

**Final Statement of Reasons for the Adoption of  
Proposed Amendments to  
California Code of Regulations, Title 18, Division 4.1,  
*Office of Tax Appeals' Rules for Tax Appeals.***

**UPDATE OF INFORMATION IN THE INITIAL STATEMENT OF REASONS**

The Office of Tax Appeals (OTA) held a public hearing regarding the adoption of proposed amendments to California Code of Regulations, title 18, division 4.1, the *Office of Tax Appeals' Rules for Tax Appeals* (OTA's Rules for Tax Appeals), hereinafter referred to as the "proposed regulatory action." OTA decided to adopt the proposed regulatory action.

As part of the proposed regulatory action, OTA's public comment process included soliciting public input, considering all comments, and revising the draft proposed regulations accordingly.

OTA posted the proposed regulations on its website and distributed the proposed regulations to interested parties. OTA provided a public comment period, which closed on March 20, 2023. On March 20, 2023, OTA held an interested parties meeting to obtain comments regarding the draft of the proposed regulatory action. In addition, OTA received written comments from the public regarding the proposed regulatory action. After reviewing and considering the comments received, OTA revised the proposed regulatory action.

Following careful consideration of the comments received during the public comment period, the proposed amendments clarifying the limits of OTA's jurisdiction to invalidate regulations of the Franchise Tax Board (FTB) or the California Department of Tax and Fee Administration (CDTFA) were withdrawn from the current proposed regulatory action. These revisions elicited comments from numerous stakeholders, and OTA would like to review and provide an additional opportunity to discuss. OTA will hold an interested parties meeting in connection with the future anticipated rulemaking for Regulation 30104.

Additionally, after reviewing comments provided by stakeholders, OTA deleted an example citing to California Code of Regulations, title 18, section 1698.5.

OTA has also made minor modifications to the proposed regulatory action as necessary to incorporate the public comments. The public comments were very helpful to OTA. This Final Statement of Reasons summarizes each comment received during the public comment period and provides OTA's response.

The factual basis, the specific purposes, the necessity for, the problems to be addressed by, and the anticipated benefits from the adoption of the proposed regulatory action are the same as provided in the initial statement of reasons. OTA anticipates that the proposed regulatory action will benefit OTA, FTB, CDTFA, local entities, taxpayers, representatives, and the general public by:

- Updating regulatory language to provide for non-attorney panel members as required by Senate Bill 189 (Stats. 2022, Ch. 48).
- Making minor stylistic changes to improve clarity and accessibility of the regulations for the general public, including all parties to an appeal.
- Updating authority citations that have been impacted by the recent statutory changes.
- Creating a comprehensive set of rules governing the newly created Small Case Program pursuant to Senate Bill 92 (Stats. 2019, Ch. 34) including multiple examples to provide guidance on appeal eligibility for the Small Case Program.
- Creating comprehensive ethical standards to govern the conduct of all panel members, both attorneys and non-attorneys, as required by Senate Bill 189 (Stats. 2022, Ch. 48).

The adoption of the proposed regulatory action is not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to the text of the regulations proposed in OTA's Rules for Tax Appeals.

OTA did not rely on any data or technical, theoretical, or empirical study, report, or similar document in proposing this regulatory action that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period.

In addition, the factual basis has not changed for OTA's initial determination that the proposed regulatory action will not have a significant adverse economic impact on business, OTA's determination that the proposed regulatory action is not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. OTA's proposed regulatory action:

- Will neither create nor eliminate jobs in the State of California;
- Nor result in the elimination of existing businesses;
- Nor create or expand business in the State of California; and
- Will not affect the benefits of the proposed regulatory action to the health and welfare of California residents, worker safety, or the state's environment.

The proposed regulatory action may affect small businesses.

