

**TITLE 18. FRANCHISE TAX BOARD**  
**[Notice published October 9, 2020]**  
**NOTICE OF PROPOSED RULEMAKING**

Pursuant to California Government Code section 11346.4, the California Franchise Tax Board ("Board") hereby gives notice of its intention to amend California Code of Regulations, Title 18, ("CCR") section 19133, relating to the penalty for failure to file a return upon notice and demand ("demand penalty").

**PUBLIC HEARING**

The Board has not scheduled a public hearing on this proposed action. However, the Board will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period indicated below. The request should be submitted to the Board, at the address below. In addition, Government Code section 15702, subdivision (b), provides for consideration by the Board of any proposed regulatory action if any person makes such request in writing.

**WRITTEN COMMENT PERIOD**

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written period closes on November 23, 2020, and the Board will consider only comments received at the Board offices by that time. The Board encourages submission of comments in electronic form, rather than in paper form. Comments may be submitted by email to [FTBRegulations@ftb.ca.gov](mailto:FTBRegulations@ftb.ca.gov).

Submit comments in paper form to:

**Mailing Address:**

Joel M. Smith, Tax Counsel III  
Legal Division MS A260  
Franchise Tax Board  
P.O. Box 1720  
Rancho Cordova, CA 95741-1720

**Fax:**

(916) 843-0377

**AUTHORITY AND REFERENCE**

Revenue and Taxation Code ("RTC") section 19503 authorizes the Board to prescribe regulations necessary for the enforcement of Part 10.2 (commencing with section 18401) of the RTC. The proposed amendments to CCR section 19133 implement,

interpret, and make specific provisions in RTC section 19133, which is included in Part 10.2 of the RTC.

## **INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW**

### **(A) Existing Laws & Regulations.**

In 1994, the California Legislature enacted RTC section 19133. RTC section 19133 provides the Board with the discretionary authority to impose the demand penalty upon taxpayers who fail to file a tax return upon notice and demand by the Board.

In 2004, the Board adopted CCR section 19133 to provide clarity and guidance on how the Board administers the demand penalty. Under CCR section 19133, the Board imposes the demand penalty upon individual taxpayers who are individuals who received a proposed assessment of tax after receiving, and failing to respond to, either a request for tax return or a demand for tax return for one of the four taxable years immediately preceding the subject taxable year. Such an individual is subject to the imposition of the demand penalty. Subsection (b) of CCR section 19133 provides the regulatory framework that controls the Board's consistent application of the demand penalty, as detailed in the examples at subsection (d).

### **(B) Effect of Proposed Amendments.**

The effect of the proposed amendments to CCR section 19133 is to remove ambiguity between subsections (b) and (d) to ensure that the demand penalty is imposed on individual taxpayers who are individuals who received a proposed assessment of tax after receiving, and failing to respond to, either a request for tax return or a demand for tax return for one of the four taxable years immediately preceding the subject taxable year. A recent interpretation of the plain meaning of subsection (b)(2) of CCR section 19133 demonstrates an inconsistency with the Board's interpretation of subsection (b)(2) as set forth in an example in subsection (d). Subsection (d) of CCR section 19133 reflects the Board's original intent in adopting CCR section 19133 and the Board's longstanding practice of imposing the demand penalty on an individual taxpayer to whom the Board issued a proposed assessment following that taxpayer's failure to file a return in response to a request for tax return or demand for tax return by the Board *for* one of the four taxable years immediately preceding the subject taxable year. Subsection (b) of CCR section 19133 has alternatively been interpreted to apply to any taxable year as long as the proposed assessment is issued *during* one of the four preceding taxable years. The proposed amendments do not alter how the Board interprets and applies CCR section 19133.

### **(C) Objectives of Proposed Amendments.**

The objectives of the proposed amendments are to reduce taxpayer confusion. Currently, CCR section 19133 has been interpreted in some cases in a manner that is more expansive than the Board's longstanding interpretation and counter to the original intent of the regulation. Subsection (b) has been alternatively interpreted to allow the

Board to impose the demand penalty on a taxpayer for taxable years more than four taxable years in the past if the taxpayer failed to respond to a request for tax return or demand for tax return for the older taxable year and a proposed assessment was issued during the last four years. This interpretation is inconsistent with the Board's intent in adopting CCR section 19133, as it allows for a notice to trigger the demand penalty when such notice is issued after failure to respond to a request for a tax return or a demand for a tax return for a taxable year that may not be close in time to the taxable year for which the current demand is issued. This interpretation allows a greater number of previous taxable years, beyond the immediately preceding four taxable years, to trigger the demand penalty under CCR section 19133, subsection (b). The proposed amendments ensure CCR section 19133 will be consistently applied throughout the administrative tax appeal process.

