

Changes to Proposed Regulation
March 10, 2000

Section 19041 is adopted to read:

§19041. Protest.

(a) General.

ITEM 1

(1) A taxpayer has the right to file a protest with respect to a deficiency proposed to be assessed by a Notice of Proposed Assessment. The taxpayer has the right to a copy of the audit file upon request without having to file a Public Records Act request. Within 60 days of a written request by the taxpayer, the FTB shall provide the legal and factual basis (reasons) for the Notice of Proposed Assessment as well as the scheduled (computations) supporting the Notice of Proposed Assessment unless both are included in the Notice of Proposed Assessment. The department shall review and act upon the protest based upon a determination of whether the proposed deficiency is correct, in whole or in part. This regulation sets forth and makes specific the rules for filing, considering and determining a protest.

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(2) The protest process is intended to be informal. It is the first step in the administrative and judicial review process where the taxpayer can dispute proposed adjustments to increase or determine the taxpayer's tax for a particular year. It provides an opportunity for a staff member of the Franchise Tax Board and the taxpayer to discuss the issues relating to the proposed assessment as well as any issues raised by the taxpayer involved and to make sure that all of the necessary facts to resolve the protest have been presented. The protest hearing process is not subject to the requirements of the administrative adjudication provisions of the Administrative Procedures Act, sections 11400, et seq., of the California Government Code. Subsequent proceedings in the administrative and judicial review process are more formal. These subsequent proceedings involve adjudicative bodies other than the Franchise Tax Board. In these proceedings the evidence admitted and the testimony given become part of the formal record of the proceedings maintained by the adjudicative body. Evidence submitted at the protest level does not become part of any formal record and is not forwarded automatically to any other administrative or judicial body for purposes of that body making a determination on the merits of any case. Taxpayers, and the Franchise Tax Board, must present all evidence directly to those adjudicative bodies in accordance with the rules of that body if they wish such evidence to be considered.

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(3) The role of the staff member of the Franchise Tax Board handling the protest is to objectively resolve the protested tax assessment in accordance with the Taxpayers' Bill of Rights and the Franchise Tax Board's Statement of Principles of Tax Administration through an analysis of the relevant code and case law as applied to the facts relevant to the protest. While an objective

~~analysis should include an independent review of the audit file, it does not include a new examination, the raising of any issues not adjusted in the NPA, or re-audit of the taxpayer's books and records charged with the responsibility of making a determination of the correct amount of tax based upon the facts of the case and a correct application of the law to those facts.~~ The protest process is not a negotiation where disagreements are compromised. There is a separate Administrative Settlement process which allows for taxpayers and the Franchise Tax Board to reach an agreement as to the settlement of a dispute based upon the various risks that are involved. See Revenue and Taxation Code section 19442.

(4) A taxpayer may file a protest contesting the specific adjustment proposed by the Franchise Tax Board or raising other issues in an effort to show that the proposed tax is not owed in total or in part. In all circumstances, the taxpayer must show why the calculation of the tax proposed to be assessed by the department is incorrect either factually or as a matter of law.

(5) In most circumstances, the Franchise Tax Board will only be in possession of facts which have been supplied by the taxpayer or discovered during an audit. ~~Not all of the facts may have been made available prior to the issuance of the Notice of Proposed Assessment.~~ The taxpayer has the burden of establishing error in the proposed assessment of tax. It is the taxpayer that will be in possession or control of the necessary information, documents, books and records and who will have the knowledge regarding the circumstances of the relevant activities such that a determination of the correct tax can be made. The inability, or failure, of a taxpayer to supply relevant information in support of their protest may can result in a proposed assessment being sustained. ~~The Franchise Tax Board is entitled to conclude that the failure to produce information gives rise to an inference that the information if provided would support the proposed assessment. However, it is not necessary that the taxpayer create documents that never existed in its records and no inference shall be drawn from the fact that the taxpayer never maintained records requested by the Franchise Tax Board. It is the responsibility of the taxpayer to inform the Franchise Tax Board if any requested information does not exist.~~

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(6) The regulation sets forth specific rules that govern the protest process based upon the language of the statute. The regulation provides a number of specific rules and time limits, with specific exceptions. These rules, time limits and exceptions are provided for the protection of taxpayers. They are intended to inform taxpayers of their rights and provide protections in a number of circumstances. In virtually every situation, the department is provided the discretion to waive rules or grant extensions. It is the goal of the department to resolve disputes with taxpayers concerning their tax liability at the lowest level possible in the administrative process, and the Franchise Tax Board will liberally exercise its discretion in all areas provided for in the regulation with this goal in mind.

