are made in the settlement program outside of the process. And that's typical of any settlement program.

So that settlement discussions aren't normally brought up in a Court, they're not brought up in any other adjudicatory forum. And we don't think it's -- it be -- it would be helpful to bring it up in -- in the -- before the Board.

But more importantly, number one, it's -- it could be harmful because we think it's just not
necessary. And, number two, it -- it hurts the
program's -- it could brought a chilling effect on the
program, itself.

So that if a taxpayer was in the program and
they said, well, the statements I'm making are -- could
damage my own case but they might be admissible or they
might come -- come out in a Board proceeding, well,
that's going to -- that's going to hurt that taxpayer.

So, we've tried to put in -- suggest that up
front in a Board regulation that -- that the statements
made in settlement are inadmissible. So that -- so that
a taxpayer knows at the outset they shouldn't even try
to introduce them.

And -- and we've put in a regulation that kind
of speaks to that issue.

There's some exceptions to the -- to that,
the -- kind of the prohibition or the inadmissibility,
and that is, for instance, if there's key facts that
come out in the settlement process, those -- and those
key facts would have come out in an FTB discovery or a
taxpayer discovery, those key facts can be brought
before a Board.

But the fact that the FTB sought to compromise
the -- the settlement or the tax liability with making
an offer, that type of discussion should not be --
should not go before the Board and -- and should be
considered inadmissible.

So, that's a little brief overview of the -- of
how we envisioned the program or the regulation.

MR. FOSTER: I could back up Brad's point a little bit about how he -- he wanted to make -- you know, reflect the fact that he or -- neither he nor I nor any of us in Legal are the final arbiters. The Board ultimately is going to decide what they think is relevant.

There was an Income Tax case recently where the taxpayer introduced a settlement offer as evidence as an exhibit. And it -- and it was harmful to their case, ultimately. Very harmful. And I -- because it was a settlement discussion, I respected it, and even though the taxpayer had now waived their confidentiality by introducing it, I respected the intent of the settlement program. I did not discuss it in the hearing summary. I did not bring it up in front of the Board.

But at the hearing a Board member said, "Isn't that in the file?"

And I said, "Well, yeah."

And the Board Members wanted to see it. So, out it came. They decided it was relevant, and I'm not sure how much weight they gave it, but --

MR. MICHAELS: Well, did they decide it's relevant or did they decide they were curious to see it?

MR. FOSTER: Well, they decided that they wanted to know what the amount of the offer was.

MR. HUDSON: Tom Hudson. I have two -- two comments. One is I don't think we're using the right
word here. I mean, "settlement offers" I would assume that they're almost always relevant under the California Evidence Code. If you're using the word "relevant" the way the Evidence Code does, that they are relevant. They tend to prove a fact that's in dispute.

But -- but that's not the issue. It's are they admissible or they're something that we should be talking at the hearing.

So, "relevant" is not the word to use. That's the first comment I would make.

Second of all, I'm wondering if -- if we're really helping --

MR. MICHAELS: What -- what is the word?

MR. HUDSON: Well, I'd have to go back -- and check, but "relevant" means, you know, tending to prove a fact --

MR. HELLER: Right.

MR. HUDSON: -- that's in dispute. And -- and they -- they certainly do tend to prove a fact that's in dispute. That if you're saying you have a strong case and the evidence you've presented proves Point X, well, then why were you willing to give it up without a fight in your settlement?

But -- so I'm just saying it's a wording choice, it's maybe the wrong word to use, but -- but, secondly, maybe the broader point is I'm wondering if we gain that much by putting this language in these regulations at all, like even mentioning settlement
discussions. Because I don't know, and I'm not sure I
have the right answer to this, I'm not sure who the
target audience of these regulations are. But if
they're sophisticated people, you know, then they're
going to typically understand the general rule that you
don't present, you know, testimony about settlement
offers and things.

So, if they're sophisticated folks then -- then
they don't really need that. And if they're
unsophisticated folks, then I'm not sure what good it
does putting it in here, because they won't know what
things were said to them as part of a settlement offer
and they won't understand where to find out whether or
not they're allowed to do that.

I just think we're -- maybe this is something
that can't really be addressed by regulation very well
and maybe that's something the Board Members should
just, you know, as a practice say if somebody gets into
settlement negotiations we'll just advise them that
that's -- that's not something we're here to discuss.
We want to see the facts and the evidence you have to
present.

MR. DAVIS: Well, if I could just comment
that -- Ken Davis, at least as to the Evidence Code,
which is 1152, and the -- there's a corresponding
Government Code that's used in other adjudicatory
processes for the -- under the A.P.A. It's 11415.60,
and it's referenced in the -- the comments we made.
At least they -- they say -- and I think you key off on the issue, it's really the inadmissibility of settlement discussions. And that means that it's not even invited for -- to be presented --

MR. HUDDSON: Right.

MR. DAVIS: -- into -- into evidence.

So, if it's inadmissable, it doesn't even get heard or considered. At least that's where we were headed.

MR. HUDDSON: Whether it's relevant or not, that's the whole point.

MR. DAVIS: Whether it's relevant or not. And the other thing is there are many times when offers of compromise are made that really don't go -- and the Government Code talks about that -- as well as the Evidence Code, both talk about they're inadmissible to prove liability. Because many times offers are made not because their -- their party is at fault, it's because the cost of litigation or the -- the resources to -- to go fight the issue are -- they -- they're more important in terms of -- and they'd rather settle.

So, sometimes it doesn't prove the issue of liability but overall the overriding premise is that there should be this free flow of information in the settlement process, and it doesn't get before the Board.

So that's -- and the other issue is, if I can comment, I think the -- theregs. are really designed for the non-sophisticated -- or unsophisticated taxpayer
so that they just know at the outset this is not admissible.

At least that's our -- our thoughts on it.

MR. AMBROSE: Then -- this is Lou Ambrose. Then I -- I think that you would have to carve out an exception, you know, as Tom and Ken have indicated to -- that -- that it isn't admissible. Because, you know, the general idea -- the general concept is that, you know, this is an administrative hearing. You know, evidentiary rules don't apply and all that sort of thing.

But, I mean, obviously, you know, there's a pretty strong feeling that they do. I mean, at least this particular --

MR. HUDSON: At least -- not the hearsay rule, but the evidence rule.

MR. AMBROSE: Right. Yeah.

MR. DAVIS: At least into this one area.

MR. AMBROSE: Yeah, right.

MR. MICHAELS: Maybe -- maybe the caption here should instead of saying "relevant evidence" should say "admissible evidence", possibly, following up on what Tom said.

MR. AMBROSE: But -- but I think relevance is really the standard that, you know, they follow, you know, before this Board and, you know -- well, in local appeals, too.

MR. MICHAELS: Well, I mean, yes and no. I
mean, it's a philosophical discussion. You know, when
the Board -- whoever gave that example, the Board Member
wanted to see what the offer was.

MR. AMBROSE: Right.

MR. MICHAELS: I'm not sure that's probative,
particularly. I mean, it's a -- a judgment call, you
know.

MR. AMBROSE: It is.

MR. HELLER: Yeah.

MR. MICHAELS: It might have been prurient and
it might have been probative. There's no way of
knowing.

MR. HELLER: Well, I do think -- I do --

MR. LO FASO: Alan LoFaso. I'm confused as to
whether we're casting down what we do now or we're
starting to walk down a policy discussion for Members as
to whether we're going to have a new inadmissibility
rule on settlement offers.

MR. HELLER: Correct.

MR. MICHAELS: Well, what -- what's the old
rule?

MR. LO FASO: That's -- that would be implicit
in my question.

MR. MICHAELS: Well, there -- there isn't one.

MR. HELLER: The old rule was that any relevant
evidence could be presented to the Board.

MR. MICHAELS: Yeah.

MR. HELLER: And so --
MR. MICHAELS: Yes.

MR. HELLER: -- to the extent that a Board Member or the Board as a whole determined that something is relevant, then it could be presented and that, you know, contrary to other things it could -- there was no policy prohibiting the Board from accepting settlement negotiations or discussions. And I think they've refrained from doing it, and the parties are refrained from introducing that information.

But there's no -- there hasn't been any written policy preventing --

MR. MICHAELS: But --

MR. HELLER: -- preventing its introduction or --

MR. AMBROSE: But I think that the safeguard, the thing that would prevent a party or FTB or a taxpayer from -- is -- is the agreement, itself. Am -- am I correct? Ken?

Because we had -- I -- I had an appeal recently, the -- either the last Board meeting or the one before that, where FTB presented a couple of declarations from the attorneys who participated in the settlement discussions, not -- not to prove the fact or, you know, the amounts that they were going to settle on or even really the details, but just to dispute or refute a representation that the taxpayer was making.

The taxpayer was claiming that he hadn't been notified of -- I can't remember what it was. But it
didn't really help his case, anyway. But he wanted to
show, you know, sort of bad faith on the part of FTB.

And so, these two attorneys, you know, executed
a declaration where they said, well, we -- we did inform
him, you know, in this discussion and, you know, A, B
and C was discussed.

But it wasn't -- it wasn't being introduced for
the purpose of, you know, showing what the parties could
have settled on or, you know, how this could have been
resolved. It was -- it was to refute -- but -- but the
taxpayer's attorney in that case actually -- and I -- I
don't know what happened because this was a Culver City
hearing and I wasn't there, but wrote a pretty
strongly-worded letter, I -- I believe to the Board
Members, you know, objecting to this and, you know,
threatening to, you know, have the attorney sanctioned
and, you know, that sort of thing.

MR. DAVIS: There are other exceptions to
the -- or in the Evidence Code as to how certain
things in -- how certain statements in settlement can be
considered admissible. As long as you're not talking
about the settlement discussions, themselves, or an
offer, but if it's -- if it relates to fraud, if it
relates to the use of settlement discussions for the
purposes of delay.

If it's not intended for the purpose of
conveying an issue related to liability or a compromise
in -- of -- of a civil liability then at times through
the Evidence Code it is admissible.

So there's a little -- there's a little carve
out there.

MR. AMBROSE: So, notwithstanding the -- the
agreement that --

MR. DAVIS: Right. Now --
MR. AMBROSE: -- this guy entered into.
MR. DAVIS: And it's -- and our -- and our
agreement specifies some of those issues, as well.

