

INTERESTED PARTIES MEETING

REPORTERS' TRANSCRIPT

MARCH 15, 2006

IN RE

RULES FOR CALIFORNIA TAX ADMINISTRATION

AND APPELLATE REVIEW

PART 4, APPEALS FROM ACTIONS

OF THE FRANCHISE TAX BOARD

REPORTED BY:

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1 PROCEEDINGS

2 Sacramento, California  
3 March 15, 2006

4 ---o0o---

5 MR. HELLER: Good morning, everybody. Looks  
6 like we're all here. Welcome everyone on the telephone.

7 We're here this morning to meet and discuss  
8 Part 4 of the Board's -- of the Board of Equalization's  
9 Rules for California Tax Administration and Appellate  
10 Review. Part 4 deals with appeals from the  
11 Franchise Tax Board.

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

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

24 And staff's goal is to go forward on the formal  
25 rule-making process on all of the rules at the same time

1 so that we can have one package.

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

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

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

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

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

22 We're going to go basically regulation by  
23 regulation so that everybody has a chance to address  
24 each regulation and a chance to speak. And if you can  
25 just limit your comments so we can hear everyone and

1 keep things on pace, we'd really appreciate that.

2 Also, we have two court reporters here this  
3 morning. And if you can go ahead and state your name  
4 before you speak and also possibly provide your business  
5 card to the court reporters so that they can keep an  
6 accurate record of who's speaking today, I'd really  
7 greatly appreciate that.

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

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

15 MR. FOSTER: Ian Foster, also with BOE Legal.

16 MS. MANDEL: Marcy Jo Mandel, State  
17 Controller's Office.

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

20 MS. BORGMAN: Susan Borgman, Franchise Tax  
21 Board.

22 MR. EVANS: Gary Evans, Board Proceedings.

23 MR. AMBROSE: Lou Ambrose, Board Legal.

24 MS. RUWART: Carole Ruwart, Board Legal.

25 MR. LoFASO: Allen LoFaso with Board member

1 Betty Yee's office.

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

4 MS. OLSON: Diane Olson, Board Proceedings.

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

7 MR. MANCIA: Fran Mancina, MBIA.

8 MS. CARLOCK: Chelsea Carlock, Board  
9 Proceedings Division.

10 MR. SPERRING: Jon Sperring, Price Waterhouse  
11 Coopers.

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

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

15 MR. KOCH: Al Koch, MBIA.

16 MR. BESSENT: Carl Bessent, Appeals Division.

17 MR. SCHREITER: Reed Schreiter, Appeals  
18 Division.

19 MR. DALY: Charles Daly, BOE Legal.

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

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

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

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

1 office.

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

4 MR. FOSTER: Thank you, Brad.

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

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

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

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

24 We have redesignated them pre-hearing  
25 conferences. They're now discretionary and can be held

1 at the request of a party or upon order of the Board or  
2 Board staff. And they are only in cases when an oral  
3 hearing will be held. And then the conference will not  
4 result in a decision and recommendation, but the purpose  
5 is to build a better record for oral hearing so that  
6 there's a more detailed, complete hearing summary.

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

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

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

23 And also, the latest versions contain different  
24 options on possibly bifurcating appeals in the  
25 jurisdictional and substantive issues and different

1 options on having extensions to the time for filing  
2 appeals.

3 MR. HELLER: Thank you, Ian.

4 And with that, I'm just going to go ahead and  
5 just start off with Article 1 of Part 4, "Application,  
6 Definitions, and Jurisdiction." That starts with  
7 Section 4010, application of the part. Are there any  
8 comments on Section 4010? Thank you.

9 We're going to move on to Section 4011,  
10 "Definitions." Are there any comments on Section 4011?  
11 No comments.

12 Section 4012, "Jurisdiction."

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

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

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

17 Jon Sperring, Price, Waterhouse, Coopers.

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

25 And I'm just wondering, what's the need for

1 that? It just seems like -- why are we limiting  
2 people's appeals rights here?

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

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

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

19 MS. MANDEL: Or the notice.

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

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

25 MR. FOSTER: Right. Yeah.

1 MS. MANDEL: Okay. Yeah.

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

7 MS. MANDEL: And you say "directly"?

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

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

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

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

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

1 forth.

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

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

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

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

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

19           MR. LANGSTON: I think this was old language.

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

22           MS. MANDEL: Okay. Okay.

23           MR. LANGSTON: Because I believe this is  
24 language that's commonly in letters to taxpayers who  
25 write with appeals that are not -- you know, that

1 don't -- that don't object to the tax but are just  
2 making general complaints. And I think that's where  
3 this language may have been derived from.

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

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

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

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

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

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

22 Now, if the complaint comes along with an  
23 appeal from a notice of action, the issues -- the  
24 underlying tax or penalties or interest would be  
25 addressed, but the decision would also -- would usually

1 have some -- whether it be a footnote or something in  
2 there saying, "By the way, we can't do anything about  
3 whether FTB's employees were mean to you," or whatever  
4 their complaint was.

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

7 MR. FOSTER: Upfront?

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

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

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

20 MR. LoFASO: Yeah.

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

25 MR. SHAH: This is Neil. What about collection

1 matters? That comes up once in a while, too.

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

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

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

20 MS. MANDEL: Before you get to Neil's question,  
21 I'd just like to follow up, if someone wrote in the kind  
22 of an appeal he's talking about, FTB, the person was  
23 horrible, mean, abusive, blah, blah, blah, but I agree  
24 with the tax, but boy, they were just horrific," what  
25 you said, Reed, would happen out of Board Proceedings,

1 you know, without casting any whatever on the person who  
2 wrote the letter, does that kind of complaint get  
3 forwarded at all to the taxpayer rights advocate or  
4 taxpayer advocate at FTB or anything like that?

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

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

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

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

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

21 And I'm just sort of curious as to under -- you  
22 know, I'm of the "if it's not broke, don't fix it"  
23 school. So if Board Proceedings already has that  
24 authority now, from whence does it come? And why can't  
25 it continue to come from that, is my ultimate question.

1           But you don't have to respond. That's just  
2 where I was going in my question.

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

5           MR. LoFASO: Sure. Unfortunately, I forgot to  
6 bring my cards. Allen LoFaso. L-o-F-a-s-o.

7           THE COURT REPORTER: Thank you.

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

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

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

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

23          If someone's not happy with the way FTB's been  
24 garnishing their wages, FTB has every right to garnish  
25 your wages if there's a final liability, and there's

1 nothing we can do about that.

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

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

12 MR. FOSTER: Certainly.

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

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

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

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

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

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

25 MS. BORGMAN: I believe Board Proceedings does

1 that in other contexts of nonappeal letters, you know,  
2 like, say, unpaid liability, and if you say they have to  
3 pay and file a claim for a refund and you refer them  
4 back to Franchise Tax Board, we can do the same thing  
5 with these type of issues.

