

FINAL STATEMENT OF REASONS
FOR PROPOSED CALIFORNIA CODE OF REGULATIONS,
TITLE 18, SECTION 19133

UPDATE OF INITIAL STATEMENT OF REASONS

Revenue and Taxation Code section 19133 provides the Franchise Tax Board with the discretionary authority to assess a notice and demand penalty of 25% of the amount of tax assessed pursuant to Revenue and Taxation Code section 19087 upon those taxpayers who fail to respond to a notice and demand by the Franchise Tax Board for a return, unless the failure is due to reasonable cause and not willful neglect. In paraphrasing section 19133 of the Revenue and Taxation Code in subsection (a) of the proposed regulation as originally noticed to the public, the Franchise Tax Board did not reference the statutory exception for abatement of the penalty due to reasonable cause and lack of willful neglect. The omission of this language from subsection (a) prompted two comments, both of which questioned why the Franchise Tax Board had omitted the reasonable cause and willful neglect language from the proposed regulation. The commenters appeared concerned that the notice and demand penalty, once imposed under the circumstances described in subsection (b) of the proposed regulation, could not be abated for reasonable cause and lack of willful neglect.

The purpose of this regulation is to make specific under what circumstances the Franchise Tax Board will exercise its discretion to impose the notice and demand penalty, and not the circumstances under which it may be abated. Nevertheless, in response to these comments, the Franchise Tax Board agrees that subsection (a) of the regulation, which paraphrases section 19133 of the Revenue and Taxation Code, should include a reference to the exception for reasonable cause and lack of willful neglect for abatement of the penalty, so that it reflects the statutory language. The Franchise Tax Board has added this language to subsection (a) of the proposed regulation to clarify that the regulation does not prevent an individual taxpayer, on a case-by-case basis, from establishing reasonable cause and lack of willful neglect for abatement of the notice and demand penalty.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE NOTICE PERIOD OF APRIL 23, 2004 THROUGH JUNE 7, 2004

COMMENT NO. 1: Alan D. Bollinger initially observed that section 19133 grants the Franchise Tax Board discretionary authority to impose the notice and demand penalty, unless the failure to respond to the notice and demand or to file a return was due to reasonable cause and not willful neglect. He then asked whether the Franchise Tax Board purposefully omitted the reasonable cause standard from subsection (a) of the proposed regulation.

Response: The Franchise Tax Board agrees to incorporate in subsection (a) of the regulation the reasonable cause and willful neglect language from Revenue and Taxation Code section 19133.

COMMENT NO. 2: Mr. Bollinger observed that subsection (b) of the proposed regulation uses the terms "will" and "only" when the statute provides for a reasonable cause exception before the "permissive" imposition of the penalty. He then asked whether the Franchise Tax Board was indirectly or implicitly defining reasonable cause and whether the Franchise Tax Board was defining what it considered to be willful neglect?

Response: No, the Franchise Tax Board is not defining nor attempting to define, by this regulation, reasonable cause or willful neglect. Instead, this regulation makes specific under what circumstances the Franchise Tax Board will exercise its statutory discretion to impose the penalty. (See Govt. Code § 11342.600.) The Franchise Tax Board will impose the penalty under the circumstances set forth in subsection (b) of the regulation. This does not mean that the taxpayer is prevented from attempting to establish reasonable cause and lack of willful neglect for abatement of the penalty.

COMMENT NO. 3: Mr. Bollinger asked whether subsection (c)(1) of the proposed regulation intentionally uses the term "will" when the statute uses the permissive "may" language?

Response: Yes, the Franchise Tax Board intentionally used the term "will" in subsection (c)(1) of the proposed regulation. This regulation makes specific under what circumstances the Franchise Tax Board will exercise its statutory discretion to impose the penalty. (See Govt. Code § 11342.600.) The Franchise Tax Board will impose the penalty under the circumstances set forth in subsection (b) of the regulation.

COMMENT NO. 4: Mr. Bollinger asked whether subsection (c)(2) of the proposed regulation intentionally uses the term "will" when the statute uses the permissive "may" language?

Response: Yes, the Franchise Tax Board intentionally used the term "will" in subsection (c)(2) of the proposed regulation. This regulation makes specific under what circumstances the Franchise Tax Board will exercise its statutory discretion to impose the penalty. (See Govt. Code § 11342.600.) The Franchise Tax Board will impose the penalty under the circumstances set forth in subsection (b) of the regulation.

COMMENT NO. 5: Mr. Bollinger noted that section 19133(c) of the proposed regulation is a definitional section and then asked whether the Franchise Tax Board could define reasonable cause and willful neglect?

Response: The Franchise Tax Board will not define reasonable cause or willful neglect in the proposed regulation. The regulation is not meant to address standards of reasonable cause and willful neglect, which have generally been defined under relevant case law. Instead, this regulation makes specific under what circumstances the Franchise Tax Board will exercise its discretion to impose the penalty. (See Govt. Code § 11342.600.) This does not mean that the taxpayer is prevented from attempting to establish reasonable cause and lack of willful neglect for abatement of the penalty.

COMMENT NO. 6: Mr. Bollinger noted that section 19133(d) of the proposed regulation is used to provide examples and then asked whether the Franchise Tax Board could provide examples of reasonable cause and willful neglect?

Response: The Franchise Tax Board will not provide examples of reasonable cause or willful neglect in the proposed regulation. The regulation is not meant to address standards of reasonable cause and willful neglect, which have generally been defined under relevant case law. Instead, this regulation makes specific under what circumstances the Franchise Tax Board will exercise its discretion to impose the penalty. (See Govt. Code § 11342.600.) This does not mean that the taxpayer is prevented from attempting to establish reasonable cause and lack of willful neglect for abatement of the penalty.

COMMENT NO. 7: Gina Rodriguez initially stated that the statute provides for a reasonable cause exception, and then indicated that there was no mention of the exception in the regulation. The commenter then questioned whether a repeat nonfiler would be excused from the penalty for reasonable cause.

Response: The Franchise Tax Board agrees to incorporate in subsection (a) of the regulation the reasonable cause and lack of willful neglect language from Revenue and Taxation Code section 19133. A repeat nonfiler would be entitled to attempt to establish reasonable cause for abatement of the penalty.

COMMENT NO. 8: Ms. Rodriguez observed that the statute is permissive and not mandatory. She then asked why the proposed regulation used the mandatory "will" terminology instead of the permissive "may" language throughout the text.

Response: This regulation makes specific under what circumstances the Franchise Tax Board will exercise its statutory discretion to impose the penalty. (See Govt. Code § 11342.600.) The Franchise Tax Board will impose the penalty under the circumstances set forth in subsection (b) of the regulation. This does not mean that the taxpayer is prevented from attempting to establish reasonable cause and lack of willful neglect for abatement of the penalty.

ALTERNATIVES DETERMINATION

The Franchise Tax Board has determined that no alternative would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected individual taxpayers than the proposed regulation.

LOCAL MANDATE DETERMINATION

The proposed regulation does not impose any mandate on local agencies or school districts.