The issue is, at least for us -- is the current
language -- or the proposed language, settlement offers,
discussed in settlement negotiations are not generally
considered relevant, to us is going to invite more --
possibly invite someone to introduce these settlement
discussions, and we think that's -- I mean, that's a
real concern to us.

MR. HUDSON: And I guess to follow up with
this --

MR. DAVIS: Despite settlement -- or
non-disclosure agreement.

MR. HUDSON: And my followup to your -- your
point on that where I'm agreeing with you is that,
furthermore, the way this is being phrased it appears
that -- because we're saying they're not generally
considered relevant evidence, it appears that we're
making the key issue is it relevant. You know, is it
-- is it probative of a fact that's in dispute.

And that appears to be the determinative
factor. And -- and that's not supposed to be the -- the
thing we're talking about when we're talking about
whether it's inadmissible. There's totally different
policy reasons for keeping it out that has nothing to do
with relevance.

So, -- so I think this sentence is not helpful, is what I'm saying. You should either take the whole
thing out and not address the issue, or if we -- if we
have to address the issue because it has been explained,
maybe, if we're dealing with unsophisticated folks who
might see this regulation and not -- not know anything
about the general policy -- if we have to say something,
then we should just say very plainly that it's -- it's
inadmissible as plainly as we can.

MR. DAVIS: And at least we'd like the Board
staff to consider it, and the Board staff might have its
own, as Brad pointed out earlier -- might weigh in on
it -- they have their own settlement program which is
mandated by the Legislature, as well.

And so -- and I don't know how -- if they've
had similar or other experiences.

MR. HELLER: All right. And I -- hopefully, I
mean -- I think these are all absolutely valid and
valuable concerns, and -- I mean, I agree 100 percent
with Tom that we need to have a clear statement to the
readers at whatever level of expertise they have as to
what it is we're trying to direct them to do here.

And I also agree that there's valuable reasons
to preserve the both agencies' settlement programs and doing stuff to make it appear that settlement negotiations might be introduced could hamper those programs.

Having said that, I'm not a hundred percent sure that I could come up with something that's going to work properly and address both concerns. I definitely think I can, you know, delete the word "relevant" and use something like admissible so that it's very clear whether it's admissible or not, and we don't get into the discussion of relevancy.

As far as how far I can go to making it a 100 percent hard and fast rule that these things are not admissible or even a rule that mimics the Evidence Code and creates exceptions where settlement negotiations might be admissible under certain circumstances, I'm not sure if I can -- I can accomplish that goal for our purposes.

And mainly just because it does represent a change in the Board's current policy. So, as I -- to my understanding, the Board's current policy is not that settlement negotiations are absolutely prohibited. There's nothing that says that it's a fast rule.

As far as I know.

MR. MICHAELS: There is no policy, really.

MR. HELLER: It's basically just that relevant information. And so, as we understand it even in this room, there's -- there's definitely some folks who would
find probative value in settlement negotiations. So --

MR. DAVIS: Everybody would in some cases.

MR. HELLER: So there is -- there's relevancy
there, so as far as -- you know, my concern is just that
staff does not want to take away the Board Members'
right to discover evidence that they consider relevant
and admissible where they are not even required to
exclude the evidence by statute.

So, staff's definitely going to take a look at
it. And so, if there's some way to convey what's being
done there either as recommended if it -- if it appears
that our management is comfortable recommending that the
Board change its policy that way, or if not then we may
even end up with something more towards what Tom is
suggesting, which is deleting the reference so as to not
mislead people over what settlement and how settlement
negotiations are treated.

And those are things that we could even discuss
in a separate publication or something like that, which
I think there's some of the Board Members are indicating
they may want us to do regardless of what -- how these
rules turn out, because there's numerous activities that
go on that aren't being discussed in the rules that
might be relevant to somebody. And certain things that
are just not regulatory in nature but guidance would be
helpful.

So, there could be an ability to have a
publication that talks about evidence in a way that's
more general that conveys the same information without
adding a bunch of ambiguity to our regulation.

So, I'm going to definitely take up all the --
the comments and see if there's some way I can meld them
into something that -- that my management can recommend
to the Board.

And if I can do that, then I'll do it to the
best of my ability. If not, then my next suggestion
would probably be -- I don't know, I'd probably either
delete the language or -- or retain something similar to
the current, at least change the word "relevant" to
"admissible" so we don't raise the relevancy issue.

But, like I said, I'm going to try to look
through it all towards the best possible resolution.
So -- so, hopefully I can get something that's
satisfactory to everybody, would be my goal.

MR. FOSTER: Any other comments on Section
5014?

MR. MICHAELS: Yes. Sorry.

But on page 23, (d), Official Notice, there are
a couple of things that I -- I am not clear on -- one,
I'm -- I'm not sure what the significance in the first
place is of -- of official notice. I noted -- I do
officially hear notice that tax returns are included.
Which in the case of a State assessee would be the
Business Property Statement.

And then my final point or concern is after 3
it says, "The parties may at the hearing or through a
petition for rehearing refute any matter thus noticed."

So, there's like -- I guess if -- if you think
that what, the official notice is, what, wrong or --
what -- what are you refuting?

MR. HELLER: Well, my feeling would be normally
you're not refuting anything. Most of these documents
either exist or they don't exist, and they contain the
information that they do.

MR. MICHAELS: Yeah.

MR. HELLER: However, I think there's -- I'm
aware of some cases where there's a dispute over whether
something is properly being noticed at all. And whether
it's subject to being noticed --

MR. MICHAELS: What does that mean, being
noticed?

MR. HELLER: Well, what this is, it's really --
what we're trying to do is create a concept --

MR. MICHAELS: What's "official notice" mean?

MR. HELLER: -- close that's the same as
judicial notice. And what that means is when you're --
you know, when you're in front of a Court of law, the
Court can take notice of certain information that's
publicly known and treat it as if it were evidence
introduced at the -- at the -- in that proceeding.

MR. KOCH: It's a hearsay exception.

MR. HELLER: So, yeah, for instance they can
recognize that an article was published in the L.A.
Times on "X" date about this railroad yard or something
to that effect.

    MR. MICHAELS: Yeah.

    MR. HELLER: That would be the kind of thing that would be noticed. And then what happens, though, is my experience, and I'm very limited experience in -- in trial work, but essentially when something is judicially noticed, that's -- there are oftentimes disputes over whether it's the type of information that should be noticed.

    And then, also, whether or not it's really being used to like prove something when in fact judicial notice is usually used to acknowledge that something's occurred or something's happened, and take -- take notice of a fact as opposed to take notice of --

    MR. MICHAELS: Opinion.

    MR. HELLER: -- something that asserts the existence of something else and creates an argument.

    So, there are situations where I think somebody might want to object or -- or file something that would dispute the Board's decision or -- or a party's recommendation to take notice of something.

    And we did put that language in so that somebody -- so it would be clear that if this is happening at your hearing you can object there, and as well -- and I realize that not everyone can file a petition for rehearing, but to the extent that they can they can also object in the petition for rehearing.

    Since one of the grounds is an irregularity in the
proceeding. Also failure to follow the law.

MR. MICHAELS: So -- and, Lou, I kind of have you in mind maybe to comment on this, too, the caption here is "Presentation of Evidence or Exhibits." And it says in here that the -- the Board may take official notice of -- basically, if you look at (d)(1), records maintained by the Board -- well, for example, a State assessee, that's going to be every possible thing that, you know, the State assessee has ever been asked to or voluntarily produced for that given year or ever in its history.

MR. HELLER: Uh-huh.

MR. AMBROSE: Ever, yes.

MR. MICHAELS: So, is the Board taking some kind of official notice there? Does that legitimize the public discussion of -- of basically in the -- in the example I'm using, everything and anything that ever was turned over to the Board?

MR. HELLER: Does that authorize a public discussion of it?

MR. MICHAELS: Well, it -- I mean, this --

MR. HELLER: I mean, I think --

MR. MICHAELS: -- Presentation of Evidence or Exhibits. So, this would seem -- I don't mean to sound argumentative, I mean I'm thinking about it for the first time.

MR. HELLER: Oh, no, I understand.

MR. MICHAELS: But -- but it says,
"Presentation of Evidence or Exhibits." Well, that does sound kind of like it's part of the actual argument in the case, yeah.

MR. HELLER: That's right.

MR. MICHAELS: And then official notice would -- well, yeah, does the scope of official notice for a State assessee cover literally everything the Board maintains? According to this, it would seem to.

MR. HELLER: Well, it's -- it's really still -- I mean, I think that they can judicially notice any record of the Board. However, it's not -- wasn't the -- the idea behind it was not that we would just rec -- notice all of these things and somehow then have them moved into the record of an oral hearing.

The fact would be that they can now recognize them and treat them as evidence that was submitted. And so, I don't think that they would just say, "I'm officially noticing that all our records pertaining to this taxpayer," what they would say was that, "I take notice of the Notice of Determination that we mailed out," or "We can take notice of -- of the valuation report that we did." "Now we can take notice of the correspondence that we received."

MR. MICHAELS: And what does that mean, "I take notice"? I mean, in that context -- I appreciate your explanation earlier, like judicial notice, which is referred to here, but --

MR. HELLER: Right.
MR. MICHAELS: Okay. So, Board Member X says, "I'd like to take official notice of" fill in the blank.

MR. HELLER: Right

MR. MICHAELS: Then, so what? What does -- what does that -- how does that either dignify or -- what does that -- how does that legitimize anything?

MR. DAVIS: Let me -- let me offer up a suggestion. I think, Peter, what you're getting to is that to -- to create the record one of the parties have to offer it -- offer up the evidence. And -- and, therefore, that the -- the preface to this to -- under official notice should be "at a party's request, a Board Member may take judicial notice."

So, that the Board Member is not just going out there and pulling something that's not presented. But it's a party is requesting that the Board take judicial notice.

MR. AMBROSE: Right.

MR. DAVIS: And that way you're creating a record -- and -- and therefore the Board Members are only considering that which is presented in evidence and an official record is requested by the Board by a party to take judicial notice.

Is that -- I think that's --

MR. HELLER: Yeah.

MR. AMBROSE: You know, and their --

MR. DAVIS: -- closer.

