

REQUEST FOR PERMISSION TO PROCEED WITH THE FORMAL REGULATORY PROCESS TO ADOPT AMENDMENTS TO CALIFORNIA CODE OF REGULATIONS, TITLE 18, SECTION 25137, RELATING TO ALTERNATIVE APPORTIONMENT METHOD PETITION PROCEDURES

Introduction

The purpose of adopting the proposed amendments to California Code of Regulations, Title 18, section 25137 (Regulation) is to provide procedural guidance to practitioners and the taxpayer community for filing petitions pursuant to Revenue and Taxation Code (RTC) section 25137, with the Franchise Tax Board (FTB), itself, and for related ex-parte communications. The most current draft of the proposed Regulation language was posted on the FTB Regulatory Activity page on December 29, 2020.

Background

RTC section 25137 permits a taxpayer to petition the FTB, itself, for the use of an alternative apportionment method, if the standard allocation and apportionment provisions do not fairly reflect the extent of a taxpayer's business activity in California.

Other than the guidance set forth in the Regulation, FTB Resolution 2000-10, and FTB Resolution 2017-01, there is no other formal guidance as to how petitions filed pursuant to RTC section 25137 are considered by the FTB, itself. With this in mind, staff commenced the informal rulemaking process by holding Interested Parties Meetings (IPMs) to begin discussions with interested parties, with the ultimate goal of providing more formal guidance to practitioners and the taxpayer community as to how RTC section 25137 petitions should be considered by the FTB, itself, and for related ex-parte communications

Interested Parties Meetings

The first IPM was held on June 30, 2017 to provide the public with an opportunity to discuss and provide comments on potential amendments to the Regulation. Staff explained the purpose of the Regulation and the public responded positively to receiving additional guidance by way of amendments to the Regulation. Numerous topics were discussed, including whether the Regulation should address any conditions that would need to be met before filing a RTC section 25137 petition, what constitutes a valid petition, whether to adopt formal time limits and other procedural rules for oral presentations and witness testimonies, the applicability of any rules consistently to all parties, reconsiderations of petitions by the FTB, itself, and the potential need for waivers of any statute of limitations.

The second IPM was held on November 26, 2018. Staff presented draft Regulation language, as well as an explanation of the draft Regulation language, after consideration of comments received from the first IPM. The proposed Regulation language was generally acceptable to the interested parties in attendance. Staff explained under the draft Regulation language when a variance action (as discussed in

further detail below) could be made and discussed the procedural aspects of petitioning the FTB, itself, upon receiving an adverse variance action determination from staff. A number of comments were raised by participants about the conditions under which the FTB, itself, would hear and decide petitions and whether an appeal could be made directly with the Office of Tax Appeals or the superior court. Other comments dealt with issues pertaining to witness testimonies, ex-party communications, and waivers of confidentiality.

The third IPM was held on December 4, 2019 to further elicit public input regarding the potential amendments to the Regulation. Staff and interested parties in attendance discussed in detail certain aspects of the petition process, including acknowledgment procedures, timelines for the filing of petitions, briefing rules, ex-parte communications, scheduling of witnesses and hearings, and procedures for issuing decisions by the FTB, itself. Staff clarified that the proposed Regulation procedures apply to petitions filed with the FTB, itself, and not to variance action requests made with staff. However, staff noted that any petition would need to be reviewed by staff before a petition would be considered by the FTB, itself. Other comments dealt with the discretion of the FTB, itself, to deny petitions, the waiver of confidentiality, and the applicability date of the proposed Regulation.

The fourth IPM was held on August 11, 2020. Staff presented draft Regulation language along with an explanation of the draft Regulation language, and received input from the public. Staff explained that the intent of the proposed Regulation was to be consistent with FTB Resolutions 2000-10 and 2017-01 which provide the circumstances under which RTC section 25137 petitions will be considered by the FTB, itself. After consideration of public comments, staff determined that the filing of a RTC section 25137 petition would not be deemed an administrative remedy that would be required to be exhausted before a taxpayer could seek further administrative or judicial relief. Staff addressed a number of comments which were raised regarding disclosure of information and closed-sessions. Staff explained that any records submitted to the FTB, itself, for consideration during an open meeting, as well as any decision of the FTB, itself, would be subject to the California Public Records Act and the Bagley-Keene Act, unless otherwise provided. Other comments dealt with deadlines for filing of the petitions, notification of the hearing date, and appeals made directly to the Office of Tax Appeals.

Finally, after consideration of the comments during and after the August 11, 2020 IPM, a Twenty-Day Notice¹ containing revisions to the draft Regulation² was noticed and posted to FTB's Regulatory Activity page on December 29, 2020. Based on comments received in response to the Twenty-Day Notice, staff made one minor revision to the proposed Regulation language by replacing the word "within" to "by the later of" in subsection (d)(2)(B) to provide additional clarity.

¹ Exhibit A.

² Exhibit B.

The Proposed Regulatory Text

After the fourth IPM, staff considered public comments and made further changes to the proposed Regulation language, incorporating and adopting some suggestions made by the public and other changes as a result of further staff review of the Regulation. As a result of public input and staff consideration of all IPMs, the proposed Regulation text is explained as follows:

Subsection (d) was amended to streamline the subject matter and to become an introductory paragraph to the procedural amendments that follow it.