(7) Time limits provided for in this regulation shall be used as guidelines for a quick and orderly processing of the protest; however, the Franchise Tax Board, at its discretion, may vary these time limits in order to address various circumstances which warrant such changes. The rules and time limits in the regulation are not intended to be used to foreclose or limit a taxpayer's access to the protest process. They are intended to provide an orderly process that leads to a quick resolution of the disagreement. They will be invoked to limit the protest process, only after a notice has been given, and when necessary for the timely and efficient completion of the protest process. When the expiration of any time period provided for by statute or this regulation falls on a Saturday, Sunday or holiday, the time will be extended to the next business day. For purposes of this rule, "holiday" means any day on which the United States Post Office does not deliver regular mail.

(8) A taxpayer may, either in conjunction with filing a protest or subsequent to the filing of a protest, pay all or part of the amount that the Franchise Tax Board has proposed to assess, or make a deposit in the nature of a cash bond. If the taxpayer makes full payment of the tax proposed to be assessed, the protest is converted to a Claim for Refund under Revenue and Taxation Code section 19335. Where the taxpayer designates in writing in a statement attached to or submitted together with the payment that the payment is intended as a cash bond and not a payment of tax, Revenue and Taxation Code section 19041.5 shall apply, and the deficiency remains under protest. Filing a Claim for Refund gives rise to different rights and remedies and has procedural consequences that may limit rights in subsequent proceedings. A taxpayer should be aware of these consequences. Where the grounds raised by the taxpayer in a protest may result in a reduction in tax in excess of the additional amount proposed to be assessed, the protest letter must alert the Franchise Tax Board that an overpayment is being claimed, in addition to the fact that the deficiency is being protested if the taxpayer wishes the amended protest to serve as a claim for refund. In that circumstance, the protest will also be treated as a claim for refund whenever the protest is filed within the statutory period permitted for filing a claim for refund. Nothing in this section shall be deemed to preclude a taxpayer from filing a separate claim for refund or offset within the statutory timeframes permitted for filing such claim or offset request in a manner consistent with other provisions of the Revenue and Taxation Code.

(b) Time for Filing a Protest.

(1) Beginning of Period. A protest is timely if filed with the department on or before the later of 60 days after the mailing of the Notice of Proposed Assessment to which it relates or the date determined by the Franchise Tax Board as the last day specified for filing the protest that appears on the Notice of Proposed Assessment. The department shall treat the date of mailing of a Notice of Proposed Assessment as the date that appears on the Notice of Proposed Assessment. The taxpayer may prove that the Notice of Proposed Assessment

was mailed on a different date. The postmark on the envelope in which the Notice of Proposed Assessment is an example of proof that the Notice of Proposed Assessment was mailed on a different date.

(2) End of Period. A protest is timely filed if it is mailed to or hand-delivered to an office of the department within the later of 60 days after the date of the mailing of the Notice of Proposed Assessment or the date determined by the Franchise Tax Board as the last day specified for filing the protest that appears on the Notice of Proposed Assessment. If the 60th day falls on a Saturday, Sunday or holiday, the last day for filing the protest is the next business day. For purposes of this rule, "holiday" means any day on which the United States Post Office does not deliver regular mail.

(3) Establishing Date of Filing. The date of the filing of a protest may be established by the postmark on the envelope in which it was mailed, proof of mailing from the postal service, an affidavit of mailing or service, or a dated receipt of delivery signed by an employee of the department or other competent evidence. The department does not retain the envelope in which the protest was mailed in the normal course of business.

