pages. Marcy Jo agrees with me. Okay.

MR. FOSTER: Yes.

MS. RUWART: Very good. There are 19 pages involved.

Starting on page 1 --

MR. VINATIERI: Carole?

MS. RUWART: Yes.

MR. VINATIERI: This is Joe.

Point of clarification. This came out on Friday. A lot of us have been working off the old version, so today we're working off the new version, and anything that we -- as I understand it, if we have concerns about what we see in the new version, we should talk today, but if we haven't had a chance to review them because we've been working on other things, then we have to have that in by December 23rd, which is a week from this coming Friday.

Then, as I understand it, based upon the comments that are made today about what we're to undertake, the staff, SBE staff, is going to go back and probably redo this, redo what we're about to look at right now.

And then are taxpayers, the FTB, and others going to have an opportunity then to speak to that and give written comments on that prior to the time it goes
in front of the Board in February?

MS. RUWART: That's an excellent question.

Let's review.

Brad.

MR. HELLER: Basically, the plan is to incorporate all the comments that we receive and to actually have final drafts of all of the regulations prepared for the Board to consider at the February 1st meeting and to vote on whether or not we should begin the formal rule-making process at that time. So we can still take comments for that meeting. It will be a noticed agenda item, and we can certainly receive comments on that. That will be considered for that hearing.

But as far as comments that we're going to receive between December 23rd and the date of that hearing as far as it being incorporated into the draft that goes to the Board members, it will be very difficult to do if we're going to have it on schedule for February 1st, and it's really just a time constraint issue. Certainly had nothing to do with any intent to deprive people of an opportunity to comment.

And basically if there are -- if you have important issues, please be in contact with me. If there's some way we can create an extension, or if
there's something that's a matter dealing with a
particular section or something, so that's something
that staff can work with you to get some additional
time, we want to work with the public to make sure that
we can get everybody's comments in, because we do want
the best draft and we don't want to have to rewrite
things for common sense changes during the formal
rule-making process.

So we really apologize for the short notice.

There were just things that we felt really needed to be
in this, in these procedures, before the Board saw the
final package. And so please contact me. My phone
number is (916) 324-2657. I have business cards with
me. My information is all on the website as well. And
please just contact me. Send me what you can. If you
can even send me an Email, that will be great; we will
go ahead and consider that and get it into the file as
well. But if there's something else, please just
contact me and I'll try to make whatever arrangements I
possibly can.

MR. VINATIERI: Joe again.

And just for the record, there have been some
pretty substantive comments made so far by FTB, many of
which I would agree with.

And we've been working off the old one, the old
Part 4; then we have the new Part 4 on Friday. And just
to be very clear, it's problematic to me, and I
appreciate the need to have a time frame, but it is
problematic that we are trying to undertake a major
rewrite of the rules of practice or the new name in such
a short time frame.

And so I think I will endeavor to do what I
can, even at the Christmas holiday period, to be timely,
but I think it is a difficult burden for people, perhaps
on the other side who are not in State service, because
of our things that are pending, to be timely and respond
to some of the comments that you undoubtedly are going
to agree to, based upon the comments that have been made
here today.

MS. RUWART: May I just, as a matter of process
here today, maybe one of the ways we can help focus this
part and minimize the confusion between the two versions
is at the start of each article or each significant
subsection, Ian can explain the new version, what we're
looking at, and how different it is from the old.

And we may find that there are a couple of
sections where there were changes made, and we can
discuss them, but others are actually pretty easy and
maybe we can even refer back to the old one for people's
comments. So I just thought of that.
MR. VINATIERI: This is Joe.

I would appreciate that, because I think -- I had a chance to look at this real briefly last night in a hotel room.

MS. RUWART: Right.

MR. VINATIERI: And there are some interesting things here, changes that are substantive in nature.

MS. RUWART: And I want to focus on the interesting changes and not get lost in the fact that it looks different.

So let's try this: For Section 4030, the General Requirements for briefing schedules and procedures, Ian, can you just walk us through? I notice in the old version, there is six subdivisions, (a) through (f). You've made Subdivisions (a) through (g). Can you just explain the significant differences between the two versions.

MR. FOSTER: Yes, this is Ian again.

The new version, 4030, is substantially similar to the old version. It has not changed much.

We have -- there's one more subdivision because we thought we could better organize it and break down the subjects better into separate subdivisions. It refers to the new electronic filing and facts provisions that we've incorporated as well.
Other than that, I don't believe there's any substantive changes.

MS. RUWART: Okay. So are there any comments on either the old or the new Subdivision (a)?

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

In Sub (b) we just request that the notification be in writing upon receipt of the perfected appeal.

MS. RUWART: Okay.

MS. BORGMAN: In Subparagraph (c), current practice on it for request for extensions, we normally do not have written stipulations of the parties. Primarily, the parties agree to extend and Board Proceedings accepts the mutual agreement. That's more of a memo or an agreement instead of a formal written stipulation for an extension.

MR. FOSTER: And we can rephrase that. That's essentially what I was referring to is we want the parties to both send us a letter saying we want this extended.

MS. BORGMAN: Right, exactly.

MS. RUWART: You want it in writing rather than verbally, I guess?

MS. BORGMAN: Exactly.
And Subparagraph (f), the current regulations provide that the briefs can be handwritten. This version only provides for a typed version instead of handwritten. And so the in pro per taxpayers and claimants might not meet this requirement.

MS. RUWART: And just to be clear, you are referring to the revised version.

MS. BORGMAN: Yeah, the new.

MS. RUWART: Let's try to be clear when we're doing this.

MS. BORGMAN: I'm sorry.

MS. RUWART: Okay. That's all right. So Revised version, Subsection (f).

Please continue.

MS. BORGMAN: I would just add that handwritten submissions are permissible, but not preferable. That's all.

MS. RUWART: Are there any other comments on just generally 4030?

MR. VINATIERI: This is Joe.

MS. RUWART: Old or new.

MR. PENILLA: This is Jess Penilla.

