



**STATE BOARD OF EQUALIZATION**

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State Controller

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Executive Director

September 4, 2015

Dear Interested Party:

Enclosed are the Agenda, Issue Paper, and Revenue Estimate for proposed amendments to Regulation 1432, *Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle*, which will be presented at the Board's September 16, 2015 Business Taxes Committee meeting. The proposed amendments clarify the definition of highway use and provide examples when diesel fuel is not used to operate vehicles upon the public highway.

Please feel free to publish this information on your website or otherwise distribute it to your associates, members, or other persons that may be interested in this issue.

Thank you for your input on these issues and I look forward to seeing you at the Business Taxes Committee meeting at **10:00 a.m.** on **September 16, 2015** in Room 121 at the address shown above.

Sincerely,

Susanne Buehler, Chief  
Tax Policy Division  
Sale and Use Tax Department

SB:ls

Enclosures

cc: (all with enclosures, via email and/or hardcopy as requested)  
Honorable Jerome E. Horton, Chairman, Third District  
Senator George Runner (Ret.), Vice Chair, First District  
Honorable Fiona Ma, CPA, Member, Second District  
Honorable Diane L. Harkey, Member, Fourth District  
Honorable Betty T. Yee, State Controller, c/o Ms. Yvette Stowers (MIC 73)

Ms. Kari Hammond, Board Member's Office, Third District  
Mr. David Hunter, Board Member's Office, Third District  
Ms. Shellie Hughes, Board Member's Office, Third District  
Mr. Sean Wallentine, Board Member's Office, First District  
Mr. Lee Williams, Board Member's Office, First District  
Mr. Alan Giorgi, Board Member's Office, First District  
Mr. Brian Wiggins, Board Member's Office, First District  
Mr. Jim Kuhl, Board Member's Office, Second District  
Ms. Kathryn Asprey, Board Member's Office, Second District  
Mr. John Vigna, Board Member's Office, Second District  
Mr. Tim Morland, Board Member's Office, Second District  
Ms. Lizette Mata, Board Member's Office, Second District  
Mr. Russell Lowery, Board Member's Office, Fourth District  
Mr. Ted Matthies, Board Member's Office, Fourth District  
Ms. Lisa Renati, Board Member's Office, Fourth District  
Mr. Clifford Oakes, Board Member's Office, Fourth District  
Ms. Lynne Kinst, Board Member's Office, Fourth District  
Mr. Ramon Salazar, State Controller's Office (MIC 73)  
Ms. Cynthia Bridges (MIC 73)  
Mr. Randy Ferris (MIC 83)  
Mr. David Gau (MIC 101)  
Ms. Lynn Bartolo (MIC 43)  
Mr. Todd Gilman (MIC 70)  
Mr. Wayne Mashihara (MIC 47)  
Mr. Kevin Hanks (MIC 49)  
Mr. Mark Durham (MIC 67)  
Mr. Robert Tucker (MIC 82)  
Mr. Jeff Vest (MIC 85)  
Mr. Jeff Angeja (MIC 85)  
Mr. David Levine (MIC 85)  
Mr. Bradley Heller (MIC 82)  
Mr. Lawrence Mendel (MIC 82)  
Mr. John Thiella (MIC 73)  
Mr. Kevin Smith (MIC 82)  
Ms. Kirsten Stark (MIC 50)  
Mr. Marc Alviso (MIC 101)  
Mr. Chris Lee (MIC 101)  
Ms. Lauren Simpson (MIC 70)  
Ms. Karina Magana (MIC 47)  
Mr. Bradley Miller (MIC 92)  
Mr. Bill Benson (MIC 67)  
Ms. Tracy McCrite (MIC 50)  
Ms. Laurel Smith (MIC 88)

**Agenda – September 16, 2015 Business Taxes Committee Meeting**  
**Regulation 1432, *Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle***

<p><b>Action 1 – Agreed Upon Items</b></p> <p>Agenda, pages 2-7.</p>	<p><b>Alternative 1</b></p> <p>Approve and authorize publication of the proposed amendments to Regulation 1432, <i>Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle</i>.</p> <p>The amended regulation defines terms, provides examples of qualifying equipment, and provides safe-harbor percentages for nontaxable uses of diesel fuel.</p> <p style="text-align: center;">OR</p> <p><b>Alternative 2</b></p> <p>Do not approve the proposed revisions to Regulation 1432.</p>
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**Agenda – September 16, 2015 Business Taxes Committee Meeting**  
**Regulation 1432, Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle**

**Action 1 – Staff Recommendation**

~~(a) Power Take-Off Equipment:~~

~~(1) A person may claim a refund for tax paid on diesel fuel used to operate power take-off equipment. Power take-off equipment is generally defined to be an accessory which is mounted onto a transmission allowing power to be transferred outside the transmission to a shaft or driveline. The accessory is usually either a small gearbox with an external shaft, or a short shaft with a driveline yoke assembly for attaching an external driveline. The vehicle's transmission must be specially designed for a power take-o(2) Power take-off equipment may be found, for example, on boom trucks (block boom), bulk feed trucks, car carriers or trucks with hydraulic winches, carpet cleaning vans, cement mixers, distribution trucks (hot asphalt), dump trailers, dump trucks, fire trucks, leaf trucks, lime spreaders, line trucks (digger/derrick), aerial lift trucks, milk tank trucks, mobile cranes, pneumatic tank trucks, refrigeration trucks, salt spreaders (dump with spreader), sanitation trucks, seeder trucks, semi-wreckers, service trucks with jackhammers, pneumatic drills, sewer cleaning trucks (sewer jet, sewer vactor), snow plows, spray trucks, sweeper trucks, tank trucks, tank transports and wreckers.~~

**(a) DIESEL FUEL USED FOR PURPOSES OTHER THAN OPERATING MOTOR VEHICLES UPON THE HIGHWAYS OF THIS STATE.**

(1) A person may claim a refund for tax paid on diesel fuel that is not used to operate a motor vehicle upon a highway in California.