(4) Postal Service. For purposes of filing a protest, any reference to mail or postal service shall include United States mail, the postal system of any foreign country, or any designated delivery service as designated by the Secretary of the Treasury of the United States under the authority of Internal Revenue Code section 7502(f).

ITEM 5 [\(5\) Upon showing of reasonable cause for failure to file a timely protest \(such as being out of the country during the time of the notice\), the department may allow a late filing of a protest.](#)

ITEM 6 [\(6\) Acknowledgement of Protest: Upon receipt of the protest, the department shall, within 30 days, send acknowledgment that the protest has been received and identify the staff member of the department handling the protest.](#)

ITEM 7 (c) Manner of Filing. A protest ~~is normally may be~~ [either](#) by mailing it to the address that appears on the reverse side of the Notice of Proposed Assessment. ~~A protest may also be filed or~~ by hand-delivering it to an office of the Franchise Tax Board.

(d) Form.

(1) Writing. A protest must be in writing and must indicate that a protest is being made against the proposed assessment that appears on the Notice(s) of Proposed Assessment. No special form is required for filing a protest. A date on a protest shall be treated as the date of filing unless there is other evidence, such

as a postmark on the envelope in which a protest was mailed, to indicate that the protest was filed on a different date.

(2) Contents. The protest shall set forth:

(A) the name of the taxpayer or taxpayers,

(B) the taxpayer's or taxpayers' identifying number(s) (Social Security number of individuals or federal identification number for entities, such as corporations, estates and trusts, or partnerships),

(C) the current address of the taxpayer(s) or the taxpayer's representative to which correspondence concerning the protest should be directed,

(D) the amount(s) being protested,

(E) the year(s) to which the protest is directed,

(F) the identifying number(s) that appear(s) on the Notice(s) of Proposed Assessment,

(G) the date of the Notice(s) of Proposed Assessment, and

(H) if the taxpayer(s) files a protest more than sixty days after the date of the Notice of Proposed Assessment or after the date determined by the Franchise Tax Board as the last day specified for filing the protest that appears on the Notice of Proposed Assessment, a statement of the reason why the filing is timely.

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(3) Oral Hearing. A request for an oral hearing on the protest ~~must~~ should be expressly stated and ~~must~~ should be included as part of the protest. However, the taxpayer will be granted an oral hearing if it is requested at any time prior to the issuance of a Notice of Action on the protest by the department. The right to an oral hearing is waived if a request is not included in the protest; however, the department may at its discretion grant an oral hearing requested after the protest has been filed. See Regulation section 19044.

(4) Signed. The protest must be dated and signed by the taxpayer(s) or by an authorized representative.

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(5) Grounds ~~and Reasons~~. The protest must specify the grounds upon which it is based, ~~set forth the facts involved, and the reason(s) why the proposed assessment is in error~~. See subsection (e) of this regulation for rules relating to grounds.

(6) Reasons and Legal Authorities. The protest should include the reason(s) why the proposed assessment is in error, any legal authorities relied

upon by the taxpayer(s), including relevant statutes, regulations, rulings, and administrative or judicial decisions.

(e) Grounds.

(1) No Limitation on Grounds for Filing a Protest. A protest may raise objections to the proposed assessment based upon any grounds. A protest shall not be limited to objections to the adjustments made by the Notice(s) of Proposed Assessment.

ITEM 10 (2) Not Limited to Grounds in Protest Letter. A taxpayer may introduce ~~Except as otherwise provided in this regulation, a protest shall be limited to the grounds set forth in the protest letter. The department shall have the discretion to inquire into or allow the introduction of~~ new, additional or alternative grounds to determine whether the proposed assessment is correct in whole or in part until the issuance of the Notice of Proposed Action. The department's discretion in this regard shall be liberally construed with the view to allowing the taxpayer to present new grounds consistent with timely and efficient tax administration.

(3) New, Additional or Alternative Grounds. A new, additional or alternative ground includes a different ground or one that alters an objection to the Notice of Proposed Assessment contained in the protest. Assertions that clarify or develop the protest that are consistent with the protest are not a new, additional or alternative ground.

(4) ~~Requests to~~ Amendment to the Protest.