### **Necessity for Duplication**

The proposed regulatory action may duplicate some provisions from the Revenue and Taxation (RTC) and Government Code sections that they implement, interpret, and make specific, which are cited in their respective "reference" notes. OTA has determined that the duplications are necessary to ensure that the proposed regulations and amendments clearly implement, interpret, and make specific the provisions of the Taxpayer Transparency and Fairness Act of 2017,

Assembly Bill 102 (Stats. 2017, Ch. 16), as modified by Assembly Bill 131 (Stats. 2017, Ch. 252), Senate Bill 92 (Stats. 2019, Ch. 34) and Senate Bill 189 (Stats. 2022, Ch. 48), and satisfy the clarity requirement of Government Code section 11349.1, subdivision (a)(3).

### **No Mandate on Local Agencies or School Districts**

OTA has determined that the adoption of the proposed regulatory action does not impose a mandate on local agencies or school districts.

## **SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE PUBLIC COMMENT PERIOD ENDING MARCH 20, 2023**

### **COMMENT NO. 1: Amendments to Regulation 30104 - Jurisdiction of OTA**

Yoni Fix of Reed Smith commented on proposed amendments to Regulation 30104 that provide OTA does not have the jurisdiction to declare a regulation of FTB or CDTFA invalid on the basis the regulation conflicts with the Revenue and Taxation Code or the California Code of Regulations. The comment stated that the State Board of Equalization (BOE) had the authority and jurisdiction to declare a regulation invalid. OTA stepped into the shoes of the BOE, so OTA should have this same authority and jurisdiction. In addition, limiting OTA's jurisdiction would cause unnecessary financial burdens on taxpayers.

**OTA's Response:** The provisions clarifying OTA's jurisdiction to determine whether a regulation of FTB or CDTFA is invalid have been removed from the amendment to Regulation 30104. A separate rulemaking project will occur at a later date to address this jurisdiction amendment.

### **COMMENT NO. 2: Amendments to Regulations 30101.5, 30102, 30104, 30203, 30210, 30211, 30219, 30220, 30223, 30224, 30401, 30501, 30502, and 30608**

Marcy Jo Mandel, of McDermott, Will, and Emory, made the following comments:

1. Section 30101.5 (Inapplicability of Division 2.1) – The proposed language makes it unclear when the regulations are effective because OTA's Rules for Tax Appeals were not in effect until January 5, 2018. Thus, it is unclear whether the regulations should be effective on January 1, 2018, or January 5, 2018.
2. Section 30102 (Definitions) – Deletion of the term FTB should not occur. Franchise Tax Board is not defined anywhere else in the regulations.
3. Section 30102 (Definitions) – Deletion of the standard of admissibility of evidence can be detrimental to certain taxpayers bringing an appeal before OTA, specifically small businesses and individuals.
4. Section 30104 (Limitations on Jurisdiction) - The proposal to add language to subdivision (a), clarifying that OTA does not have jurisdiction to "refuse to follow an applicable statutory provision" should be deleted.
5. Section 30104 (Limitations on Jurisdiction) – OTA has the authority to declare an FTB or CDTFA regulation invalid because administrative hearings before OTA are adjudicatory

in nature and a challenge to the validity of a regulation is cognizable in such hearings, citing to *Woods v. Superior Court* (1981) 28 Cal.3d 668 and *Harris Transportation Co. v. Air Resources Board* (1995) 32 Cal.App.4<sup>th</sup> 1472. In addition, BOE had this authority in *Appeal of Save Mart Supermarkets & Subsidiaries* (2002-SBE-002) when exercising its quasi-judicial powers.