Subsection (d)(1) was added to provide definitions of key terms used throughout the Regulation. Definitions were included to provide detailed clarity, provide consistency within the Regulation, and to avoid redundancy. Of particular note, staff defined the terms "petition" and "variance action" to distinguish requests for an alternative apportionment methodology made with the FTB, itself, and requests made with FTB staff.

Subsection (d)(2) was added to address procedures and deadlines for filing a petition with the FTB, itself. This subsection makes clear that any records submitted to the FTB, itself, as well as the decision of the FTB, itself, are subject to the California Public Records Act and the Bagley-Keene Act. This subsection specifies when and how the notification of the receipt of a taxpayer's petition is to be provided to the FTB, itself, and taxpayers, which initiates the briefing schedule for the parties, and identifies when the ex-parte rule applies. In addition, to ensure a petition is considered appropriately by the FTB, itself, this subsection also provides that the petition is to be considered by FTB staff if it has not previously done so, that a taxpayer must agree in writing to extend the statute of limitations if a notice of proposed deficiency assessment has not been mailed to the taxpayer, and that the parties must file a joint request to defer proceedings if an appeal has been filed with the Office of Tax Appeals.

Subsection (d)(3) was added to address procedures related to hearings on petitions filed pursuant to RTC section 25137. This subsection describes the manner in which opening presentations are to be made by the parties, notifications of witnesses are to be provided, and how decisions on petitions are to be issued.

Subsection (d)(4) was added to provide the prohibition of ex-parte communication. This subsection specifies when the ex-parte communication rule does or does not apply as well as provides procedures for the event an ex-parte communication occurs.

Subsection (d)(5) was added to address the applicability date of the proposed amendments and to make clear that the proposed amendments are applicable prospectively only.

Request for Permission

Staff believes that the proposed regulation provides appropriate criteria and guidance in implementing the procedures for filing alternative apportionment method petitions with the FTB, itself, and now requests permission to commence the formal regulatory process under the Administrative Procedure Act.

**TWENTY-DAY NOTICE OF PROPOSED AMENDMENTS
CALIFORNIA CODE OF REGULATIONS,
TITLE 18, SECTION 25137
DECEMBER 29, 2020**

Background

The Franchise Tax Board (FTB) held Interested Parties Meetings (IPMs) to elicit public comment for proposed amendments to Title 18, California Code of Regulations, Section 25137(d), Alternative Apportionment Method Petition Procedures Regulation (Regulation) on June 30, 2017, November 26, 2018, December 4, 2019, and August 11, 2020. The FTB posted documents for these IPMs at the [Regulatory Activity](#) page.

After considering comments made at the IPM held on August 11, 2020 and during the comment period, FTB staff is now issuing this twenty-day notice, as well as the revised proposed draft Regulation language, and a discussion of these revisions.

Purpose

The purpose of this twenty-day notice is to elicit comments on additional revisions to the proposed draft Regulation language, regarding procedural guidance for petitions, as described below. Please submit written comments regarding the newly revised proposed draft Regulation language by 5:00 p.m. on **January 18, 2021**.

Following the close of this twenty-day comment period, FTB staff intends to present the newly revised proposed draft Regulation language to the three member Franchise Tax Board (Board itself) to request permission to proceed with the formal Administrative Procedures Act (APA) regulatory process.

Discussion

The revisions to the proposed draft Regulation language are summarized below:

The first revision to the proposed draft Regulation language retains the previously deleted language "Consideration of said petitions by the Board shall be in open session at a regularly-scheduled meeting" to section 25137(d) to make clear that petitions will be held in open session.

The second revision adds language to section 25137(d)(2)(D) to specify that a taxpayer will receive notification of the petition and the briefing schedule either sixty (60) calendar days from the date of the petition, or sixty (60) calendar days from the date of FTB staff's determination if a determination was not previously made, whichever occurs later.

The third revision modifies the time allowed for opening and reply presentations specified in section 25137(d)(3)(A) from thirty (30) minutes for opening presentations and fifteen (15) minutes for taxpayer's reply presentation to twenty (20) minutes for opening presentations and ten (10) minutes for taxpayer's reply. This modification streamlines the petition hearing process.

The final revision to the proposed draft Regulation language replaces "of" with "at" in section 25137(d)(3)(C) to clarify the use of a defined term.

Written comments regarding the newly revised proposed draft Regulation language will be accepted until 5:00 p.m. on **January 18, 2021**. All inquiries and written comments concerning this notice should be directed to Hanna Cho per the below contact information.

Email: FTBRegulations@ftb.ca.gov

Telephone: (916) 845-7298

Facsimile: (916) 855-5786

Mailing Address: Franchise Tax Board

Legal Division (MS A260)

Attn: Hanna Cho

P.O. Box 1720

Rancho Cordova, CA 95741-1720

This notice and the newly revised proposed draft Regulation language also will be made available at the [Regulatory Activity](#) page of the Franchise Tax Board's website.

