

Request for Permission to Adopt Emergency Regulations under Title 18, Sections 19195-1 and 19195-2, relating to Business and Professions Code Section 494.5, and to Proceed with the Formal Regulatory Process.

Under Revenue and Taxation Code (RTC) Section 19195(a), the Franchise Tax Board (FTB) is required to publish at least twice each year a list of the 500 largest tax delinquencies in excess of \$100,000 (Top 500 List). Before including a taxpayer's name on the Top 500 list, FTB must inform the taxpayer that the taxpayer's name will be included on the list unless the taxpayer pays the amount due or makes arrangements with FTB for payment of the amount due. (RTC Section 19195(d).)

Under Business and Professions Code (BPC) Section 494.5(c), FTB forwards a list of the taxpayers on the Top 500 List to the following California state governmental licensing entities (Licensing Entities):

- Department of Alcoholic Beverage Control
- State Bar of California
- California Highway Patrol
- Department of Business Oversight
- Commission on Teacher Credentialing
- Department of Consumer Affairs
- Department of General Services - Office of the State Architect
- Department of Motor Vehicles
- Department of Real Estate
- Department of Insurance
- Office of Real Estate Appraisers
- Horse Racing Board
- Housing and Community Development
- Toxic Substances Control

The Licensing Entities must (or may in the case of the State Bar of California and the Department of Alcoholic Beverage Control) send a preliminary notice (Preliminary Notice) to an applicant for a license or a licensee (hereinafter, Taxpayer) appearing on the list received from FTB, of the Licensing Entities' intent to suspend or withhold issuance or renewal of the Taxpayer's license unless the Licensing Entity receives a release from FTB. (BPC Section 494.5(e)(2) and (f)(1).)) If FTB provides a release, the Taxpayer's license will not be suspended or a license will be issued or renewed upon payment of any required fees.

The Taxpayer has the right to request a release from FTB and FTB is required to immediately send a release to the appropriate Licensing Entity and the Taxpayer, if the Taxpayer (1) pays the unpaid taxes, (2) enters into an installment payment arrangement with FTB under RTC Section 19008 to satisfy the unpaid taxes, (3) submits a request for release within 45 days after receipt of the Preliminary Notice, but FTB is unable to make a determination related to whether to issue a release within 45 days of its receipt of the request for release through no fault of the Taxpayer, or (4) has a current financial hardship. (BPC Section 494.5(h).) Under the statute, "financial

hardship” means financial hardship as determined by FTB, where the Taxpayer is unable to pay any part of the outstanding tax liability and the Taxpayer is unable to qualify for an installment payment arrangement as provided by RTC Section 19008. (BPC Section 494.5(h)(3).)

Several taxpayers have recently challenged FTB’s procedures for determining whether a release must be provided. (See *Franceschi v. Chiang*, Case No. 14-01960 (C.D. Cal.); *Berjikian v. Franchise Tax Board*, B252427 (Cal. Ct. App.); and *Berjikian v. Franchise Tax Board*, Case No. 13-06301 (C.D. Cal.).) Although the decisions in these cases are not controlling, staff has reexamined its procedures and has determined that FTB should: (1) publish procedures under which taxpayers would be allowed a hearing on the issue of whether FTB must provide a release; and (2) publish standards to be used in connection with such a hearing. The hearing procedure is contained in proposed Regulation section 19195-1, and the standards are contained in proposed Regulation 19195-2. These regulations will assist FTB in its efforts to publically ensure taxpayers are treated fairly and in accordance with law.

BPC Section 494.5(o) specifically authorizes FTB to adopt these regulations as emergency regulations. It is appropriate to do so, because taxpayers may be facing the suspension or denial of their licenses in connection with the October 2016 publication of the Top 500 List.

If approved, staff will send the attached draft language as part of an emergency regulatory package to the Office of Administrative Law (OAL). This approval includes authority to make changes as required by the OAL during the emergency regulation process. After the promulgation of the emergency regulations, staff will immediately proceed with the formal regulatory process on these regulations, and this request, if approved, will also provide staff with the authority to proceed into the formal regulatory process to ultimately adopt the emergency regulations as final regulations.

Title 18, California Code of Regulations
Adopt Sections 19195-1 and 19195-2
Text of Regulation

Section 19195-1 is adopted to read:

19195-1. Hearing on Requests for Release under Section 494.5 of the Business and Professions Code

(a) Applicability of Regulation. This regulation applies to hearings provided by the Franchise Tax Board in connection with requests for release under section 494.5 of the Business and Professions Code.

(b) Right to Request Hearing, Notification of Right, and Limitation on Scope and Effect of Hearing.

(1) Unless the Franchise Tax Board determines to send a release to the appropriate state governmental licensing entity under section 494.5 of the Business and Professions Code without a hearing under this regulation, an applicant or licensee who receives a preliminary notice or preliminary notices under subdivision (e)(2) of section 494.5 of the Business and Professions Code and who has made a request for release to the Franchise Tax Board under section 494.5 of the Business and Professions Code shall have the right to one (1) hearing before a Franchise Tax Board hearing officer related solely to the issue of whether the Franchise Tax Board shall send a release to the appropriate state governmental licensing entity under section 494.5 of the Business and Professions Code. An applicant or licensee who has had a hearing under this regulation related to a request for release shall have the right to a hearing under this regulation related to another request for release only upon a showing of a material change of circumstances.