(A) For purposes of this regulation, equipment used to operate a motor vehicle upon a highway in California is defined as and includes equipment used in the propulsion of a motor vehicle and, in addition, any equipment, accessories, or amenities used for the safety, convenience, or comfort of drivers or passengers in conjunction with the operation of a motor vehicle on a highway, such as global positioning systems, heating systems, air-conditioning systems, windshield wipers, power windows and locks, heated seats, radios, Bluetooth equipment, cell phones, media players, and other similar equipment, accessories, or amenities.

Additional examples of equipment, accessories, or amenities that are used to operate a motor vehicle upon a highway in California include, but are not limited to, alternators, generators,

**Agenda – September 16, 2015 Business Taxes Committee Meeting**  
**Regulation 1432, Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle**

**Action 1 – Staff Recommendation**

air-conditioner compressors, hydraulic pumps for power steering and brakes, fuel-injection pumps, superchargers, power steering, power brakes, automatic transmissions, diesel particulate filter generation systems, and other similar equipment.

(B) Equipment, accessories, or amenities other than equipment used to operate a motor vehicle upon a highway in California, which is operated from the same fuel tank as the motor vehicle, is considered “auxiliary equipment.” Equipment powered from a separate fuel source or tank than is used to operate the motor vehicle would not be considered auxiliary equipment.

“Auxiliary equipment” includes, but is not limited to, equipment found on a boom truck (block boom), bulk feed truck, car carrier with a hydraulic winch, carpet cleaning van, cement mixer, cement pumper, distribution truck (hot asphalt), dump trailer, dump truck, fire truck, garbage truck ((automated side loader, manual side loader, single drive front end loader, dual drive front end loader, single drive rear end loader, dual drive rear end loader, roll-off truck, lugger truck, recycling truck (compaction and non-compaction), one-pass truck, and container delivery truck)), leaf truck, lime spreader, line trucks with digger, derrick or aerial lift, log trucks with self loader, mobile crane, pneumatic tank truck, refrigeration truck, salt spreader (dump with spreader), seeder truck, semi-wrecker, service trucks with a jackhammer or pneumatic drill, sewer cleaning truck (sewer jet, sewer vactor), snow plow, spray truck, super suckers (port-o-let trucks), sweeper truck, tank transport, tank truck, truck with a hydraulic winch, transfer trailer, and wrecker.

(2) Safe-Harbor Percentages. For transactions occurring on and after April 1, 2016, the following are presumed amounts of diesel fuel used to operate auxiliary equipment. Safe-harbor percentages must be applied to diesel fuel consumption by auxiliary equipment type. Off-highway use, as defined in subdivision (b), is included in these percentages:

<u>Boom truck/block boom</u>	<u>15%</u>
<u>Bulk feed truck</u>	<u>15%</u>
<u>Car carrier with hydraulic winch</u>	<u>10%</u>

**Agenda – September 16, 2015 Business Taxes Committee Meeting**  
**Regulation 1432, Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle**

<b>Action 1 – Staff Recommendation</b>	<a href="#"><u>Carpet cleaning van</u></a>	<a href="#"><u>10%</u></a>
	<a href="#"><u>Cement mixer</u></a>	<a href="#"><u>25%</u></a>
	<a href="#"><u>Cement pumper</u></a>	<a href="#"><u>40%</u></a>
	<a href="#"><u>Distribution truck (hot asphalt)</u></a>	<a href="#"><u>15%</u></a>
	<a href="#"><u>Dump trailer</u></a>	<a href="#"><u>15%</u></a>
	<a href="#"><u>Dump truck</u></a>	<a href="#"><u>15%</u></a>
	<a href="#"><u>Fire truck</u></a>	<a href="#"><u>25%</u></a>
	<a href="#"><u>Garbage truck</u></a>	<a href="#"><u>35%</u></a>
	<a href="#"><u>Leaf truck</u></a>	<a href="#"><u>15%</u></a>
	<a href="#"><u>Line spreader</u></a>	<a href="#"><u>15%</u></a>
	<a href="#"><u>Line truck with digger, derrick or aerial lift</u></a>	<a href="#"><u>20%</u></a>
	<a href="#"><u>Log truck with self loader</u></a>	<a href="#"><u>20%</u></a>
	<a href="#"><u>Mobile crane</u></a>	<a href="#"><u>25%</u></a>
	<a href="#"><u>Pneumatic tank truck</u></a>	<a href="#"><u>15%</u></a>
	<a href="#"><u>Refrigeration truck</u></a>	<a href="#"><u>20%</u></a>
	<a href="#"><u>Salt spreader (dump with spreader)</u></a>	<a href="#"><u>15%</u></a>
	<a href="#"><u>Seeder truck</u></a>	<a href="#"><u>15%</u></a>
	<a href="#"><u>Semi-wrecker</u></a>	<a href="#"><u>15%</u></a>
	<a href="#"><u>Service truck with jack hammer/drill</u></a>	<a href="#"><u>15%</u></a>
	<a href="#"><u>Sewer cleaning truck/jet/vactor</u></a>	<a href="#"><u>25%</u></a>
<a href="#"><u>Snow plow</u></a>	<a href="#"><u>15%</u></a>	
<a href="#"><u>Spray truck</u></a>	<a href="#"><u>15%</u></a>	

**Agenda – September 16, 2015 Business Taxes Committee Meeting**  
**Regulation 1432, Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle**