COST IMPACTS OF PROPOSED RULEMAKING

The department encourages submission of information from interested parties during the pre-APA process in order to assess the economic impact of a proposed rulemaking action on businesses (including small businesses), employees, jobs or occupations, competitiveness of California businesses, reporting requirements, or individuals.

NOTE: This handout is intended only for purposes of soliciting comments for the following proposed amended text as discussed in the twenty-day notice dated December 29, 2020.

The proposed amendments from the November 26, 2018 IPM are in single underline for additions and ~~single-strikeout~~ for deletions. The proposed amendments from the December 4, 2019 IPM are in **single underline and bold** for additions and ~~single-strikeout and bold~~ for deletions. The proposed amendments from the August 11, 2020 IPM are in single underline and italics for additions and ~~single-strikeout and italics~~ for deletions. The proposed amendments for this notice are in **single underline, italics, and bold** for additions and ~~single-strikeout, italics, and bold~~.

FRANCHISE TAX BOARD

CALIFORNIA CODE OF REGULATIONS TITLE 18, DIVISION 3, CHAPTER 3.5, SUBCHAPTER 17, ARTICLE 2.5, SECTION 25137 REGARDING OTHER APPORTIONMENT METHODS

PROPOSED AMENDED TEXT AS DISCUSSED IN THE TWENTY-DAY NOTICE DATED DECEMBER 29, 2020

§ 25137. Other Apportionment Methods.

(a) Special Rules. In General. Section 25137 provides that if the allocation and apportionment provisions of the Uniform Division of Income for Tax Purposes Act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the Franchise Tax Board may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (1) Separate accounting;
- (2) The exclusion of any one or more of the factors;
- (3) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (4) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Section 25137 permits a departure from the allocation and apportionment provisions of the Uniform Division of Income for Tax Purposes Act only in limited and specific cases.

Section 25137 may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment and allocation provisions contained in these regulations.

In the case of certain industries such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, various types of professional athletics, and so forth, the foregoing regulations in respect to the apportionment formula

do not set forth appropriate procedures for determining the apportionment factors. Nothing in Section 25137 or in this Regulation shall preclude the Franchise Tax Board from establishing appropriate procedures under Sections 25129 to 25136 inclusive, for determining the apportionment factors for each such industry, but such procedures shall be applied uniformly.

(b) Special Rules. Property Factor.

(1) The following special rules for determining the net annual rental rate as provided by California Code of Regulations, title 18, section 25130, subsection (b), are established in respect to the property factor of the apportionment formula:

(A) Subrents. If the subrents taken into account in determining the net annual rental rate under Regulation 25130, subsection (b), produce a negative or clearly inaccurate value for any item of property, another method which will properly reflect the value of rented property may be required by the Franchise Tax Board or requested by the taxpayer.

In no case however shall such value be less than an amount which bears the same ratio to the annual rental rate paid by the taxpayer for such property as the fair market value of that portion of the property used by the taxpayer bears to the total fair market value of the rented property.

EXAMPLE:

The taxpayer rents a 10-story building at an annual rental rate of \$1,000,000. Taxpayer occupies two stories and sublets eight stories for \$1,000,000 a year. The net annual rental rate of the taxpayer must not be less than two-tenths of the taxpayer's annual rental rate for the entire year, or \$200,000.

(B) Property of others in general. If property owned by others is used by the taxpayer at no charge or rented by the taxpayer for a nominal rate, the net annual rental rate for such property shall be determined on the basis of a reasonable market rental rate for such property.

(C) Natural resources. Without regard to whether the following property is also described in subsection (b)(1)(B), if a taxpayer enters upon property owned by others for the purpose of extracting natural resources such as timber, oil, gas or hard minerals, and irrespective of whether such entry or extraction is pursuant to an agreement between the holder of the interest in the property and the taxpayer (and also irrespective of whether such relationship is characterized as a profit à prendre or some other relationship), consideration actually paid by the taxpayer to the holder of the interest in the property that constitutes a sharing of current or future production or extraction of the timber, oil, gas or hard minerals from such property (irrespective of the method of payment or how such consideration is characterized, whether as a royalty, advance royalty, rental or otherwise) and consideration actually paid by the taxpayer for the right to enter the property and

extract the timber, oil, gas or hard minerals (such as forest management fees, fire protection fees, reforestation or reclamation fees, road maintenance fees, etc.) for the taxable year at issue shall constitute the net annual rental rate. The net annual rental rate shall then be multiplied by eight (8) in accordance with Revenue and Taxation Code section 25130. Improvements shall not be included in the calculation of a net annual rental rate, but are separately accounted for. (See California Code of Regulations, title 18, section 25130, subsection (b)(5).)