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

8 MR. SPERRING: No, that's fine.

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

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

17 MR. HELLER: Any other comments on Section  
18 4012, any other subdivisions?

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

21 We had a couple of written comments in our  
22 submission to you last week on subparagraph(b), and so  
23 there's a couple of minor corrections there that we  
24 submitted. I don't know whether you want us to go over  
25 every little thing.

1 MR. FOSTER: If we have it in writing.

2 MS. BORGMAN: You're okay with that?

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

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

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

9 MS. BORGMAN: Uh-huh.

10 MS. MANDEL: -- but are --

11 MR. LANGSTON: They're just technical.

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

15 MS. BORGMAN: Okay.

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

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

23 Any comments on subsection (a)?

24 Subsection (b)?

25 Okay. We'll move ahead to Section 4020.5,

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

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

17 Tim Hudson for Bill Leonard's office.

18 One thing that's absolutely critical is  
19 if we're going to list our physical mailing address,  
20 that we also list, you know, how somebody would go about  
21 E-filing. And if we're afraid that things like E-mail  
22 addresses are going to change over time, then we should,  
23 at a minimum, have a website that's in the regulations  
24 so that it's kind of on par with the -- with the post  
25 office box, so people say, you know, either I can mail

1 it here or I can go to this website right now and figure  
2 out, you know, what file formats are acceptable and what  
3 Em ail addresses are and that kind of thing.

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

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

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

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

24                   MR. HUDSON: And have the place --

25                   MS. MANDEL: And then have the website in

1 here. That's an interesting -- you know, instructions  
2 provided by the Board and that the Board is going to  
3 post them on its website.

4 MR. HELLER: I think at this point --

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

8 MR. HUDSON: Yeah.

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

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

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

25 And then also staff agreed that we did need to

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

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

19 MR. HELLER: Right.

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

1 know how you sort of --

2 MR. HELLER: Yes.

3 MS. MANDEL: -- tell them to --

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

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

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

20 MS. MANDEL: Willy-nilly.

21 MR. HELLER: Willy-nilly, exactly.

22 MR. HUDSON: My only point is that you don't  
23 necessarily need to work out all of those things, like  
24 all the potential file formats you can set. You don't  
25 need to work that out prior to publishing this

1 regulation. You just need to say, "Here is the website  
2 where you'll be able to find the most recent version of  
3 that stuff." Courts do this all the time.

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

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

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

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

14 MS. MANDEL: Okay.

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

18 And so we're kind of concerned that with having  
19 any E-filing instructions, if in fact we're more than a  
20 year away from ever posting something to our website or  
21 actually being capable of doing that, so we don't -- at  
22 the same time we want to be clear; we also don't want to  
23 mislead people into thinking that that's coming in a  
24 month or two, when in fact it might be further down the  
25 road.

1           So we're just trying to tackle the whole issue,  
2 at least to the extent necessary for the Board members  
3 to approve any kind of regulation that would have that  
4 language and want to address it fully.

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

8           Are there any other comments on this Section  
9 4020? We'll move ahead then. We're on page 6 of the  
10 redacted version.

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

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

20           MR. FOSTER: We felt that ultimately the  
21 examples were better kind of put in Publications as  
22 opposed to Regulations, just in the Regulations, and  
23 that seemed to be mostly the consensus from the last  
24 meeting, that we put all the examples to our heart's  
25 content in the Publications.

1 MS. MANDEL: Well, okay. That gets to my other  
2 thing about a lot of what's in Part 5, which is things  
3 that don't belong in a Regulation, they belong in a  
4 Publication. I think that included examples were put in  
5 here -- were the examples in the original regulation, or  
6 were they just added to this first go-around?

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

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

11 MR. HELLER: Other questions?

12 MR. SPERRING: John Sperring, Price Waterhouse  
13 Coopers.

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

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

22 MR. LANGSTON: Whatever is later.

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

25 MR. SPERRING: I'm wondering if we should say

1 "postmark." That way it's absolutely clear that that's  
2 what we're talking about.

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

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

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

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

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

20 MR. LANGSTON: Go ahead.

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

24 MR. LANGSTON: Right.

25 MS. MANDEL: Do you see that?

1 MS. BORGMAN: Isn't it in here?

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

4 Does that answer your question?

5 MR. SPERRING: Yeah, that would be fine.

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

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

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

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

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

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

21 MR. FOSTER: Yes, it has.

22 MS. MANDEL: Okay.

23 MR. FOSTER: And we clarify, in the First  
24 Alternative here, keeps the extensions which are in the  
25 current reg, but it clarifies that the extension is

1 based on where FTB mails its notice to and not where the  
2 taxpayer is mailing an appeal from, so there's no longer  
3 discrimination against E-filers as far as the length of  
4 time they have to appeal.

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

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

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

24 Are there any comments on Section 4022, First  
25 Alternative?

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

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

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

11           And would anyone from there --

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

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

25           You know, it could be a multistate corporation

1 case that is pages and pages. And, you know, our view  
2 is, like pretty much any Court you go to, the first  
3 question is, do I have the right to be in court? Once  
4 that's decided, then, yes, then you go to the merits of  
5 the case.

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

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

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

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

1                   Comments?

2                   MR. SCHUTZ: This is Chris Schutz.

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

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

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

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

25                  MR. LANGSTON: Well, and that -- that would be

1 a -- that would go beyond this regulation, I think.

2 MS. MANDEL: Yeah.

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

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

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

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

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

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

24 MR. LANGSTON: No, I mean, just the opposite.

25 The point is if there's no jurisdiction --

1           MR. SHAH: No, because there are times when an  
2 issue, you don't have jurisdiction, like bankruptcy, but  
3 they have other issues also that they're raising which  
4 the Board has jurisdiction --

5           MR. LANGSTON: No.

6           MS. MANDEL: Neil.

7           MR. SHAH: -- because it's an assessment issue,  
8 is it accurate or not.

9           MS. MANDEL: Neil, I think what FTB is talking  
10 about is more the fundamental, a real fundamental  
11 jurisdiction over the appeal.

12           So that if an appeal is late, filed late, but  
13 there seems to be a dispute about whether it's filed  
14 late, perhaps there's lots of smudgy postmarks or  
15 something, or somebody is trying to take an appeal, for  
16 example, on a deemed denial of a refund claim or  
17 something like that where they say they're in a refund  
18 status and they haven't complied with everything you  
19 have to comply with before filing a refund claim with  
20 FTB, like they haven't paid all the money, that those  
21 are -- those kinds of fundamental jurisdiction over the  
22 appeal, that they would want those -- and then the  
23 person also says, and, besides, the tax is totally wrong  
24 and etcetera, that the issue of whether the Board has  
25 the fundamental jurisdiction to even hear the appeal be

1 taken up first. And then if the Board decides it has  
2 jurisdiction, then they do all the work on the other  
3 issues.