(A) ~~The department shall accept a request to amend the protest to set forth new, additional or alternative grounds if:~~

~~1. it is part of the response to a request by the department to perfect a protest pursuant to subsection (f)(3) of this regulation, or to provide additional information or authorities pursuant to subsection (g) of this regulation; or~~

~~2. it is mailed or delivered at least fourteen (14) days prior to the date of the first scheduled oral hearing on the protest, if an oral hearing has been requested.~~

(B) ~~The department, at its discretion, may grant a request to amend the protest when:~~

~~1. in the case of a taxpayer that has requested an oral hearing, the request is submitted less than 14 days prior to the first scheduled oral hearing or prior to any subsequent oral hearing.~~

~~2. in the case of a taxpayer who has not requested an oral hearing, the request is received by the department prior to the date a Notice of Action on the protest was issued.~~

~~3. the taxpayer shows reasonable or good cause for allowing an amendment.~~

~~(C) A taxpayer submitting a new, additional or alternative ground must should provide facts and authorities in support of the ground with the request.~~

~~(D) The department's discretion in this respect shall be exercised liberally with the view to allowing the taxpayer to present new, additional, or alternative grounds consistent with timely and efficient tax administration.~~

ITEM 11 (B) If a taxpayer introduces new, additional or alternative grounds at the hearing, the department is entitled to a 45-day postponement of the hearing to review the material. If the new, additional or alternative grounds are introduced within 45-days of the hearing, the department may ask for a postponement of the hearing until not later than 45-days subsequent to the introduction of the new, additional or alternative grounds.

(5) Amendment as a Claim for Refund. Amending a protest to add new, additional or alternative grounds, or to change the grounds upon which a protest is made, shall, to the extent it may give rise to a refund and is identified as a claim, be treated as filed as of the date of the amendment for purposes of determining whether or not it is a timely filed claim for refund. See Revenue and Taxation Code sections 19306 through 19313, and the regulations adopted thereunder.

(6) Failure to Raise Grounds in a Protest. Failure to raise an issue in a protest does not prejudice a taxpayer's right to raise the issue in an appeal to the State Board of Equalization or to file a claim for refund with respect to the issue.

(f) Perfecting a Protest.

ITEM 12 (1) Perfecting a Protest. A protest that does not contain all of the information required by subsections (2), (4), and (5) of subsection (d) of this regulation must be perfected or it is not a valid protest. No other requirements must be met for a valid protest.

(2) Procedures. Except as provided in subsection (e) of this regulation:

ITEM 13 (A) A taxpayer who has not requested an oral hearing ~~in the original protest~~ may perfect a timely filed protest by submitting any missing information. Submission must be within 60 days of the filing date of the protest.

(B) Except as limited by subsection (3) of this subsection, a taxpayer who has requested an oral hearing may perfect a timely filed protest by submitting the information missing from the protest prior to the conclusion of the oral hearing or such extended time as may be granted by the department.

(3) Franchise Tax Board Request to Perfect.

(A) Determination of Need. Upon review of the protest, the department may determine that it is incomplete and needs to be perfected. Within 90 days of the filing of the protest, the department shall notify the taxpayer, or the taxpayer's representative, of its determination that the protest is incomplete and needs to be perfected and specify how the protest needs to be perfected.

(B) Notification. A need to perfect a protest does not arise unless and until the taxpayer, or the taxpayer's representative, is notified by mail by the department that the protest is incomplete and needs to be perfected.

(C) Time to Perfect. A protest shall be perfected by the latter date of the protest hearing or period of thirty days after the notice described in (B) of this subsection is mailed. ~~will be presumed to be sufficient time to perfect a protest.~~ An extension of 15 days will be granted if requested prior to the expiration of the 30 days. One additional extension of time of 15 days to perfect a protest may be granted in extraordinary circumstances, if requested prior to the expiration of the 15-day extension. The granting of an additional extension is at the discretion of the department. A taxpayer has the burden of establishing why any additional time to perfect the protest is necessary. In no event, however, will the due date for perfecting a protest be less than 60 days from the date the taxpayer or its representative have actually received a full and complete copy of the FTB's audit file if the taxpayer has requested the file prior to the issuance of the notice described in (B) of this subsection.