EXAMPLE: On December 31, 2000, a taxpayer engaged in the paper products business enters into a 50-year forest management agreement with a government entity to commence January 1, 2001, that allows it to extract 100,000 cords of timber per year from forests owned by that government entity. In exchange for the right to enter the government's land and extract timber, the taxpayer agrees to pay a royalty fee of \$10.00 per cord extracted, plus a \$10,000 per year access fee, \$10,000 fire protection fee for any fires caused by the taxpayer, and an additional reforestation fee of 10 percent of the royalty fee paid. The forest management agreement also requires the taxpayer to make \$1 million worth of improvements to an existing mill facility owned by the government entity. In taxable year 2001, the taxpayer extracts 50,000 cords and does not cause any fires to occur. It also makes the \$1 million in improvements to the existing mill facility. The taxpayer therefore pays the government entity the \$10,000 access fee, \$500,000 in royalty fees (\$10.00 per cord times 50,000 cords), and an additional \$50,000 for the reforestation fee (10 percent of the \$500,000 royalty fee). Under these facts, the taxpayer is entitled to claim \$560,000 as the net annual rental rate. The taxpayer reports \$4,480,000 (\$560,000 multiplied by 8) for property factor purposes for this property for taxable year 2001. In addition, the taxpayer reports the \$1 million in improvements in the property factor as property owned by the taxpayer in accordance with California Code of Regulations, title 18, section 25130, subsection (b)(5), for taxable year 2001.

(D) Definitions. For purposes of subsection (b) the following definitions apply.

1. A "reasonable market rental rate" shall mean the rate at which a lessor is willing to lease and a lessee is willing to pay in an open and competitive marketplace for the property.
2. A "nominal rate" shall mean a token payment compared to a rental rate at which a lessor is willing to lease and a lessee is willing to pay in an open and competitive marketplace for the property.
3. "Agreement" shall mean contract, lease or similar arrangement for the use of property.

(c) Special Rules -Sales Factor.

(1) The following special rules are established in respect to the sales factor of the apportionment formula:

(A) Where substantial amounts of gross receipts arise from an occasional sale of a fixed asset or other property held or used in the regular course of the taxpayer's trade or business, such gross receipts shall be excluded from the sales factor. For example, gross receipts from the sale of a factory, patent, or affiliate's stock will be excluded if substantial. For purposes of this subsection, sales of assets to the same purchaser in a single year will be aggregated to determine if the combined gross receipts are substantial.

1. For purposes of this subsection, a sale is substantial if its exclusion results in a five percent or greater decrease in the sales factor denominator of the taxpayer or, if the taxpayer is part of a combined reporting group, a five percent or greater decrease in the sales factor denominator of the group as a whole.

2. For purposes of this subsection, a sale is occasional if the transaction is outside of the taxpayer's normal course of business and occurs infrequently.

(B) Insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities may be excluded from the sales factor unless such exclusion would materially affect the amount of income apportioned to this state. For example, the taxpayer ordinarily may include or exclude from the sales factor gross receipts from such transactions as the sale of office furniture, business automobiles, etc.

(C) Where the income producing activity in respect to business income from intangible personal property can be readily identified, such income is included in the denominator of the sales factor and, if the income producing activity occurs in this state, in the numerator of the sales factor as well. For example, usually the income producing activity can be readily identified in respect to interest income received on deferred payments on sales of tangible property (Regulation 25134, sub. (a)(1)(A)) and income from the sale, licensing or other use of intangible personal property (Regulation 25136, sub. (b)(4)).

Where business income from intangible property cannot readily be attributed to any particular income producing activity of the taxpayer, such income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures or government securities results from the mere holding of the intangible personal property by the taxpayer, such dividends and interest shall be excluded from the denominator of the sales factor.

(D) The numerator and denominator of the sales factor shall exclude interest and dividends from intangible assets held in connection with a treasury function of the taxpayer's unitary business as well as the gross receipts and overall net gains

from the maturity, redemption, sale, exchange or other disposition of such intangible assets.

1. "Treasury function" is the pooling, management, and investment of intangible assets for the purpose of satisfying the cash flow needs of the trade or business, such as providing liquidity for a taxpayer's business cycle, providing a reserve for business contingencies, business acquisitions, etc. A treasury function includes the use of futures contracts and options contracts to hedge foreign currency fluctuations. A treasury function does not include a taxpayer's trading function that engages in futures and option transactions for the purpose of hedging price risk of the products or commodities consumed, produced, or sold by the taxpayer. A taxpayer principally engaged in the trade or business of purchasing and selling intangible assets of the type typically held in a taxpayer's treasury function, such as a registered broker-dealer, is not performing a treasury function with respect to income so produced.
2. This subsection shall not apply to entities that apportion their income under the rules of regulation 25137-4.2.
3. This subsection is applicable to taxable years beginning on or after January 1, 2007.

(d) In cases deemed appropriate by the Franchise Tax Board, *itself*, it may elect to hear and decide petitions filed pursuant to Section 25137 instead of having this function performed by the ~~FTB Franchise Tax Board staff or may elect to hear and decide a taxpayer's objection appeals of denied petitions for a to a variance action determination or FTB staff impositions of alternative apportionment methodologies pursuant to regulation section 25137~~. As a condition to having such petition considered by the Board, the petitioning taxpayer shall waive in writing the confidentiality provisions of Section 19542 with respect to such petition and to any other facts which may be deemed relevant in making a determination. Consideration of said petitions by the Board shall be in open session at a regularly scheduled meeting. **Consideration of said petitions by the Franchise Tax Board, itself, shall be in open session at a regularly-scheduled meeting.**

(1) Definitions. For purposes of subsection (d) the following definitions apply.