	<table border="0"> <tr> <td><a href="#"><u>Super sucker (port-o-let trucks)</u></a></td> <td align="right"><a href="#"><u>25%</u></a></td> </tr> <tr> <td><a href="#"><u>Sweeper truck</u></a></td> <td align="right"><a href="#"><u>20%</u></a></td> </tr> <tr> <td><a href="#"><u>Tank transport</u></a></td> <td align="right"><a href="#"><u>15%</u></a></td> </tr> <tr> <td><a href="#"><u>Tank truck</u></a></td> <td align="right"><a href="#"><u>15%</u></a></td> </tr> <tr> <td><a href="#"><u>Truck with hydraulic winch</u></a></td> <td align="right"><a href="#"><u>15%</u></a></td> </tr> <tr> <td><a href="#"><u>Transfer trailer</u></a></td> <td align="right"><a href="#"><u>20%</u></a></td> </tr> <tr> <td><a href="#"><u>Wrecker</u></a></td> <td align="right"><a href="#"><u>15%</u></a></td> </tr> <tr> <td><a href="#"><u>Other Auxiliary Equipment</u></a></td> <td align="right"><a href="#"><u>10%</u></a></td> </tr> </table> <p><a href="#"><u>(3) For transactions occurring on and after April 1, 2016, prior to submitting a claim for refund for exempt diesel fuel consumption greater than the percentages provided in subdivision (a)(2), a person must submit a specific study conducted by them and approved by the Board. Approved studies shall be valid for 5 years after the date of approval and must be updated upon expiration. A person may claim exempt diesel fuel consumption in the percentages indicated above without conducting a study. In order to claim an exemption for diesel fuel used in auxiliary equipment not listed in subdivision (a)(2), the “other” category may be utilized or, if the percentage of use claimed will be greater, a specific study must be conducted in accordance with this subdivision.</u></a></p> <p><b>(b) OFF-HIGHWAY USE.</b></p> <p>(1) A person may claim a refund for tax paid on diesel fuel used off the highway. "Off the highway" includes private property, a way or place permanently or temporarily closed to public use for the purpose of vehicular travel, or any way or place used for vehicular travel which is not a highway as defined in Regulation 1411. <a href="#"><u>If the safe-harbor percentages in subdivision (a)(2) are used to calculate the amount of refund, no additional refund will be allowed for diesel</u></a></p>	<a href="#"><u>Super sucker (port-o-let trucks)</u></a>	<a href="#"><u>25%</u></a>	<a href="#"><u>Sweeper truck</u></a>	<a href="#"><u>20%</u></a>	<a href="#"><u>Tank transport</u></a>	<a href="#"><u>15%</u></a>	<a href="#"><u>Tank truck</u></a>	<a href="#"><u>15%</u></a>	<a href="#"><u>Truck with hydraulic winch</u></a>	<a href="#"><u>15%</u></a>	<a href="#"><u>Transfer trailer</u></a>	<a href="#"><u>20%</u></a>	<a href="#"><u>Wrecker</u></a>	<a href="#"><u>15%</u></a>	<a href="#"><u>Other Auxiliary Equipment</u></a>	<a href="#"><u>10%</u></a>
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[fuel used to operate auxiliary equipment while off the highway or while idling as described in subdivision \(d\).](#)

(2) If the diesel fuel is used in the operation of construction [equipment](#) which is exempt from registration under the Vehicle Code, the user must establish to the satisfaction of the Board [that](#) the diesel fuel is used in the operation of the construction equipment while operated within the confines or limits of a construction project and only incidentally operated on the highway within such confines or limits.

(3) As used in subdivision (2), "incidentally operated" does not include the use of special construction equipment for the transportation of persons or property upon the highways in an operation which requires registration of the [motor](#) vehicle under the Vehicle Code.

**(c) REFUNDS.**

Persons who acquire diesel fuel tax paid and subsequently use [the diesel fuel to operate auxiliary equipment or ~~the diesel fuel in power take-off equipment~~ to operate a motor vehicle](#) off the highway are entitled to a refund of the diesel fuel tax paid for that fuel. Persons claiming a refund [for nontaxable use of diesel fuel in auxiliary equipment](#) may use ~~any method to calculate the amount of refund, including computing a percentage of the fuel used for nontaxable purposes~~ [the percentages listed in subdivision \(a\)\(2\), or prior to submission of the claim, submit a specific study conducted by them following Board-approved test methods, demonstrating the amount of diesel fuel used in a nontaxable manner in excess of the safe-harbor percentages. Approved studies shall be valid for 5 years after the date of approval and must be updated upon expiration.](#) It is the responsibility of the person claiming the refund to document and support the amount claimed. [The safe-harbor percentages cannot be claimed for periods prior to April 1, 2016.](#)

**(d) IDLE TIME.**

Diesel fuel consumed in motor vehicles on the highway is subject to the diesel fuel tax whether the motor vehicle is moving or idling, and no refunds will be allowed for [the](#) diesel fuel tax paid on diesel fuel ~~which is used to while idle idling~~ [a motor](#) vehicle on the highway. If the [motor](#)

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	<p>vehicle is idling on the highway while auxiliary equipment is in use, a refund will be allowed for the diesel fuel tax paid on that portion of the diesel fuel which is used to operate the <del>power take-off</del> <u>auxiliary</u> equipment; however, no refund will be allowed for the diesel fuel tax paid on that portion of the diesel fuel which is used for idling. <u>If the safe-harbor percentages in subdivision (a)(2) are used to calculate the amount of refund, no additional refund will be allowed for diesel fuel used to operate auxiliary equipment while idling.</u></p>
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Issue Paper Number 15-010



- Board Meeting
- Business Taxes Committee
- Customer Services and Administrative Efficiency Committee
- Legislative Committee
- Property Tax Committee
- Other

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## **Regulation 1432, *Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle***

### **I. Issue**

Whether the Board should approve amending Regulation 1432, *Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle*, to remove ambiguous language, clarify the refund provisions, distinguish equipment used to operate a motor vehicle on the highway from auxiliary equipment, and to provide safe-harbor percentages that can be used when claiming a refund for nontaxable uses of diesel fuel.

### **II. Alternative 1 - Staff Recommendation**

Staff recommends approval of the proposed amendments to Regulation 1432, as provided in Exhibit 2. Staff's proposal defines terms, provides examples of qualifying equipment, and provides safe-harbor percentages for nontaxable uses of diesel fuel.

### **III. Other Alternative(s) Considered**

Do not approve the proposed amendments to Regulation 1432.

## IV. Background

Prior to July 1, 1995, all exemptions from tax for both diesel fuel and alternative fuels covered under the Use Fuel Tax Law were governed by Regulation 1316, *Exempt Uses of Fuel in a Motor Vehicle* (Regulation 1316). On July 1, 1995, the authority to tax diesel fuel was removed from the Use Fuel Tax Law (commencing with Revenue and Taxation Code (RTC) section 8601), and placed into the newly created Diesel Fuel Tax Law (commencing with RTC section 60001). In 1998, the Board of Equalization (BOE) adopted Diesel Fuel Tax Regulation 1432, *Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle* (Regulation 1432) to implement, interpret and make specific these provisions of the Diesel Fuel Tax Law.