Just 'a comment on Subsection (f). One thing I have learned from the SBE staff is that it's a lot more efficient and easier if you do not include tabs with,
you know, your documents because then they can drop them
in the feeder and just Xerox them. And I'm thinking if
we're going to transmit these files electronically, that
filing the documents with tabs will also be an obstacle
or problem.

So someone may offer some suggestive wording to
make it more efficient.

MS. RUWART: Very good.

Joe, did you have a question?

MR. VINATIERI: Yes. I know -- I think -- I
think I saw it in the original version. I had a concern
about extreme hardship regarding filing a brief.

As I understand it, I see the new one, the new
version in that same section. Did you change it
to "reasonable cause"?

MR. FOSTER: We changed it to "reasonable
cause."

MR. VINATIERI: Okay. Thank you.

MS. RUWART: Any more on old or new 4030?

Very good. Ian, if you could address old and
new 4031, the General Briefing Schedule. This seems to
cover the same topic, so we can take comments on both
versions. Just, when you're referring to subsection --
I'll break it down by subsection then.

MR. FOSTER: 4031 is substantially similar. We
only made one or two technical changes.

I believe in subsection (a) it had referred to three other briefing schedules, but now it only refers to two other briefing schedules. Other than that, it's the same.

MS. RUWART: Very good. So with that, we can apparently either take comments using the old or the new subsections. Any comments on subsection (a)?

Subsection (b), opening briefs?

MR. DAVIS: Ken Davis. We're suggesting some -- and we'll try to submit some written comments on the same deadline issues that we've talked about here. But on (b)(1), "The perfected appeal shall be considered the taxpayer's opening brief," we're going to suggest some additional language so that the taxpayer knows that the opening brief shall be submitted under the format methods for delivery set forth in 4020, because everything flows from Section 4020, including the mailing provision of whether it's one copy or two copies, but at least we're suggesting throughout some of these other provisions that that kind of -- that similar language always refers back to 4020.

And then in (2), we're suggesting that FTB will file its opening brief, and also if -- whatever procedure we use, that we'll also mail a copy to the
opposing party, which is also -- which is consistent
with current practice.

MS. RUWART: Anything else in (b)? Subdivision
(c), reply briefs? This has several provisions. Let's
take (c)(1) first. Any comments on (c)(1)?

MR. VINATIERI: This is Joe. I had indicated
in the initial -- the old section or the old rule
that -- or I probably should say the prior submission --
that I had changed from 30 days to 90 days the time to
file a reply brief.

The reason I had done that was to have
similarity to the Franchise Tax Board in that the appeal
is considered in essence for the taxpayer the initial
filing.

Sometimes it's not until you get the FTB brief
that you understand in totality what the issues are.
And even though you filed your appeal, it's timely, it's
perfected, et cetera, things really don't come to a
head, so to speak, until you get the FTB brief.

My concern about having to file a reply brief
within 30 days of the date that the FTB has filed its
brief is that sometimes -- and we've had this
experience -- 30 days is not enough time to respond to
the submission of the Franchise Tax Board.

I had initially put 90 days just as a matter
of, as I said, similarity. I don't think it needs to be
90 days, but I do think that 30 days pushes it too hard
for the taxpayer. And I would suggest, instead of
90 days, that we just -- and I understand the need to
move forward and keep things moving -- I would suggest
it be changed from 30 days to 60 days.

MS. RUWART: Okay. Any other comments on
(c)(1)?

MR. DAVIS: Ken Davis. Franchise Tax Board is
also suggesting here -- and this is, again, to help
facilitate the process -- that the taxpayer may file a
reply brief, obviously, with the Board and mail a copy
to the opposing party, which in this case would be --

MS. RUWART: So the mailing to the opposing
party, that's a generic way to comment?

MR. DAVIS: Right. That's the concept.

MS. RUWART: Great. We'll take that as a
global concept.

MR. FOSTER: This is Ian again. Subdivision
(e) of 4030, we have a general provision that directs a
party filing a brief to give one copy to Board
Proceedings Division and then the Board Proceedings
Division is responsible for making sure that every other
party has a copy.

MR. DANOWITZ: Could I ask for a clarification?
This is Steve. When the Franchise Tax Board then files its initial reply, do you also have -- you know, you'll -- the Franchise Tax Board will send a copy to the opposing party as well?

MR. DAVIS: Yes. That's what we're suggesting.

MR. DANOWITZ: So that's consistent on both sides?

MR. DAVIS: Yes.

MR. DANOWITZ: Because, I guess, all of the briefing deadlines are keyed off of when the Proceedings staff notifies us that the respective brief is --

MR. HELLER: That's correct.

MS. PELLEGRINI: This is Debbie Pellegrini. In response to what Ian said, it's almost easier for Board Proceedings to just assume the need to send, because we won't know, unless somebody actually put a cc, if it was sent or not. So that's kind of why the wording was put, so therefore, we just assumed that responsibility.

MS. RUWART: (c)(1)? Great. (c)(2), which has several subsections, we'll take them all at once. (c)(2), that's the Franchise Tax Board reply brief.

MS. BORGMAN: Yes. Susan Borgman. I have a comment on subparagraph (A), reduce the current practice for Franchise Tax Board to request permission to reply from 20 days to 15 days. We think it should remain at
20 days. Oftentimes reply briefs from the taxpayers or claimants, usually the taxpayers, are very lengthy. This will give us enough time to make an informed decision as to whether we want to reply or not, and we would just have better information and know whether a reply is absolutely necessary.

MS. RUWART: Okay. Any other comments on (c)(2)? Steve?

MR. DANOWITZ: Yes, I think that somehow the taxpayer ought to have the right to participate in this process.

MR. FOSTER: You mean the right to oppose --

MR. DANOWITZ: The right to oppose, right, additional briefing.

MR. LANGSTON: I have a comment. Bruce Langston, Franchise Tax Board. You know, this has always troubled us a little bit. This sort of double you have to ask to reply and then you reply, because in the memo asking to reply, pretty much you have to spill out everything you're going to do.