~~(A) "Board member staff" means staff employed by any of the three members of the Franchise Tax Board.~~

~~(B)~~**(A)** "Brief" means a written document containing an argument or arguments supporting a party's position. **A brief may, but is not required to, include citations to specific laws, regulations, or other authorities. A brief may be in the form of a letter, other informal writing, or formal legal writing. Briefs are subject to the requirements identified in these regulations.**

~~(C)~~**(B)** "Ex-parte communication" means **any communication concerning a pending or impending petition to or from between one of the three members of the Franchise Tax Board, itself, and/or Franchise Tax Board member staff, outside the presence of either FTB-Franchise Tax Board staff or and the petitioner-taxpayer without notice to all parties and/or his or her representative, or FTB staff.**

(C) "Franchise Tax Board member staff" means staff employed by any of the three members of the Franchise Tax Board.

(D) "FTB-Franchise Tax Board staff" means staff employed by the Franchise Tax Board and does not include any Franchise Tax Board member staff.

(E) "Open session at a regularly-scheduled meeting" means the open session of a Franchise Tax Board regularly-scheduled meeting of the Franchise Tax Board.

(F) "Petition" means a request by a taxpayer for the Franchise Tax Board, itself, to consider an alternative apportionment methodology pursuant to Section 25137 at an open session at a regularly-scheduled meeting.

(F) "Three-member board" means California Franchise Tax Board as defined by California Government Code section 15700.

~~(G) To "make a record" means to memorialize in writing the identity of who initiated the inadvertent ex-parte communication, and all parties to the appeal who were entitled to participate. The record made must reflect the general substance of what was discussed and the response of any Franchise Tax Board member and/or the Board member's staff. If any documents are provided or exchanged, they must be identified, copied and made part of the record.~~

~~(H)~~**(F)(G) "Variance action" means a taxpayer's request for Franchise Tax Board staff to allow the taxpayer to use filed petition for an alternative apportionment methodology pursuant to Section 25137 before FTB staff, or a FTB-Franchise Tax Board staff imposed imposition of an alternative apportionment methodology pursuant to Section 25137, to which the taxpayer objects.**

(2) Petitions. In the event a variance action has been filed with Franchise Tax Board staff by a taxpayer, if the taxpayer desires to petition the Franchise Tax Board, itself, to hear and decide its petition filed pursuant to Section 25137 or of an adverse variance action determination, the following procedures shall apply. The following shall apply to petitions filed pursuant to this subsection:

(A) Any records submitted to the Franchise Tax Board, itself, by either the taxpayer or the Franchise Tax Board staff, as well as the decision of the Franchise Tax Board, itself, shall be open to public inspection pursuant to the California Public Records Act, Government Code section 6253 and the Bagley-

Keene Act, Government Code section 11125.1. Any records of the Franchise Tax Board staff that are not submitted to the Franchise Tax Board, itself, shall remain confidential pursuant to Revenue and Taxation Code section 19542.

~~(A)~~**(B) The taxpayer shall file its petition with the Chief Counsel of the Franchise Tax Board explaining why its requested alternative apportionment methodology pursuant to Section 25137 is warranted appropriate, or why FTB's Franchise Tax Board staff's imposed alternative apportionment methodology is not warranted appropriate. Such petition shall be filed no later than either within:** and/or its representative, may present facts and assertions pertaining to the variance action in person to FTB staff who will hear and decide the variance action.

1. Sixty (60) calendar days after from the date of a written adverse variance action determination by FTB Franchise Tax Board staff; to impose an alternative apportionment methodology pursuant to Section 25137

2. One hundred twenty (120) calendar days from filing the date of a claim for refund filed pursuant to Revenue and Taxation Code sSection 19301 in which the alternative apportionment methodology is relevant to the taxable years in the claim for refund; or

3. Sixty (60) calendar days from prior to a scheduled protest hearing the date of a protest filed pursuant to Revenue and Taxation Code sSection 19041 19044 in which the alternative apportionment methodology is relevant to the taxable years being protested;

4. Five (5) calendar days from the date of an appeal filed with the Office of Tax Appeals in which the alternative apportionment methodology is relevant to the taxable years on appeal;

5. Sixty (60) calendar days from the date of a letter of rejection by the Settlement Bureau of the Franchise Tax Board in which the alternative apportionment methodology is relevant to the taxable years at settlement; or

6. Sixty (60) calendar days from the date of applicability as specified in subsection (d)(5) of this regulation.

~~(B) At the time the taxpayer's petition is filed, the taxpayer shall submit a waiver to the Chief Counsel of the Franchise Tax Board, waiving the confidentiality provisions of Section 19542 with respect to the taxpayer's petition. If a variance action initiated by the taxpayer pursuant to Section 25137 is not granted by FTB staff, either in whole or in part, or if the variance action was imposed by staff requiring employment of an alternative apportionment methodology in a manner to which the taxpayer objects, the taxpayer may appeal the variance action to the Board, itself.~~

(C) Upon ~~submittal~~ Within sixty (60) calendar days from the date of the taxpayer's petition and waiver of confidentiality, the Executive Officer of the Franchise Tax Board, or the Executive Officer's designee, shall notify the Franchise Tax Board, itself, of the receipt of the taxpayer's petition.