RTC section 60501, subdivision (a)(4)(A) provides that persons who paid the excise tax on diesel fuel they purchased and “[u]sed for purposes other than operating motor vehicles upon the public highways of the state” may, if other criteria are also met, be granted a refund of the tax they paid. Regulation 1432 allows a claim for refund for excise tax paid on diesel fuel used in “power take-off” (PTO) equipment and for off-highway uses. Currently, a business must substantiate the amount of fuel used off highway, usually by conducting a fuel use study. An example of a fuel use study would be having a garbage truck which uses a hydraulic arm and a compaction system operate normally while being followed by a similar “shadow” truck. The shadow truck would drive the same route, without operating a hydraulic arm or compaction system. The difference in fuel use would be used to calculate the amount of allowed exemption.

## V. Discussion

Staff is revising Regulation 1432 to streamline the refund process for claimants, as well as provide clarifying language and examples to make the regulation easier to understand. Streamlining the process will also make it cost effective for small operators to file refund claims. While small operators may currently be eligible for refunds, many do not request refunds because the cost of conducting a test of fuel use is prohibitive. Staff’s proposed revisions provide examples of equipment that qualify as auxiliary equipment, as well as safe-harbor exemption percentages for fuel consumed in auxiliary equipment. This paper addresses suggestions that were raised in interested parties meetings and the submissions received from interested parties.

### *Auxiliary Equipment*

As explained above, a person may claim a refund for the excise tax paid on diesel fuel that is used for purposes other than to operate a motor vehicle on a highway in California. This includes fuel used to power equipment, accessories or amenities from the same fuel tank as the motor vehicle as well as fuel used off-highway. To help clarify the exemption, staff recommends replacing the term “Power Take-Off Equipment,” which has various interpretations, with the more accurate term “auxiliary equipment.” In addition to defining “auxiliary equipment,” staff recommends providing examples of eligible auxiliary equipment that may qualify for the exemption, as well as equipment that does not qualify for the exemption to avoid the confusion previously encountered with the term “Power Take-Off Equipment.” Examples of eligible auxiliary equipment include: booms, hydraulic winches, cranes, and lifts. The proposed changes also define what constitutes off-highway use, and explain the operator’s responsibility for maintaining proper records and providing supporting documentation.

*Safe-Harbor Percentages (for vehicles other than garbage trucks)*

Staff proposes to provide a list of various safe harbor percentages for eligible auxiliary equipment. Proposed subdivision 1432(a)(2) includes a list of equipment and a safe-harbor percentage of exempt use for each equipment type. Beginning April 1, 2016, claimants would use this percentage when claiming a refund for exempt fuel usage by looking up the safe-harbor percentage allowed for a specific type of equipment and applying that percentage to the number of gallons of diesel fuel used in that piece of equipment. Currently, to take this exemption, claimants must provide supporting documentation to verify exempt fuel use. The most common method to substantiate exempt fuel use is conducting a fuel use study for each type of equipment that uses exempt fuel. Not only is this process time consuming, it also can be expensive. If the regulation is adopted a claimant may still elect to do a study if they believe their auxiliary equipment consumes more fuel than the safeharbor allows. If a claimant has a type of equipment not assigned a safe-harbor percentage, they may elect to use the ten percent exemption allowed for “other equipment.” Otherwise, the claimant may opt to conduct a study in order to claim a higher percentage. The safe-harbor percentages were determined by contacting other states as well as using data provided by the Special Taxes Department and Fees, Appeals and Data Analysis Branch.

*Safe-Harbor Percentages for Garbage Trucks*

The term “garbage truck” includes several different types of trucks generally used in the refuse industry including the following: side-loader trucks, front-loader trucks, rear-end loader trucks, roll-off trucks, and container delivery trucks. Staff recognizes that there may be significant differences in the volume of fuel used to power auxiliary equipment in garbage trucks, depending on the type of truck and its compaction process. However, by having a broad definition of “garbage truck,” companies would not have to document fuel consumption on a truck-by-truck basis, and instead track only the fleet usage. This is important because, if a greater percentage was used for some trucks and a lesser percentage for other trucks, the fuel usage of each truck would need to be tracked.

Staff also recognizes that fuel usage varies depending on the density of the truck route. Generally, trucks used in urban areas have higher auxiliary equipment fuel use than trucks used in rural areas, since stops requiring auxiliary equipment to lift garbage cans and crush garbage are more concentrated in urban areas.

With all of these factors, it is challenging for staff to determine a safe-harbor percentage for the “garbage truck” category. The percentage should be high enough that, generally, claimants will receive a reasonable refund without generating excessive refunds for some operators. Originally, staff proposed a safe-harbor percentage of 30 percent for the “garbage truck” category. Staff arrived at 30 percent by surveying exemption amounts offered by other states and adding an allowance for off-highway use. Staff’s research found the average allowance in the 11 western states to be 25 percent. Staff added a five percent allowance for off-highway use. Off-highway use includes fuel used in privately-maintained and gated communities, landfills (not owned by a municipality), private roads, and private driveways.

Staff received a submission on July 1, 2015, from Mr. Leonard Finegold on behalf of Waste Management (Exhibit 3), regarding the safe-harbor percentages for garbage trucks, refund calculations, and how claiming a safe-harbor percentage in a period may impact a future claim for refund. With regard to the safe-harbor percentage for garbage trucks, staff explained how the BOE arrived at the proposed 30 percent exemption. Waste Management believed that the 30 percent exemption was too

low, and they provided BOE staff additional data supporting an increased safe-harbor exemption. Staff reviewed the data provided by Waste Management and also examined data from past BOE approved claims for other refuse companies. Based on this re-evaluation, staff has determined that a 35 percent exemption for garbage trucks is a suitable safe harbor. Waste Management supports this recommendation.

In addition, staff and Waste Management discussed the concept of having more than one rate for garbage trucks, as well as the tracking and reporting requirements that would go with this option. Waste Management does not currently have the ability to monitor consumption that this option would require; as a result staff and Waste Management agreed that a single rate for garbage trucks is the best option.