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

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

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

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

18 MR. LANGSTON: That's your choice.

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

23 You know, that's going to be -- it's going to  
24 be different in every case. I mean, it depends what the  
25 case is about, and how serious it is, and what the

1 issues are, and whether the facts and issues of the  
2 disputed year are relevant or necessary. But, you know,  
3 the basic rule of tax is each year stands on its own,  
4 and you have to establish jurisdiction for each year.

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

9 MR. LANGSTON: We --

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

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

24 MR. FOSTER: I think we could write something  
25 in there.

1 MR. LANGSTON: There shouldn't be, because then  
2 it would be completely ineffective. I mean, you sort of  
3 destroy the whole provision if you say, "Oh, you can  
4 just choose to ignore whether you have the right to be  
5 there at all," and force everyone to go through the  
6 merits of the case.

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

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

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

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

24 MS. MANDEL: Isn't that because Board  
25 Proceedings used to send stuff for verification to FTB?

1 And they stopped doing that a while ago.

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

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

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

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

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

20 MR. KOCH: Jurisdiction.

21 MR. LANGSTON: Yes. In some cases, again, it's  
22 in a small -- I don't anticipate -- this is primarily  
23 for large cases, I think, what we were most concerned  
24 about, because in a small case, I can understand that  
25 there will be -- you know, it's just as easy to touch it

1 once, send out the brief, put both issues in the brief.

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

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

14 MS. BORGMAN: A lot of times the --

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

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

24 MS. MANDEL: So under this one, under (a),  
25 where it's the Chief of Board Proceedings can determine

1 if the Board has jurisdiction, including whether it's  
2 timely, they may have to be checking with you again like  
3 they used to to determine.

4 MS. BORGMAN: Mm-hmm.

5 MS. MANDEL: Okay.

6 MR. HELLER: I think also, under both  
7 alternatives it does provide regulatory language to  
8 require the Chief of Board Proceedings to determine  
9 whether there's -- whether the appeal's timely and  
10 whether the Board has jurisdiction. So it is going to  
11 require some sort of procedure through Board Proceedings  
12 to do some sort of verification. Neither procedure  
13 really foresees sending something to the FTB and then  
14 having them object.

15 MS. MANDEL: I found those materials this  
16 morning from '96 or '97 when they stopped doing it.

17 MR. SPERRING: A question I have for staff.  
18 What's the -- I mean, one concern I have is the tail not  
19 wagging the dog here. What percentage of jurisdictional  
20 issues are raised for complex cases versus simple cases?

21 MR. FOSTER: I don't know that we have  
22 statistics on it. I think a complex case is less likely  
23 to have jurisdictional issues. You would -- I mean, I  
24 would think that a large corporate taxpayer with a  
25 complex multi-state issue would have dotted their I's

1 and crossed their T's before trying to come over here.  
2 They don't always. They're more likely to have done so  
3 than a person with maybe just a late filing penalty  
4 issue.

5 MS. MANDEL: What's FTB seeing?

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

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

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

25 MS. BORGMAN: A deficiency.

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

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

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

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

22 MS. BORGMAN: And Board staff, too.

23 MR. LANGSTON: And Board staff. And the  
24 taxpayer's money, you know. That's where we're coming  
25 from on this.

1           MR. SPERRING: A question for you, Bruce. Have  
2 you seen any head of households where there's a  
3 jurisdictional issue?

4           MR. LANGSTON: Yes.

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

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

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

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

23           So, you know, the other -- so anyway, that's  
24 sort of where we have come from. And these  
25 jurisdictional cases run the gamut, and they're not just

1 late appeals. A lot of them have to do with fairly  
2 complex issues where there simply aren't appeal rights  
3 in certain areas.

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

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

7 MS. BORGMAN: It runs the whole gamut.

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

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

22 And so when the FTB is required to brief an  
23 appeal like that, even though it's not timely, if we're  
24 going to let it go to the Board hearing level, then, in  
25 many cases, staff at the Franchise Tax Board then does

1 have to pick up that six-year-old claim, go back and  
2 find the information, go ahead and still have an auditor  
3 assigned, have an audit supervisor review their workup,  
4 have them work with an attorney to get them up to speed  
5 so that --

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

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

22 MR. HELLER: That may not be.

23 MR. LANGSTON: It's mostly payment. It's  
24 mostly where they have not paid something and are  
25 alleging that, you know --

1           MR. FOSTER: The typical case is of penalty  
2 abatement. There's an unpaid late payment penalty.  
3 They say to FTB, "Why don't you lift the penalty?"

4           FTB says, "No we're not going to abate it."

5           They appeal here. Well, there is no right to  
6 appeal here because it's not paid.

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

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

15          MS. BORGMAN: That's good.

16          MR. HELLER: I think, just to round out the  
17 discussion on the other side, you know, Board of  
18 Equalization staff is aware that to the extent that  
19 staff at the FTB isn't successful in these bifurcated  
20 matters and it is going to require Board staff -- Board  
21 of Equalization staff to possibly review a whole 'nother  
22 set of briefs, possibly hold another appeals conference,  
23 then to prepare recommendations for summary for the  
24 Board and then still hold another Board hearing for all  
25 the Board members to be present again.

1           So that's really the -- at least one of the  
2 primary countervailing concerns that the Board staff has  
3 is just, you know, what is the more efficient approach?  
4 Both sides have definitely addressed efficiency concerns  
5 and then possibly raise other inefficiencies. So it's  
6 the reason that we have two alternatives at the moment.

7           MS. PENNINGTON: This is Margaret Pennington.

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

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

23           So in our subdivisions (a) they both require  
24 that the Board Proceedings division do some sort of  
25 verification. It's only the Second Alternative that

1 then says that if we've identified an issue, then we're  
2 going to separate out that issue. We're going to hold  
3 everybody in abeyance. We're just going to deal with  
4 the jurisdictional or timeliness issue.

5 The other alternative --

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

10 MS. MANDEL: Obviously.

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

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

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

22 MR. HELLER: Currently what we have -- the  
23 Chief Counsel is going to take a look at it -- basically  
24 what we'd have is Board Proceedings do the initial look  
25 at jurisdictional and timeliness issues.

1           If they've identified an issue, then it would  
2 go to the Chief of the Board or the Chief Counsel to see  
3 if there's a genuine issue that needs to go ahead and  
4 get briefed and bifurcated and go to the Board members.