(2) If an applicant or licensee is entitled to a hearing under subsection (b)(1) and if the Franchise Tax Board has not done so previously, the Franchise Tax Board shall, within five (5) business days after the Franchise Tax Board receives a request for release, send written notification to the applicant or licensee requesting the release, of the applicant's or licensee's right to submit a written request for a hearing in accordance with this regulation.

(3) The applicant or licensee shall not be permitted to contest the applicant's or licensee's obligation to pay the outstanding tax obligation through the procedures contained in section 494.5 of the Business and Professions Code or in this regulation.

(4) The decision of the hearing officer, the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee under this regulation shall be binding on the applicant or licensee and the Franchise Tax Board only in connection with the request for release that was the subject of the hearing and not in connection with any other request for release or any other matter.

(c) Time, Date, Place and Manner of Hearing.

(1) Upon receipt of a written request for a hearing in accordance with this regulation, the Franchise Tax Board shall use reasonable diligence to hold a hearing in accordance with this regulation within twenty (20) business days of the Franchise Tax Board's receipt of the request for a hearing. The failure of the Franchise Tax Board to hold a hearing within twenty (20) business days shall not require the Franchise Tax Board to send a release under section 494.5 of the Business and Professions Code, except as required by subdivision (h)(2) of section 494.5 of the Business and Professions Code.

(2) The time, date and place of the hearing under this regulation shall, when possible, be determined by mutual agreement of the applicant or licensee and the Franchise Tax Board. If a mutual agreement cannot be reached as to the time, date and place of the hearing, the Franchise Tax Board shall determine the time, date and place of the hearing and send written notification to the applicant or licensee of that determination.

(3) Hearings shall be held at a Franchise Tax Board office and scheduled Monday through Friday during normal business hours for the office where the hearing is to be held (generally between 8:00 a.m. and 4:30 p.m., local time).

(4) A hearing may be conducted by telephone, videoconferencing or similar means if the applicant or licensee and the Franchise Tax Board mutually consent.

(5) The applicant or licensee may request that the hearing be rescheduled; however, the determination of whether to reschedule the hearing shall be made by the Franchise Tax Board.

(6) An applicant or licensee who does not appear at the scheduled hearing shall be deemed to have waived the right to a hearing under this regulation unless good cause, not within the applicant's or licensee's control, exists for the failure to appear. The hearing officer will determine whether good cause exists. If good cause exists, the hearing shall be rescheduled as soon as practical.

(d) Hearing.

(1) Hearing Officer and Hearing Witnesses.

(A) The Franchise Tax Board shall designate a member of its staff as the hearing officer for the hearing in connection with the request for release under section 494.5 of the Business and Professions Code. The Franchise Tax Board may change the designation of the hearing officer at any time. The Franchise Tax Board shall not appoint any member of its staff as the hearing officer if that staff member had any prior involvement with respect to the applicant or licensee.

(B) The hearing officer shall have the authority to conduct the hearing and make the determination as to whether the Franchise Tax Board should send a release.

(C) The Franchise Tax Board may designate one or more members of its staff as hearing witnesses for the hearing in connection with a request for release. The Franchise Tax Board may change the designation of the hearing witnesses at any time.

(2) Representative.

(A) The applicant or licensee shall have the right to have a representative or representatives at the hearing, provided each representative is designated by the applicant or licensee in a written notice signed by the applicant or licensee that is received by the Franchise Tax Board at or prior to the commencement of the hearing.

(B) The representative may be any person of the applicant's or licensee's choosing, including, but not limited to, an attorney, accountant, bookkeeper, employee, consultant or business associate.

(C) The hearing officer may limit the number of representatives of the applicant or licensee at a hearing. No more than one active representative will be allowed at the hearing unless the hearing officer determines that more than one active representative participating in the hearing would be beneficial to the proper determination of the matter.

(3) Conduct of Hearing.

(A) Purpose of Hearing. The purpose of the hearing is to allow the hearing officer and the applicant or licensee to address the relevant issues raised by the request for release and to develop the factual basis for a decision on the request for release.

(B) Reasonable Accommodations. The Franchise Tax Board shall provide reasonable accommodations to any applicant, licensee, representative or witness who has a disability and requires such accommodations to facilitate the hearing process. An applicant or licensee shall notify the Franchise Tax Board in writing of the need for reasonable accommodations at the same time that the applicant or licensee submits a written request to the Franchise Tax Board for a hearing in accordance with this regulation. Such notification shall specify the accommodations needed.

(C) Language Assistance. An applicant or licensee may receive language assistance at the hearing if such assistance is necessary to facilitate the hearing process and if such assistance is reasonably available.

(i) The assistance may be provided by:

(I) An interpreter supplied by the applicant or licensee,

(II) An interpreter who is a member of the Franchise Tax Board's staff, other than the hearing officer, or

(III) A certified administrative hearing interpreter from the list of such interpreters maintained by the State Personal Board, if one is reasonably available.