You know, I understand the taxpayer wants to have input on that, but on the other hand, if our ability to reply is denied, I mean, you sort of back-door into us replying anyway, and the taxpayer replying, you might as well just treat it as a brief.
So if the goal in requiring FTB to go through this double procedure is, you know, to kind of speed things up, then every time you add another, you know, let the other party reply, let the other party reply, it lengthens the whole process.

So one option, if that's what we want to do, is get rid of the request to reply and just say Franchise Tax Board may reply and then, you know, that would solve the problem. And then, of course, the taxpayer would have a right to reply to the reply. So that would be an option, but . . .

MR. HELLER: Would FTB get to reply -- this is Bradley Heller. Would FTB reply to the reply to the reply?

MR. LANGSTON: And when does it stop? That's the question.

MR. HELLER: That's basically been our concern, not about really -- I think everybody's capable of telling when there's a need for more briefing on a particular issue. But yeah, I think we'll take all those comments under consideration. We're definitely reviewing that section and trying to streamline it as much as we can.

MR. JESS PINELLA: This is Jess Pinella. I have a comment on this section. I suppose this is
probably as good a section to bring this up.

    One concern I have is the circumventing of the
process of the briefing process. I have seen at least
one occasion where FTB Legal issued an IDR to a taxpayer
when it was not their turn to file a brief and they did
not do it in the form of a brief. They did it in the
form of an IDR, essentially questioning the ruling of
the protest hearing officer and asking the taxpayer to
answer questions that should have been taken care of at
the audit level.

    I did not receive a satisfactory answer from
FTB's legal management when I responded to -- or I
questioned FTB's attorneys. I did not receive a
satisfactory answer. The answer was, well, it doesn't
say that they can't do this, so we're going to allow
them to send your taxpayer these requests for additional
information, essentially circumventing the briefing
process.

    And when the taxpayer receives this letter in
this form from the FTB, essentially saying, you know, if
you don't respond to these questions, then you've got
something to hide, it's very intimidating for the
taxpayer.

    So I'm very concerned about circumventing the
briefing process. I think there should be something
affirmative in there saying that they can't do this.

   Now, logic would tell you that we're laying out
3  the briefing rules, and it should be clear that if
4  you're not authorized to do this through the briefing
5  rules, that then you can't issue these IDR's. However, I
6  have seen it happen.

   MS. RUWART: Thank you. Any other comments on
7  (c)(2)? Very good. Moving on to (c)(3). It looks like
8  it's pretty much the same as it was. Okay. Very good.
9
10  MR. DAVIS: Oh.
11
12  MS. RUWART: Go ahead.
13  MR. DAVIS: One additional.
14  We're suggesting -- this is Ken Davis.
15  Franchise Tax Board is suggesting that during
16  the briefing process that -- and this was included in
17  the former section 5075.1(a) -- that amicus briefs be
18  allowed.
19  We think this helps the Board receive input
20  from outside parties on issues that may not be addressed
21  by the parties, if it's a significant issue that might
22  have widespread impact.
23  So we're suggesting adding here or in some
24  section the idea of the amicus, and so we're -- and we
25  refer back to 5075.1.

   MR. FOSTER: This is Ian.
I think we can say we agree with that. That is an inadvertent omission.

MS. RUWART: There's a couple more sections to go through and at the end of Article 3 -- I know we're trying to get out of here by 12:30, but I think having a five-minute break after we finish Article 3 might be good for everybody, so let's head on to finishing up Article 3.

Section 4032, the Briefing Schedule For Innocent Spouse Appeals.

Ian, do you want to talk about that a little bit?

MR. FOSTER: This is substantially the same as the prior version that's posted on the web in September. There were only a couple of grammatical errors that we caught and changed in there.

MS. RUWART: Great. So it appears we can take comments using the same old and new subdivision numbers, because they're the same.

Let's go to Subdivision (a), Application. Are there any comments? Very good.

Subdivision (b), Definitions, any comments? Very good.

Subdivision (c), Rights of Nonappealing Spouse, any comments?
MR. DAVIS: This is Ken Davis. We've had some of our lawyers that have -- that work substantial -- that work primarily in this area of innocent spouse review the old section, and we wanted to compare it to the new, so we'll -- and we have some detailed comments relating to your comment about making sure the nonappealing spouse has essentially the same rights. We're going to be providing some -- some additions -- and some additions and detailed comments, and we'll submit those in writing.

MR. FOSTER: Very well.

MS. CROCETTE: This is Sabina. When you are providing comments, would you say you don't support that or you do?

MR. DAVIS: I'm sorry. We do support that.

MS. CROCETTE: Okay.

MR. DAVIS: We're adding some additional language just to clarify the spouse who files an appeal subsequent to initial appeal at times is called the nonappealing spouse, and some additional language as well as some clarifying principles as to when the -- when the Franchise Tax Board files its appeal or its reply, I guess, opening brief is the most current term. Franchise Tax Board files its opening brief after the nonappealing spouse files its -- his or her opening
brief. And so we have those types of procedural
clarifications.

    MS. CROCETTE: Okay.

    MR. FOSTER: This is Ian.

    We welcome that. And just to clarify the
purpose of this briefing schedule as well, recent
amendments to the innocent spouse statutes left open the
undesirable possibility of never-ending appeals where
one spouse wins at MTB, the other spouse appeals here
and wins, then the other spouse under the statute had
rights to appeal. I mean, it literally left open that
possibility where it never stopped. So the purpose of
this briefing schedule is to take care of everything in
one appeal.

    MS. RUWART: A concept we can all agree on, it
sounds like.

    Yes?

    MR. KOCH: Does that mean -- does "meaningful
participation" mean briefing and argument?

    MR. FOSTER: The statute doesn't define
"meaningful participation."

    MR. KOCH: Well, I wonder if the regulation
might not.

    MR. FOSTER: We can think about that.

    MR. KOCH: Where would you find in the
legislative history what the legislation meant by "meaningful participation"? I hope somebody has some better definition than that, than those words.