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

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

15           MS. MANDEL: With respect to the actual filing  
16 date of the appeal, that appears to be something that  
17 wouldn't require verification with FTB unless there's an  
18 issue -- because if the notice is attached -- I think  
19 they used to check those, you know, check those things,  
20 but -- and if for some reason there's, you know, some  
21 monkeying around with the notice that someone does, you  
22 know, I suppose we'll hear about that later, but -- and  
23 hopefully that never occurs -- but it sounded like there  
24 were other types of fundamental jurisdictional issues  
25 that perhaps would only be possibly known by FTB because

1 it might not appear on the face of the appeal unless  
2 there's certain types of issues that start getting  
3 acknowledged as ones that raise, like certain types of  
4 penalty abatement that would require, and then the  
5 Chief Counsel needs to give Board Proceedings a list of  
6 what to watch out for. That's what it sounds like.

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

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

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

19 So Section 4023, on page 12, Perfecting an  
20 Appeal. Are there any comments on subdivision (a)?

21 Subdivision (b), Time to Perfect the Appeal?

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

24 MR. HELLER: Are there any other comments on  
25 Section 4023? Excellent.

1           Why don't we adjourn for a five-minute break,  
2 and we'll return here at a quarter until 11:00 on the  
3 clock.

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

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

10           Do we have any comments or questions on Section  
11 4030?

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

17           MR. SCHUTZ: Chris Schutz.

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

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

24           Go ahead, Al.

25           MR. LOFASO: Al LoFaso from Betty Yee's office.

1           Just a quick question on subdivision (b). Is  
2 it the Chief of Board Proceedings's job to give the  
3 brief to the opposing party or the litigant's job to  
4 give the brief to the opposing party? It looks like you  
5 changed it, but maybe it's somewhere else.

6           MR. HELLER: That's how it --

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

15          MR. LOFASO: Okay. Appreciate the  
16 clarification.

17          MR. HELLER: Okay. Moving ahead to Section  
18 4031, General Briefing Schedule, and for those of you  
19 who haven't been through Part 4 before, there's a  
20 general briefing schedule. There's also a small tax  
21 case briefing schedule that's going to come up next that  
22 would apply to an elective schedule for certain  
23 taxpayers with small cases or HRA loans.

24          MR. FOSTER: And there's an Innocent Spouse  
25 privilege.

1 MR. HELLER: Well, that's correct also. So  
2 that's why there's a general briefing and that's  
3 applicable to everyone who doesn't fall into those  
4 special schedules.

5 So comments or questions on Section 4031,  
6 beginning on page 14? Subdivision (a)?

7 Subdivision (b), Opening Briefs?

8 Subdivision (c), Reply Briefs?

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

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

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

22 MR. HELLER: Sure.

23 MS. PENNINGTON: On 18 --

24 MR. HELLER: Okay.

25 MS. PENNINGTON: -- we feel that, you know,

1 they shouldn't have to ask permission to file a brief  
2 for the nonappealing spouse. It's down, No. 2.

3 MR. HELLER: Where are you?

4 MS. PENNINGTON: 2 on page 18.

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

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

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

16 MS. PENNINGTON: Am I reading it wrong?

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

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

22 MS. PENNINGTON: I think maybe I read it wrong.  
23 I think that -- but it does on the respondent's reply  
24 brief, No. 3, they have to ask permission to respond. I  
25 believe they're talking about Franchise Tax Board has to

1 ask permission. Why is that?

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

5 MS. PENNINGTON: But --

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

10 MS. PENNINGTON: Uh-huh.

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

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

25 So the idea is if we have looked at a brief

1 that basically the taxpayer appealed, they filed their  
2 own brief, the FTB responded to that, the taxpayer has  
3 responded, now the FTB wants to file another brief, and  
4 it looks like those, all the issues, had been addressed  
5 in their first brief, that would be the situation where  
6 we would deny them permission to respond.

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

16 Okay. Are there any other questions on Section  
17 4032, Innocent Spouse Appeals?

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

22 MR. LANGSTON: Innocent Spouse appeal?

23 MR. HELLER: Well, I think we're now going to  
24 let the nonappealing spouse be part of the briefing and  
25 hearing process, so it could make for some interesting

1 fireworks on certain cases. For those of you who have  
2 ever worked in family law, you probably know what I  
3 mean.

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

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

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

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

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

24 But, then, the Second Alternative I have, we  
25 keep the simplified procedure and make it entirely

1 elective for everybody. Nobody is forced to use it.

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

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

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

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

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

24 MR. FOSTER: Yes. You have a statutory right  
25 to a petition for rehearing. We cannot take that away.

1 It's nice of us to follow the law.

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

4 I apologize for speaking the First Alternative.

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

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

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

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

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

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

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

25 And I don't know that it would cause a problem

1 for the regulation, although I think it's duplicative of  
2 just the very act of asking for further briefing.

3 MR. DALY: Charles Daly, BOE Legal.

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

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

19 MR. LANGSTON: Often, I will point out,  
20 supplemental briefing will happen when a new court case  
21 comes out, for example, and the Board staff will ask us,  
22 "Well, how does this new case affect the argument you  
23 previously made?" you know, to give us an opportunity  
24 for something that couldn't have been raised, you know,  
25 because the case wasn't done yet.

1           Sometimes we'll get a request for supplemental  
2 briefing on an argument that the taxpayer made that, I  
3 don't know, we hadn't requested a reply to respond to  
4 because we thought it was so obvious, no one could  
5 possibly take that, and -- just kidding.

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

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

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

22           And sometimes we may ask questions that you  
23 guys have already decided it's not a relevant question,  
24 it's already been taken care of at protest but not  
25 raised in the briefing, something along those lines.

1           And maybe sometimes we may ask a question that  
2 isn't as specific as it could be or repeat a question  
3 that you think is irrelevant. And it seems relevant to  
4 us, we think, because of the basis of our knowledge.

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

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

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

1 is what you're requesting. And I think we can work out  
2 something.

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

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

11 MR. HELLER: Correct.

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

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

23 And we specifically amended it so that it  
24 wouldn't -- it wouldn't make a -- how should I say it?  
25 We made it clear that oral arguments could not turn into

1 a brief; and therefore, if we had a hearing just on  
2 briefs, so we submitted a matter on briefs only, it  
3 would not be an oral hearing within the terms of Part 5.

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

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

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

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

25 MR. HELLER: Correct. So, like, you would know

1 that it's about this deduction, and we want to know why  
2 this evidence applies or doesn't apply.

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

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

14           MS. RUWART: Okay.

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

17           MR. FOSTER: Yeah.

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

25           UNIDENTIFIED SPEAKER: And I was going to chime

1 in that we talked about this in the context of Part 3  
2 several weeks ago.