(D) Within sixty (60) calendar days from the date of the taxpayer's petition, or the date of Franchise Tax Board staff's determination as specified in subsection (2)(E), whichever is later, the Chief Counsel of the Franchise Tax Board shall notify the taxpayer of the receipt of the taxpayer's petition in writing, which shall include a briefing schedule as specified in subsection (2)(H).

~~(D)~~(E) If ~~FTB~~ Franchise Tax Board staff have not previously made a determination on the request to use an alternative apportionment methodology which is the subject of the taxpayer's petition on the imposition or request for an alternative apportionment methodology before the Franchise Tax Board, itself, the Chief Counsel of the Franchise Tax Board shall ensure ~~FTB~~ Franchise Tax Board staff determines whether the alternative apportionment methodology is warranted appropriate.

(F) If the taxpayer files an appeal with the Office of Tax Appeals for the taxable years in which the alternative apportionment methodology is relevant to the taxable years on appeal, the taxpayer and Franchise Tax Board staff shall file a joint request to defer proceedings with the Office of Tax Appeals pending a decision by the Franchise Tax Board, itself.

(G) If a notice of proposed deficiency assessment, within the meaning of Revenue and Taxation Code section 19057(a), has not been mailed to the taxpayer with respect to the taxable years pertaining to the petition, the taxpayer shall agree in writing to an extension of the statute of limitations for the mailing of the notice of proposed deficiency assessment, until one-hundred and eighty (180) calendar days after the Franchise Tax Board, itself, has made its decision during an open session at a regularly-scheduled meeting.

~~(E)~~(H) When ~~FTB~~ Franchise Tax Board staff have made a determination on whether the alternative apportionment formula methodology is appropriate, the Chief Counsel of the Franchise Tax Board shall acknowledge to the taxpayer that the petition has been received and set a briefing schedule pursuant to this subsection. Ex parte communication rules which appear in this Regulation at section 25137(d)(4) apply beginning when the Chief Counsel acknowledges taxpayer's petition and continues while the petition is pending with the Franchise Tax Board, itself, and releases when the Franchise Tax Board, itself, renders a decision. **Taxpayer shall submit a its opening brief to the Chief Counsel of the Franchise Tax Board within sixty (60) calendar days of the Chief Counsel's acknowledgement** from the date of the document notifying the taxpayer of the receipt of the taxpayer's petition.

~~(3) In the event the taxpayer desires to appeal a variance action to the Three-member board, the following procedures shall apply:~~

~~(A) The taxpayer must waive, in writing, the confidentiality provisions of Section 19542 with respect to such variance action, which waiver must be sent to the Franchise Tax Board Chief Counsel,~~

~~(B) To file an appeal under this regulation, the taxpayer must submit a brief, as provided for within this section, within sixty (60) calendar days of being notified in writing by FTB staff that a variance action initiated by the taxpayer filing a petition pursuant to Section 25137 was denied, in whole or in part, by FTB staff, or a variance action was imposed by FTB staff requiring employment of an alternative apportionment methodology. After the taxpayer has submitted its opening brief, FTB Franchise Tax Board staff ~~has~~ **shall have** thirty (30) calendar days to submit its opening brief. Thereafter, the taxpayer ~~has~~ **shall have** thirty (30) calendar days to submit a reply brief. Further briefing may be required by the Franchise Tax Board, **itself**. All briefs are subject to the following **rules requirements**:~~

1. Opening Briefs are limited to double-spaced thirty (30) pages and *twelve* (12) point font per inch of paper.
2. Reply briefs are limited to double-spaced fifteen (15) pages and *twelve* (12) *point* font per inch of paper.
3. All briefsing must be filed by the parties with the **Chief Counsel of the Franchise Tax Board** **Chief Counsel**.

~~(C) Upon submittal of the taxpayer's opening appeal brief and the written waiver of the confidentiality provisions of Section 19542 with respect to such variance action and to any other facts that may be deemed relevant by the three-member board in making a decision on the variance action, the Franchise Tax Board's Executive Officer, or the Executive Officer's designee, shall notify the Three-member board of the taxpayer's request to have the Three-member board hear and decide the appeal of the variance action.~~

~~(D)(F) If a notice of proposed deficiency assessment, within the meaning of Section 19057(a), has not been mailed to the taxpayer with respect to the tax year pertaining to the petition variance action, the taxpayer must shall agree in writing if requested by the Franchise Tax Board to an extension of the statute of limitations for the mailing of the notice of proposed deficiency assessment, until 180 days after the Franchise Tax Board, itself, appeal of the variance action has made its determination during an open session at a regularly-scheduled meeting. been heard and decided by the Franchise Tax Board.~~

~~(E)(G)(I)~~ Upon completion of briefing, the Franchise Tax Board, itself, may schedule a hearing during an open session at a regularly-scheduled meeting to consider the taxpayer's petition. ~~notification by the Executive Officer or the Executive Officer's designee, as provided above in subsection (3)(C), the Franchise Tax Board shall set a hearing in an open session at a Three-member board meeting to hear and decide the taxpayer's appeal of the variance action.~~ The taxpayer ~~will~~ shall be notified in writing by ~~Franchise Tax Board staff~~ the Chief Counsel of the Franchise Tax Board ~~the Franchise Tax Board~~ of the hearing date.