MR. HELLER: Actually the proposed regulation does allow the nonappealing spouse to file briefs and to submit additional information to oppose or support the appealing spouse, which would be odd to support, but it's possible.

MS. MANDEL: We have had a case.

MS. RUWART: Very good. I think I -- still where we all are, have we finished our comments in Subsection (d)? Okay. Very good -- Subsection (e), Subdivision (e) refers to reply briefs. Any comments on (e)? Okay. No comments on Subsection (e), Reply Briefs.

Subsection -- oh, my goodness. That's a long one. Okay. Maybe we should break down (e). Let's try (e)(1), I'm sorry, pardon me, (e)(1). No comments. Very good.

Subsection (e)(2), the Nonappealing Spouse's Reply Brief?

(e)(3), Franchise Tax Board's Reply Briefs?

(e)(4), if nobody files a reply brief?

(e)(5), Second Reply Brief of the Appealing Spouse?
Moving on to Subsection (f), Conformity With Federal Action. There's no -- we could do 1, 2, 3, 4, 5. Does anybody have any comments on any of that? Very good. All right.

MR. VINATIERI: Carole?

MS. RUWART: Yes.

MR. VINATIERI: Can I just make a general statement? This is Joe.

MS. RUWART: Sure.

MR. VINATIERI: On -- on the nature of these briefs, it would probably not be a bad idea in each of these sections, whether it be Innocent Spouse or the portion prior, to maybe utilize, put actually what the names of those briefs are, just like we have in the court of appeal we have the appellant's opening brief.

MS. RUWART: As a definition?

MR. VINATIERI: Yes. It will make it a lot easier.

MS. RUWART: That will be very helpful.

MR. VINATIERI: Then we have the respondent's reply brief and then we have the appellant's reply brief and we call them AOB, etcetera, etcetera, etcetera.

MS. RUWART: And have it in one place on the list of all of them and then you can figure it out.

MR. VINATIERI: I think it would make it a lot
easier rather that going through appealing spouse's
second reply brief, you know, all that stuff.

MS. RUWART: And maybe that's a good
suggestion, just generally sets of definitions of
defining what we're talking about.

MR. VINATIERI: Yes, in general.

MS. RUWART: I love definitions sections, so if
it were up to me, I'd define them all.

MR. FOSTER: Very good section.

MS. RUWART: Moving on to Section 4033, the
Simplified Briefing Schedule for the Small Tax Cases and
HRA Appeals, any significant differences between the
two?

MR. FOSTER: Yes, this is where we, in the
prior version, we had 4033 for small tax cases and 4034
for HRA appeals. They were pretty similar, so here we
simply combined them into one regulation 4033. It's
State mandatory for HRA appeals, and it's elective for
taxpayers, incoming franchise taxpayers, who have no
more than $10,000 at issue.

And one quick thing to know, and it was true in
both versions, corporations with franchise tax
liabilities at issue cannot elect this section, no
matter how small the liability.

MS. MANDEL: Did I miss a section when I came
in? Is that -- was there an earlier provision on the
small tax cases?

MR. FOSTER: Yes, there was in the prior
version.

MS. MANDEL: Oh, you're just talking prior
version, not like we talked about this morning.

MR. FOSTER: No, no, correct.

MS. MANDEL: Oh, okay. Sorry.

MS. RUWART: That said, 4033, are there any
comments in Subdivision (a), Intent?

MR. VINATIERI: This is Joe.

I had had substantial changes to the original
4033 in terms of just reorganization.

But I looked at this briefly last night, and it
looked to me like you had somewhat reorganized it along
the lines that I had recommended.

MR. FOSTER: We had incorporated some of those
changes.

MR. VINATIERI: Okay. Thank you.

MS. RUWART: Yes. And in this case actually
just to be very clear, I'm working off the revised
version and that's page 7 of our new document.

Any comments on Subsection (b), Pro Bono
Representation? Okay.

Any comments on Subsection (c), Application, 1,
2, or 3?

MR. LANGSTON: Yes, Bruce Langston, Franchise Tax Board.

We have a problem with amount at issue not being more than $10,000.

As we know, from amnesty and everything, we need to clarify what do you mean, what do we mean by the "amount at issue"? Do we mean the total -- in a deficiency case, is it the total deficiency amount excluding interest or including interest?

MR. FOSTER: This is Ian.
The amount at issue is defined in (c)(3).

MR. LANGSTON: Okay.

MR. FOSTER: It was in the prior version as well.

MS. RUWART: So just to be clear, Bruce, your comments with respect to Subdivision (c)(2)(A) --

MR. LANGSTON: Oh, I'm sorry, I did not read that.

MS. BORGMAN: Susan Borgman.

I did have a question about that. The amount at issue is for the entire case or what if there are multiple tax years before your Board?

MR. FOSTER: The way it reads now, it would be multiple tax years.
MR. LANGSTON: So, not each year $10,000.

MR. FOSTER: I'm sorry, yes, it's the entire case.

MR. LANGSTON: So if you have three years that are less than $10,000, then it has to be the entire case, so if you consolidate two small cases, you knock yourself out of this provision?

MR. FOSTER: Yeah, that's a good suggestion, consider by tax year.

MR. LANGSTON: The other issue is contested issues versus not contested issues. We have a lot of cases where it might be a million dollar assessment, but they only disagree about $800 of it. Is that a small case?

MR. FOSTER: We had intended and maybe we may not have made it clear enough, but we had intended it only to be contested issues.

MR. LANGSTON: Okay. That would help us a lot.

MS. RUWART: Okay.

MR. PENILLA: Jess Penilla.

This may be repetitive. I've had cases where I have an S corporation with a number of shareholders, where they maybe each billed $10,000, and we just heard all the cases in one day.

MR. LANGSTON: Bruce Langston again.
As long as we're on this subject, we believe that it would be helpful to include certain business entity cases. We have a lot of just very routine minimum tax cases, pass-through entity-type things. And unless there's a reason not to include business entities in this, it allows the taxpayer who has a simple case to get expedited processing. So we would suggest including business entities as well.