(ii) An applicant or licensee requesting the Franchise Tax Board to supply language assistance services under subsection (d)(3)(C)(i)(II) or (III) shall notify the Franchise Tax Board in writing of the need for language assistance services at the same time as the applicant or licensee submits a written request to the Franchise Tax Board for a hearing in accordance with this regulation. Such notification shall specify the language assistance needed.

(iii) If the applicant or licensee requests a certified administrative hearing interpreter pursuant to subsection (d)(3)(C)(i)(III) and one is supplied, the cost of supplying the interpreter shall be paid by the applicant or licensee, unless, upon request of the applicant or licensee, the hearing officer directs the Franchise Tax Board to pay such cost. The hearing officer's decision to direct the Franchise Tax Board to pay such cost shall be based upon an equitable consideration of all the circumstances of the case, such as the ability of the applicant or licensee to pay.

(iv) A person providing language assistance under subsection (d)(3)(C)(i)(I) shall not be considered a representative for purposes of subsection (d)(2), unless so designated by the applicant or licensee.

(D) Confidentiality. The hearings under this regulation are part of the administrative process of the Franchise Tax Board and are covered by the confidentiality provisions contained in Article 2 of Chapter 7 of Part 10.2 of the Revenue and Taxation Code.

(E) Attendance of Persons Other Than Applicant, Licensee, Staff of the Franchise Tax Board, Hearing Witnesses of the Franchise Tax Board, and Hearing Officer. No person other than the applicant, licensee, staff of the Franchise Tax Board, hearing witnesses of the Franchise Tax Board and the hearing officer shall be entitled to attend the hearing unless the hearing officer receives:

(i) Written notice signed by the applicant or licensee authorizing such person to attend the hearing, and

(ii) Such person provides the hearing officer with a signed written statement that:

(I) Such person shall not record the hearing by means of an audio or video recording or any other means, and

(II) Such person shall follow any instructions given by the hearing officer.

(F) Recording, Transcript and Records of Hearing.

(i) The Franchise Tax Board is not required to record the hearing by means of an audio or video recording or any other means or to prepare a transcript of a hearing under this regulation. The Franchise Tax Board is not required to maintain a record of the documents submitted or statements made during the course of a hearing after the applicant's or licensee's entitlement to a release has been decided.

(ii) An audio recording of the hearing will only occur if, at least five (5) business days before the hearing, the applicant or licensee and the Franchise Tax Board agree that an audio recording of the hearing will occur.

(iii) If the applicant or licensee and the Franchise Tax Board agree that an audio recording of the hearing will occur under subsection (d)(3)(F)(ii):

(I) The applicant or licensee and the Franchise Tax Board shall each be entitled to separately record the hearing, and

(II) The Franchise Tax Board shall provide the applicant or licensee with a copy of the Franchise Tax Board's audio recording of the hearing upon written request received by the hearing officer or the Franchise Tax Board no later than five (5) business days after the hearing.

(iv) Except as otherwise provided in this subsection (d)(3)(F), no one shall have the right to record the hearing by means of an audio or video recording or any other means.

(v) If the hearing officer determines that a recording of a hearing is disruptive, the hearing officer may require the termination of the recording of the hearing.

(G) Witnesses and Documentary Evidence. At a hearing, the applicant or licensee may present witnesses and/or offer documentary evidence in support of the applicant's or licensee's request that the Franchise Tax Board send a release under section 494.5 of the Business and Professions Code and to rebut evidence of the Franchise Tax Board.

(i) Witnesses.

(I) Oral testimony will be evaluated by the hearing officer in making a decision on the request for release.

(II) Oral testimony does not need to be under oath, unless the hearing officer determines that it must be under oath.

(III) The applicant or licensee and the Franchise Tax Board shall exchange a list of the names of witnesses who will be present at the hearing so that such lists are received at least five (5) business days prior to the hearing; provided, however, the hearing officer may shorten the five (5) business day period.

(IV) The hearing officer may allow witnesses not on the lists described in subsection (d)(3)(G)(i)(III) to testify at the hearing.

(V) The hearing officer may limit the testimony of witnesses if and when the hearing officer determines testimony to be repetitious, redundant, or irrelevant.

(VI) The Franchise Tax Board is not required to compel witnesses to appear at a hearing.

(ii) Documentary Evidence.

(I) Documentary evidence will be evaluated by the hearing officer in making a decision on the request for release.

(II) Documentary evidence does not need to be submitted under penalty of perjury, unless the hearing officer determines that it must be submitted under penalty of perjury.

(III) The applicant or licensee and the Franchise Tax Board shall exchange a copy of any documentary evidence to be offered in support of their positions so that such documentary evidence is received at least five (5) business days prior to the hearing; provided, however, the hearing officer may shorten the five (5) business day period.

(IV) The hearing officer may allow presentation of documentary evidence not on the lists described in subsection (d)(3)(G)(ii)(III) at the hearing.

(V) The Franchise Tax Board is not required to compel production of documents at a hearing.