MR. AMBROSE: I mean -- I mean, as you said, I
mean there should be a request made and with the -- with
the State assessee appeals I don't -- I don't think that
the staff really does that.

MR. MICHAELS: Well, no, but we had some
looney --

MR. AMBROSE: It's just a general, you know,
blanket, you know, statement that the Board may take
official notice of, you know, any records within its
possession. But without -- which is really just kind
of a -- kind of a substitute for the staff actually
having to produce those, you know, attach those as
exhibits to their -- to their --

MR. MICHAELS: Right.

MR. AMBROSE: -- briefs and so forth.

MR. MICHAELS: Well, you know --

MS. CROCETTE: I have a question. This is
Sabina. I have a question about whether or not we are
saying as a matter of policy that Board Members can't
just say on their own, because I know it doesn't relate
to anybody in the room, but, you know, sometimes
taxpayers and their reps. do get up and say stuff that's
not true. And there are times when, you know, our staff
can't necessarily respond to that. And so, I've seen a
couple of instances where Board Members, who can think
on their feet or may have access to other information,
will say whatever.

And I just want to make sure I'm understanding,
are we saying as a matter of policy that that is not
appropriate? And if so, can you just explain to me why.

And then if that's not what we're saying, are
we saying that just in terms of what, you know,
especially taxpayers' representatives think, you think
it's most appropriate that this be based on the request
by either party?

MR. HELLER: Well, this is Bradley Heller.
First off, staff definitely was not trying to remove the
Board Members' discretion in their proposed language.
And still does -- still tends to agree with you that --
that to the extent that a Board Member wants to -- to
notice something that can be judicially noticed by a
Court of this State, I don't think that staff thinks
there's any reason to prohibit that from happening.

There are other ways that we can deal -- deal
with concerns about what becomes a public -- disclosable
public record or something like that, if that's a
concern.

MR. MICHAELS: Well, it -- pardon my
interruption, it is a concern because look at (c). (c)
says, "Board proceeding staff shall distribute copies of
any documentary evidence that has been submitted or
officially noticed.

So --

MR. HELLER: Well --

MR. MICHAELS: And, you know, if you go back to
the -- which no one in here probably does, but the era
of the Board Member Nevins and the era of Board Member
Bennett, they were perfectly capable of doing something to stick it to staff or a taxpayer if they were so inclined.

I -- you know, it does concern me -- the distribution aspect of this where it's actually required, it's something that's officially noticed.

So, even if hypothetically I want to refute, quote-unquote, something that's been taken notice of, that's not going to prevent disclosure of that. Despite my objection, despite my refutation.

MR. HELLER: That's correct. And I think -- I mean, basically, the way the disclosure, though, is supposed to work is essentially, you know, we outline the information, but it -- like, for instance, this information assuming it does -- it was not provided in response to a petition or -- or in opposition to a petition, and isn't contained in a brief, and isn't actually disclosed on the record of an oral hearing, then it's not going to be a disclosable public record.

But if it is -- for some reason it's now they say, "I'm taking judicial notice of this," and it says X" and they start reading it on the record, then it does become disclosable because it's on the record of that public hearing. So, it will be in the transcript.

And, also, if the Board Member was to move it into the actual record. So, they can go ahead and ask Board Proceedings to enter a document in the record and then that would be included, as well.
MR. MICHAELS: So -- so --

MR. HELLER: So, those are the two ways. So, just having it noticed, to the extent that it would be in the transcript, that -- that may happen automatically because the Board is going to have to say that they're noticing something.

However, beyond that there's nothing -- like the actual documents and things don't necessarily become disclosable records. And many of them are really just public documents to begin with. We wouldn't be able to judicial notice many documents other than the Board's own records that weren't open and available to the public, because it's generally --

MR. AMBROSE: Well, you know, that -- that brings up a -- a good point, because your definition of a matter that may be judicially noticed was, you know, something that was -- you know, was public knowledge or, you know, something to that effect.

But it seems to me like that -- I mean these Board records like property statements, et cetera, are not, you know, matters available to the public. I mean, it just -- somehow there's like a -- you know, this isn't adding up to me.

MR. HELLER: Uh-huh.

MR. AMBROSE: You know, they --

MR. MICHAELS: In other words --

MR. AMBROSE: -- a property statement isn't really something, according to that definition, that
would be judicially or officially noticed.

MR. MICHAELS: Or a tax return, even --
MR. AMBROSE: Or a tax return.
MR. MICHAELS: I mean, just connecting the dots here, it says, "The records maintained by the Board, including tax returns," the Board may take notice.

So, that sweeps every tax return in and then below it says the Board shall distribute those tax returns to the world, on request.

MR. KOCH: May I just say that I -- I don't like that word "distribute" too much. I mean, I think it ought to be "provide" or "furnish" only to the parties that are involved. Distribution implies, you know, you're putting it on the internet or something. You're not doing that.

It's only the parties to the proceeding that would get that.

But there may be a difference here, Brad, as to whether or not the -- the item has been attached as an exhibit. And marked --

MR. HELLER: There --
MR. KOCH: -- as evidence. At that point I think it does become part of the transcript.
MR. HELLER: It can if it's entered into the record of the oral hearing so that -- our current -- our current procedures are if the Board Members move for something to be entered in the record then it does become a disclosable public record and part of the
record of the oral hearing.

    But just because a document is out there during an oral hearing, it has not been our policy of considering that to become a disclosable document and it doesn't get included in the record necessarily, to the extent that it's not discussed on the transcript.

    So, if the transcript shows that it's been mentioned, that's all that you'll find. There's no copy of that document maintained.

    MR. KOCH: Right.

    MR. HELLER: But I do think -- as far as all this goes, I think we are making a lot of headway, and I think -- Ian was just recommending that maybe what we could do here would say to take out both -- both paragraphs 1 and 2 out of Subdivision (d) so we're not talking about the records maintained by particular agencies that wouldn't normally be judicially noticed by a Court. And just leave it with the same ability that the Court has.

    And then in Subdivision (e) I can take out the provisions for providing copies of what's been noticed, since I theoretically -- and I had some issues with this when I wrote it, but it's hard to deal with -- whether to do or not do something.

    But essentially a lot of this stuff will be noticed right at the hearing in some cases. So, like let's say a particular Board Member says, "Hey, I saw an article and it's got 'X' and I've got it right here,"
then, you know, I don't know that we need to have it now
distributed necessarily.

But -- but I think to the extent that that
distributed makes -- I shouldn't say the Board
distributed. I don't mind changing the word
"distributed." But I mean as far as requiring some
distribution of the noticed document does create its own
little problematic issues for procedural purposes.

But I do think if we can take out those other
two subdivisions then we wouldn't have the property
statement or anything like that, or the taxpayer's tax
returns or something from their file, for instance, that
would become part of -- of an officially noticed piece
of evidence, for instance. It would only be the same
types of things that the Courts could take judicial
notice of, which would generally be public information.

So, it probably wouldn't be to expand
disclosure.

MR. DAVIS: Brad, this is Ken Davis. The --
so, what you're also suggesting, though, on at least the
heading of this is -- or the start of it, it's really
the Board may on its own. So, we're -- you know, I was
offering up that we're talking about only at a party's
request.

MR. HELLER: Uh-huh.

MR. DAVIS: You're saying the Board on its own
may take judicial notice. So, it's something that's not
been introduced by a party.
MR. HELLER: Uh-huh.

MR. DAVIS: But it's going to be offered up by the Board, itself?

MR. MICHAELS: The official notice, actually.

MR. HELLER: Right.

MR. DAVIS: Yes.

MR. HELLER: But I think in regards to that, I don't have any problem allowing --

MR. DAVIS: Just so it's clarity --

MR. HELLER: Right.

MR. DAVIS: -- of what --

MR. HELLER: Yes. Well, my goal --

MR. DAVIS: -- that the Board can do things on its own.

MR. HELLER: My goal is to retain that authority in the Board or that discretion. But I don't have any problem adding language that allows the parties to request judicial notice -- or official notice so that they're directing documents that they think are -- are appropriate to be noticed.

But then at the same time to the extent that a Board Member does have a document that he knows of -- he or she, then I -- I don't intend to include any language that would prevent them from noticing it unless they can get a party to tell them to notice that. That's -- I don't really --

MR. MICHAELS: Then they'd have to keep notes about the whole conversation.
MR. HELLER: Correct. And so -- I just think it creates a very odd dichotomy where a staff member of the Board might know -- a Board Member staff might know of a perfect document to notice and then be prohibited because of some other ruling and nobody would get a party to say it. Although I'd be happy to notice any document or request notice.

MR. FOSTER: Perhaps it could say, "The Board may on its own or upon the request of a party."

MR. HELLER: Yeah, I think that would be good. So, to clar -- I do think it's important to make it clear to the reader that we are also -- this is a mechanism for the parties to -- to present addition -- or get additional evidence considered by the Board Members.

So, that's what the -- the process of judicial notice is used for in the Court system, which is essentially to prevent parties from having to overcome hearsay and other objections to particular evidence. So that was really all staff was trying to do. I think we can go ahead and make those changes to delete the non-public documents so that there's no expanded disclosure or concern.

Does that sound somewhat agreeable, Peter?

MR. MICHAELS: That's good. Thank you, sure. Appreciate it. Thank you.

MR. HELLER: I think to the extent that those other documents are deleted, I think the Board note
staff can present those as exhibits where they're
relevant, anyway. So -- I think the procedures we have
for that --

Go ahead.

MR. LO FASO: Oh, no, no, no. I'm sorry. I
had my hand up. I'll let you finish your sentence.

MR. HELLER: Oh, I was just saying -- I mean --

MR. LO FASO: Thank you.

MR. HELLER: -- there's other provisions that
we've discussed with regard to briefing and things that
would allow the parties to the extent they're relevant
to include a record of the Board, if it's relevant to
supporting a brief. And the same with the Franchise Tax
Board, an appeal from the Franchise Tax Board, to the
extent that returns and other documents related to that
are relevant to an appeal, they can certainly file those
documents, as well.

So there's -- I don't really think that we're
going to lose any evidence by deleting those provisions.
They just won't come in the door this way. And,
therefore we won't create a new disclosure window.
They'll just be the old process for submitting them as
evidence supporting something by a party, and not the
Board noticing it.