6. Section 30104 (Limitations on Jurisdiction) – The proposal to add subsections (e)(2) and (3) to disavow jurisdiction where a taxpayer did not receive procedural rights during audit or the internal appeal process at CDTFA may result in taxpayers who poorly-word their appeal being rejected on this basis, when their appeal is in fact proper.
7. Section 30203<sup>1</sup> (Time for Submitting an Appeal) – The use of the term “unpaid assessment” does not appear correct because it is still a proposed assessment at this point in time.
8. Section 30203 (Time for Submitting an Appeal) – Two references to CDTFA were missed in the deletion. See subdivisions (b)(3) and (b)(4) and delete the reference to CDTFA before Appeals Bureau.
9. Section 30210 (Conferences) – The proposed amendment to subsection (e) to change “reasonable notice” to “written notice” means that there is no timing requirement for notice for conferences. The commenter would like to confirm that OTA will obtain agreement from both parties prior to scheduling conferences.
10. Section 30211 (Representation) – Suggestion to add “if the taxpayer does not have a resolution” after (2) and before “a copy of a waiver ...” The rationale is that currently, the proposed regulations make it seem like a waiver is always necessary when you do not need a waiver if you have an R&TC 7096(b) resolution.
11. Section 30219 (Application of Burden of Proof) – The proposed amendments should clarify that a new matter is one that is inconsistent with the position taken in making the original determination or that requires the presentation of different evidence. A new matter is not limited to an increase in the determined liability.
12. Section 30220 (Postponement and Deferral) – If all of the parties agree to a postponement, then it should be allowed regardless of the reasons. Therefore, the deleted section should be reinstated.
13. Section 30223 (Dismissal) – There is a concern that an action might be dismissed due to the agency’s failure to act or respond. Therefore, any dismissal should acknowledge the Agency’s concession or withdrawal to reflect the true status of the dispute.
14. Section 30224 (Request for Reconsideration of an Appeals Bureau Decision) – The reference to CDTFA should be deleted prior to Appeals Bureau.
15. Section 30401 (Process for Requesting an Oral Hearing) – Forfeiture or waiver of an oral hearing is an extreme remedy that should be avoided. Thus, the proposed language should be avoided. To the extent that this language might be attempting to solve a problem such as physical danger, it seems unnecessary because OTA now offers virtual oral hearings.

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<sup>1</sup> This was listed as 30202 in the comment; however, the section intended to be cited was 30203.

16. Sections 30501 (Publication of an Opinion) – The publication of a superseded opinion is unnecessary and might cause confusion. Therefore, the proposed language should be avoided.
17. Section 30502 (Process of Designating an Opinion as Precedential) – Same as previous.
18. Section 30608 (Effect of Withdrawal or Failure to Participate During a Petition for Rehearing) – Same comments as 30223. Also, the proposed language should reference the dismissal of the petition for rehearing and not the underlying appeal.

**OTA's Response:**

1. Section 30101.5 (Inapplicability of Division 2.1) – The language referenced in this comment was removed from the proposed regulatory action.
2. Section 30102 (Definitions) – The deletion of the term “FTB” was made in error and the language has been added back into the proposed regulatory action.
3. Section 30102 (Definitions) – The definition of evidence was added back into the proposed regulatory action to address the second part of this comment.
4. Section 30104 (Limitations on Jurisdiction) – OTA has withdrawn this language from the proposed regulatory action. A separate rulemaking project will occur at a later date to address this jurisdiction amendment.
5. Section 30104 (Limitations on Jurisdiction) – OTA has withdrawn the example at proposed subdivision (e)(3).
6. Section 30104 (Limitations on Jurisdiction) – OTA has withdrawn the new example citing to Regulation section 1698.5 from the proposed regulatory action. The example regarding the appeals conference was adopted in a prior rulemaking and is in the current version of OTA's Rules for Tax Appeals.
7. Section 30203 (Time for Submitting an Appeal) – OTA has updated the “unpaid assessment” language to instead refer to a “proposed assessment.”
8. Section 30203 (Time for Submitting an Appeal) – OTA has corrected the referenced language.
9. Section 30210 (Conferences) – Based on this comment, OTA has amended the language to state that the notice of prehearing conference will be included with the notice of oral hearing, which reflects OTA's current practice.
10. Section 30211 (Representation) – The proposed regulatory action only proposed technical, non-substantive, edits to this regulation pertaining to capitalization, punctuation, and style. OTA believes that the rules are clear as currently written and no substantive change is required.
11. Section 30219 (Application of Burden of Proof) – OTA has corrected the referenced language. The purpose of this amendment is to adopt the position in OTA's precedential case *Appeal of Praxair*, 2019-OTA-301P, which clarified that applicable precedent in Franchise and Income Tax Appeals from FTB concerning the effect of a tax agency raising a new matter, would also apply to Business Tax Appeals from CDTFA. Possible language to clarify whether or when a new theory may be considered a new matter were discussed internally but were not added to this regulation because this issue has not yet

been addressed in any precedential Business Tax Appeals involving CDTFA. The revised language is intentionally silent on this aspect.