(H) Termination of Hearing. The hearing officer shall have the authority to terminate a hearing. Grounds for terminating a hearing include, but are not limited to:

(i) The applicant or licensee or the applicant's or licensee's representative persists in making repetitious or irrelevant statements, or

(ii) The applicant or licensee, the applicant's or licensee's representative, or any other individual permitted to be at the hearing by the applicant or licensee behaves in a disruptive manner or does not follow the hearing officer's instructions.

(e) Decision.

(1) In reaching a decision, the hearing officer shall consider the following:

(A) Any documents or other evidence, including, but not limited to, any financial statements, submitted by or on behalf of the Franchise Tax Board in accordance with this regulation,

(B) Any documents or other evidence, including, but not limited to, any financial statements, submitted by or on behalf of the applicant or licensee in accordance with this regulation,

(C) Whether the applicant or licensee has submitted the information and documentation related to assets, income or expenses or any other information or documentation requested by the Franchise Tax Board for the purposes of making the determination of whether the applicant or licensee is unable to pay the outstanding tax obligation due to a current financial hardship under subdivision (h)(3) of section 494.5 of the Business and Professions Code in the form requested by the Franchise Tax Board and under penalty of perjury if requested by the Franchise Tax Board,

(D) Whether the applicant or licensee has acted with diligence in responding to notices from the applicable state governmental licensing entity and the Franchise Tax Board as required by subdivision (i) of section 494.5 of the Business and Professions Code,

(E) Any argument made by the applicant or licensee, the applicant's or licensee's representative or the Franchise Tax Board, and

(F) The hearing officer's experience, technical competence and specialized knowledge.

(2) In determining whether the applicant or licensee is entitled to a release under section 494.5 of the Business and Professions Code, the hearing officer shall apply Regulation section 19195-2.

(3) Within five (5) business days of the completion of the hearing, the hearing officer shall decide whether the applicant or licensee is entitled to a release under section 494.5 of the Business and Professions Code.

(A) If the hearing officer decides that the applicant or licensee is entitled to a release under section 494.5 of the Business and Professions Code, the Franchise Tax Board shall immediately send a release to the applicant or licensee and the applicable governmental licensing entity.

(B) If the hearing officer decides that the applicant or licensee is not entitled to a release under section 494.5 of the Business and Professions Code, the Franchise Tax Board

shall, within five (5) business days of the completion of the hearing, send a written notification to the applicant or licensing that:

(i) Informs the applicant or licensee that the hearing officer has decided that the applicant or licensee is not entitled to a release, and

(ii) Provides the applicant or licensee with the hearing officer's written decision that the applicant or licensee is not entitled to a release. The decision shall be based on the record and include a statement of the factual and legal basis of the decision related to whether the applicant or licensee is entitled to a release under section 494.5 of the Business and Professions Code and the names of all persons in attendance at the hearing. If the decision is based substantially on the credibility of one or more witnesses, the decision shall identify any specific evidence of the observed demeanor, manner or attitude of the witnesses that supports the determination, and

(iii) Informs the applicant or licensee of the right to request reconsideration of the hearing officer's decision under this regulation and the procedure for requesting reconsideration, and

(iv) Informs the applicant or licensee of the right to request review of the hearing officer's decision by the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee under this regulation and the procedure for requesting review.

(4) If a hearing is provided, the Franchise Tax Board shall be deemed to have completed its release review and to have sent notice of its findings to the applicant or licensee as required by subdivisions (h)(2) of section 494.5 of the Business and Professions Code once the Franchise Tax Board has either sent:

(A) A release to the applicant or licensee and the applicable governmental licensing entity, or

(B) The notification as required by subsection (e)(3)(B) to the applicant or licensee.

(f) Request for Reconsideration.

(1) The applicant or licensee has the right to submit one (1) written request that the hearing officer reconsider the hearing officer's decision that the applicant or licensee is not entitled to a release, provided:

(A) The applicant or licensee submits the request so that it is received by the Franchise Tax Board within ten (10) business days of the date the applicant or licensee receives the notification under subsection (e)(3)(B), and

(B) The applicant or licensee has not and does not request a review of the hearing officer's decision by the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee under this regulation, prior to the time the hearing officer makes a decision related to the request for reconsideration by the applicant or licensee.

(2) Within seven (7) business days of the Franchise Tax Board's receipt of the request for reconsideration, the hearing officer shall decide whether the applicant or licensee is entitled to a release based on the items described in subsection (e)(1), the information and argument included in the request for reconsideration and any other information the hearing officer determines is appropriate.

(A) If the hearing officer decides that the applicant or licensee is entitled to a release under section 494.5 of the Business and Professions Code, the Franchise Tax Board shall immediately send a release to the applicant or licensee and the applicable governmental licensing entity.

(B) If the hearing officer decides that the applicant or licensee is not entitled to a release under section 494.5 of the Business and Professions Code, the Franchise Tax Board shall immediately send a written notification to the applicant or licensee that:

(i) Notifies the applicant or licensee that the hearing officer has decided that the applicant or licensee is not entitled to a release, and

(ii) Notifies the applicant or licensee of the right to request review of the hearing officer's decision by the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee and the procedure for requesting such review.