### *Fuel Use Studies*

In the revision of Regulation 1432, staff proposes additional language regarding fuel use studies. To ensure that a study remains representative despite changing equipment and fuel composition technologies, it is recommended that a study be valid for a five-year period of time. In their submission, Waste Management recommended including examples in the regulation of how to conduct a fuel use study. Staff responded by explaining some of the potential drawbacks of providing specific testing methods in the regulation, as each piece of equipment has a unique testing methodology. In addition, it would be difficult to update a regulation since the technology used for the testing process is changing at a rapid rate. To address this concern, staff will update the "Frequently Asked Questions" section of the Diesel Users Fuel Tax page on the BOE website, [http://www.boe.ca.gov/sptaxprog/refund/faq\\_users.htm](http://www.boe.ca.gov/sptaxprog/refund/faq_users.htm), as well as work with claimants to help them devise a study that is suitable for the specific equipment they would like to test. In addition, upon validation of the claimant's completed study, staff will mail the claimant an approval letter which will include an effective date for the resulting exemption. This will provide guidance to taxpayers, while still allowing flexibility for updates.

### *Refunds*

Subsection 1432(c) has been revised to reflect the inclusion of safe-harbor percentages. If a business claims a refund using the safe-harbor percentages, they are still responsible for maintaining proper records to support their claim. In addition, it clarifies that a business still has the option of conducting a fuel use study if they believe they consume a higher amount of exempt fuel than the safeharbor allows. The safe-harbor percentages cannot be applied to periods prior to the effective date of the revision of Regulation 1432.

### *Idle Time*

The revised language in Regulation 1432 clarifies that if the vehicle with auxiliary equipment is idling on-highway, only the fuel used to operate the auxiliary equipment will qualify for an exemption. Fuel used to idle the vehicle on-highway does not qualify for the exemption. In addition to fuel used in auxiliary equipment, the safe-harbor percentages have been calculated to include an allowance for off-highway use, which includes idling off-highway. It should also be noted that effective June 2008 the California Air Resources Board adopted a regulation prohibiting idling for more than five consecutive minutes, with few exceptions.

## **VI. Alternative 1 - Staff Recommendation**

### **A. Description of Alternative 1**

Staff recommends approval of the proposed amendments to Regulation 1432, as provided in Exhibit 2. Staff's proposal defines terms, provides examples of qualifying equipment, and provides safe-harbor percentages for nontaxable uses of diesel fuel.

### **B. Pros of Alternative 1**

The proposed revisions would create a consistent exemption percentage businesses can claim when diesel fuel is used to operate auxiliary equipment. By providing a safe-harbor percentage, businesses do not have to conduct a study, which can be costly and time consuming to complete. It will also allow small businesses who previously have chosen not to complete a claim with a simpler, less time consuming method to support their exempt use. Staff will also be able to process refunds in a more expeditious manner if the safe harbor is taken; a refund will not be contingent on the completion of a study.

### **C. Cons of Alternative 1**

Claimed fuel consumption by equipment that exceeds the safe-harbor percentages will still need to have a study conducted to support the amount requested. If equipment is not listed, the highest exemption available without a test is 10%.

### **D. Statutory or Regulatory Change for Alternative 1**

No statutory change is required; however, Regulation 1432 will need to be revised.

### **E. Operational Impact of Alternative 1**

The refund process will be streamlined, decreasing the amount of time needed to approve a refund. Staff will spend less time working on approving and validating studies. Staff will publish the proposed amendments to Regulation 1432 and begin the formal rulemaking process. Staff will also revise the appropriate forms and publications that contain guidance relevant to this issue. In addition, staff will contact industry representatives and previous claimants to notify them of the changes.

### **F. Administrative Impact of Alternative 1**

#### **1. Cost Impact**

The workload associated with publishing the regulation and updating forms and publications is considered routine. Any corresponding cost would be absorbed within the BOE's existing budget.

#### **2. Revenue Impact**

None. See Revenue Estimate (Exhibit 1).

### **G. Claimant/Customer Impact of Alternative 1**

The proposed changes will provide claimants published safe-harbor percentages, which will make it easier to calculate and claim a refund. Many claimants who may have previously chosen not to perform a study and file a claim are now able to request a refund without having to perform a fuel use study or submitting similar information.

### **H. Critical Time Frames of Alternative 1**

The changes are proposed on a prospective basis, which if approved would go into effect April 1, 2016.

## **VII. Alternative 2**

### **A. Description of Alternative 2**

Do not amend Regulation 1432.

### **B. Pros of Alternative 2**

The BOE will not incur the workload associated with revising the regulation.

### **C. Cons of Alternative 2**

Claimants and BOE staff will still have difficulty determining what does and does not qualify for exempt use. Claimants will not have access to the safe-harbor percentages when documenting their exempt use.

### **D. Statutory or Regulatory Changes for Alternative 2**

None.

### **E. Operational Impact of Alternative 2**

None.

### **F. Administrative Impact of Alternative 2**

#### **1. Cost Impact**

None.

#### **2. Revenue Impact**

None. See Revenue Estimate (Exhibit 1).

### **G. Claimant/Customer Impact of Alternative 2**

Without the regulatory amendments, Regulation 1432 will remain in effect. Claimants will not have the ease of using the safe-harbor percentages, and will still be required to conduct fuel use studies or

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otherwise verify off-highway fuel use to claim a refund for diesel fuel used in an exempt manner. In addition, the language will remain ambiguous and lack clarity.

**H. Critical Time Frames for Alternative 2**

None.

**Preparer/Reviewer Information**

Prepared by: Policy and Compliance Division, Special Taxes and Fees Department

Current as of: September 2, 2015

**REVENUE ESTIMATE**

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION



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**Proposed Amendments to Regulation 1432, *Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle***

**I. Issue**

Whether the Board should approve amending Regulation 1432, *Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle*, to remove ambiguous language, clarify the refund provisions, distinguish equipment used to operate a motor vehicle on the highway from auxiliary equipment, and to provide safe-harbor percentages that can be used when claiming a refund for nontaxable uses of diesel fuel.