(3) Hearings. The following shall apply to hearings on petitions filed pursuant to this subsection:

~~(F)(H)(A)~~ ~~The Franchise Tax Board, shall give T~~ the parties shall each have to the appeal ~~thirty (30) twenty (20)~~ minutes to present their respective positions and an additional ~~fifteen (15) ten (10)~~ minutes for the taxpayer's reply. The ~~Franchise Tax Board, itself, Three-member board~~ has the discretion to allow additional time ~~as warranted~~. Presentations of the parties at the hearing shall occur as follows:

1. The taxpayer shall ~~first~~ make its opening presentation.
2. ~~FTB-Franchise Tax Board~~ staff shall make its opening presentation immediately following the taxpayer's opening presentation.
3. The taxpayer shall make its reply presentation immediately following ~~FTB Franchise Tax Board~~ staff's opening presentation.

~~(G)(I)(B)~~ Witnesses. A party ~~seeking wishing~~ to have an expert or percipient witness ~~or witnesses~~ testify ~~before the Franchise Tax Board, itself, and must~~ notify the other party to the proceeding ~~in writing~~ no later than fifteen (15) ~~calendar days after the filing of the taxpayer's reply brief prior to the hearing date,~~ of the identity of ~~the witness or the witnesses,~~ the general nature of the expected testimony, and the expected duration of the testimony at the hearing. ~~The Executive Officer of the Franchise Tax Board, or the Executive Officer's designee, shall notify the Franchise Tax Board, itself, of any witness, the general nature of the expected testimony, and the expected duration of the testimony at the hearing.~~

~~(H)(J)(C)~~ ~~The Three-member board~~ Franchise Tax Board, itself, shall render its decision on the ~~taxpayer's petition variance action~~ during an open session ~~of at a regularly-scheduled meeting, when the Three-member board has reached its decision.~~

~~(34)(4)~~ Applicability of Ex-parte Communication Rule. Rules. Except as provided by this regulation, there shall be no ex-parte communication regarding any

substantive issue in the petition without notice and opportunity for all parties to participate in the communication.

~~(A) The Ex-parte communication rules do not apply during the pendency of a petition variance action that is initially submitted before FTB Franchise Tax Board staff or the Three-member board.~~

~~(B)(A) The Ex-parte communication rules applyes beginning with the acknowledgement of the taxpayer's petition continuing until a final decision has been rendered, as is set forth in subsection (2)(E) above notification to the taxpayer and the Franchise Tax Board, itself, of the receipt of the taxpayer's petition, continues while the petition is pending with the Franchise Tax Board, itself, and terminates when the Franchise Tax Board, itself, renders a decision. The Executive Officer of the Franchise Tax Board, or his or her the Executive Officer's designee, shall notify the Franchise Tax Board, itself, of the applicability of the ex-parte communication rules to the petition. during the pendency of any appeal to the Franchise Tax Board of a variance action as follows: There shall be no communication, direct or indirect, regarding any substantive issue relating to the appeal between any Franchise Tax Board member or Board member staff, appellant or appellant's employee or representative, and/or FTB staff, without notice and opportunity for all parties to participate in the communication.~~

~~(B) The ex-parte communication rule does not apply during the pendency of a variance action that is before Franchise Tax Board staff.~~

~~(C) Applicability of tThe ex-parte communication rules does not apply to communications between members of the Franchise Tax Board, itself, or Franchise Tax Board member staff, FTB Franchise Tax Board staff, and the taxpayer or its representatives during the pendency of a petition if the communication is only related to the scheduling of a future discussion of the petition, and which only involves one member of the Franchise Tax Board ,itself, member at a time. In such case: in which case: ends when the Franchise Tax Board renders its decision on the appeal of a variance action.~~

~~(D) Permitted communications between the Franchise Tax Board, FTB staff, and the taxpayer and/or its employees and/or representatives during the pendency of an appeal of a variance action include:~~

- ~~1. Briefs and oral presentations at open session are not ex-parte communications, and are permitted communications.~~
- ~~2. Ex-parte communications are permitted provided that the communication does not pertain to any matters within the variance action, but instead involves communication between the taxpayer, the~~

~~representative, the board member or Board member staff, and FTB staff that only relates to the scheduling of a future discussion about the substantive matters of the variance action. If this is the goal of such an ex-parte communication, then:~~

~~(a)1. The Franchise Tax Board member **and/or** Franchise Tax Board member staff shall invite all parties **and/or** their representatives, **but no other Franchise Tax Board members**, to participate in a scheduled telephonic discussion or in-person meeting as soon as practicable.~~

~~2. Any communication for purposes of **setting up arranging** this scheduled **future** discussion or in-person meeting shall only concern the scheduling and not the substance of the **petition subject variance request**.~~