(3) The applicant or licensee shall not have a right to a hearing in connection with a request for reconsideration under this subsection (f).

(g) Request for Review by Taxpayers' Rights Advocate.

(1) The applicant or licensee has the right to submit one (1) written request for review of the hearing officer's decision that the applicant or licensee is not entitled to a release to the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee, provided:

(A) The applicant or licensee submits the request so that it is received by the Franchise Tax Board on or before the later of:

(i) Ten (10) business days after the date the applicant or licensee receives the notification under subsection (e)(3)(B), and

(ii) Ten (10) business days after the date the applicant or licensee receives notification from the Franchise Tax Board under subsection (f)(2)(B), if the applicant or

license has submitted a request for reconsideration that complies with subsection (f)(1)(A) and (B), and

(B) If the applicant or licensee has submitted a request for reconsideration that complies with subsections (f)(1)(A) and (B), the applicant or licensee has received notification under subsection (f)(2)(B).

(2) If an applicant or licensee submits a request for review by the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee prior to receiving notification from the Franchise Tax Board under subsection (f)(2)(B), the applicant or licensee waives the right to a decision by the hearing officer under subsection (f)(2).

(3) Within seven (7) business days of the Taxpayers' Rights Advocate's receipt of a request that complies with subsections (g)(1)(A) and (B), the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee shall decide whether the applicant or licensee is entitled to a release based on the items described in subsection (e)(1), the decision of the hearing officer, the information and argument included in the request for review and any other information the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee determines is appropriate.

(A) If the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee decides that the applicant or licensee is entitled to a release under section 494.5 of the Business and Professions Code, the Franchise Tax Board shall immediately send a release to licensee or applicant and the applicable governmental licensing entity.

(B) If the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee decides that the applicant or licensee is not entitled to a release under section 494.5 of the Business and Professions Code, the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee shall immediately send a written notification to the applicant or licensee that the Taxpayers' Rights Advocate or the Taxpayers' Rights Advocate's designee has decided that the applicant or licensee is not entitled to a release.

(4) The applicant or licensee shall not have a right to a hearing in connection with a request for review under this subsection (g).

(h) Resolution Outside Hearing Process.

At any time, an applicant or licensee may discuss with the collector assigned to the applicant's or licensee's account the resolution of the request for release and resolve the request for release.

(i) Other Requests for Release.

Even if an applicant or licensee is not entitled to a hearing under this regulation, the Franchise Tax Board shall consider and respond to any request for release received from an

applicant or licensee, provided that, in the case of multiple requests for release in connection with the same preliminary notice or preliminary notices, such request is based on a material change of circumstances.

(j) Notifications, Notices and Requests.

(1) Notifications and Notices to Applicant or Licensee. All notifications and notices to the applicant or licensee under this regulation shall be mailed by first-class mail to the address of the applicant or licensee on the request for a release or, in the absence of such address, to the last known address of the applicant or licensee pursuant to section 18416 of the Revenue and Taxation Code, unless the applicant or licensee notifies the Franchise Tax Board in a writing signed by the applicant or licensee of an alternative address. If the applicant or licensee notifies the Franchise Tax Board in a writing signed by the applicant or licensee of an alternative address, all future notices to the applicant or licensee under this regulation shall be mailed by first-class mail to that address. In addition to sending notices and notifications by first-class mail, all notifications and notices to the applicant or licensee under this regulation may be sent by facsimile or encrypted email, if the applicant or licensee requests in writing that the Franchise Tax Board send notifications and notices to the applicant or licensee by facsimile or encrypted email and provides sufficient instructions to do so.

(2) Notifications, Notices and Requests to Franchise Tax Board. All notifications, notices and requests to the Franchise Tax Board under this regulation shall be mailed by first-class mail to the address and unit that the Franchise Tax Board shall designate by FTB Notice. In addition to sending notifications, notices and requests by first-class mail, all notifications, notices and requests may also be sent by facsimile or email, if such method is described in the FTB Notice.

(k) Applicability of Regulation. This regulation shall apply to any request for release under section 494.5 of the Business and Professions Code received by the Franchise Tax Board on or after the effective date of this regulation under subdivision (o) of Business and Professions Code section 494.5.

Note: Authority Cited: Section 494.5, Business and Professions Code; Section 19503, Revenue and Taxation Code. Reference: Section 19195, Revenue and Taxation Code.

Section 19195-2 is adopted to read:

19195-2. Determination of Current Financial Hardship under Subdivision (h)(3) of Section 494.5 of the Business and Professions Code

(a) **Applicability of Regulation.** This regulation applies to determinations of whether an applicant or licensee is unable to pay the outstanding tax obligation due to a current financial hardship under subdivision (h)(3) of section 494.5 of the Business and Professions Code.