**II. Alternative 1 - Staff Recommendation**

Staff recommends approval of the proposed amendments to Regulation 1432. Staff's proposal defines terms, provides examples of qualifying equipment, and provides safe-harbor percentages for nontaxable uses of diesel fuel.

**III. Other Alternative(s) Considered**

Do not approve the proposed amendments to Regulation 1432.

**Background, Methodology, and Assumptions**

**Alternative 1 – Staff Recommendation**

There is nothing in the staff recommendation that would impact revenue. The proposal provides a safe-harbor exemption percentage businesses can claim when diesel fuel is used to operate auxiliary equipment. By providing a safe-harbor percentage, businesses do not have to conduct a study, which can be costly and time consuming to complete. While small operators may currently be eligible for refunds, many do not request refunds because the cost of conducting a test of fuel use is prohibitive. The revisions also include a clause that allows taxpayers to apply an exemption rate received as a result of a fuel use study to five years in the future. Staff will also be able to process refunds in a more expeditious manner if the safe harbor is taken; a refund will not be contingent on the completion of a study.

### **Other Alternatives Considered**

There is nothing in Alternative 2 that would impact revenue. However, claimants and BOE staff will still have difficulty determining what does and does not qualify for exempt use. The refund process will remain cumbersome, and due to the costs involved in conducting a fuel use study, many who are entitled to a refund will be unable to successfully receive a refund. Claimants will not have access to the safe-harbor percentages when documenting their exempt use.

### **Revenue Summary**

Alternative 1 – staff recommendation does not have a revenue impact.

Other alternatives considered – Alternative 2 does not have a revenue impact.

### **Preparation**

Mr. Ronil Dwarka, Research and Statistics Section, Legislative and Research Division, prepared this revenue estimate. This estimate has been reviewed by Mr. Mark Durham, Manager, Research and Statistics Section, Legislative and Research Division, and by Ms. Susanne Buehler, Chief, Tax Policy Division, Sales and Use Tax Department. For additional information, please contact Mr. Dwarka at (916) 445-0840.

Current as of August 20, 2015.

**§ 1432. Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle.**

~~(a) Power Take-Off Equipment.~~

~~(1) A person may claim a refund for tax paid on diesel fuel used to operate power take-off equipment. Power take-off equipment is generally defined to be an accessory which is mounted onto a transmission allowing power to be transferred outside the transmission to a shaft or driveline. The accessory is usually either a small gearbox with an external shaft, or a short shaft with a driveline yoke assembly for attaching an external driveline. The vehicle's transmission must be specially designed for a power take o(2) Power take-off equipment may be found, for example, on boom trucks (block boom), bulk feed trucks, car carriers or trucks with hydraulic winches, carpet cleaning vans, cement mixers, distribution trucks (hot asphalt), dump trailers, dump trucks, fire trucks, leaf trucks, lime spreaders, line trucks (digger/derrick), aerial lift trucks, milk tank trucks, mobile cranes, pneumatic tank trucks, refrigeration trucks, salt spreaders (dump with spreader), sanitation trucks, seeder trucks, semi-wreckers, service trucks with jackhammers, pneumatic drills, sewer cleaning trucks (sewer jet, sewer vactor), snow plows, spray trucks, sweeper trucks, tank trucks, tank transports and wreckers.~~

**(a) DIESEL FUEL USED FOR PURPOSES OTHER THAN OPERATING MOTOR VEHICLES UPON THE HIGHWAYS OF THIS STATE.**

(1) A person may claim a refund for tax paid on diesel fuel that is not used to operate a motor vehicle upon a highway in California.

(A) For purposes of this regulation, equipment used to operate a motor vehicle upon a highway in California is defined as and includes equipment used in the propulsion of a motor vehicle and, in addition, any equipment, accessories, or amenities used for the safety, convenience, or comfort of drivers or passengers in conjunction with the operation of a motor vehicle on a highway, such as global positioning systems, heating systems, air-conditioning systems, windshield wipers, power windows and locks, heated seats, radios, Bluetooth equipment, cell phones, media players, and other similar equipment, accessories, or amenities.

Additional examples of equipment, accessories, or amenities that are used to operate a motor vehicle upon a highway in California include, but are not limited to, alternators, generators, air-conditioner compressors, hydraulic pumps for power steering and brakes, fuel-injection pumps, superchargers, power steering, power brakes, automatic transmissions, diesel particulate filter generation systems, and other similar equipment.

(B) Equipment, accessories, or amenities other than equipment used to operate a motor vehicle upon a highway in California, which is operated from the same fuel tank as the motor vehicle, is considered "auxiliary equipment." Equipment powered from a separate fuel source or tank than is used to operate the motor vehicle would not be considered auxiliary equipment.

“Auxiliary equipment” includes, but is not limited to, equipment found on a boom truck (block boom), bulk feed truck, car carrier with a hydraulic winch, carpet cleaning van, cement mixer, cement pumper, distribution truck (hot asphalt), dump trailer, dump truck, fire truck, garbage truck ((automated side loader, manual side loader, single drive front end loader, dual drive front end loader, single drive rear end loader, dual drive rear end loader, roll-off truck, lugger truck, recycling truck (compaction and non-compaction), one-pass truck, and container delivery truck)), leaf truck, lime spreader, line trucks with digger, derrick or aerial lift, log trucks with self loader, mobile crane, pneumatic tank truck, refrigeration truck, salt spreader (dump with spreader), seeder truck, semi-wrecker, service trucks with a jackhammer or pneumatic drill, sewer cleaning truck (sewer jet, sewer vactor), snow plow, spray truck, super suckers (port-o-let trucks), sweeper truck, tank transport, tank truck, truck with a hydraulic winch, transfer trailer, and wrecker.