MR. LO FASO: Okay. And then -- and you're
getting to the -- to the question I was waiting to ask,
which is I'm trying to be clear on, what we lost by
taking out 1 and 2. And I guess I understand this
pretty fuzzily, is the idea that if the Board had -- if
the Board Member has reason to know by virtue of
documents the Board Member has seen that some things are
true that may or may not be different than things that
have been placed in evidence, what then can the Board
Member do?

Obviously, if the Board knows and the Board
doesn't have to write down the basis of the Board
Member's vote, the Board can make a decision on the
basis simply because there's nothing to prevent that
Board Member from doing it.

MR. HELLER: Absolutely.

MR. LO FASO: So then can the Board Member say,
"Well, you know, in the document that's ABC it says that
XYZ happened, and that contradicts what you just told
me," can the Board Member say this -- and alluded to
something that we do now that I don't follow.

Do you --

MR. HELLER: Well, let me -- let me see how I
can best answer that. I think -- I think we -- there's
a slight loss there in the sense that we're -- to the
extent that the document we're referring to is like a
record of the Board or -- or a tax return or supporting
document is filed with the FTB, then it -- it does sort
of take the -- it -- it deprives that Board Member of
discretion to say that they're officially noticing this
as evidence for the case.

And outside of that, it -- it's information
that to the extent that they would let either the
parties know or request additional briefing could be
provided through other mechanisms. But essentially
there wouldn't be this mechanism for saying, "I'm taking
official notice."

However, as you pointed out, there's nothing
prevent -- preventing them from essentially discussing
anything that they really want to discuss at a Board
hearing. There's no regulation that we've written that
said that that prohibits a Board Member from discussing
any -- anything that they consider relevant.

So, to the extent that they just want to start
discussing something or whatever, that's fine. It's
just different than the Board taking judicial -- or
official notice and just dissents that I think -- I
think there's just -- one would be a formal process that
this is the evidence that the Board is now accepting.

The other one says this is something that
someone -- that one of the Board Members recalled and
now wants to include it in discussion. And I think
it's a very formalistic distinction.

MR. LO FASO: And -- and I appreciate it.

MR. HELLER: I don't think there's a lot of
loss there. But --

MR. LO FASO: But it seems to get to the --

MR. HELLER: -- a tiny bit, maybe.

MR. LO FASO: It seems to get to the question
that because we have looser rules of evidence than
Courts of law, it's not like in a Court of law where there's arguably a written decision that has to be a logical sequence of the evidence, and if there's a gap in the logical sequence of evidence the -- the trial decision, you know, is -- is already jeopardized on appeal.

We don't have a quite analogous situation, so we don't have quite the need for the formality.

MR. HELLER: That's correct. And I think really -- I mean, really, we're -- our real goal was just to actually provide the Board with more discussion, which was to just notice certain types of documents.

Which -- which they really could do right now. There's nothing that prohibits the Board from noticing something right now. It was really just designed to make it clear that the Board has all the authority that the Court does with regard to that kind of evidence.

But I don't think it was intended to -- to alter their authority or their discretion in any way. It was not the staff's goal here. It was really more -- it was really just to put everybody on notice that to the extent there's an article or something out there that could be noticed by a Court, that it could be noticed by the Board.

I think if we make the changes that we're talking about, that authority would still be there, and the Board would still have several mechanisms available to try to get those items that we might delete out of
paragraphs 1 and 2 to the Board.

And I think to the extent that it's in our records, I think our staff is going to do a pretty good job of getting those -- anything that we have in our records that supports the -- the Board's -- the staff's position, although, you know, to the extent that it was something that there might be in a Board -- in the Board's records that might support a taxpayer or something like that, I don't know. I hopefully drew them -- you know, the Department and the Appeals Division and the Tax and Fee Programs Division that would come to light and be provided to the taxpayers. But that's the kind of thing where if it wasn't provided and a Board Member knew about it, they would need some kind of mechanism to get that noticed.

Here I'm just saying all they can do is discuss it. They can bring it up. It doesn't really have a major difference, as you said, because of the way the decisions are rendered.

So, substantively, a Board Member can still talk about whatever they would like to talk about regarding pretty much any document at the Board meeting, as opposed to the only difference would be that they're just not officially taking official notice.

Essentially saying this is evidence as the Board's considering -- it all is evidence. So, it's a slightly different -- just conceptually, I think, really, more than anything. So --
MR. LO FASO: Appreciate that.

MR. HELLER: So, anyway, staff is definitely going to try to revise that section to incorporate all those concerns. So --

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SECTION 5000.5015

WITNESSES

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MR. FOSTER: Okay, page 24, Section 5015, witnesses.

Any comments?

Nothing?

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SECTION 5000.5017

PUBLIC AGENDA NOTICE

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MR. FOSTER: We're going to jump ahead to page 29, Section 5017, Public Agenda Notice.

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5000.5018

ARRIVAL TIME

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MR. FOSTER: Page 30, Section 5018, arrival.

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SECTION 5000.5019

SIGN-IN

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MR. FOSTER: Section 5019, sign-in.

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MR. FOSTER: Page 32, Section 5020, conduct of the Board meeting.

MR. EVANS: Can we back up one second?

MR. FOSTER: Sure.
MR. EVANS: Sign-in for presentation of the evidence and exhibits, No. 1 says,
"Nine copies of evidence or exhibits should be provided at the sign-in desk."
Can we say something that would -- if they have already submitted it, you don't have to bring nine more copies?
MR. MICHAELS: Well, here -- just above that, Gary, at the beginning there is, "If evidence or exhibits have not been provided previously to the Board".
MR. HELLER: So, it would be a case where there is something being provided that hasn't been provided prior to that moment at sign-in.
MR. EVANS: Okay.
MR. HELLER: Now, Gary, is nine copies still the correct amount?
MR. EVANS: Yes.
MR. MICHAELS: But it's ten copies of what I send you?
MR. HELLER: Correct, ten petitions.
MR. MICHAELS: Ten petitions.
MR. HELLER: Correct.
MR. HUDSON: Where do we get the nine copies, Gary?
MR. EVANS: We have five Board Members, two to Appeals, one to the lawyer, you know, those guys, one to us, Board Proceedings, and reporters -- two to Appeals
and five to the Board Members.

MR. HUDSON: Gary, is that still strictly enforced, the nine copies thing?

MR. MICHAELS: Meaning what, if you don't bring nine, you're --

MR. EVANS: If you don't bring nine, we have to make copies.

MR. LO FASO: Well, it's a fair question, is it strictly enforced?

MR. MICHAELS: It should -- says, "should."

MR. HELLER: It should say, "Shall."

MR. KOCH: These regulations are not rules, they are guidelines.

MR. MICHAELS: Well, they are rules, they are rules.

MR. LO FASO: Well, then they have to follow them, that's the point I'm making.

MR. MICHAELS: Then should is a bit of a squishy word, isn't it?

MR. HELLER: Right. It is a squishy word.

MR. KOCH: Squishy rule, that's why.

So, if you lose the Xerox coming off the train San Diego -- I mean it happens.

MR. LO FASO: A squishy rule is a term or art to define a rule that need not be followed?

MR. KOCH: No, that should be followed

MR. MICHAELS: It's so ambiguous it doesn't mean anything.
MR. KOCH: It should be followed but if it's not, it's not jurisdictional.

MR. HELLER: I like that explanation. I would agree

MR. EVANS: To answer your question, if they don't bring nine copies, we make them.

MR. FOSTER: Okay.

MR. HELLER: Squishy.

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SECTION 5000.5020

CONDUCT OF THE BOARD MEETING

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MR. FOSTER: Page 32, Section 5020, conduct of the Board Meeting.

MR. DAVIS: The one question I had is you've got -- you have removed the State Board of Equalization rules of order.

And it's just an open question of it, what will be the effect of the -- I assume, the effect of the implementation of this regulation would supercede the rules of order?

That's a question, Brad.

MR. HELLER: Well, actually, currently all of these laws supercede the rules of order right now.

And that the rules of order can not conflict with the Baley-Keene Open Meeting Act or the other ones.

MR. DAVIS: Correct.

MR. HELLER: So, there is really no change in that respect.

And, essentially, the Board of Equalization rules of order are essentially the rules adopted by the Board Members to govern themselves.

MR. MICHAELS: Are these different than the rules of practice?

MR. HELLER: These are totally different from the rules of practice.

MR. MICHAELS: Where are they?
MR. HELLER: And it's essentially something similar to Robert's rules of order that the Board Members have used in different forms from time to time as they felt that it was appropriate to conduct their hearings.

MR. HUDSON: The Board Members can hand out copies of this thing to employees at some point or are they hidden away somewhere?

MR. KAMP: Rules of order?

MR. HELLER: Yes.

MR. HUDSON: I never saw them before.

VOICE: They're a Board meeting reference.

MR. HELLER: That's different, that's a whole another document.

There is, in fact, a third -- there's a third thing, that is rules of order, and my understanding is that it goes in and out of use and it is not always maintained and it's generally open to the discussion of the Board Members as to what it contains at the time that it's invoked.

MR. MICHAELS: Sounds airtight.

MR. HELLER: So, I have received, I -- you know, there are copies of it, but I don't think any of them are necessarily currently adopted by the Board, per se.

MS. OLSON: They are, the Board Meeting References are right after the rules of practice.

Last time they --
MR. HELLER: The Board meeting reference?

MS. OLSON: The Board Meeting reference.

The last time they were amended was like 1996 or something like that.

MR. HELLER: But, essentially, they're just an informal -- I mean they're not a regulation, they're not a law, they're just informal rules that the Board Members have adopted amongst themselves.

So, they can continue to apply them and there's nothing in here that takes away the Board Members' discretion.

Well, I should say that to the extent that something would conflict with a regulation that we're going to promulgate, it might be prohibited from being a continued practice under the rules -- rules of order, if the Board Members want to adopt and continue to use some procedure like that.

But to the extent there was no conflict with an established regulation or statute then they can really -- they really have quite a broad discretion to establish any rules they want to govern their interaction between each other at a Board meeting.

And that's all those are. Staff essentially deleted it because it's really not a public document, really it's only between the Board Members.