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(D) A taxpayer, or the taxpayer's representative, that has been notified to perfect a protest may provide information and legal authorities in addition to the specific information requested by the department to perfect the protest. Such additional information and authorities will be considered by the department in determining the protest.

(4) Action on Nonperfected Protest. A protest that has not been timely perfected shall be acted upon through the issuance of a Notice of Action on the protest as provided for in subsection (h)(2) of this regulation.

(g) Request of Department for Additional Information or Authorities.

(1) Right to Request. In order to make its determination with respect to the protest, the department may request additional relevant information ~~or authorities~~ regarding any new or additional ~~the~~ grounds raised in the protest. A request for additional information or authorities may be made either in writing or during the course of an oral hearing. See Regulation section 19044(h)(9). At the taxpayer's request, a written request will be provided for any information requested.

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~~(2) Duty to Respond. A taxpayer, or the taxpayer's representative, has the duty to make a timely and complete response to any requests for additional information or authorities by the department pursuant to subsection (1) above.~~

~~(A) Time for Response. A request for additional information or authorities by the department shall include a due date for a timely response. The period for response shall not be less than 30 days from the date of the request unless otherwise agreed to by the taxpayer, or the taxpayer's representative, and the department.~~

~~(B) Extensions. One extension of time to submit the requested information or authorities will be granted if requested. The period of extension shall not be less than one half the period of time allowed for response in subsection (A) above.~~

~~(C) Additional Time. In its discretion, the department may grant extensions of time to respond in addition to the periods provided for in subsection (B) above.~~

~~(3) Failure to Respond.~~

~~(A) Failure to provide a timely and complete response to a request from the department for additional information or authorities may result in the protest being determined by resolving questions of fact to which the requests relate against the taxpayer. In addition, failure to provide a timely and complete response may give rise to an assertion by the department that the taxpayer has failed to exhaust administrative remedies in subsequent administrative or judicial proceedings. For purposes of this subsection, a written statement by the taxpayer that information requested does or did not exist will be considered a complete response.~~

~~(B) The department will advise a taxpayer of its determination that the taxpayer has failed to respond or has failed to provide an adequate response. The department will specifically advise the taxpayer of the extent to which it has determined that the response is inadequate. The taxpayer will be given 30 days to make the response adequate.~~

(h) Determination on Protest.

(1) Letter of Determination and Notice. The department shall provide to the taxpayer, or the taxpayer's representative, a written Notice of Action setting forth the determination that has been made with respect to the protest. If an oral hearing had been requested on the protest, the department shall also provide the taxpayer, or the taxpayer's representative, with a letter setting forth its determination, unless the receipt of a separate letter is waived in writing or orally. If a letter of determination has been sent to the taxpayer, or the taxpayer's representative, setting forth in detail the legal and factual basis of the

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determination, the Notice of Action issued with respect to the protest may set forth the determination by reference to the letter. A taxpayer may appeal the department's determination on its protest, as reflected on the Notice of Action, to the California State Board of Equalization within the time limits provided by the Revenue and Taxation Code. See Revenue and Taxation Code sections 19045 and 19324, and the regulations adopted there under.

(2) Time for Issuance of Letter of Determination and Notice of Action.

(A) If an oral hearing has been requested on the protest, the Franchise Tax Board shall provide the taxpayer, or the taxpayer's representative, with a letter setting forth its determination within 60 days of the final oral hearing on the matter. The subsequent written Notice of Action shall be issued within 60 days of the Letter of Determination. If the department fails to issue the Letter of Determination within the prescribed time, the NPA shall be deemed void.

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(B) If an oral hearing has not been requested on the protest, the Franchise Tax Board shall provide the taxpayer, or the taxpayer's representative, with a written Notice of Action setting forth the determination that has been made with respect to the protest within 24 months of the filing of the protest or the date on which the protest is perfected under subsection (f) of this regulation.