(2) Safe-Harbor Percentages. For transactions occurring on and after April 1, 2016, the following are presumed amounts of diesel fuel used to operate auxiliary equipment. Safe-harbor percentages must be applied to diesel fuel consumption by auxiliary equipment type. Off-highway use, as defined in subdivision (b), is included in these percentages:

<u>Boom truck/block boom</u>	<u>15%</u>
<u>Bulk feed truck</u>	<u>15%</u>
<u>Car carrier with hydraulic winch</u>	<u>10%</u>
<u>Carpet cleaning van</u>	<u>10%</u>
<u>Cement mixer</u>	<u>25%</u>
<u>Cement pumper</u>	<u>40%</u>
<u>Distribution truck (hot asphalt)</u>	<u>15%</u>
<u>Dump trailer</u>	<u>15%</u>
<u>Dump truck</u>	<u>15%</u>
<u>Fire truck</u>	<u>25%</u>
<u>Garbage truck</u>	<u>35%</u>
<u>Leaf truck</u>	<u>15%</u>
<u>Lime spreader</u>	<u>15%</u>
<u>Line truck with digger, derrick or aerial lift</u>	<u>20%</u>

<u>Log truck with self loader</u>	<u>20%</u>
<u>Mobile crane</u>	<u>25%</u>
<u>Pneumatic tank truck</u>	<u>15%</u>
<u>Refrigeration truck</u>	<u>20%</u>
<u>Salt spreader (dump with spreader)</u>	<u>15%</u>
<u>Seeder truck</u>	<u>15%</u>
<u>Semi-wrecker</u>	<u>15%</u>
<u>Service truck with jack hammer/drill</u>	<u>15%</u>
<u>Sewer cleaning truck/jet/vactor</u>	<u>25%</u>
<u>Snow plow</u>	<u>15%</u>
<u>Spray truck</u>	<u>15%</u>
<u>Super sucker (port-o-let trucks)</u>	<u>25%</u>
<u>Sweeper truck</u>	<u>20%</u>
<u>Tank transport</u>	<u>15%</u>
<u>Tank truck</u>	<u>15%</u>
<u>Truck with hydraulic winch</u>	<u>15%</u>
<u>Transfer trailer</u>	<u>20%</u>
<u>Wrecker</u>	<u>15%</u>
<u>Other Auxiliary Equipment</u>	<u>10%</u>

(3) For transactions occurring on and after April 1, 2016, prior to submitting a claim for refund for exempt diesel fuel consumption greater than the percentages provided in subdivision (a)(2), a person must submit a specific study conducted by them and approved by the Board. Approved studies shall be valid for 5 years after the date of approval and must be updated upon expiration. A person may claim exempt diesel fuel consumption in the percentages indicated above without conducting a study. In order to claim an exemption for diesel fuel used in auxiliary equipment

not listed in subdivision (a)(2), the "other" category may be utilized or, if the percentage of use claimed will be greater, a specific study must be conducted in accordance with this subdivision.

**(b) OFF-HIGHWAY USE.**

(1) A person may claim a refund for tax paid on diesel fuel used off the highway. "Off the highway" includes private property, a way or place permanently or temporarily closed to public use for the purpose of vehicular travel, or any way or place used for vehicular travel which is not a highway as defined in Regulation 1411. If the safe-harbor percentages in subdivision (a)(2) are used to calculate the amount of refund, no additional refund will be allowed for diesel fuel used to operate auxiliary equipment while off the highway or while idling as described in subdivision (d).

(2) If the diesel fuel is used in the operation of construction equipment which is exempt from registration under the Vehicle Code, the user must establish to the satisfaction of the Board that the diesel fuel is used in the operation of the construction equipment while operated within the confines or limits of a construction project and only incidentally operated on the highway within such confines or limits.

(3) As used in subdivision (2), "incidentally operated" does not include the use of special construction equipment for the transportation of persons or property upon the highways in an operation which requires registration of the motor vehicle under the Vehicle Code.

**(c) REFUNDS.**

Persons who acquire diesel fuel tax paid and subsequently use the diesel fuel to operate auxiliary equipment or ~~the diesel fuel in power take-off equipment~~ to operate a motor vehicle off the highway are entitled to a refund of the diesel fuel tax paid for that fuel. Persons claiming a refund for nontaxable use of diesel fuel in auxiliary equipment may use ~~any method to calculate the amount of refund, including computing a percentage of the fuel used for nontaxable purposes~~ the percentages listed in subdivision (a)(2), or prior to submission of the claim, submit a specific study conducted by them following Board-approved test methods, demonstrating the amount of diesel fuel used in a nontaxable manner in excess of the safe-harbor percentages. Approved studies shall be valid for 5 years after the date of approval and must be updated upon expiration. It is the responsibility of the person claiming the refund to document and support the amount claimed. The safe-harbor percentages cannot be claimed for periods prior to April 1, 2016.

**(d) IDLE TIME.**

Diesel fuel consumed in motor vehicles on the highway is subject to the diesel fuel tax whether the motor vehicle is moving or idling, and no refunds will be allowed for the diesel fuel tax paid on diesel fuel ~~which is~~ used ~~to~~ while idling a motor vehicle on the highway. If the motor vehicle is idling on the highway while auxiliary equipment is in use, a refund will be allowed for the diesel fuel tax paid on that portion of the diesel fuel which is used to operate the ~~power take-off~~ auxiliary equipment; however, no refund will be allowed for the diesel fuel tax paid on that portion of the diesel fuel which is used for idling. If the safe-harbor percentages in subdivision (a)(2) are used to calculate the amount of refund, no additional refund will be allowed for diesel fuel used to operate auxiliary equipment while idling.



**WASTE MANAGEMENT**

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July 1, 2015

ATTN: Susanne Buehler  
Chief - Tax Policy Division  
Sales and Use Tax Department  
State Board of Equalization  
450 N Street  
Sacramento, California 94279-0080

**Re: Comments to the Board's Second Discussion Paper on Regulation 1432, *Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle***

Dear Ms. Buehler:

On behalf of Antelope Valley Recycling and Disposal Facility, Inc., Azusa Land Reclamation, Inc., Cal Sierra Disposal, Coast Waste Management, Inc., Feather River Disposal, Inc., G.I. Industries, Modesto Garbage Co., Inc., USA Waste of California, Inc., Valley Garbage and Rubbish Company, Inc., Waste Management Collection and Recycling, Inc., Waste Management of Alameda County, Inc., Waste Management of California, Inc., Waste Management Recycling and Disposal Services of California, Inc., Guadalupe Rubbish Disposal Co., Inc., Looney Bins, Inc., and WM Recycle America, L.L.C. (collectively "Waste Management"), Waste Management, Inc. respectfully submits comments to the State Board of Equalization's ("Board") Second Discussion Paper on Regulation 1432, *Other Nontaxable Uses of Diesel Fuel in a Motor Vehicle* ("Regulation 1432").