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

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

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

21 The reason the Appeals Division was given  
22 authority without having to go through the Board Chair  
23 is because the Appeals Division is going to -- all of  
24 its requests, if any, are going to be done because it's  
25 trying to prepare the file to go to the Board. So the

1 Board hasn't even seen the file yet.

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

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

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

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

20 MR. SHUTZ: That's right.

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

1 is ultimately responsible.

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

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

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

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

24 And I guess that's what we talked about the  
25 notice thing to give the Chair some opportunity to weigh

1 in but not require somebody who wanted supplemental  
2 briefing earlier in the process to have to wait for that  
3 consent when it doesn't serve the same functional  
4 purpose.

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

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

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

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

19 MR. SHUTZ: Right. Exactly.

20 MR. HELLER: Okay.

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

1 for potential conflict?

2 MR. HELLER: Yes, we are.

3 MR. SHUTZ: Yeah. So . . .

4 MR. EVANS: If I can chime in? Gary Evans.

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

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

15 MR. SHUTZ: Right.

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

20 MS. RUWART: That means there may have been  
21 a -- oh, I see what you're saying.

22 MR. SHUTZ: There may have been a postponement  
23 for some other reason, like they didn't show up, but  
24 Board staff already looked at it and they want further  
25 briefing anyway.

1           MR. KOCH: Al Koch. Under some of the existing  
2 rules there's required to be a space of 30 days between  
3 determination of briefing and hearing. I don't see that  
4 in here now.

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

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

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

17           MR. FOSTER: Is it 45?

18           MR. EVANS: 60.

19           MR. KOCH: 60 days. Okay.

20           MR. SHUTZ: Just two quick comments. One, I  
21 think that you could just put something in the language  
22 like if a request for briefing -- if it will require a  
23 postponement, then the Board Chair needs to approve that  
24 and without bifurcating the postponement versus the  
25 briefing. That might be a little bit too much.

1           And I think that sometimes briefing is  
2 requested from Appeals staff and that also requires  
3 postponement, somebody looks at it, whatever, through  
4 gatekeeping, will look at it again and say, "Oh, you  
5 know what? We missed this issue when we first prepared  
6 the hearing summary. You know, we really need to have  
7 additional briefing." Or somebody will have a further  
8 thought looking at the hearing summary.

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

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

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

18           MR. HELLER: Postponements.

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

25           MR. KOCH: Obviously.

1 MR. SHUTZ: Obviously.

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

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

10 MR. EVANS: Yes and no.

11 MR. SHUTZ: Okay.

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

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

21 MR. KOCH: Yeah. I just say that I think the  
22 way briefs are made available to staffs is not clear to  
23 me. I think there's a screen that people get. And I'm  
24 not sure how much time they have to look at these  
25 things.

1           But certainly, I feel there should be at least  
2 30 days, because sometimes staffs are so busy on  
3 everything that they have to do and we all know that  
4 they're overworked.

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

7           MR. KOCH: Not always.

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

10          MR. KOCH: Not always.

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

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

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

24                 And then it has basically a list of different  
25 grounds including any other facts or circumstances

1 determined by the Chief of Board Proceedings or the  
2 Chief Counsel that constitute reasonable cause.

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

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

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

21           But I think it's -- my feeling is that it's  
22 always good to have notice, especially the Board  
23 Proceedings division, and then certainly to have them  
24 provide it to all the Board members who would certainly  
25 want to know if additional briefing has been requested

1 from any of the parties in any of the proceedings so  
2 that they can be aware and they can adjust their  
3 schedules and their preparations accordingly.

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

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

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

24 And I just think we should keep that in mind  
25 when we're setting these rules, that if you've got a

1 Board member, and this is pretty rare in my experience,  
2 but if a Board member is saying here is the key issue  
3 for me and it wasn't addressed in the briefing, then our  
4 process should be designed to have that issue come  
5 forward and have that Board member make their decision  
6 on facts and not based on something that was never  
7 briefed.

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

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

16 MR. HELLER: Right.

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

21 MR. HELLER: I think in business -- I mean, my  
22 experience isn't so much within the Appeals Division for  
23 franchise income appeals, but in business tax cases we  
24 almost never see a request for briefing coming from the  
25 Board members. We do -- we do get contact when there's

1 additional information or something that's just  
2 clarification that somebody needs personally but not  
3 typically a request for additional briefing.

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

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

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

22           But we're -- and so I think we're headed in  
23 that direction, and we'll try to work with the Chair's  
24 office to see whatever things we can work out as far as  
25 keeping the Chair notified and determining any instances

1 where the Chair would be required to make a decision to  
2 postpone or reschedule something so that there's proper  
3 notice and there's a procedure for the Chair to make  
4 that determination.

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

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

16 MR. BESSENT: Carl Bessent.

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

1 that needs to be evaluated.

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

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

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

22 MR. HELLER: Right. And I think along those  
23 lines we think all the Board members probably should be  
24 notified, since everybody has got the same scheduling  
25 issues. It's just the Board -- the Chair has other

1 duties, but all the Board members need to know the  
2 schedules.

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

9 MR. HELLER: I think that explains it.

10 MS. RUWART: Can I ask a question?

11 Carole Ruwart.

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

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

25 So how is that -- how does Section 4042

1 interact with this scheduling of 4035 and some of the  
2 comments we just had about the interaction with the date  
3 of the hearing that's requested?

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

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

25 So what the new procedure is designed to do is

1 say when the briefing is concluded, the file will go to  
2 the Appeals Division. And the Appeals Division will  
3 look at it and say, okay, this addresses everything  
4 adequately. Go ahead and schedule it.

5 Or appeals would say, no, there's a ton of  
6 outstanding questions. Let's use the 4035 authority for  
7 supplemental briefing, let's do the extra briefing,  
8 let's get all these questions answered; or let's go to  
9 4042.5, which is a prehearing conference, and say these  
10 can be better answered if we all sit around a table and  
11 hash it out. Or maybe you need a combination of both of  
12 those.

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

18 Does that clarify it?

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

23 MR. FOSTER: Yes.

24 MR. HELLER: Uh-huh.

25 MS. RUWART: Whereas, (a) and (c), Board

1 requests and the individual Board member's requests may  
2 or may not occur, in fact probably won't occur, until  
3 after the hearing is scheduled?

4 MR. FOSTER: Uh-huh.

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

9 MR. FOSTER: You mean, ordering the regs?

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

11 MS. RUWART: In 4035.

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

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

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

19 MR. FOSTER: Right.

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

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

23 MS. MANDEL: -- reorder them?

24 The Board, you know, the Board is not going to  
25 do it except on a Board order at a meeting, right?

1 That's what you're talking about, the full Board voting  
2 to do it.

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

4 MS. MANDEL: Maybe --

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

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

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

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

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

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

16 MR. SCHUTZ: Although we're talking about that  
17 staff may request briefing even later than what's in  
18 4042.

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

25 MS. MANDEL: No, but you're going to -- a staff

1 request for additional briefing is going to act on  
2 presumably all the way up until the moment they walk  
3 into that Board hearing room.