**(D) Anticipated Benefits.**

The proposed amendments will benefit individual California taxpayers by removing ambiguity in CCR section 19133 and providing greater clarity as to the number of possible taxable years evaluated under CCR section 19133, subsection (b)(2). The proposed amendments will ensure the language of CCR section 19133 follows the Board's longstanding interpretation and practice for imposition of the demand penalty. The proposed amendments are expected to reduce taxpayer confusion and compliance costs, which may include the direct costs for preparing and reviewing tax documents.

**(E) Compatibility with Existing State Regulations.**

During the process of developing this proposed regulatory action, the Board, pursuant to Government Code section 11346.5, subdivision (a)(3)(D), conducted a review for any similar state regulations. The proposed regulatory action is not inconsistent or incompatible with existing regulations.

**(F) Comparison to Federal Regulations.**

There is no comparable federal law.

**DISCLOSURES REGARDING THE PROPOSED ACTION**

Mandate on local agencies and school districts: *None*.

Cost or savings to any state agency: The Board has concluded that the proposed rulemaking may result in a fiscal effect on state government but it will not be significant.

Cost to any local agency or school district which must be reimbursed under Part 7, commencing with Government Code section 17500, of Division 4: *None*.

Other non-discretionary cost or savings imposed upon local agencies: *None*.

Cost or savings in federal funding to the state: *None*.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: *None*.

Potential cost impact to directly affected private persons or business: The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Effect on small business: Sole proprietors are taxpayers who file individual tax returns and are treated as individual taxpayers. Thus, the proposed amendments would affect sole proprietorships in the same manner as it affects individuals. Only those sole proprietorships who received a proposed assessment of tax after receiving and failing to respond to either a request for tax return or a demand for tax return for one of the four taxable years immediately preceding the subject taxable year would be subject to the demand penalty. CCR section 19133 is not applicable to any other business entity such as corporations, partnerships, or limited liability companies.

Significant effect on housing costs: *None*.

## **RESULTS OF THE ECONOMIC IMPACT ASSESSMENT**

Pursuant to Government Code section 11346.3, subdivision (b), the Board has determined in the economic impact assessment that there would be negligible effects on (a) the creation or elimination of jobs within the state; (b) the creation of new businesses or the elimination of existing businesses within the state; or (c) the expansion of businesses currently doing business within the state. The proposed amendments would provide the benefit of giving clarity to taxpayers and tax preparers regarding the process for imposition of the demand penalty; however, there is no expected significant direct change to the health and welfare of California residents, worker safety or California's environment as a result of the proposed amendments.

## **CONSIDERATION OF ALTERNATIVES**

In accordance with Government Code section 11346.5, subdivision (a)(13), the Board must determine that no reasonable alternative that it considered or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board invites interested persons to present statements or arguments with respect to alternatives during the written comment period or at the hearing, if one is requested.

## **CONTACT PERSONS**

Inquiries concerning the proposed administrative action may be directed to:

Joel M. Smith, Tax Counsel III  
Legal Division MS A260

Franchise Tax Board  
P.O. Box 1720  
Rancho Cordova, CA 95741-1720  
Telephone: (916) 845-5429  
Email: [FTBRegulations@ftb.ca.gov](mailto:FTBRegulations@ftb.ca.gov)

The backup contact person for these inquiries is:

Christy Keith  
Legal Division MS A260  
Franchise Tax Board  
P.O. Box 1720  
Rancho Cordova, CA 95741-1720  
Telephone: (916) 845-6080  
Email: [FTBRegulations@ftb.ca.gov](mailto:FTBRegulations@ftb.ca.gov)

**AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE**

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulation, and the Initial Statement of Reasons. Copies can be obtained on the Board's website at [ftb.ca.gov](http://ftb.ca.gov) or by contacting Christy Keith at the address, phone number, or email address listed above.

**AVAILABILITY OF CHANGED OR MODIFIED TEXT**

After the close of the comment period and considering all timely and relevant comments received, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Board adopts the regulations as revised. Copies of the modifications will be published on the Board's website at [ftb.ca.gov](http://ftb.ca.gov) and mailed to anyone who has expressed an interest in receiving the modification information. Please send requests for copies of any modified regulations to the attention of Christy Keith at the address or email address indicated above. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

**AVAILABILITY OF THE FINAL STATEMENT OF REASONS**

Upon its completion, copies of the Final Statement of Reasons will be published on the Board's website at [ftb.ca.gov](http://ftb.ca.gov) and may also be obtained by contacting Christy Keith at the above address or email address.

## **AVAILABILITY OF DOCUMENTS ON THE INTERNET**

Copies of the Notice of Proposed Rulemaking, the Initial Statement of Reasons, and the proposed text of the regulation in underline and strikeout can be accessed through the Board's website at [ftb.ca.gov](http://ftb.ca.gov).