MR. FOSTER: This is Ian again.
Again, we can certainly try to clarify the way we wrote it, but the way we intended it is that business entities can elect this --

MR. LANGSTON: Okay.

MR. FOSTER: -- for things like minimum tax penalties and interest, but not in underlying franchise tax liability. We don't want a unitary apportionment case on the small tax provision.

MR. LANGSTON: That's fair.

MS. RUWART: Okay. Any more comments on (c), Application?

MR. VINATIERI: Yes, this is Joe.
I -- I really like this, because I think that there's a lot of people, a lot of small mom and pops, etcetera, who need their day in court, so to speak. They just need an opportunity to speak. They just need
due process of some sort.

So I think as we look at what's written here in 4033, we need to kind of keep, not kind of, we need to keep that in mind.

When I gave my comments on the prior version, I made a comment regarding the definition of "amount at issue." And I tried to read it from the standpoint of, well, if you're an individual who just needs to be -- you need to have your day in court, we somehow need to make sure that this is reader friendly.

And I had a real problem with the language "Unpaid interest" blah-blah-blah, "only if the taxpayer is seeking abatement under 19104, and only to the extent of the unpaid interest accrued through the date of the FTB."

MS. RUWART: So, Joe, would it be fair to summarize your comments, at least with respect to HRA specific provisions and small tax provisions, we should make an extra effort to perhaps rephrase things or phrase things in a way that we might not normally in order to ensure clarity to that specific audience?

MR. VINATIERI: A leading question, and the answer is yes.

MS. RUWART: Can we move on?

MR. FOSTER: This is Ian.
And, Joe, I know it's in your written comments as well. It's interesting that you would bring up the wording of that provision. While drafting that provision, I remember being concerned about it sounding too legalistic and complicated. For the time being, I opted to go for what I thought was precise language and worry about readability later. I am worried about the readability, but I am also worried about it being precise so that it's interpreted the same way every time.

MR. LANGSTON: Bruce Langston.

I would also point out forms and instructions can be written in plain language, but the regulation has to be clear so that we know in all these different types of cases that we have whether it's going to apply or not. So I have no objection to having further forms and instructions targeted to specific audiences, but I do think we need the regulations themselves to specify so that -- mainly so that staff can know, does this case fit in here or does it fit in there?

I would imagine -- I can't -- I don't know that there is an HRA case that's even close to $10,000, so I don't think it's ever going to be an issue for that or for head of household.

MR. FOSTER: This is mandatory for all HRA
cases regardless of amount.

MR. LANGSTON: Okay.

MS. RUWART: That's a good comment, too. We
don't have to make these regulations do all the work.
We have other ways of communicating to people.

MR. VINATIERI: This is Joe.

And I think that's a very good point because
these do have to be precise, but I would just tender the
opinion, or perhaps the idea, that once this is put
together, that maybe the taxpayer's rights
advocate looks at this specifically and have a pamphlet
and some type of information that's specific and takes
the language that ultimately ends up here and puts it in
English that's understandable.

MS. RUWART: Very good.

Any other comments on plain English, plain
language, plain anything? Very good.

Susan? Yes.

MS. BORGMAN: We will have additional comments
on this section, but we'll submit them in writing next
week.

MS. RUWART: Thank you. That will be great.

I'm conscious of moving along, because now
we're down to an hour and 15 minutes, and I do want to
give everybody at least five minutes as soon as we
finish this section, and we have, really, substantive things afterwards so, Subsection (d), Upon Receipt of a Perfecting Appeal, four subdivisions. Is there -- do we need to keep them -- do you want to take them (d)(1)? Let's take (d)(1). Is there any comments?

MS. MANDEL: This is Marcy.

So I'm not sure -- I mean, I have some issues with these substantive changes and how these rules would propose that the Board handle matters, not the least of which is sending everything to appeals conferences and getting D & Rs, but here you have something about waiving your right to an oral hearing before the Board automatically.

And a lot of people, if all they want to do is be heard, I think they're going to want to be heard by the Board members, not just some other staff lawyer. That's sometimes what we see with people who actually come and say, you know, now that I have told you everything and I've talked to all these different lawyers, I understand why FTB, you know, sent me this notice, but I just think they still -- we've had one or two that I can remember where people actually said that and said they wanted to come and unload before the Board members.

Even if -- I'm not sure, I guess you wrote it
this way to have them waive an oral hearing because
statutorily this responsibility is with the Board, and
you still are intending that whatever comes on a
nonappearance calendar, even if you put it on
nonappearance calendar, they would be entitled to come
before the Board under the Open Meetings Act and address
the Board for three minutes on their items if they
wanted to.

But I just am sort of wondering where this is
coming from and why -- I'm concerned about whether
taxpayers would inadvertently, and I guess you're saying
they won't inadvertently because you're going to make it
so specific to them, they'll get a letter saying, by the
way, you're giving up your rights to appear before the
Board, which is sort of a half truth because of the Open
Meeting Act, and I'm not quite sure, you know, where
it's all coming from and why and whether it somehow
results in a complete delegation application to the
appeals section that might not be appropriate.

MR. FOSTER: This is Ian. I can answer a
number of your questions. As far as where it's coming
from, essentially, for a long time, we've been getting
feedback from basically all sides on these sorts of
issues, that they would like a small tax procedure.
People thought it would be useful. And the reason we
had it being a waiver of the oral hearing if you elect
it is because if you still go forward with a right to
oral hearing, then as a practical matter, we haven't
actually shortened or simplified the process very much.