12. Section 30220 (Postponement and Deferral) – OTA has not changed the regulatory action based on this comment. The intent of this amendment is not to specify that the consent of all parties cannot be good cause to postpone an appeal, but to clarify that the consent of all parties may not, by itself, constitute good cause; such as, for example, if multiple postponements have already been granted on this basis. In such circumstances, OTA may request clarifying evidence to establish good cause to postpone.
13. Section 30223 (Dismissal) – Language was added consistent with this comment.
14. Section 30224 (Request for Reconsideration of an Appeals Bureau Decision) – OTA has corrected the referenced language.
15. Section 30401 (Process for Requesting an Oral Hearing) – OTA has not changed the regulatory action based on this comment, because this amendment is intended only for unusual or extreme circumstances. For example, an appellant who has threatened physical harm to an OTA or Tax Agency employee.
16. Sections 30501 (Publication of an Opinion) – OTA believes that in the interest of public transparency, we are required to publish all opinions issued to the parties by OTA, and it is OTA's current practice to publish superseded Opinions.
17. Section 30502 (Process of Designating an Opinion as Precedential) – Same as previous.
18. Section 30608 (Effect of Withdrawal or Failure to Participate During a Petition for Rehearing) – OTA has corrected the amendment to reference the dismissal of the petition for rehearing.

### **COMMENT NO. 3: Amendments to Regulation 30104 - Jurisdiction of OTA**

Preston Young, CalChamber, expressed concern about the proposed amendment to Regulation 30104. Currently, OTA has the authority to comment on the validity of a regulation. In addition, BOE had the same authority. To restrict this authority would result in harm to taxpayers because taxpayers would be required to pay the tax and then proceed with a refund action in court.

**OTA's Response:** The provisions clarifying OTA's jurisdiction to determine whether a regulation of FTB or CDTFA is invalid have been removed from the amendment to Regulation 30104. A separate rulemaking project will occur at a later date to address this jurisdiction amendment.

### **COMMENT NO 4: Amendments to Regulations 30104, 30223, and 30608**

Bart Baer, CalTax, commented that the proposed amendment to Regulation 30104 is in conflict with California law. OTA is the successor agency to BOE. As a result, OTA has the same authority that BOE had, which includes the ability to determine whether a regulation is invalid, citing to *Appeal of Standard Oil Company of California* (83-SBE-068) and *Save Mart Supermarkets & Subsidiaries* (2002-SBE-002.). Nothing in the statutory language that created

OTA limited OTA's review of regulations. In addition, Government Code section 11350 provides an affirmative grant of authority to seek invalidation of a regulation in court. This government code section does not state that it is the only method in which to do such an action nor does it limit OTA's authority to do so. Lastly, this would cause unnecessary expense to taxpayers due to the cost of litigation.

Concerning Regulation 30104(e), Mr. Baer stated that the new examples in this subdivision create an unfair playing field. OTA should have the authority to determine whether an agency's failure to follow its own rules because it could prevent the correct determination of tax. The proposed example sends a message to the tax community that the Agencies can do whatever they want without oversight.

Mr. Baer also stated that way the amendments to Regulations sections 30223(g) and 30608 were written appears to favor the Agencies. The language should include references to the Agencies if they fail to participate in the appeal or become unresponsive.

**OTA's Response:** The provisions clarifying OTA's jurisdiction to determine whether a regulation of FTB or CDTFA is invalid have been removed from the amendment to Regulation 30104. A separate rulemaking project will occur at a later date to address this jurisdiction amendment.