(b) **Applicant or Licensee Required to Provide Information.** Notwithstanding any other provision of this regulation, the Franchise Tax Board shall not send a release under subdivision (h)(3) of section 494.5 of the Business and Professions Code if the applicant or licensee fails to submit:

(1) Any and all information and documentation related to assets, income or expenses, and

(2) Any and all other information or documentation

requested by the Franchise Tax Board for the purposes of making a determination of whether the applicant or licensee is unable to pay the outstanding tax obligation due to a current financial hardship pursuant to subdivision (h)(3) of section 494.5 of the Business and Professions Code in the form and manner requested by the Franchise Tax Board and under penalty of perjury if requested by the Franchise Tax Board.

(c) **Applicant's or Licensee's Entitlement to Release.** An applicant or licensee has a current financial hardship under subdivision (h)(3) of section 494.5 of the Business and Professions Code and the Franchise Tax Board shall send a release under section 494.5 of the Business and Professions Code if both of the following are true:

(1) The applicant or licensee is unable to pay any part of the outstanding tax obligation; and

(2) The applicant or licensee is unable to qualify for an installment payment arrangement as provided for by section 19008 of the Revenue and Taxation Code.

(d) An applicant or licensee is able to pay part of the outstanding tax obligation within the meaning of subsection (c)(1) and is not entitled to a release under subsection (c) if the following calculated amount is greater than zero:

(1) The amount of the applicant's or licensee's assets that are cash or readily converted to cash, without regard to whether such conversion will have an adverse tax consequence to the applicant or licensee, including, but not limited to, assets that are separate, community or quasi-community property of the applicant or licensee, but excluding assets that are necessary for the operation of the applicant's or licensee's trade or business that produces

income for the applicant or licensee, including, but not limited to, a trade or business that is separate, community or quasi-community property of the applicant or licensee, less

(2) The amount described in subsection (d)(1) that is either:

(A) In the case of an individual applicant or licensee, necessary to provide for the applicant's or licensee's (and his or her family's) health and welfare as determined in subsection (g), during the five (5)-year period after the date of the determination under this subsection (d), or

(B) Necessary to pay the reasonable costs, during the five (5)-year period after the date of the determination under this subsection (d), of the operation of the applicant's or licensee's trade or business that produces income for the applicant or licensee, including, but not limited to, a trade or business that is separate, community or quasi-community property of the applicant or licensee.

(3) Amounts described in subsection (d)(1) are necessary under subsection (d)(2) and, therefore, included in subsection (d)(2) only to the extent such amounts cannot be paid from sources other than those described in subsection (d)(1).

(e) An applicant or licensee is able to qualify for an installment payment arrangement as provided for by section 19008 of the Revenue and Taxation Code within the meaning of subsection (c)(2) and is not entitled to a release under subsection (c) if the following calculated amount is greater than zero:

(1) The amount of any and all assets owned or to be owned by the applicant or licensee that are cash or can be converted to cash during the five (5)-year period after the date of the determination under this subsection (e), without regard to whether such conversion will have an adverse tax consequence to the applicant or licensee, including, but not limited to, assets that are separate, community or quasi-community property of the applicant or licensee, but excluding assets that are necessary for the operation of the applicant's or licensee's trade or business that produces income for the applicant or licensee, including, but not limited to, a trade or business that is separate, community or quasi-community property of the applicant or licensee, plus

(2) The amount of any and all income projected to be received by the applicant or licensee during the five (5)-year period after the date of the determination under this subsection (e), including, but not limited to, income that is separate, community or quasi-community property of the applicant or licensee, less

(3) The amount described in subsections (e)(1) and (e)(2) that is either:

(A) In the case of an individual applicant or licensee, necessary to provide for the applicant's or licensee's (and his or her family's) health and welfare as determined under subsection (g) during the five (5)-year period after the date of the determination under this subsection (e), or

(B) Necessary to pay the reasonable costs, during the five (5)-year period after the date of the determination under this subsection (e), of the operation of a trade or business of the applicant or licensee that produces income for the applicant or licensee, including, but not limited to, a trade or business that is separate, community or quasi-community property of the applicant or licensee.

(f) Even if the Franchise Tax Board is not required to send a release under subsection (c), the Franchise Tax Board shall send a release under section 494.5 of the Business and Professions Code if both:

(1) The applicant or licensee pays the Franchise Tax Board in a manner determined by the Franchise Tax Board an amount equal to:

(A) The amount of the applicant's or licensee's assets that are cash or can be readily converted to cash, without regard to whether such conversion will have an adverse tax consequence to the applicant or licensee, including, but not limited to, assets that are separate, community or quasi-community property of the applicant or licensee, but excluding assets that are necessary for the operation of the applicant's or licensee's trade or business that produces income for the applicant or licensee, including, but not limited to, a trade or business that is the applicant's or licensee's separate, community or quasi-community property, less

(B) The amount described in subsection (f)(1)(A) that is either:

(i) In the case of an individual applicant or licensee, necessary to provide for the applicant's or licensee's (and his or her family's) health and welfare as determined in subsection (g), during the five (5)-year period after the date of the determination under this subsection (f), or

(ii) Necessary to pay for the reasonable costs, during five (5)-year period after the date of the determination under this subsection (f), of the operation of the applicant's or licensee's trade or business that produces income for the applicant or licensee, including, but not limited to, a trade or business that is the separate, community or quasi-community property of the applicant or licensee.