It's not used by most people and I really feel that it was misleading to start to put it out there so that people will go looking for something that is very
difficult to obtain in the first place.

And these are really all of rules that somebody
needs to do for hearing are here. The taxpayer does not
need to know how the Board does a motion necessarily or
the specifics of how it's seconded, although that may be
provided in other places here.

There are reasons why it was deleted, just
essentially it's to continue to allow the Board Members
own document, their own rules as amongst each other.

So, that will continue to be out there and to
the extent that the Board Members want to utilize it,
but it's not -- it's really not being covered by these
regulations.

And the Board Members would continue to have
their discretion to use it.

MR. HUDSON: Why did you feel the need to even
list the three laws that you did list?

MR. HELLER: Well, there, I think -- it really
was just designed to provide some notice to individuals,
I think.

I think there has been, even amongst the Board
staff, there are days when it's difficult to get a room
of people to understand what laws apply to a Board
hearing.

MR. KAMP: Yeah, Steve Kamp.

I would note that it is -- you routinely hear
people talk about the Brown Act, but it's the
Bagley-Keene Open Meeting Act.
MR. HELLER: Exactly. So, we did think there was value to this, especially with our own staff and maybe even like new -- like when a new Board Member comes on at the Board of Equalization to know these are the laws.

If somebody is talking about like the Brown Act or some other thing that applies to the PUC, you don't see it listed here.

MR. KAMP: Local government is the Brown Act.

MR. HELLER: I understand, I wasn't -- anyway, I was just referring to other types of things.

But, essentially, that's why we listed it, it was just to provide notice.

And so that -- also there are some provisions dealing with contribution disclosure and things like that, so, we wanted to make sure that people understood that this is all connected.

That's where that comes from.

MR. MICHAELS: This is where you should have had all 950 of those references.

MR. HUDSON: Every section.

MR. MICHAELS: Conduct of hearing.

---00o---
SECTION 5000.5021

CALL TO ORDER

---o0o---

MR. FOSTER: 5021, call to order.

Question?

MR. LO FASO: I may go into nitpicky, prescriptive mode.

So, what means "Board Chair"? Does it mean the standing chair? Or does it mean the individual who is acting in the Chair at the moment?

Which is to say, the standing elected Chair, his plane is late, does that mean the meeting can not convene? Or may the Vice Chair convene the meeting because for all intents and purposes he is the Chair?

MR. MICHAELS: In the absence of the Chair, the Vice Chair is the Chair.

MR. LO FASO: It doesn't say that.

MR. HELLER: No, it doesn't.

MR. MICHAELS: Is the term "Board Chair" defined?

MR. HELLER: It is.

MR. LO FASO: That's my question.

MR. HELLER: Alan has a good question and, no, it doesn't definite -- the definition of Board Chair only includes the Chair of the Board.

It doesn't specify someone who would be acting Chair, or even the -- I think we need to make a change there so that it's clear that the meeting can be called
to order even the Chair is not present.

MR. KAMP: Steve Kamp.

My next point is I think Marcy Jo should be hear to answer the question, but, as I recall, and this goes to your references down there as well, the Deputy State Controller statute is Government Code 7.6 and/or 7.9, and it is a certain type of Deputy State Controller that's able to sit for the Controller.

And I think it also should make it clear under subdivision 2, the reason the Deputy State Controller can not participate in these listed matters is they are constitutional functions.

And that's -- there is an Attorney General opinion that led to the creation of those two Government Code Sections that I cited that lays all this out.

MR. MICHAELS: All good points, all true.

You are saying Deputy State Controller of Taxation is what it is saying there?

MR. KAMP: Well, there's also the times where Mr. Chivaro, the Chief Counsel, at one point the Chief Deputy State Controller has come over here.

MR. MICHAELS: Right.

MR. KAMP: So, that needs to be -- you just need to clarify all that.

MR. KOCH: What sections are those?

MR. KAMP: Government Code Sections 7.6 and 7.9.

MR. KOCH: 7.6, shouldn't they be referenced?
MR. KAMP: I think they should.

MR. MICHAELS: But, Steve Kamp, it says that the State Controller may designate a Deputy State Controller.

The Controller could send over whoever

MR. KAMP: Not unless -- I think those two statutes actually puts some limits.

MR. MICHAELS: Oh, because Marcy just said there were two people.

MR. KAMP: That's right.

MR. MICHAELS: Chivaro was was the other one,

I'm sure.

MR. DAVIS: Yes.

MR. HELLER: Staff will definitely take a look at those sections and try to change them.

MR. KAMP: There's an AG opinion that might be worth referencing. You will find it cited in both of them, I think.

MR. KOCH: I am confused over the definition of redetermination.

Does that mean that the staff's findings are being changed or the staff's recommendation is being changed?

MR. HELLER: Well, the term "redetermination" as used in here is talking about when there has been a Notice of Determination issued --

MR. KOCH: Yeah.

MR. HELLER: -- and that contains staff's
proposed assessment and then this be would a petition
for redetermination, which is a request petitioning
that.

So, it's basically a request that the Board
redetermine the amounts that the staff has determined in
its Notice of Determination and, hence, that's where the
petition for redetermination comes from.

MR. KOCH: But sometimes the staff will reduce
the amount in the process of preparing for hearing.

MR. HELLER: That's correct.

MR. KOCH: Now is that then the Board
redetermines, based upon that?

Or what does it mean when they say, "Move to
redetermine."?

That's what I'm trying to focus on.

MR. HELLER: Well, move to redetermine --

MR. MICHAELS: Who wins?

MR. HELLER: Depends on the language that
follows that.

It depends. They can redetermine based on --
they can redetermine as staff recommends, I think in
most of those cases they're really referring to the
Appeals Division recommendation, not to the audit
department's original assessment, because most of the
time they're looking at as approving what the Appeals
Division has recommended in their hearing summary.

MR. HUDSON: I wish they'd just say that.

MR. KOCH: But it's --
MR. HELLER: Right.

MR. KOCH: -- very confusing because the redetermine -- the petition for redetermination opposes any deficiency.

MR. HELLER: Right.

MR. KOCH: So, when they say, "Move to redetermine," I mean who -- what are they moving for? So, I don't know what to say about that except that maybe that's in those rules of order.

MR. FOSTER: On occasion I've heard them say, "Move to redetermine," on an income tax, which has --

MR. HELLER: No determination whatsoever.

MR. MICHAELS: You've been saving up that question for 20 years.

MR. KOCH: No no, no. I haven't been around as long as you have.

MR. HELLER: I think it's something that we can work on as far as terminology goes.

There's a lot of archaic terminology that the Board uses that we're trying to filter out where we can. And as one example, in Part 2, during the business taxes, we did take out the term "late protest." It is now gone and it's now "administrative protest," which --

MR. MICHAELS: What was the old term?

MR. HELLER: It was late protest.

MR. KOCH: Late protest.

MR. HELLER: Which admittedly didn't have --
you wouldn't think it was so archaic or anything, but apparently it applied to early petitions. So, you wouldn't necessarily -- you might file something early and have it treated as a late protest, because the late protest terminology was created before early petitions were treated as a protest.

So, we're trying weed those out where we can, so, we appreciate any help.

(Multiple speakers -- unintelligible.)

MR. HELLER: So, please feel free to point any ones as we go forward, even if you see them after this meeting as we go forward, go ahead and let me know.

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SECTION 5000.5022

ORDER OF BUSINESS AND

TIME ALLOCATION FOR ORAL HEARINGS

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MR. FOSTER: Section 5022, order of business and time allocation, begins on page 33.

MR. HELLER: Moving ahead, no comments.

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SECTION 5000.5022.1

PUBLIC COMMENTS

---o0o---

MR. HELLER: Moving on to Section 5000.5022.1, on page 35, public comment.

MR. MICHAELS: Hang on, public comment.

I haven't read this through all of the way, but last time the Board met, it struck me that a public comment was made during a hearing, basically.

It used to be the case that there were -- there was time carved out at the very, very beginning for people who weren't on the agenda, just like they do at Board of Supervisors and City Council meetings and if someone out in the public wants to get up and say something, they're afforded an opportunity.

Some City Councils or Boards of Supervisors afford the public an opportunity to speak at the very end of the meeting.

But, it's kind of unusual to let someone throw their three minutes in right during a case.
MR. EVANS: It's not during the case, it's
before the case actually begins, theoretically speaking.

MR. MICHAELS: Sorry, I don't mean to mock you,
but I mean, the guy was -- you look at the transcript,
you wouldn't know --

MR. EVANS: Yeah.

MR. MICHAELS: -- he's not really part of this
case, even though he's being asked questions, he's
testifying, he's making statements, he's disagreeing
with what the other side is saying.

MS. CROCETTE: Hi, this is Sabina.

Gary, I have a question about that one in
particular -- not to justify any of that, because I
agree it was very unusual.

Wasn't that a situation where there was some
issue about them not responding to the Notice for
Hearing, then we put them on the consent calendar or
something of that nature?

Was that that case?

MR. EVANS: No, this was --

MR. SHAH: An income tax case?

MR. EVANS: This was an income tax case where
you allow general -- no, that was Mercury.

This was a nonappearance calendar and it was
like an H. R. A. and there was like a hundred people on
this particular appeal. And this -- I am going to say
representative, because I don't know what he really
was -- thought that it was a hearing and not a
nonappearance matter. That's why he was there.

MR. SHAH: Peter mentioned three minutes, is that supposed be in there?

MR. EVANS: The three minutes is not actually stated in the proposed regulation.

MR. HELLER: It's not.

MR. EVANS: That's just a standard that we're using with this Board Chair.

MR. SHAH: It could more?

MR. EVANS: Could be less.

MR. HELLER: It's just that the Bagley-Keene Opening Meeting Act allows the public to appear and make comments.

It doesn't specify a particular length of time. And the Board staff hasn't tried to incorporate a formal time length into this regulation, more as a concern that we didn't want to -- even we said three minutes, we don't want to encourage people to use the entire three minutes if, in fact, they can get done in a minute.

MR. EVANS: And, as a practice, we've allowed these people to speak at the beginning of the item in which they want to speak to, versus, as Peter says, at the beginning of -- at the beginning of meeting there is time allocated for public comment.

And if all of the public comment is not handled during that time period, then more time could be set aside at the end of the meeting.