The amendments to Regulation sections 30223(g) and 30608 have been corrected consistent with this comment.

#### **COMMENT NO. 5: Amendments to Regulations 30411, 30104, 30214, 30436, and 30504**

Joseph Vinattieri and Benjamin Lee, of Bewley, Lassleben, and Miller, commented that they have a case that involves the issue of whether a regulation is invalid. The proposed change to OTA's regulation has now influenced the ALJs on this issue and created a bias. Furthermore, BOE had this authority, and OTA, as successor to BOE, also has this authority. The proposed regulation change also unduly burdens taxpayers and requires them to pay the tax and incur the cost of litigation. OTA should seek a statutory change instead of impermissibly making a regulation change.

Mr. Vinattieri and Mr. Lee suggested that Regulation 30411 be revised to include any member of OTA rather than just OTA's legal division. They also suggested that Regulation 30104.5 add a new section to the penalties, providing:

*"In general, the imposition of penalties under the Revenue and Taxation Code are intended to encourage voluntary taxpayer compliance and are not intended as a punitive measure. The imposition of a penalty is discretionary based on individual facts and circumstances. OT A has the discretion to determine whether a penalty was properly imposed, and overturn the imposition of any penalty made under the Revenue and Taxation Code. Whenever there is any doubt as to whether factual conditions warrant a penalty, that doubt should be resolved in favor of the taxpayer."*

Mr. Vinattieri and Mr. Lee suggested that language be added to Regulation 30214 stating that:

*“(4) The Panel may use the California rules of evidence when evaluating the weight to give evidence presented in a proceeding before OTA. The OTA shall consider the degree of persuasiveness and reliability of any evidence presented. Any party may provide argument on the relevant weight that should be given to an item of evidence.*

*“(5) After weighing the evidence, the Panel shall make factual findings in any Opinion issued by OTA. A factual finding on any material disputed fact shall not be based solely on unsworn statements made by a party during the appeal proceeding before OTA, such as statements contained in a party’s brief, or arguments made by an unsworn representative during an OTA oral hearing. However, a factual finding on any material disputed fact shall be based on sworn statements made by a party during the appeal proceeding before OTA, such as testimony by a sworn witness during an OTA oral hearing, or signed declarations submitted by a party.”*

Mr. Vinattieri and Mr. Lee suggested that language be added to Regulation 30436 stating that:

*“If a pending appeal before the OTA solely involves a question of law, the panel shall be comprised solely of administrative law judges. If a pending appeal involves both questions of law and other issues, such as audit methodology, a party shall have the right to petition that the panel is comprised solely of administrative law judges. The OTA shall grant such a petition unless it can specify in writing a reasonable basis why it is not feasible to do so.”*

Lastly, Mr. Vinattieri and Mr. Lee suggested that if OTA considers depublishing a precedential BOE opinion pursuant to Regulation 30504, the public should be able to comment before the precedential status is removed. They suggest OTA specify the reasons why the precedential status is being removed, and allow a thirty day period for public comment before OTA makes a final determination.

**OTA’s Response:** The provisions clarifying OTA’s jurisdiction to determine whether a regulation of FTB or CDTFA is invalid have been removed from the amendment to Regulation 30104. A separate rulemaking project will occur at a later date to address this jurisdiction amendment.

In response to the comment regarding Regulation 30411, the proposed amended language has been moved to Regulation 30216 and corrected consistent with this comment.

Regarding the proposed addition to Regulation 30214, OTA is not going forward with additional changes at this time.

In response to the proposed addition to Regulation 30436, OTA is not able to go forward with this change at this time because OTA does not currently have non-attorney panel members and



the breakdown of work between attorney and non-attorney panel members has not yet been determined.

In response to the comment for Regulation 30504, OTA is not going forward with changes at this time. Regulation 30503 already requires OTA to explain the reasons for removing the precedential status of any opinion, including precedential BOE opinions. Additionally, Regulation 30502 provides a public comment for pending precedential opinions before OTA makes its final determination regarding the precedential status of an opinion.