(C) Amounts described in subsection (f)(1)(A) are necessary under subsection (f)(1)(B) and, therefore, included in subsection (f)(1)(B) only to the extent such amounts cannot be paid from sources other than those described in subsection (f)(1)(A).

(2) The applicant or licensee and the Franchise Tax Board enter into an installment payment arrangement as provided for by section 19008 of the Revenue and Taxation Code, if the applicant or licensee is able to qualify for installment payment arrangement as provided for by section 19008 of the Revenue and Taxation Code, and as is defined in subsection (e), that:

(A) Is consistent with the need of the applicant or licensee to pay:

(i) In the case of an individual applicant or licensee, expenses necessary to provide for the applicant's or licensee's (and his or her family's) health and welfare as determined under subsection (g) during the period of the installment payment arrangement, and

(ii) Necessary and reasonable costs, during the period of the installment payment arrangement, of the operation of the applicant's or licensee's trade or business that produces income for the applicant or licensee, including, but not limited to, a trade or business that is the applicant's or licensee's separate, community or quasi-community property, and

(B) Contains such terms and conditions as are required by the Franchise Tax Board in exercising its discretion under Section 19008 of the Revenue and Taxation Code, which may include terms and conditions allowable under Sections 19008 and 21019 of the Revenue and Taxation Code, including, but not limited to, some or all of the following terms and conditions:

(i) Terms related to timing, amounts and duration of payments, which duration may be five years or any time longer or shorter,

(ii) The applicant or licensee shall authorize electronic funds withdrawal from the applicant's or licensee's bank account to make payments required under the installment payment arrangement,

(iii) The applicant or licensee shall maintain sufficient funds in a bank account to make the payments required under the installment payment arrangement,

(iv) As a condition to the Franchise Tax Board's agreement to the installment payment arrangement, the applicant or licensee shall provide a financial statement in the form requested by the Franchise Tax Board that is signed under penalty of perjury and the applicant or licensee shall agree that any false statement in the financial statement shall constitute a breach of the installment payment arrangement,

(v) The applicant or licensee shall provide information and documentation requested by the Franchise Tax Board during the term of the installment payment arrangement, including, but not limited to, financial statements submitted under penalty of perjury, and the applicant or licensee shall agree that the Franchise Tax Board may require that the installment payment arrangement be modified based on a change of circumstances,

(vi) If the applicant or licensee receives wages, the applicant or licensee shall confirm that the withholding rates for Employment Development Department Form DE 4 and Internal Revenue Service W-4 on file with the applicant's or licensee's employer will withhold enough California income tax to pay the applicant's or licensee's California state income tax liability for the next California income tax return and shall agree that the applicant or licensee will ensure that the withholding rates for Employment Development Department Form DE 4 and Internal Revenue Service W-4 on file with the applicant's or licensee's employer will

withhold enough California income tax to pay the applicant's or licensee's California income tax liability for the future California income tax returns,

(vii) The applicant or licensee shall make any required estimated payments if the applicant or licensee receives income from sources other than wages,

(viii) The applicant or licensee has filed and shall agree to file all past, present and future tax returns that are required to be filed with the Franchise Tax Board,

(ix) The applicant or licensee shall not incur any additional obligations to the Franchise Tax Board that are not paid when due, and

(x) The applicant or licensee shall provide security for the Franchise Tax Board's rights against the applicant or licensee.

(g) The Franchise Tax Board shall determine whether expenses are necessary to provide for the applicant's or licensee's (and his or her family's) health and welfare as follows:

(1) The Franchise Tax Board shall make its determination under this subsection (g) pursuant to the following Internal Revenue Service standards, as such standards are modified from time to time by the Internal Revenue Service, except as otherwise provided in this subsection (g):

(A) The Internal Revenue Service Allowable Living Expenses National Standards related to food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous, as found in internet web sites designated in an FTB Notice,

(B) The Internal Revenue Service Allowable Living Expenses Health Care Standards related to out-of-pocket health care expenses including medical services, prescription drugs, and medical supplies (e.g., eyeglasses, contact lenses, etc.), as found in internet web sites designated in an FTB Notice,

(C) The Internal Revenue Service Allowable Living Expense Housing and Utilities Standard related to mortgage or rent, property taxes, interest, insurance, maintenance, repairs, gas, electric, water, heating oil, garbage collection, residential telephone service, cell phone service, cable television, and internet service, as found in internet web sites designated in an FTB Notice, and

(D) The Internal Revenue Service Allowable Living Expenses Transportation Standards, related to loan or lease payments and amounts for monthly operating costs, as found in internet websites designated in an FTB Notice.