So, that's also a possibility. But as a matter
of practice, we don't do it that way.

MR. MICHAELS: Is it just, I guess, presumptuous or inappropriate for staff, if you will, or for this group here to be considering inclusion of some -- some verbiage in here that says that the matter gets -- if you have got public comment it's at the beginning or the end, but not in the middle -- I mean not during the case?

I don't know if that's out of bounds for us.

MR. HELLER: I can certainly assure the comment and consider it.

I don't think -- at this point I would say I have any reason to --

MR. MICHAELS: It's an invitation to chaos at a certain level.

I mean just thinking back, there have been a number of instances where people have signed up and where there has been a lot of, you know, backstage jockeying and positioning for exactly when they're going to make their comment for the most effect or to neutralized whoever else, you know.

Maybe to prevent manipulation and opportunism if there was a hard and fast policy, you know, there's a period for public comment at the very beginning, there is a period for public comment at the very end, we're open to the public. We respect all of the rules.

But once the actual hearings start, that is not the time for public comment.
MR. HELLER: Well, we'll definitely consider that. I think from what I'm hearing, most people consider it irregular to not have comments at the beginning of the hearing.

So, I don't think it's -- would be contrary to our general policy, but staff just needs to consider it as far as, you know, it would be -- would, theoretically, restrict the Board Members' discretion to the extent that a Chair or one of the Board Members did want comments to come at end of the hearing or something like that.

I do agree with you, though, that there is reasons why, both for efficiency and also for notice of the parties who are now about to argue the case that there is good reason to have it at the beginning, but --

MR. MICHAELS: Fairness, I mean, someone I really stack the deck and get twenty people to sign up to get three minutes of public comment in the middle of the hearing and really change things radically.

MR. HELLER: Oh, absolutely. And I don't think -- I mean, right now, there's nothing here allowing someone to show up and demand that they're going to comment in between parties, or at this point they're really -- as far as I can tell, based on the Bagley-Keene Open Meeting Act, and the language of this regulation, that as long as the Board is providing an opportunity for them to comment, then that's all that's required and they really have no right to demand that
they comment last or third or anything in that.

So, I think Board Proceedings and the Board Chair could probably handle them it's currently set out, but I think staff might definitely consider something like, "generally provided," it says, "Generally comments will be presented prior to the hearing," or something to that effect.

So -- because I'm very concerned that to the extent we get the odd case where it would be appropriate or the Chair certainly thinks it's appropriate to have comment come later, I'm concerned with not restricting the Chair or the other Board Members' discretion to be able to say, "You know I want to hear from him and then I want to hear the comment. Then I want to hear from him about that comment."

There could be the rare case where that's really the most appropriate way to proceed and I don't want to go further and bind them.

But I think it might be good to point out, for even the people who are appearing that they'll generally be asked to speak beforehand. I think that might be of some benefit for these people who are appearing to comment as well so they know when they need to be available.

So, anyway, we definitely will take the comment consideration. I am just not positive what I'll be able to do, but I'll definitely try to do something and we'll consider the issue.
MR. LO FASO: Let me just offer one more
innocent example for discretion.

   Somebody wants to make a comment at the
beginning of the hearing and their plane was delayed and
they can't come until later in the day, you wouldn't want to
not let them comment.

   MR. HELLER: I think that's good.

   MR. MICHAELS: That's fine, at the very
beginning or at the very end.

   MR. EVANS: You can always open up the
comments, as you mentioned, at the very beginning or the
very end.

   The concern that could be raised is that the
person making a comment, a public comment, that what
they're commenting on has already been voted on.

   MR. MICHAELS: That happens all the time in
City Councils and Boards of Supervisors.

   MR. EVANS: Okay.

   MR. MICHAELS: That doesn't necessarily make it
right, but I mean, it does happen all the time, and
given the alternative of possibly disrupting and -- in a
way that's adverse to one or both of the parties, having
someone come barging in and disrupt the proceedings,
seems to me -- it seems more orderly for there to be
structure.

   And, you know, someone who's coming in somewhat
impulsively to make a public comment, right, I mean that
they're making a public comment because they have,
theoretically, recently -- like too recently to notify 
the Board in advance -- gotten interested in saying 
something.

   So, I feel less -- yeah, those people must be 
heard, but I feel less sensitive about compromising the 
sort of Johnny come lately types, if they speak at the 
very end, well, those are the breaks.

   You know, you kind of caught on to it at the 
last minute, you showed up at the last minute and you 
get to be heard at the last minute, but you will be 
heard.

   MR. EVANS: I think think typically where we 
may put ourselves in a box here is that we will, for 
State assessees coming up, we say, okay, send us -- send 
us something and send us your name so you can -- because 
you want to speak.

   MR. MICHAELS: Yeah.

   MR. EVANS: So --

   MR. MICHAELS: And a list of all the people you 
are speaking on behalf of.

   MR. EVANS: Right. Then we'll have Chief 
Counsel matters or rulemaking matters where we say, 
okay, if you have an -- if you want to speak to this 
issue, please do so.

   So, we put those at the beginning of those 
items. So, I think that we get caught up in that. When 
somebody wants to speak to a case oral, an hearing or 
nonappearance matter, that we also put them in front of
that category.

So, it's a box that we put ourselves in -- and using the term "box" loosely here, but it's something that we have -- this is our -- this is how we developed, so --

MR. MICHAELS: Okay, well, Brad has acknowledged that he understands the concern and he'll do the best he can.

MR. EVANS: We walked into it and we can walk out of it.

MR. HELLER: There is no -- I think we did beat this horse a little bit, but I think -- I'll definitely consider the comment and see what we can do to make it more clear.

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SECTION 5000.5022.2

BURDEN OF PROOF

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MR. HELLER: Section 5000.5022.2, on page 35, burden of proof.

No comments on Section 5022.2.

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SECTION 5000.5023

QUORUM

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MR. HELLER: Moving to 5000.50023 on page 36, quorum.

Also, just to let everyone know, Miss Mandel also gave me a comment, similar to the earlier one regarding specifying the Deputy Controller so, I'm taking a look at that and making sure that it coordinates with the language that we're going to be putting into Section 5021 as well.

They should generally -- maybe not exactly mirror each other, but should be very similar.

Are there any comments on Section 5023?

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SECTION 5000.5024

VOTING AND DECISIONS

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MR. HELLER: Section 5000.5024, is on the bottom of page 36, voting and decisions.

MR. MICHAELS: Yeah, this has always been a pet peeve of mine. The statute actually says that taxpayers are entitled to a decision. And a tie is not a decision. A tie is a tie.

Does this cover that? Does this address it?

Here it says,

"A quorum is required for all affirmative decisions or actions of the Board."

So, is --

MR. HELLER: Well --

MR. MICHAELS: What's tie? Is that an affirmative decision?

MR. LO FASO: I would say it's lacking -- it's not decided.

They may decide. They have tied and collectively they have not decided.

MR. MICHAELS: That's not a decision then. As you just said, they have not --

MR. LO FASO: Then I don't know how you enforce your --

MR. HELLER: I'm sorry, Al.

MR. LO FASO: No, no, please.

MR. HELLER: This is -- it's a contentious
issue, but essentially the language was designed to make it clear.

MR. MICHAELS: What does it say? Maybe read it.

MR. HELLER: This was our intention and it says, I'll read it. It says,

"A majority of the quorum is required for all affirmative decisions or actions of the Board."

Did you need another copy?

MR. MICHAELS: No, I'm sorry, I was thinking of what the law says.

MR. HELLER: Okay.

So, we added the word "affirmative" and this was to deal with this issue, but essentially, in order for there to be an affirmative decision, for the Board Members to be directing staff to change something or directing us in a specific way, they do need to have a majority vote.

But, the reason the word "affirmative" is there is because sometimes when Board votes and does not reach an affirmative decision to direct staff to do something else, by default -- this has been the opinion of the Legal Department for a quite a while -- that does result in a decision, just not an affirmative decision to change direction, but a decision, essentially, to maintain the status quo.

And that was why the word "affirmative" was added was that essentially in order to maintain the
status quo under some circumstances there does not need
to be -- there could be a tie vote where there is just
no majority reached to do anything and in that case
there would still -- there still would be direction to
the staff by the fact that there was no majority
reached.

MR. MICHAELS: So, does "affirmative" suggest
there are neutral decisions or negative decisions?

MR. HELLER: Well, "affirmative" really
contemplates, and I think it's probably what you're
concerned with, but, essentially, the situation with the
State assessee where the the Board can not reach an
affirmative decision to set the value and, therefore,
let's the value stand.

MR. MICHAELS: And that's not a decision?

MR. HELLER: That's -- the Legal Department
believes that's decision and we just put in the word
"affirmative" to make it clear that particular type is
not being --

MR. MICHAELS: It's not -- it's a tie.

In boxing a draw is a no decision.

MR. HELLER: we're not boxing.

MR. MICHAELS: In this --

MR. LO FASO: It says --

MR. AMBROSE: It says,"If a majority vote is
required for a 'decision,' then the tie," you know a tie
is not a majority vote, right?

So, the motion is whether to grant the petition
or request for relief or whatever, so, in order to
decide that, you know, in favor of the petitioner, they
need a majority. They need three votes

MR. MICHAELS: I will double check the rule,
unless you have it there, but you know what I am talking
about, the statute?

I don't know that the word "majority" is in
there, I think --

MR. HELLER: Just says decide.

MR. MICHAELS: "The Board shall decide."

MR. AMBROSE: Right.

MR. EVANS: Does it say --

MR. MICHAELS: I better look, I don't want to
make anything up.

MR. EVANS: Does it say today?

MR. MICHAELS: Shall decide today?

No, no.

MR. EVANS: They could take make the --

MR. MICHAELS: They could postpone it, exactly.

MR. EVANS: -- tie and bring it back next week.

MR. MICHAELS: Again, you know, in the State
assessee context, that's why we had to meet at LAX that
time because Gray Davis was -- the only way that he was
going to be available to break a tie was between
flights, okay.

And, of course, when he realized his vote was
the tie breaking vote, he left and so there was no
decision.
MR. HELLER: Sounds like Gray.