#### **COMMENT NO. 6: Amendments to Regulation 30104 - Jurisdiction of OTA**

Dan Kostenbauder of the Silicon Valley Leadership Group commented on proposed amendments to Regulation 30104, which would provide that OTA does not have the jurisdiction to declare a regulation invalid. Similar to prior comments, Mr. Kostenbauder stated that OTA is the successor to BOE, and this produces an undue burden on taxpayers. In addition, this comment states that the authorities cited in the proposed regulations do not support a finding that OTA does not have the authority to invalidate a regulation.

**OTA's Response:** The provisions clarifying OTA's jurisdiction to determine whether a regulation of FTB or CDTFA is invalid have been removed from the amendment to Regulation 30104. A separate rulemaking project will occur at a later date to address this jurisdiction amendment.

#### **COMMENT NO. 7: Amendments to Regulations 30103, 30104, 30106, 30214, and 30503**

Jason Fox of CalCPA commented on the proposed amendments to the following Regulations:

1. Regulation 30103 - The term "perfected" is not defined in the regulations, and there is concern that this will lead to the improper rejection of appeals where claims are made through letters, reasonable cause forms, or other accepted alternatives to amended returns. Otherwise, OTA should define what "perfected" means.
2. Regulation 30104 – Similar to previous comments, this commenter stated that OTA is the successor to BOE who had authority to determine the validity of regulations, and the amendment would force taxpayers into court and place on them a significant burden. Also, OTA's opinions have similar effect as Agency regulations. Thus, OTA should review Agency regulations to ensure that potentially inappropriate regulations do not unilaterally control tax and fee policy for the entire state. Also, the authorities cited for limiting of jurisdiction do not support limiting OTA's jurisdiction.
3. Regulation 30106 – The commenter suggested removing this Regulation because it is no longer applicable.
4. Regulation 30214 - The proposed change does not define or set any parameters around the definition of a "material disputed fact," nor does it provide any guardrails against parties characterizing an issue as involving a material disputed fact without prior notice.
5. Regulation 30503 – The commenter noted that while the proposed language is helpful to know why the precedential status is removed, a more robust review process (including the opportunity for meaningful comment) should apply before the precedential status of any opinion from either BOE or OTA is withdrawn.

**OTA's Response:**

1. Regulation 30103 – In response to this comment, OTA added a definition of the term “perfected” to address the commenter’s concern.
2. Regulation 30104 - The provisions clarifying OTA’s jurisdiction to determine whether a regulation of FTB or CDTFA is invalid have been removed from the amendment to Regulation 30104. A separate rulemaking project will occur at a later date to address this jurisdiction amendment.
3. Regulation 30106 – OTA will not remove this Regulation at this time.
4. Regulation 30214 – A definition of material was added to the amended regulations to address this comment.
5. Regulation 30503 – This amendment does not expand the scope of Regulation 30503 because the Regulation already specifies that OTA can withdraw the precedential status of a BOE opinion. Instead, this amendment is intended to reflect current practice that, when a BOE Opinion is removed from precedential status, OTA must follow the same procedures as removing an OTA Opinion from precedential status. Currently, Regulation 30504 does not impose any restrictions or limitations on OTA removing the precedential status of a BOE opinion.

**ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT  
ON SMALL BUSINESS**

No alternatives were proposed to OTA that would lessen any adverse economic impact on small business.

**Determination Regarding Alternatives**

OTA determined that no alternative to the adoption of the proposed regulatory action would be more effective in carrying out the purposes for which the regulations are proposed, would be as effective and less burdensome to affected private persons than the proposed regulatory action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

OTA did not reject any reasonable alternative to the proposed regulatory action that would lessen any adverse impact the proposed regulatory action may have on small business.

No reasonable alternative has been identified and brought to OTA’s attention that would lessen any adverse impact the proposed action may have on small business, be more effective in carrying out the purposes for which the action is proposed, 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 than the proposed action.