MS. MANDEL: But why should they not have some
right to go -- maybe they don't get, you know,
maybe -- maybe small tax cases don't need 30 minutes
before the Board, but why should they be completely
precluded from appearing before the Board members and
saying, you know, FTB was, assuming that things didn't
go their way in the appeals conference, FTB was stupid
and wrong and your appeals officer was stupid and wrong.
Why should they have to rely on the Open Meetings Act,
which probably none of them are aware of. That's just
kind of -- kind of the question. Their hearing before
the Board of Equalization on FTB matters is really their
administrative trial, if you will, and on matters for
which the Board is the administrator of the tax, why
should the Board -- why should someone be completely
precluded from making some level of oral presentation
before the Board? Maybe it's not --

MR. LANGSTON: Well --

MS. MANDEL: -- a full-time period.

MR. LANGSTON: Bruce Langston here.

My suggestion is, you know, they make that
decision. The (d)(1) says you send them a letter saying
if you elect this small provision, you don't go before
the Board.

Now, the person who wants to go before the
Board, maybe we need to clarify a little more to make it
clear that they or maybe -- maybe we would add something
to say, if they're unhappy with the decision, then they
still could have an oral hearing, maybe that.

But it just seems to me that was the trade-off.
That's how we can get these cases done quickly. And as
long as they're informed and advised that if you go this
way, you don't have an oral hearing but everything is
quicker; if you go the other way, you do get an oral
hearing but there's a longer briefing schedule and it's
going to take longer to resolve, to me that's fair. But
I understand your point also that taxpayers may not
understand that.

MR. FOSTER: This is Ian.
And there is still a right that is a statutory
right to a petition for rehearing, everybody in every
case no matter what briefing schedule they use.
In a small tax, appellant is not happy with the
D & R, D & R is adopted by the Board, they will file a
petition for rehearing.

MS. MANDEL: Right, and the standard for
rehearing is -- is pretty strict, and they very
rarely -- and they would not have the right to be heard.
And if you're going to -- particularly with sort of the
open meeting aspect, if you're going to preclude -- if
you're going to say to someone you waive your right to a
hearing to any kind of -- or the presentation before the
Board members, that's not entirely true because they
could come under the Open Meetings Act.

MR. FOSTER: The way the regulation is written
right now, they're waiving a specific right to request
an oral hearing to contest the D & R.

MR. VINATIERI: This is Joe.

There's two policy issues going on here and
Marcy is focused on them, and there's a right to have a
taxpayer to have their day in court with the elected
Board members basically. And that's a very, very
important right that they possess in California unlike
any other State in the United States.

So I -- and when I initially looked at this I
thought, you know, this is a good way of speeding things
up, but I understand Marcy's concern. I'm of the
opinion that that right from a policy standpoint should
probably outweigh doing away with the right to go to the
Board.

And so, therefore, what I would suggest is you
go ahead, go ahead and allow them to go to the Board but perhaps when it comes to Board hearing, maybe you have a specific calendar, one day, that's basically small tax cases.

So that there's a couple times a year -- and let's be candid here, the reason this is happening is because there's a lot of things on the calendar, and this is a way of kind of cutting down the calendar for the Board to hear, so let's understand that.

So maybe what you do is the way that you cut it down is by just having a half a day or one day where you just have -- you hear these cases. Instead of getting 35 minutes, they get 20 or 15 minutes or whatever it might be.

MS. RUWART: Steve, yes.

MR. KAMP: I think your comments, I think you're trying to solve one problem and the other problem you end up creating, you're also shutting aside these small taxpayers.

The Board rejected a proposal earlier this year to line them up by the amount of dollars at stake. And one thing, from a Board member's office perspective, I personally always found it interesting, one minute we're hearing a big unitary case, next, a small taxpayer who has got an issue is having their day in court.
Everybody is on an equal footing here. And I think that's what I think you lose if you end up creating like a small taxpayer day.

That's all I have to say on that one.

MS. CROCETTE: This is Sabina.

MS. MATULICH: I'm on the telephone.

MS. RUWART: I'm sorry.

MS. MATULICH: Diane Matulich on the telephone.

I entirely agree with Marcy Jo that there needs to be the ability for small taxpayers to have the oral hearing before the Board. They shouldn't be precluded from that. And especially the small taxpayer, who may not understand all the proceedings of the Board and they get the information in the mail, they may not understand it. I think it's important that it allow them to be able to go to the Board. Some of them don't know their representative. I used to work for the Board. A lot of them would go on their own.

MS. RUWART: Very good.

Sabina?

MS. CROCETTE: This is Sabina with Betty Yee's office.

I think a middle ground, because although I do appreciate and agree that they should know all their rights, and I think Marcy Jo points out that they do
have that right to make a presentation, at least three
minutes under the Brown Act, and that would be an
appropriate clarification. But it defeats the purpose
of having this, this bifurcation as opposed to speeding
something along if we say, oh, yeah, you get another
chance, oh, yeah, you get another chance. So maybe the
middle ground is to clarify that once it goes to the
nonappearance, that if they want to speak to it, there's
three minutes they can come and speak to it in the three
minutes.

And that doesn't add yet another procedure,
which to me defeats the point of the streamlined
procedure. So it acknowledges the truth that they do
have an opportunity to speak with what we already have.

But to do the other --

MS. MANDEL: Or --

MS. CROCETTE: -- what's the point of the
streamline?

MS. MANDEL: This is Marcy.

You could still have -- I think, you know, I
haven't read these all totally carefully, you could have
a streamlined quick process for small tax cases and not
have a full ugly briefing process that you have for the
major cases or a full ugly hearing that you have for the
major cases. You could -- you could schedule these
quickly on a Board calendar, just as quickly as you
would schedule them, you know, if you were putting them
on a nonappearance.

MR. SHAH: We prefer the current process where
they are asked if they want to come to the oral hearing.
If they say no, then this comes in the nonappearance
calendar. So even if you go to a simplified briefing
process, we still prefer that the current process remain
after that, where the taxpayer is asked whether they
want an oral hearing or not.

MR. HELLER: Brad Heller.

I think we pretty much understand everyone's
comments on this position and --

MR. AMBROSE: Lou Ambrose, legal.

Since this is mandatory for HRA appeals, does
that mean that if, you know, if your version here went
into effect, that HRA claimants would not have a right
to a Board hearing?