4 MR. FOSTER: It's possible.

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

11 MR. FOSTER: Right.

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

16 MR. FOSTER: We could reorder that.

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

20 MS. MANDEL: Yeah.

21 MR. FOSTER: But we wanted to leave the option  
22 for staff to request after it's noticed, and we're going  
23 to write in there that if staff requests something  
24 that's going to affect the calendaring, then they have  
25 to go to the Board Chairman to make sure it's postponed.

1 MR. HELLER: Okay. Are we -- are there any  
2 further comments on Section 4035 before we move forward?  
3 I think staff is going to take another stab at it, at  
4 clarifying those procedures and dealing with  
5 postponements where they're necessary.

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

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

11 MS. RUWART: May I ask a quick question?

12 MR. HELLER: Certainly.

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

17 MR. FOSTER: Um --

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

20 MR. FOSTER: Well, the previous sentence says,  
21 "Upon the receipt of a timely request, the Chief of  
22 Board Proceedings shall send written acknowledgement."  
23 It's just to make sure that written acknowledgement  
24 still happens.

25 MS. RUWART: Okay.

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

3 MS. MANDEL: I have a question.

4 Conducting oral hearings, if there's a court  
5 order, how do we find out about the Court order?  
6 Presumably somebody tells us.

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

9 MS. MANDEL: They let us know.

10 MR. FOSTER: Yes.

11 MS. MANDEL: And then if we have separate  
12 hearings, do they get a transcript? Do they have an  
13 opportunity to apply for something, a separate hearing?  
14 I know we haven't even had to do one of those yet. I'm  
15 just kind of wondering -- did we do one that was  
16 separate?

17 MR. EVANS: Yes.

18 MS. MANDEL: Oh, and --

19 MR. EVANS: We held the first hearing.

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

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

1 nonappearance and make the decision.

2 MS. MANDEL: And people get the transcript of  
3 the other hearing in case they say that the person is  
4 totally lying or putting in some evidence that --

5 MR. LANGSTON: I'm not sure we want to do that.

6 MS. MANDEL: Okay. I was just wondering.

7 MR. FOSTER: That could sort of resolve it.

8 MS. MANDEL: It's never ending. It's never  
9 ending.

10 MR. LANGSTON: No, it's like we hear this story  
11 and then we hear that story, and then we decide.

12 MS. MANDEL: Okay.

13 MR. LANGSTON: Because otherwise --

14 MR. FOSTER: Hopefully, they've already told us  
15 in writing before.

16 MS. MANDEL: It was just a question I had. I  
17 don't remember seeing one.

18 MR. HELLER: I would point out though also  
19 basically any taxpayer or interested person can contact  
20 the Board and request a copy of the transcript from an  
21 oral hearing, so we're not preventing anyone from  
22 getting one, but we just don't have a procedure for it.

23 MS. MANDEL: Okay. Thank you.

24 MR. HELLER: Okay. Any further comments or  
25 questions on subdivision (b)?

1 Moving ahead to Section 4041 on page 27.

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

4 MR. HELLER: (c).

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

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

10 MR. HELLER: Uh-huh.

11 MS. MANDEL: Well, the Board has --

12 MR. FOSTER: Because the Board can only meet.

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

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

23 MR. SPERRING: Well, I guess this hearing I'm  
24 thinking about is someone comes back on a petition for  
25 rehearing. Okay, that's a consent item. Okay. Let's

1 say the staff recommends denied.

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

6 MS. MANDEL: Right.

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

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

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

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

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

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

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

1 calendar?

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

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

8 MR. SPERRING: Prevail.

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

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

14 MS. MANDEL: Right, or slightly different  
15 arguments.

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

25 Does the Board even want to -- do they want to

1 grant an oral hearing every time that happens?

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

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

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

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

21 MS. MANDEL: But if they wind -- no, different  
22 consent calendar. I meant consent agenda or, you know,  
23 some other place on the Board agenda for the day,  
24 because if they wind up -- if you deny the oral hearing  
25 request, and you put them on our consent calendar, which

1 is where we have all the cases, well, I guess, then what  
2 you're saying is they went there, a member could pull  
3 it, as long as we were informed that they wanted a  
4 hearing, and it was denied under this thingy.

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

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

15           MR. HELLER: Okay.

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

20           MR. HELLER: Yes, my comment was not to the  
21 effect that staff has made a determination as to who is  
22 the best possible people to make a determination. We're  
23 just trying -- we're just -- I was expressing our  
24 concern about the -- -- if we're trying -- if, let's  
25 say, under facts that we all agree that a hearing

1 wouldn't be appropriate. Let's say that the taxpayer,  
2 like, it's the exact example that Ian gave where the  
3 person's on the tenth request for interest abatement.

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

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

15 Go ahead, Carole.

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

23 We're trying to make this -- these rules  
24 helpful to people who are not familiar with the process.  
25 It helps people not misread this and say, "I'm not

1 getting an oral hearing of my case. I have no chance of  
2 an oral hearing."

3 So maybe a sentence like that would be helpful.

4 MR. HUDSON: That's important.

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

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

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

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

25 But somebody who probably came up with a, "No,

1 nothing's really changed. I just want another oral  
2 hearing to argue again," that would be a chance where we  
3 could achieve that type of a consensus.

4 But I think Carole's suggestion is great.

5 Go ahead, Chris.

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

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

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

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

23 MR. SPERRING: Yeah. I'm fine.

24 MR. HELLER: Okay. I'm certain that Marcie  
25 will hold us to task, as well as other people.

1           Okay. I'm going to go ahead and move forward  
2 to Section 4041 on page 27. And let's see. Subdivision  
3 (d) will be added at different alternatives. Otherwise,  
4 subdivisions (a), (b), and (c) are part of  
5 Alternative 1.

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

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

12           MR. HUDSON: I thought you did that.

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

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

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

1 response.

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

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

11 MR. FOSTER: That's the simplified briefing.

12 MR. HELLER: Oh, simplified briefing. Okay.

13 MR. FOSTER: Waiver of oral hearing.

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

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

22 "Appeals Review: Scheduling the Oral Hearing."

23 Questions or comments? Okay. Moving ahead.

24 Section 4042.5, "Pre-Hearing Conference."

25 MR. SPERRING: Yeah. I just had one quick

1 comment on (c), and that is, I think this notion that  
2 the appeals conference should be held at Board  
3 headquarters, okay, is sort of devoid of the reality  
4 that two-thirds of the state lives south of Tehachapi.