(C) If an oral hearing has been requested on the protest, the Franchise Tax Board shall provide the taxpayer, or the taxpayer's representative, with a written Notice of Action setting forth the determination that has been made with respect to the protest within 33 months of the filing of the protest or the date on which the protest is perfected under subsection (f) of this regulation.

(D) The periods of time provided for in subdivisions (B) and (C) of this subdivision (h)(2) shall be tolled at the discretion of the Franchise Tax Board in the following circumstances:

1. the years involved in the protest remain subject to audit ~~or reaudit~~ because the taxpayer has not supplied requested information at audit, the Notice of Proposed Assessment was issued because of an impending expiration of the statute of limitations, ~~or the protest raises issues that were not considered during the audit;~~

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2. ~~new issues were raised subsequent to the filing of the protest that the Franchise Tax Board determines should be resolved at the protest level;~~

~~3.—~~an appeal to the State Board of Equalization or a suit for refund is currently pending with respect to the taxpayer and that other proceeding involves the same issue or issues or there is a case involving another taxpayer with the same issue and there is no existing precedent that would be controlling;

4. a petition in bankruptcy has been filed and the bankruptcy stay has not been lifted;

5. there is a pending audit or dispute with the Internal Revenue Service the outcome of which is likely to be controlling with respect to the protest,

6. a request has been made for consideration of an Administrative Settlement pursuant to Revenue and Taxation Code section 19442 ;

7. there is a request for consideration of a section 25137 petition pending; or

8. the matter has been referred to the Special Investigations Section of the Franchise Tax Board.

Note: Authority Cited: Section 19503, Revenue and Taxation Code. Reference: Section 19041, Revenue and Taxation Code.

COMMENTS ON PROPOSED CHANGES

GENERALLY: Much of the modifications to this Regulation stem from a basic disagreement between Cal-Tax and staff on the purpose of the protest process. We believe that the audit should be complete at the time of the Notice of Proposed Assessment. The audit should stand on the audit files. The protest process is supposed to be an *independent* administrative review of the proposed assessment, not a secondary audit process. A re-audit at the protest level is fundamentally unfair to taxpayers and sends the very disturbing message to taxpayers that if you protest you will be re-audited.

It is important to remember that the taxpayer carries the burden of proof, not the FTB. If the taxpayer fails to produce information any finder of fact deems critical to their case or otherwise fails to substantiate their claim based on sound reasoning, relevant authority, and appropriate evidence, the taxpayer will lose, and that is the appropriate remedy. Not the grant to staff virtually unlimited discretion to re-audit the taxpayer or continue the suspension of the protest indefinitely until information the staff deems of importance is provided.

ITEM 1: Taxpayers should be able to obtain a copy of their audit file prior to the due date of the filing of the protest. Having to file Public Records Act requests is not a timely solution to having access to the evidence that is the basis of the NPA. Moreover, taxpayers have an intrinsic right to know the full factual and legal basis for the proposed assessment. How else can a taxpayer be expected to mount an effective protest or even respond with acquiescence of such documentation is not forthcoming from the department.

ITEM 2: This modification is intended to clarify that the scope of the protest discussion is only for those issues relating to the proposed assessment and any issues raised by the taxpayer in the protest.

ITEM 3: Quite simply, a taxpayers protest of a Notice of Proposed Assessment should not expose them to a re-audit of all their books and records for the year or years under protest. As 19041(a)(1) notes the department “shall act upon the protest based upon a determination of whether the proposed deficiency is correct, in whole or in part.” The unlimited power staff wishes to confer on the hearing officer to reexamine all the books and records of the taxpayer works as method to penalize taxpayers daring to protest the NPA. From the taxpayers’ perspective, these re-audits are little more than discovery expeditions to penalize the taxpayer for protesting or attempts to discover additional proposed assessments to counterbalance the revenue implications of the taxpayers challenge. Ultimately, the taxpayer carries the burden of proving the factual basis of their claims. Denying the FTB information relevant to the determination of the protest hurts the taxpayers claim.