~~3. All parties **and/or** their representatives and the Franchise Tax Board member **and/or** Franchise Tax Board member staff shall **coordinate to work together and** make a reasonable effort to **arrange find** a mutually agreeable date, time, and place to hold the telephonic discussion or in-person meeting ~~between the parties and one Franchise Tax Board member at a time~~. If the parties cannot agree on a date, time, and place to hold the telephonic discussion or in-person meeting **by five (5) working calendar days before the scheduled telephonic discussion or in-person meeting**, then the meeting ~~it shall not occur be held~~.~~

~~(b)24. If the telephonic discussion or in-person meeting has been scheduled and one of the parties does not participate or attend, then the telephonic discussion or in-person meeting may proceed and will not be considered an ex-parte communication. All parties must be given the opportunity to participate in a telephonic discussion or attend an in-person meeting scheduled at a mutually agreeable place, date, and time.~~

~~5. Regardless of whether all parties actually participate in the telephonic discussion or attend the in-person meeting, the Franchise Tax Board member **and/or** Franchise Tax Board member's staff participating in the telephonic discussion or attending the in-person meeting must:~~

~~(i) a. Document in writing substantive matters discussed at the telephonic discussion or in-person meeting.~~

~~(ii) b. Provide **to all parties and/or their representatives to the petition, but not to other Franchise Tax Board members**, ~~on the day subsequent to~~ **within ten (10) calendar days from the date of the telephonic discussion or in-person meeting**, the documentation **pertaining to the substantive matters addressed** and copies of any~~

~~materials distributed by any of the parties shared by the parties, the Franchise Tax Board member, and/or Board member staff participating in the telephonic discussion or attending the in-person meeting. to all parties to the appeal and their representatives within fifteen (15) days of the telephonic discussion or in-person meeting. If any party is does not participate in absent from the telephonic discussion or in-person meeting, that party shall have within fifteen (15) twenty (20) calendar days from the date of the telephonic discussion or attend in-person meeting the Franchise Tax Board member and/or the Board member staff must provide an opportunity for the absent party or parties to respond to the substantive matters discussed documentation and the any materials distributed. Such written response shall be provided to the opposing party. for the telephonic discussion or in-person meeting within fifteen (15) days of the telephonic discussion or in-person meeting. The documentation of specific matters discussed must be in sufficient context and detail to allow the absent party or parties the opportunity to respond to any matters discussed at the telephonic discussion or in-person meeting in writing and/or submit any other materials for consideration he or she may wish to provide to the Board member and/or Board member staff. Any such writing or material must also be supplied at the same time to the opposing party or its representatives within ten (10) days before the hearing.~~

~~(E)(D) In the event an ex-parte communication occurs, When there has been an ex-parte communication, the Franchise Tax Board member and/or Franchise Tax Board member staff shall document must in writing the substance of the ex-parte communication and shall provide it to the other Franchise Tax Board members and the parties to the petition during the open session of the-at a regularly-scheduled meeting when the petition is considered by the Franchise Tax Board, itself. make a record of the ex-parte communication and provide it to the Franchise Tax Board members present at the Franchise Tax Board's open meeting where the Franchise Tax Board will consider the appeal of the variance action. If any documents are provided or exchanged, copies must be provided to all parties and/or their representatives within fifteen (15) days of the telephonic discussion or in person meeting.~~

~~(F) In the event a Franchise Tax Board member and/or or the Board member staff have an inadvertent ex-parte communication with any party to the appeal of a variance action, then the Franchise Tax Board member and/or or the Board member staff must make a record of that ex-parte communication. If any documents are provided or exchanged, they must~~

~~be identified, made part of the written record, and copies provided to all parties and/or their representatives at the Franchise Tax Board's open meeting where the Franchise Tax Board will hear and decide the appeal of the variance action. The preparation and distribution of such documents are subject to the requirements of Government Code section 11125.2(c).~~

~~(G) Because the Bagley-Keene Act, set forth at California Government Code sections 11120 through 11132, prohibits a Franchise Tax Board member from sharing any written or oral information received during an ex-parte communication, even if the communication is inadvertent, with any other Franchise Tax Board member except at a duly noticed open meeting of the Franchise Tax Board, the Franchise Tax Board member involved in an ex-parte communication must report that communication at the formal hearing, where the Franchise Tax Board will hear and decide the appeal of a variance action. The Franchise Tax Board member must disclose the ex-parte communication on the record to the public, and other Franchise Tax Board members, and distribute the writing memorializing the communication as summarized above to the other Franchise Tax Board members, as well as make available all documents exchanged or provided during the ex-parte communication. The preparation and distribution of the documents between the Franchise Tax Board members are subject to the provisions of Government Code section 11125.1(c).~~

~~(H) The Franchise Tax Board staff must include a short summary of the ex-parte communication in the minutes of the Franchise Tax Board open meeting at which the ex-parte communication is disclosed.~~

~~(5)(4)(5) Applicability dDate. The amendments to subsection (d) are applicable only as of the effective date of the amendments to this subsection of the regulation. revisions to this subsection prospectively apply to variance actions and appeals of variance actions filed on or after the effective date of these changes.~~

Note: Authority cited: Section 19503, Revenue and Taxation Code.

Reference: Sections 6253 and 11125.1, Government Code. Sections 19041, 19301, 19507(a), 19542, and 25137, Revenue and Taxation Code.