(2) In addition to the expenses covered by the standards in subsection (g)(1), the Franchise Tax Board may allow the following expenses to the extent they are being paid, if they

are reasonable and the applicant or licensee provides documentation to substantiate such expenses:

(A) Accounting and legal fees for representation of the applicant or licensee before the Franchise Tax Board,

(B) Accounting and legal fees if necessary to provide for the applicant's or licensee's (or his or her family's) health and welfare,

(C) Charitable contributions (donations to tax exempt organizations) if such donations are a bona fide condition of employment,

(D) Child care (baby-sitting, day care, nursery and preschool) expenses if necessary for the applicant's or licensee's (or his or her family's) health and welfare,

(E) Court-ordered payments for alimony, child support or restitution for victims,

(F) Dependent care expenses for elderly, invalid or handicapped persons if necessary to provide for the dependent's health and welfare and if there is no alternative to the applicant or licensee paying the expenses,

(G) Education expenses if required for a physically or mentally challenged child and no public education providing similar services is available,

(H) Education expenses if such expenses are a bona fide condition of employment,

(I) Involuntary deductions that are a bona fide condition of employment, including, but not limited to, union dues, uniforms and work shoes,

(J) Life insurance expenses for a term policy on the life of the applicant or licensee,

(K) Required payments and withholdings for current year federal, FICA, Medicare, state and local taxes,

(L) Payments under agreements with the Internal Revenue Service, other states or other state agencies for delinquent taxes,

(M) Payments on student loans guaranteed by the federal government if for the applicant's or licensee's post-high school education,

(N) Payments for health insurance for the applicant or licensee (or his or her family) if necessary to provide for the applicant's or licensee's (or his or her family's) health and welfare, and

(O) Other expenses if necessary to provide for the applicant's or licensee's (or his or her family's) health and welfare.

(3) In making its determination under the Internal Revenue Service standards described in subsection (g)(1) and under subsection (g)(2), the Franchise Tax Board shall follow the Internal Revenue Service rules related to Shared Expenses found in an internet website designated in an FTB Notice, as such rules are modified from time to time by the Internal Revenue Service, with the exception of the following provisions:

(A) The non-liable spouse can seek assistance from the Taxpayer Advocate Service.

(B) Since the facts of each individual case and state law determine if the taxpayer has a property right or right of reimbursement, Revenue Officers and Advisory should seek Counsel advice when these types of issues arise in determining the taxpayer's interest for calculating income or equity in assets and any other collection alternative calculations.

(C) If an internal verification is conducted on the non-liable person, this information cannot be provided to the taxpayer. This is not an Unauthorized Access (UNAX) violation if the revenue officer's duties require the inspection or disclosure of this information for tax administration purposes. However, it is a disclosure violation under IRC 6103 if any information is shared with someone other than the non-liable person in question, unless consent to disclose the information is obtained from the non-liable person in question, unless consent is obtained from the non-liable person.

(h) Definitions:

(1) The term "asset" means all real and personal property, including, but not limited to, cash; cash equivalents; deposits; shares in credit unions; publically traded stocks; mutual funds; investment accounts; money market accounts; non-publicly traded stocks; municipal bonds; interests in incorporated and unincorporated businesses, including, but not limited to, an interest in a corporation, limited liability company, partnership, and joint venture; government and corporate bonds; other negotiable and non-negotiable instruments such as personal checks, cashier's checks, promissory notes, and money orders; pre-paid debit cards; Individual Retirement Accounts, Keogh Plans, Simplified Employee Pensions, 401(k) Plans, and any other retirement or pension accounts and profit sharing plans; annuities; trusts; equitable or future interests in property; rights or powers exercisable for the benefit of the applicant or licensee or the applicant's or licensee's community or quasi-community; mineral rights; licensing agreements; tax refunds; interests in insurance policies; soft and hard commodities including, but not limited to, precious metals and agricultural products; jewelry; gems; artwork; vehicles,

including, but not limited to, automobiles and trucks; aircraft; vessels; collectables; antiques; Bitcoin; funds deposited by crowd-sourced websites; accounts receivable; notes receivable; obligations owed to the applicant or licensee and the applicant's or licensee's community or quasi-community; real estate, including, but not limited to, rental property; trust accounts; furniture; mineral rights; factories; fixtures; buildings; inventories; merchandise; stock in trade; raw materials; work in progress; finished products; supplies; machinery; tools; equipment; intangible assets, including, but not limited to, good will, patents, copyrights, trademarks, franchises, licenses, domain names of websites and customer lists; and any other property or interest.

(2) The term "income" means payments that the applicant or licensee or the applicant's or licensee's community or quasi-community receives or is entitled to receive from any source (irrespective of whether such payments would be treated as gross income for tax purposes to the applicant or licensee), including, but not limited to, assets; wages, salary, tips, meal allowance, parking allowance, or any other monetary or non-monetary compensation as an employee for services rendered; interest; dividends; the conduct of a trade or business; pensions; social security; child support, including, but not limited to, the actual amount received in addition to other debts or bills the non-custodial parent is paying pursuant to a child support order; alimony, including, but not limited to, the debts or bills the other spouse is paying pursuant to an alimony order; royalties; gambling winnings; oil subsidies; and payments made by others on behalf of the applicant or licensee or the applicant's or licensee's community or quasi-community.

Note: Authority Cited: Section 494.5, Business and Professions Code; Section 19503, Revenue and Taxation Code. Reference: Section 19195, Revenue and Taxation Code.