MR. FOSTER: They would not have the right to
request a hearing. They could only have the hearing if
the Board chose to order one in that particular case.

And this decision was made, I mean, to be
honest, to make a good use of administrative resources.
These are things that don't require a lot of resources
to resolve.
MS. MANDEL: And they -- and believe me, there have been how many cases that come to the Board and this has been -- there's so much work done over so many years to really handle HRA more appropriately. There's really way less going on in HRA than there used to be, from what I understand.

But was your intent, following up on Lou's comment, that there would be a calendar under your proposal, consent calendar of some kind, and if someone was pulling something, a Board member would then say, no, just, you know, I have a laundry list of case names here, and I want No. 17, No. 18, No. 19, set those for public hearing, that the Board member would make a decision, like we're pulling cases off to make them adjudicatory?

When does -- when is the discretion thing happening, and how is that request being made?

MR. FOSTER: We haven't gone through every nut and bolt. We didn't want to set those kinds of procedures in stone in the regulation. We simply left it open because we can't tell the Board that they can't order an oral hearing on a case.

MS. MANDEL: Yeah, okay. All right.

MS. RUWART: All right.

MR. HELLER: We will take all those comments
under consideration.

    MS. RUWART: Yes.

Subsection (d), any more comments?

Moving to Subsection (e), the briefing schedule. Well, is there any particular comment on (e)(1), "The perfected appeal shall constitute the taxpayer's opening brief," any different comment than was made before, similar language?

    Okay. (e)(2) Franchise Tax Board has 60 days to file an opening brief. Any comments?

    MS. MANDEL: Which page are you on?

    MS. RUWART: I'm on page nine of the --

    MS. MANDEL: Okay.

    MS. RUWART: I started on page eight and I flipped over to page nine. I'm on subsection (e), the briefing schedule. So (e)(1), nothing. (e)(2), anything? (e)(3), the reply brief timing? Okay. Very good.

Are there any other comments on this Article 3, the small claims and tax? I think we had a really good discussion, definitely.

    What I'd like to do -- it's 11:25. We'd like to get this wrapped up by 12:30. How about a five-minute break? Everybody back here at 11:30.

    (Recess taken, 11:26 to 11:34 a.m.)
MS. RUWART: We've given everybody about six or 
seven minutes. Most of our speakers are here. 
Everybody ready? Okay. I'll be ready to go on the 
time record now.

I'm Carole Ruwart, Board's Legal Department. 
And we're here to pick up where we left off. We have 
Article 4 and 5 revised to go through. Our ideal is to 
be out of here at 12:30, but we will take as long as it 
takes to have the discussions that are necessary.

We want to take advantage -- we want to focus 
our discussion on the points that are where we can take 
full advantage of the fact of all the people in the room 
and on the phone.

With that said, Article 4 deals with Appeals 
Conferences, Board Hearings, Decisions and Opinions. I 
would like Ian Foster to briefly review for us where the 
major changes are from the original and then we will go 
through them accordingly.

MR. FOSTER: In a nutshell, the original was 
deleted. The changes are -- that's why there is not an 
underlined, strike-through version. The original was 
deleted in its entirety here. This is a complete 
departure from the original and a complete departure 
from our existing practice. So these are all entirely 
new.
MS. RUWART: Is there anything in the original Article 4 that survived?

MR. FOSTER: I think the provision on formal opinions and the standards for making formal opinions survived, and the provision on the standards for opposing frivolous appeals survived.

MS. RUWART: So all the procedural aspects have been substantially revised. Maybe the easiest thing to do then is, our Section 4040, the appeals conference, is quite lengthy. It has six separate subsections.

Ian, is there anything you wanted to add, since the -- what you said at the beginning, what we should be looking for when we go through each subsection?

MR. FOSTER: It's a very simple structure. It's simply the appeals conference is scheduled, Board Proceedings handles the scheduling. There's provisions for proper notice and waiver of appearance or rescheduling. Then there's a provision that describes the conduct of the appeals conference and then also a provision on additional evidence and briefing.

MS. RUWART: Okay. Very good.

MR. DANOWITZ: Steve Danowitz. Could I just ask a general question about this whole appeals conference?

MS. RUWART: Yes.
MR. DANOWITZ: Would it require additional staff positions and have they been budgeted?

MR. HELLER: It's very likely that it would require additional staff positions and it would require appeals conference for possibly every case that goes to a Board hearing, including many that won't even go to a Board hearing that would be resolved by the appeals division.

You might have noticed that our streamlined small tax procedures might have helped alleviate some of those concerns. But generally, yes, that would require additional staff. And we're making arrangements to try to be in a position to implement it with the staff that we have, if necessary, before, you know, we can work with the State to see about, you know, new hiring, new positions, which we have not been told that we will be guaranteed or anything to that effect. So that is an issue for us, absolutely.

MR. DANOWITZ: And one other just general question. Ian, in the beginning, this morning when you were pointing this out, you know, about uniformity, and you mentioned that it would cut down on Board requests for additional briefing and it would cut down on, you know, the need for hearings. Any order of magnitude how many cases the Board asks for additional briefing?
MR. FOSTER: I haven't quantified it. I mean, I know there's -- Marcy's saying this many (indicating).

MS. RUWART: Marcy, could you explain that for the people on the phone?

MR. VINATIERI: About an eighth of an inch.

MS. MANDEL: I mean, there's differences between, from my standpoint -- this is Marcy -- differences between true additional briefing where, in a case some legal issue is raised or there's, you know, something like that where we ask for additional briefing, and then there's the famous 30-30-30 that happens sometimes in sales tax cases.

The 30-30-30 is -- usually has to do with documentary evidence, that the taxpayer comes in and says I have this, I have that, I have my four boxes here that the auditor never even bothered to look at kind of thing.

And, you know, some people might say, well, that was an occasion where the Board didn't decide the case and it went back out for staff review, but it wasn't actually really additional briefing. The instances where the Board has asked for specific post-hearing briefing, I think, is pretty rare.