MR. LO FASO: In another context we established that the May value goes on the rolls. So, if you don't change it, the one that went on the roll from May is the decision, it goes on the roll.

MR. HUDSON: It was voted by the Board.

MR. HELLER: I think, just to kind of wrap it up, I think the Legal Department has taken the same interpretation or similar to what you just stated, Alan, and similar to what Lou expressed as well.

And there is some contention over over that interpretation and that's what Peter is expressing right now.

I just want to say we put the word "affirmative" in to try to make that clear. But as far as staff reconsidering whether or not the Board has made a decision in these types of property tax matters, I don't think we're going to be able to -- to change the Board's policy on whether a decision is rendered in those situations.

MR. MICHAELS: I mean it's not really -- I guess it's Tim Boyer's policy, really.

MR. HELLER: Something like that. It's a Legal Department policy, I think.

And far as -- as far as the way that this regulation is going forward, I don't believe that we're going to be able to go ahead and --

MR. MICHAELS: Okay.
MR. HELLER: -- have a full discussion of whether the Board should change or the Legal Department and the Board should change on whether a decision's been rendered or not in that set of circumstances.

MR. MICHAELS: Fair enough.

MR. HELLER: So, we're hoping that this at least makes it clear that there is -- for certain people there is a potential that there could be a decision out there, where there was an affirmative vote.

That was our goal, really, just to make that clear that to the extent that this scenario plays out, and according to the Legal Department's interpretation that, in fact, there is a decision, but without an affirmative vote of a majority of the quorum, this language makes it clear -- or basically indicates that what -- wouldn't prevent that from being considered a decision, the way I read it.

It doesn't define that type of default decision that's out of the regulation.

MR. AMBROSE: Even before Boyer, they -- what would happen with a tie?

MR. MICHAELS: Well, I wrote to him a couple of years ago because, you know, we had a 2-2 split and the controller didn't show up and so we were stuck.

MR. AMBROSE: right.

MR. MICHAELS: And, you know, I quoted the statute -- I can dig up the letter, I have it -- but Boyer wrote -- I said, .
"We're entitled to a decision. It says shall
decide. Nothing was decided it was a 2-2. We
didn't lose; we didn't win; there was no
decision. It was a tie."
He wrote back and said, "You're wrong."
MR. AMBROSE: Okay, but that's when it was put
in writing?
MR. MICHAELS: Yeah.
Do you remember, Steve?
MR. LO FASO: Well, in the US Supreme Court a
4-4 decision it means it is affirmed and that's the
decision of the court.
MR. HELLER: That's true.
Anyhow, we're going to --
MR. MICHAELS: It says, "shall decide".
MR. KAMP: But the US Supreme Court, when they
have a 4-4 decision, that is a decision.
It doesn't stand as precedent, but it did
decide and conclude the matter that's wound its way up
through two prior courts, it's affirmed.
MR. MICHAELS: I tell you what, we've beaten it
dead enough and we're not going to change this anyway
through this rulemaking process.
So, I guess we should move on and I will put it
in my letter.
MR. HELLER: Excellent. I'm making a note of
it now and I would appreciate a letter to me later as
well.
MR. HELLER: So I'm going to move ahead now from Section 5024.

And I also point out that staff is still considering revising these sections just in general that -- in any areas that it can to -- to try to maintain the Board's discretion as to the matter of motions and --

MR. KOCH: One question about the last discussion. If the -- there are only four Members present --

MR. HELLER: Uh-huh.

MR. KOCH: -- can an absent Member be brought back and -- and break the tie?

MR. FOSSER: Sure.

MR. HELLER: An absent member can if the --

MR. KOCH: Even if they haven't heard --

MR. HELLER: Sure.

MR. KOCH: -- the hearing?

MR. HELLER: The roll is left open so they could still vote on that matter.

MR. MICHAELS: It happens all the time. That's how the Controller -- the Controller is never there except to break ties.

MR. HELLER: That's correct.

MR. MICHAELS: Or historically wasn't.

MR. EVANS: As long as the Member's been briefed or properly informed about what went on at the hearing. So if they get a transcript and/or a audio of
the -- of the hearing.

   MR. KOCH: Yeah.

   MR. HELLER: Correct.

   Yeah, I think -- just to round it out, the only times we end up with this kind of no decision or a decision -- a split decision that ends up as a decision, it's because of time constraints and the Board can't go ahead and keep the roll open and let that other Member show up and vote later.

   MR. MICHAELS: No. We can't -- I mean this December 31st is a drop dead date. And if the State Controller doesn't show up, for whatever reason, tough luck.

   MR. HELLER: Absolutely. That's correct.

Okay.

---oOo---
ARTICLE 7

POST HEARING

SECTION 5000.5026

NOTICE OF BOARD DECISION

MR. HELLER: Moving ahead, now I'm on to page 39, Post Hearing -- or Article 7, Post Hearing. And I'm starting with Section 5000.5026, Notice of Board Decision.

MR. MICHAELS: The California Court of Appeal, by the way there at the top of page 39, would that be yes?

MR. HELLER: Thank you, Peter.

---ooOoo---
SECTION 5000.5027

PETITION FOR REHEARING

MR. HELLER: Looking ahead. Section 5000.5027, on page 41, Petition for Rehearing.

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MR. HELLER: Move ahead. Section 5000.5028. On the bottom of page 42. Recommendation on Petition --

Oh, go ahead, Al.

MR. KOCH: I'm -- I'm a little bit behind here. Back on the memorandum opinion.

MR. HELLER: Memorandum opinion.

MR. KOCH: If a memorandum opinion --

MR. MICHAELS: Where is that?

MR. KOCH: This is on page 38. If a memorandum -- it says, "If a memorandum opinion is presented to the Board for adoption as a non-appearance matter," that's kind of a backhand way of describing -- what is the process for getting a memorandum opinion, I guess is the question.

MR. HELLER: Uh-huh.

MR. KOCH: Does the -- does the proponent of that have to request it at the time of the hearing? Or subsequent?

MR. HELLER: Well, generally speaking, and I'm just going back through this section, but section -- I'm in the same section, it's 5024, Subdivision (d), paragraph 5 deals with the motions to prepare a memorandum opinion. And essentially it requires a Board
Member to make a motion to have one prepared.

MR. KOCH: I missed that, I'm sorry.

MR. HELLER: Oh, that's okay.

MR. HELLER: And it doesn't -- it doesn't expressly provide for requests for an opinion from the parties.

MR. KOCH: Right.

MR. HELLER: Outside of I think it does allow the Appeals Division to recommend the publication of an opinion in its hearing summaries, in other -- other parts of the rules, not Part 5.

But, essentially, a party could always ask the Board or request it and it would just be up to the Board Members if they want to make a motion.

MR. KOCH: Okay.

MR. HELLER: So, it doesn't prohibit a party from requesting it.

MR. KOCH: Yes.

MR. HELLER: And then so also going back to (e) where you were just making your other comment, essentially what would happen if they request one to be prepared, it generally is prepared by our Appeals Division. The Appeals Division then submits that -- that -- that formal opinion to the Board Members as a non-appearance matter so that they can then consider it and adopt it, because it's not their decision until it's adopted.

And then this is -- essentially what this
Subdivision (e) is talking about is if this -- this
happens so we get to the level where we're at the
non-appearance calendar, and there's now a formal
opinion being submitted, that's when a dissenting or
concurring Board Member could go ahead and request a
dissenting or concurring opinion be included with the
majority opinion.

MR. KOCH: Now it's not said that that -- that
this such a memorandum opinion has precedential effect,
but does it?

MR. HELLER: Yes, it would have it. And that's
all of our formal opinions have precedential effect and
I definitely put something to that effect into the
regulations, as well.

MR. KOCH: Okay.

MR. HELLER: Are we doing okay so we can push
through to the end or --

HEARING REPORTER: Yes.

MR. HELLER: Okay, I just want to make sure.
Perfection. Okay. I'm going to go back up to --
I think we were on Petition for Rehearing, is that
correct?

MR. MICHAELS: Yeah.

MR. HELLER: Okay, we're going back to page 41,
Section 5000.5027. This is the Petition for Rehearing.

MR. HUDSON: I guess I got to keep saying this
every time because I haven't seen any language yet
despite all our prior interested parties meetings. We
are saying that a petition for rehearing can be mailed
or it then says "hand-delivered." And we've talked
previously about e-mailing, that kind of thing.

MR. HELLER: Correct.

MR. HUDSON: And even some detailed language
about that. Is there -- what -- what's the update on
that?

MR. HELLER: The detailed language that has
been provided to the Board Members is in -- going to be
incorporated. It's in -- it's currently incorporated to
the versions of Parts 1 and 2 that we're scheduling to
be presented to the Board on the 18th. So, it is
incorporated in there.

This draft came out before we were able to
finalize it and make the executive decisions about
whether or not -- what format it would take. So, we
felt like staff would be better -- use their time better
by not putting in a third possible potential alternative
to e-filing in here. That might also get changed in
the -- the week or two even after revision.

So we're definitely planning -- assuming the
Board Members consider the language that's presented to
them on the 18th as satisfactory, and also the
accompanying instructions we intend to post on the
website, then -- then we will go ahead and incorporate
them into all the different -- all the different
chapters so that all the programs can utilize the same
e-filing procedures.
And we are trying to make them uniform throughout all the programs so there's not any kind of confusion. Although there might be different addresses to send these to.

Are there any other comments on Section 5000.5027?

MR. AMBROSE: I -- I have a comment about just a couple of -- one, I guess it's grammatical. The first sentence, it says, "The taxpayer of the matter subject to the provisions" da-da, "within 30 days of when the official notice of Board action is mailed." You might want to make it within 30 days of the date.

MR. HUDSON: The official notice

MR. HELLER: The date. Okay.

MR. AMBROSE: And then in the next sentence --

MR. MICHAELS: It looks like it did say that, Lou, and they crossed it out. Why did they cross it out? Do you know?

MR. HELLER: Well, it was actually the -- it was the date of the Board's decision and not the date of the mailing. So, there's -- it's kind of a slight difference.

MR. HUDSON: It's where -- where that is significant, though, is I've actually had a circumstance where a taxpayer got the -- you know, were calling us three weeks later and they hadn't gotten anything yet. And they were saying, "What happened?"