ITEM 4: We do not quarrel with the basic concept that the taxpayer carries with them the burden of establishing error in the proposed assessment of tax or the obvious conclusion that a taxpayer who fails to cooperate with the FTB in the production of relevant information faces a likely rejection of their protest. However, the staff language

takes a major step beyond this basic and obvious point. The staff language asserts that failure of the taxpayer to produce demanded information (whether or not it actually exists or is even relevant to the issue of the protest) ENTITLES the FTB to infer that the information requested of taxpayer would support the proposed assessment. We believe such a consequence of failure to comply with the demand for information is draconian and lacks authority in the law.

ITEM 5: This suggestion should need no explanation. Unusual circumstances may make the individual taxpayer unaware of the NPA and the FTB should have the authority to permit a late filing on good cause showing.

ITEM 6: Many taxpayers have complained to us that once they file their protest nothing happens. Currently, taxpayers are left hanging without any knowledge of whether a protest request has been denied or is pending, who the protest officer is or potentially when a hearing might be scheduled (if requested).

ITEM 7: Here the language is simply confusing and implies that delivery at a branch office of the FTB is discouraged.

ITEM 8: The taxpayer should not be bound by a formalistic rule requiring they demand an oral hearing at the time for filing the protest. While practitioners representing large corporations likely would be aware of the requirement, smaller and individual taxpayers would not and this would work as trap to the unwary. Any necessary delay for staff caused by a late request can be compensated for.

ITEM 9: Section 19041 of the Revenue and Taxation Code provides: “the taxpayer may file with the Franchise Tax Board a written protest against the proposed deficiency assessment, specifying the grounds upon which it is based.” Nothing more. Nothing about reasons or legal authority. Certainly, it is in the taxpayer’s best interest to substantiate their claim. However, it is not within the authority of the FTB to demand it.

ITEM 10: Grounds. Taxpayers should be permitted to introduce new, additional or alternative grounds to support their protest at any time up and until the issuance of the Notice of Proposed Action. Staff’s proposed discretionary authority to allow amendments raise the concern that the discretion will be applied in an arbitrary manner and a method of coercing taxpayer behavior.

ITEM 11: This amendment simply recognizes that the staff will need time to adequately prepare a response to any new or additional grounds presented by the taxpayer.

ITEM 12: Just a clarification that the scope of requirements for a valid protest are ONLY subsections (2), (4), and (5) of subsection (d).

ITEM 13: These changes are consistent with our assertion that the taxpayer should be permitted to request an oral hearing at any time prior to the issuance of the Notice of Action.

ITEM 14: These changes are consistent with our assertion that the taxpayer should be permitted to modify their protest at any time prior to the issuance of the Notice of Action.

ITEM 15: The audit should stand on its own as the basis for the Notice of Proposed Assessment. The protest hearing officer should not be permitted the opportunity to reexamine every aspect of the taxpayers records to buttress a dysfunctional audit. If the NPA lack credible support, it should not have been the basis of an NPA. If the taxpayer introduces new or additional grounds during the protest, the FTB has the right to request relevant information to support those claims. However, taxpayer bears the burden of proof. Consequently, the added consequence to taxpayer of failing to comply with an information request is totally unnecessary.

ITEM 16: The staff language undermines the basic premise that the taxpayer can assert any grounds as the basis for a protest of an NPA. Without more, their chances for a successful appeal may be significantly diminished, but their basic right to protest and have a hearing should not be denied by the FTB dissatisfaction with the sufficiency of their arguments or authority or the taxpayers willingness to provide information not relevant to the protest issues. Moreover, FTB's assertion that failure to provide information may give rise the departments assertion of failure to exhaust administrative remedies is not appropriate in this administrative regulation. It overstates the authority that exists on the point and raises concerns that the regulation may work as a method of bolstering or manufacturing their own precedent on the subject.

ITEM 17: The amendments are intended to ensure that the FTB's determination letter provides sufficient explanation of the basis for the decision.

ITEM 18: Timelines are important. Limitations on the duration of this process are important. However, it is clear that there are consequences on the taxpayer for failure to comply with these timelines. There is virtually no stated consequence for the department's failure to comply with these timelines.

ITEM 19: There should be no re-audit once the protest has been filed. The mere fact that the taxpayer raises new issues should not result in the discretionary deferral of a decision on the taxpayer's protest.