MR. FOSTER: It is rare. The 30-30-30, as Marcy said, is more common.
For those of you that aren't aware, that's when the taxpayer gets 30 days to provide additional evidence, FTB gets 30 days to respond, and Appeals get 30 days to write a recommendation.

We are hoping that appeals conferences would definitely cut down on these 30-30-30 cases by getting a lot of documentary evidence issues and factual disputes resolved at the appeals conference so that by the time it gets to the Board, that's all been taken care of.

MS. RUWART: Chris.

MR. SMITH: Chris Smith, Betty Yee's office.

Just one follow-up on that. I think one thing that's not necessarily additional briefing, but hopefully this will cut down on is, sometimes in the hearing summaries there will be a comment from the appeals attorney they should bring this to the hearing or they should bring this document, they should be prepared to discuss the relevance of this issue at the hearing. Hopefully that would kind of firm up a lot of these issues and flesh these out before the actual hearing and clean up what we're asking for in the summary to be done to help staff be better prepared.

MR. LANGSTON: This is Bruce Langston from Franchise Tax Board. FTB has a number of serious issues with this proposal. And part of it is, we believe this
would cost a lot in personnel time for FTB. You're
adding a whole separate structure. You're lengthening
the time to go to appeals. In the case of a deficiency
appeal, you are delaying the time for collecting these.

MS. MANDEL: Which increases cost to taxpayers.

MR. LANGSTON: Which increases cost to
taxpayers, increases interest if it's a refund claim.

If it's done in every case, instead of just
cases that are going to oral hearing, then, again, you
have created one more step. Most cases do not go to
hearing. The vast majority of appeals that are filed do
not go to oral hearing. And if the justification for
this is to prepare cases that are going to go to oral
hearing, then we think it's way overbroad to include it
in every single appeal.

One of the concerns we have had, and I'm
passing on some of our other FTB staff, is, there's a
concern that it will undercut the protest and settlement
process at the FTB, because right now, you know, there
is a motivation for taxpayers to settle their cases at a
lower -- at a lower level, that is, at the FTB level, or
to resolve a protest at the lower level.

What we have found is, if a taxpayer has
another avenue, they're going to hold back at protest
and settlement, save their documentation, save their
arguments for the Board, perhaps the settlement
conference. So we have a concern about that as well,
that, in fact, we may be increasing the number of cases
that go to appeal as opposed to being resolved at the
FTB level.

You know, some of the other issues, you know,
we have just some practical issues dealing with the
conferences. Are they going to be done by telephone?
Are FTB staff going to have to travel more to the Board
offices? Is it expected these will be done by attorneys
or by auditors or by field office staff?

Again, those can be worked out if and when this
goes forward, but I think, if I can synthesize a lot of
our comments, we do believe that in some cases this may
be a valuable or valid procedure, but we are hoping that
it could be cut down to the cases that it would really
help and not be mandatory for every single case.

Perhaps, as Ian pointed out, it was designed
for the more complex, high-dollar cases. You know, we
could see some value there, where there's factual
development.

It's not clear how long these appeal
conferences are going to take. We have protest hearings
that take days. I don't think anyone's expecting to
spend a week at a single appeals conference, but that
sort of needs to be tightened up before we can really
give an opinion. I mean, are we talking about all
morning for an appeals conference on a big case? Are we
talking about 20 minutes? You know, that -- I think
maybe the people in this room would have some ideas on
stuff like that. So briefly, we will be submitting
comments.

MR. FOSTER: Very good. And I look forward to
it, Bruce. A lot of your comments and points are very
well taken.

And what I can respond to is your concern about
the sort of nuts-and-bolts logistical problems of how to
go forward with the appeals conferences themselves, if
and when they happen. We deliberately left those kind
of details out of a regulation because we didn't want to
set anything in stone and then find out that it didn't
work.

MS. PELLEGRINI: This is Debbie Pellegrini.

This is modeled after what we would do with
business tax cases. Appeals conferences start out
scheduled for one hour. That's what we're looking at.
We go to the attorney that's going to be holding the
appeals conference, they review the case before
scheduling and then give an indication of how long the
appeals conference will take. And yes, most of them are
an hour to two, but there have been some that are
scheduled initially for more time. So there's that give
and take right there.

   It could be that the representative goes back
and says, "How long do you have me scheduled for? Two
hours? That's not going to be enough time. I really
want four." And those are often accommodated.

   And that's, again, not regulatory nuts and
bolts, but kind of using our business tax cases as a
model.

   MS. RUWART: Are there any other comments just
globally about this whole idea before we get into the
nuts and bolts of this particular regulation?

   MR. DANOWITZ: I guess I would just question
whether it's appropriate to import the procedure from,
you know, sort of the business taxes world into the
adjudicatory world. And the Board sort of has two
different roles -- or maybe more than two different
roles -- but the Franchise Tax appeals are a different
role for the Board than the business tax appeals, and it
just may not translate.

   MR. PENILLA: This is Jess Penilla. I have a
comment. The comment that Bruce made a minute ago about
who will be handling these from the State side, I mean,
without getting into all the detail, my preference would
be to meet with an attorney and let the attorney resolve it.

    MS. RUWART: Chris?

    MR. SMITH: Is this sort of a briefing problem where if both parties agree to have an appeals conference, have some sort of oral briefing for the appeals attorney and then there's some procedure where both parties could say yeah, we both agree that this would be an appropriate avenue to take, and put it, like, maybe in part of the briefing schedule, and that would just limit it to those cases that are going before the Board where both the FTB and the taxpayer agree that an appeals conference would be appropriate to settle out the --

    MS. MANDEL: That -- this is Marcy -- that would fit with the concept of having a prehearing conference so that it's organized for presentation before the Board. And if that's the purpose of it, if the purpose of it is that some people may want to have a more organized hearing, but . . .

    MS. RUWART: I saw a hand back there.

    MR. DALY: Charles Daly. If the basic problem is factual development, an adequate factual development at the FTB level, could this be resolved by some kind of remand procedure, sending it back to FTB rather than