5           And I do understand that we do allow electronic  
6 conferencing, you know, by phone or whatnot, but, I  
7 mean, if someone wants to do it in person, we really  
8 should have one in Culver City when we have the Board  
9 hearings, or down in San Diego.

10           It just seems -- I had a client once that was  
11 87 years old. She couldn't travel, you know, very far.  
12 Certainly not on an airplane.

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

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

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

24           MR. FOSTER: No.

25           MR. LANGSTON: It seems to me in most of your

1 cases that are fully briefed and well developed, you  
2 know, the facts are out there. You know the taxpayer's  
3 position. You know the State's position.

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

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

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

22 But also, there could be some complex  
23 multi-state cases where it could be helpful to sit down  
24 and go over things. With both parties present, you  
25 might be able to get some concessions out of one or both

1 parties and narrow the issues down so that there's less  
2 for the Board to have to worry about, if everybody could  
3 sit down together and the appeals attorney was sort of  
4 mediating the whole thing.

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

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

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

25           And why I'm saying this, I've been to lots of

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

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

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

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

24 The way it's written now, it provides the  
25 Chief Counsel with the authority to say you can hold it

1 outside of Sacramento. Maybe that's a little too  
2 limiting. We'll think about it. Maybe "extraordinary  
3 circumstances" puts too much of a limit on it. The  
4 reason we had put that in there, generally it has to be  
5 in Sacramento, are basically budgetary concerns.

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

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

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

16 MS. OLSON: They change.

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

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

25 MS. RUWART: May I comment about the location

1 of the conference? We did have an extensive discussion  
2 of this as part of the property taxes procedures in the  
3 context of welfare claim organizations, nonprofits.

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

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

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

15 MR. HELLER: Chris.

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

24 I don't know how much cross-training there is  
25 with FIT and sales and use tax and appeals, but there is

1 some -- somebody who has knowledge in all three areas  
2 and FIT goes down there for sales and use tax purposes,  
3 it's possible that they could be there for those cases  
4 without having extra expenses because they're going to  
5 be down there anyway for the sales and use tax hearing.

6 MR. DALY: Charles Daly, Appeals.

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

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

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

25 MS. PENNINGTON: Sales tax also does telephone

1 conferences. I've sat in on those. So, I mean, that is  
2 an option.

3 MR. BESSENT: They also do video conferences.

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

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

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

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

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

25 MS. OLSON: This is Diane Olson, Board

1 Proceedings.

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

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

9           MS. OLSON: To sales tax? Okay.

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

12           (Laughter.)

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

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

1 long run.

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

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

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

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

23 Any other comments on Section 4042.5?

24 MR. SHUTZ: Just real quickly, this is a  
25 comment I made before. "Report" is probably not good,

1 because you can have a summary decision and may report  
2 on what occurred. It could be, like, prepare a  
3 transcript instead.

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

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

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

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

14 MR. SPERRING: Can you do 4043?

15 MR. HELLER: I think we can do 4043.  
16 Certainly.

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

19 MR. HELLER: Diane?

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

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

24 All right. We'll go ahead and cover 4043.  
25 There was a request and then we'll go ahead and break at

1 the beginning of Article 5. And then hopefully we can  
2 return and wrap things up pretty quickly after lunch.

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

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

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

12 MR. SPERRING: Oh, okay. Thank you.

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

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

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

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

25 MR. LANGSTON: I'm Bruce Langston from the

1 Franchise Tax Board Legal Department.

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

4 MR. EVANS: Gary Evans, Board Proceedings.

5 MS. RUWART: Carole Ruwart, Board Legal  
6 Department.

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

8 MS. OLSON: Diane Olson, Board Proceedings  
9 division.

10 MS. CARLOCK: Chelsea Carlock, Board  
11 Proceedings division.

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

14 MR. BESSENT: Carl Bessent, Appeals Division.

15 MR. SCHREITER: Reed Schreiter from the Appeals  
16 Division.

17 MR. DALY: Charles Daly, Appeals Division.

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

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

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

24 MR. HELLER: Welcome.

25 MR. FOSTER: Chris won't be back.

1 MR. HELLER: Other people won't be back.

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

7 Are there any comments or questions on Section  
8 4050?

9 Moving ahead, we're going to move to Section  
10 4051, which begins on the very bottom of page 31. And  
11 that's entitled Summary Decisions. Any comments or  
12 questions on Section 4051?

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

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

23 And I'm not sure the regs -- the proposed regs  
24 say that, but I'm just curious as to the background on  
25 that and what the intent was.

1           MR. FOSTER: Well, they -- first of all, I'll  
2 back up a little bit on it. The criteria listed in  
3 subdivision (d) of 4052 set forth the criteria, and  
4 those criteria are adopted from the California Rules of  
5 Court and also from our Appeals Rules and Development.

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

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

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

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

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

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

22          MR. LOFASO: Okay. Okay.

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

1 want to adopt.

2 MR. LOFASO: Okay.

3 MR. HELLER: And just a follow up, I was --  
4 when I was speaking with Al before the meeting this  
5 morning, we were just looking at the grid that was  
6 provided that shows the matrix of comments and staff's  
7 responses to the comments on Part 4. And basically  
8 right in there, it does say that staff rejected the --  
9 or basically did not adopt the suggestions of the State  
10 Bar's tax section.

11 And so we did make it clear that we  
12 didn't -- that staff didn't intend to bind a Board  
13 member by it. But the language does provide basically a  
14 standard for people to use in making their own  
15 determination, but it would still require an affirmative  
16 vote of the Board members in order to publish the  
17 decision.

18 And as we'll get to even further in the next  
19 section, we do provide for dissenting opinions as well,  
20 which would only require the approval of the dissenting  
21 Board member.

22 MR. LOFASO: Okay. Thank you for that  
23 clarification.

24 MR. FOSTER: Sure.

25 MR. HELLER: Are there any other comments or

1 questions on Section 4052?

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

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

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

13 MR. SHAH: Okay.

14 MR. HELLER: And this one, I think our staff's  
15 concerns were since we've never had dissenting or  
16 concurring opinions, we didn't want to provide too much  
17 detailed instructions in advance and start to curtail  
18 the Board members, after creating a procedure to  
19 specifically allow them to voice their opinion and their  
20 rationale for supporting or opposing a decision, so  
21 essentially we would be fine with the Board's member  
22 staff writing and submitting it, or the Board could  
23 direct other staff, Board members could direct other  
24 staff to aid them in preparing a dissenting or  
25 concurring opinion as well.

1           Are there any other comments on Section 4053,  
2     Dissenting and Concurring Opinions?

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

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

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

1 MR. FOSTER: Okay.

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

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

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

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

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

14 MR. HELLER: Uh-huh.

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

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

21 MR. HUDSON: I'm curious about something.

22 Tom Hudson again for Bill Leonard's office.

23 I don't remember seeing this language for any  
24 of our other tax programs in the other parts, and that's  
25 because that Revenue Tax Code Section is specific?