And I was telling them on the phone what the
decision was, and they still only have 30 days. And
that's why they --

MR. AMBROSE: And then in the next sentence it
should be "affect" instead of "effect".

MR. HELLER: Affect. Thank you. Okay.
Are there any other comments on Section?
MR. KOCH: How about a change in the law.
MR. HELLER: A change in the law.
MR. KOCH: Yeah. I mean, it's not specified as
a -- as a -- one of the general circumstances under
which a petition could be granted.

MR. HELLER: Okay.

MR. MICHAELS: A retroactive change in the law.

MR. KOCH: Yeah.

MR. MICHAELS: Like what? Like a statute
that's retro?

MR. KOCH: A Court decision.

MR. MICHAELS: A Court decision.

MR. HUDSON: Like when Judges are writing it.

MR. HELLER: Okay. So, Al, are you suggesting
that we add that as one of the grounds in Subdivision
(b), is that what you're saying? Or --

MR. KOCH: Yeah, or maybe it should be broader
than that. Maybe it should be any legal ground that
could not have been previously submitted by -- under an
exercise of due care.

MR. MICHAELS: But this would be within 30
days, right? Still -- your Court --
MR. KOCH: Oh, yeah.

MR. MICHAELS: All bets are off after 30 days.

MR. KOCH: Yeah.

MR. HELLER: Okay. I'll make a note of that.

I think our current ones all came from a case called Wilson Development. And I think, though, the Board's -- the Board generally -- oh, no. I'll just have to definitely consider it and see if we can come up with a recommendation that -- that might expand it in a way that still has some -- that's clear enough to be applied.

As opposed -- I think changing the law is definitely something we might be able to do. The other part I'll have to work on later.

MR. KOCH: Yeah.

---oo0oo---
SECTION 5000.5028

RECOMMENDATION ON PETITION FOR REHEARING

MR. HELLER: Okay. Moving ahead to Section 5000.5028 --

MR. MICHAELS: Everybody stops at a quarter to 5:00.

MR. HELLER: On -- yes, on page 42, Recommendation on Petition for Rehearing.

MR. KAMP: Steve Kamp on Subdivision (b). "The recommendation on petition for rehearing shall be submitted to the Board for adoption as a non-appearance matter." I would use the word "consideration" because that implies that the Board is going to adopt --

MR. HELLER: Okay.

MR. KAMP: -- whatever is submitted.

In fact, I would suggest that you look for other situations like that, because I recall a prior meeting we had an issue with something like that.

MR. HELLER: Okay.

Any other comments on Section 5028?

---oOo---
SECTION 5000.5029

REHEARINGS

MR. HELLER: Okay. Moving ahead, I'm going to section 5000.5029, Rehearings. It begins on the bottom of page 43.

---oOo---

SECTION 5000.5031

MAILING ADDRESS

MR. HELLER: Moving ahead. Now on Section 5000.5031 on page 44. And, once again, this will also be amended to provide for electronic filing, as well, as soon as we have proof language.

---oOo---
SECTION 5000.5032

TIMELINESS OF DOCUMENTS

MR. HELLER: Okay. Going to move ahead.

Section 5000.5032 on page 45, Timeliness of Documents.

MR. MICHAELS: Now, it says here on (c), I haven't cross-checked this, but it says "shall be timely if it is mailed to". And then there's also a definition for delivery service or whatever you call that term of art.

So, I mean I send mine by U. S. Postal Service. Some people actually send things by FedEx or UPS. Is that mailed, too, if it's sent by FedEx?

MR. HELLER: Yes.

MR. MICHAELS: It's mailed?

MR. HELLER: Yes. Uh-huh.

MR. MICHAELS: It's not mail.

MR. HELLER: Would you prefer -- I don't know, let me see.

MR. HUDSON: This raises that issue -- I'm hoping you already have it ready to cross-reference for, you know, electronic delivery by or --

MR. KAMP: Steve Kamp. Do we have in the general definitions a definition of mailing that would perhaps include these non-postal delivery services? Because I think the -- the Code of Civil Procedure allows -- you know now allows the delivery by means other than the U. S. Postal Service.

MR. MICHAELS: You know, actually, large -- I
could be mistaken, but isn't -- it's the postmark, it's not the delivery date. It's the postmark date that matters. Which is why I don't use FedEx, because it doesn't matter when it gets here, it just matters when it, you know, gets stamped.

MR. AMBROSE: Well, this gives you the alternative, a postmark date, if it's nailed by the U.S. Postal Service or the date that you bring it to FedEx to be mailed.

MR. MICHAELS: Where -- where is that part that they bring it to Fedex?

MR. AMBROSE: (b).

MR. MICHAELS: In where?

MR. AMBROSE: (b).

MR. MICHAELS: (b). In the absence of other evidence, the postmark date or the date of delivery to the delivery service -- okay, that's -- I think that covers it.

MR. AMBROSE: Or put it in the box, I guess --

MR. MICHAELS: Yeah. I didn't even read that. That's fine.

MR. HELLER: Okay. However, we also will consider creating a definition for "mailing" and taking into account possibly defining e-filing as being included within that term.

MR. MICHAELS: I don't -- I don't know, maybe even the word "mailed" is outdated like "dialing" is outdated. Maybe you want to say "transmitted" or
something. Filed or some such.

MR. HELLER: Yes.

I think we'll consider a lot of alternatives
for that and -- I think the main key, though, will be
creating the definitions that makes sense as opposed to
what term you want to define.

So -- but it definitely will be something to
the effect of mail transmitted or sent or something to
that. Filed is also possible. I think we just want to
make sure that it includes all the mechanisms that the
Board accepts, which is a pretty broad group of devices
for mailing. Okay.

Any other -- any comments on Section 5032?

---oOo---
SECTION 5000.5033

PUBLIC RECORDS

MR. HELLER: Okay. Okay, with that I'm going
to skip over Sections 5033, both alternatives which we
have previously discussed. And that really just leaves
us with --

MR. EVANS: What about 5033?

MR. HELLER: 5033, first alternative?

MR. EVANS: Yeah.

MR. HELLER: We discussed that.

MR. MICHAELS: We already did it.

MR. HELLER: That was the first thing we did
this morning -- no, it was the second thing.

MR. EVANS: We did that section this morning?

MR. MICHAELS: Yeah, we already did it.

MR. HELLER: Yeah, we did both alternatives

for --

MR. EVANS: I -- I did have a couple of
questions.

MR. DAVIS: Public comment is closed.

MR. HELLER: Go ahead.

MR. MICHAELS: No, he can make his comment at
the end.

MR. DAVIS: At the end.

MR. HELLER: Okay. Transcripts.

MR. EVANS: Transcripts, number 6.

MR. HELLER: Okay, 6.

MR. EVANS: It says retained after 12 years
MR. HELLER: Uh-huh.

MR. EVANS: The CSR Board only requires seven.

MR. HELLER: Okay.

Is that what we do or -- do you have any idea what we do now?

MR. EVANS: We do ten now.

MS. OLSON: We -- we did 12 here and that was set by Chief Counsel.

MR. HELLER: Okay.

MS. OLSON: That's -- I mean, that's the only reason for it. It was a determination based by Chief Counsel to go for 12 years.

MR. MICHAELS: 12 years. So the --

MR. HELLER: So, we better stop doing 10.

MR. MICHAELS: The Sherman era is officially over.

MR. HELLER: I was kidding.

MR. MICHAELS: 12 years.

MR. HELLER: Okay.

MR. KAMP: Not quite, if it's 12 years.

MR. MICHAELS: All right. A few weeks.

MR. HELLER: Perfect.

Okay, with that I'll definitely take a note of that and check to make sure that it reflects our current policy.

---oOo---
SECTION 5000.5034

FEES: FILING, SUBPOENAS, TRANSCRIPTS AND COPIES

MR. HELLER: And then with that there's only one section left. It's Section 5000.5034 on page 53, Fees: For Filing, Subpoenas, Transcripts and Copies.

With no further comments, thank you all very much for all your help and all your comments -- was there a comment?

MR. DAVIS: Just -- Brad, Ken -- if you're going to make changes to this part -- part, will you be doing another redlined version?

MR. HELLER: If we make changes to Part 5, as we -- from this version, we will prepare an underlined and strikeout version showing what those changes are. And very likely also a clean version with those accepted -- those changes accepted and then will present both those to the Board or the interested parties, depending on what they say.

MR. MICHAELS: But based on what we've been working with today --

MR. HELLER: Right. We will agree --

MR. MICHAELS: -- that will be our -- our new ground zero.

MR. HELLER: Correct. Yes, we will treat it as if these changes were accepted and they go from there showing the modifications made from this document.

So, it will be treated as if you took the clean version that was -- that's out there today and made
changes to that. Those will be the changes that will show in the un -- in the underline and strikeout version that we'll provide.

So, you'll be able to track them from step to step.

And once again, thank you all for coming today. You can feel free to call me if you have any further comments or submit written comments. We appreciate it all and all the input and for your patience today, as well.

Thank you.

MR. MICHAELS: Well, you did a great job.

Thank you.

And thanks to the reporters, also.

MR. DAVIS: Yes. Thank you

MR. HELLER: Thank you.

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REPORTER'S CERTIFICATE

State of California    
                      ) ss
County of Sacramento  )

I, JULI PRICE JACKSON, Hearing Reporter for the California State Board of Equalization certify that on APRIL 5, 2006 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled hearing; that I transcribed the shorthand writing into typewriting; and that the preceding pages 1 through 25, 53 through 77, 97 through 115, 130 through 161, 183 through 210, and 256 through 287, constitute a complete and accurate transcription of the shorthand writing.

Dated: April 18, 2006

JULI PRICE JACKSON
Hearing Reporter
REPORTER'S CERTIFICATE

State of California )
) ss
County of Sacramento )

I, BEVERLY D. TOMS, Hearing Reporter for the California State Board of Equalization certify that on April 5, 2006 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled meeting; that I transcribed the shorthand writing into typewriting; and that the preceding pages, and pages 26 through 52, pages 78 through 96, pages 116 through 129, pages 162 through 182, pages 211 through 255, and pages 288 through 306 constitute a complete and accurate transcription of the shorthand writing.

Dated: April 18, 2006.

BEVERLY D. TOMS
Hearing Reporter