1 MR. FOSTER: Specific to Revenue and Taxation  
2 Code. It's the nature of the cases, yes.

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

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

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

10 MR. HUDSON: Thank you.

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

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

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

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

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

24 MS. RUWART: Something about the grammar of it,  
25 when I was skimming it quickly, maybe just break that

1 off into a separate sentence. "Each party shall file no  
2 more than one petition for rehearing."

3 MR. FOSTER: Okay.

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

12 And I'm just wondering, it says "the date of  
13 the decision," but the date of the decision is really  
14 the date the Board voted, as you pointed out earlier.  
15 And so in that circumstance, if somebody hadn't heard  
16 anything from the Board for three weeks, and in this  
17 case the Board hadn't sent it yet is what I was told, I  
18 called to find out why they hadn't heard anything, and  
19 it just hadn't been mailed out yet, I'm wondering if  
20 there might need to be some sort of commonsense  
21 adjustment to that. If we didn't make our three-day  
22 deadline for getting it in the mail, it turned into  
23 three weeks, are they still going to be held to the  
24 30-day rule?

25 MR. FOSTER: I believe under the statute

1 there's still the 30 days; it's 30 days from the date of  
2 the Board's determination.

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

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

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

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

19 MR. FOSTER: Uh-huh.

20 MR. BESSENT: And they're supposed to be issued  
21 30 days, you know, by 30 days after the formal opinion,  
22 well, let's say they come out on day 30 and you file  
23 your petition for rehearing, and then all of a sudden,  
24 when you get the dissenting opinion in the mail, you  
25 realize that that raises all sorts of arguments that you

1 would like to include.

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

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

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

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

25 MR. FOSTER: The dissent has to be ordered at

1 the Board meeting, yes. It can't be done with a phone  
2 call later on.

3 MR. LOFASO: Okay.

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

10 I'm thinking of the specific situation I had  
11 where somebody called and said, "I haven't heard for  
12 three weeks." And I was surprised he hadn't, so I  
13 checked into it, and they said, well, here is the deal.

14 But it seems like we are being a little bit  
15 unfair to people if we're not making it clear to them  
16 that you still have 30 days.

17 MR. BESSENT: They may have thought they won.

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

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

25 MR. FOSTER: Well, when the -- when the -- it

1 depends on how the formal comes up. If the formal comes  
2 up as a nonappearance matter from appeals, appeals  
3 decides to keep it, we think this would make a good  
4 formal, we write it as one, put it before the Board, the  
5 Board adopts it. That's the day of the decision.

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

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

13 MR. FOSTER: Uh-huh.

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

23 Whereas if it's just an unpublished decision,  
24 may make the decision not to file a petition for  
25 rehearing, because it's nonprecedential, and, you know,

1 often the unpublished decisions are less -- you know,  
2 they're shorter, and there's less analysis in them.

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

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

10           MR. FOSTER: Correct.

11           MR. LANGSTON: So --

12           MR. HELLER: Uh-huh, yes.

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

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

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

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

24           This particular taxpayer was sophisticated  
25 enough to know he had 30 days for the rehearing. That's

1 why he called me, because he knew that they had 30 days.  
2 And he said, "Well, you know, our clock is running, and  
3 we need to know what the decision was."

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

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

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

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

22 So regulatory from our procedural standpoint,  
23 there should not be a case in the future where an  
24 appellant wouldn't get notice while the 30 days is still  
25 running; however, you know, to the extent that somehow

1 Board staff fails to like -- fails to carry out its own  
2 procedures, and that taxpayer doesn't get any -- somehow  
3 doesn't get notice, we are constrained by statutes, and  
4 that really has been our great concern as far as --

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

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

13 MR. HELLER: What?

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

16 MR. HELLER: Correct.

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

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

24 MR. HELLER: You still have to file.

25 MR. HUDSON: We need to make it explicit to

1 them, if you didn't get anything from the Board --

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

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

6 MR. LANGSTON: Right.

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

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

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

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

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

23 MR. FOSTER: Yes.

24 MR. HELLER: I'm sorry.

25 MS. RUWART: Ian, may I go back to something?

1 I want to make sure I understand about the concurring  
2 and dissenting opinions.

3 MR. FOSTER: Uh-huh.

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

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

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

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

1 something is coming.

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

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

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

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

19 MS. RUWART: Uh-huh.

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

23 MS. RUWART: If they are adopted separately.

24 MR. FOSTER: Yeah.

25 MS. RUWART: So you have a provision where you

1 could adopt a formal, which is the majority vote  
2 essentially, and concurrences and dissents could come  
3 afterwards.

4 MR. FOSTER: Right.

5 MS. RUWART: Okay. Thank you.

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

8 MR. FOSTER: Uh-huh.

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

15 MR. FOSTER: So you have a plurality opinion.

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

23 MR. FOSTER: There has to be --

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

25 MR. FOSTER: -- a majority of those present and

1 voting.

2 MR. HELLER: So it's possible.

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

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

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

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

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

1 stands as the decision alone.

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

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

10 MR. HELLER: Right.

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

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

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

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

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

23 And I tend to think, you know, at least from  
24 staff's point of view, we pretty much -- we don't  
25 anticipate the Board members requesting a formal opinion

1 to be prepared where they don't have an agreement of a  
2 majority of Board members on a result, which doesn't --  
3 it wouldn't prohibit them from doing that, but just --  
4 staff's expectation at this point, from experience, the  
5 Board's been, you know, I would say, generally refrains  
6 from issuing formal opinions because it's so difficult  
7 to get at least a majority of the Board members to agree  
8 on the exact same reason for granting on exactly the  
9 same evidence and being able to, you know, clearly state  
10 that in a written document in some fashion that could  
11 then provide precedent and be valuable to be relied on  
12 by other people in the future.

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

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

22           Moving ahead now to -- we're on Section --  
23 we're moving ahead to Section 4061. This is the  
24 Petitions for Rehearing. Does this have to do with  
25 bifurcation, too?

1 MR. FOSTER: No. That has to do with  
2 extensions for filing appeals.

3 MR. HELLER: Okay.

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

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

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

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

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

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

24 MR. EVANS: Why did you call Article 6  
25 "Petitions for Rehearing and Rehearings" when you only

1 talk about petitions for rehearing?

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

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

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

10 Okay. Well, thank you all for coming today.  
11 We appreciate all of your input.

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

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

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

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

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REPORTER'S CERTIFICATE

State of California            )  
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County of Sacramento         )

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

Dated: March 29, 2006

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Laurie Gower, CSR #8000

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Carole Browne, CSR #7351