Waste Management is a holding company with subsidiaries that conduct its business operations in the United States and Canada. These operations include waste collection, transfer, recycling, and disposal services, as well as the recovery of waste resources for use in renewable energy. Some vehicles in Waste Management's fleet are equipped with solid waste compactors and other units that consume diesel fuel and compressed natural gas to operate auxiliary equipment.

Waste Management appreciates the Board's consideration and adoption of certain suggestions, comments, and proposed modifications included in Waste Management's response to the Board's Initial Discussion Paper on Regulation 1432 dated May 7, 2015 ("First Response").

*From everyday collection to environmental protection, Think Green® Think Waste Management.*

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The purpose of this response is to obtain clarification to suggestions and proposed modifications to Regulation 1432 mentioned in the First Response that were not addressed in the Second Discussion Paper dated June 5, 2015 ("Revised Regulation 1432") and to further clarify and suggest revisions to certain provisions to the amended changes in Regulation 1432 as provided in the Second Discussion Paper.

#### **"GARBAGE TRUCK" SAFE HARBOR PERCENTAGE**

In its First Response, Waste Management proposed that the Board increase the proposed 30% safe harbor percentage in subdivision (a)(2) to 38% for the "garbage truck" category. Further, Waste Management respectfully requested that the Board clarify whether the safe harbor percentages incorporate the use of fuel in any "off the highway use" activity – that is, any fuel used in a vehicle when the vehicle is not propelled on the "highway."

Subdivision (a)(2) of the Board's Revised Regulation 1432 provides that "off-highway use, as defined in subdivision (b) is included in these [safe harbor] percentages..." Subdivision (b)(1) in turn, provides that-

A person may claim a refund for tax paid on diesel fuel used off the highway. "Off the highway" includes private property, a way or place permanently or temporarily closed to public use for the purpose of vehicular travel, or any way or place used for vehicular travel which is not a highway as defined in Regulation 1411.

Waste Management's business operations encompass loading refuse at customer's sites that are typically "off the highway" and delivering the refuse to an "off the highway" location. A significant volume of fuel is used while "garbage trucks" operate "off the highway."

The following are examples of customer's sites that could potentially be considered "off the highway":

- Gated communities: Neighborhoods where the homeowners' association maintains the streets and curbs through association dues.
- Private parking lots: Shopping malls, strip malls, office complexes, industrial parks, and airport facilities wherein taxpayer monies are not used to build or maintain the roads or ways driven.
- Homeowners' property: Driveways of private residences (single or multi-family dwelling) wherein taxpayer monies are not used to build or maintain the roads or ways driven.
- Industrial parks: Private roads or ways within and/or around industrial parks.

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The following are examples of destination sites that could potentially be considered “off the highway”:

- Landfill property: An area where Waste Management’s vehicles deliver refuse, which is then buried underground.<sup>1</sup> If the landfill is not owned by a municipality it is likely a private road.
- Transfer station: Facilities where the trucks’ contents are combined for transport to a landfill.

As previously mentioned in the First Response, industry and taxing authority studies provide that the exemption percentage for fuel used in auxiliary equipment affixed to sanitation vehicles (excluding fuel that is used “off the highway”) to be approximately 30%.<sup>2</sup>

The fuel used to power the auxiliary equipment that comprises the 30% exemption percentage include, but are not limited to the following activities in the corresponding types of vehicles used in Waste Management’s business operations-

- Front-End Loaders: Operating the forks on the front of the trucks that are designed to lift a refuse dumpster/receptacle and the top door assembly for which the refuse from the dumpster/receptacle is dispensed.<sup>3</sup>
- Rear-End Loaders: Operating the “totter tipper” used to lift a refuse receptacle into the truck, to operate the compactor that compacts the refuse, and to operate the ejector cylinder that pushes the packing blade in reverse to unload the refuse from the vehicle at the landfill.<sup>4</sup>
- Container Delivery Trucks: Operating the two forks on the rear of road tractor that loads and unloads receptacles on and off a truck.
- Roll-Off Trucks: Operating the large steel roller located in the middle of the flatbed to hoist a refuse container into the truck and to lift the flatbed part of the truck to empty the refuse at the landfill.<sup>5</sup>

<sup>1</sup> "Landfill." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 30 June 2015. <<http://www.merriam-webster.com/dictionary/landfill>>.

<sup>2</sup> *Safe, Accountable, Flexible, Efficient Transp. Equity Act: A Legacy for Users (SAFETEA-LU) – Section 11144 – PTO Report*, SB/SE Research – Phila. (July 2007) (The congressionally mandated SAFETEA-LU PTO Report is still widely used by both industry and taxing authorities as a basis for fuel tax refunds. The SAFETEA-LU PTO Report obtained data for 96,043 “trash, garbage, or recycling” trucks. The data showed that 29.9% of the total fuel consumption for all 96,043 “trash, garbage, or recycling trucks” was used to power the trucks’ auxiliary equipment).

<sup>3</sup> *Rumpke Waste Inc. v. Wilkins*, Ohio Board of Tax Appeals, No. 2004-K-477 (March 30, 2007). Also note that “front end-loaders” and “rear-end loaders” (see *supra*, footnote 4) are generally classified into “fully automatic loaders” and “semi-automatic loaders.” Another “compactor” classification includes side-end loaders, for which more information can be provided if needed.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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Since the safe harbor percentages explicitly incorporate all fuel used while a vehicle with affixed auxiliary equipment operates “off the highway” (including fuel used to power the auxiliary equipment and to power the propulsion engine), the Board should increase the safe harbor percentage for the “garbage truck” category from 30% to 38%. This change would more accurately reflect the total “off the highway” usage as a combination of both fuel used in auxiliary equipment affixed to “garbage trucks” and fuel used while “garbage trucks” operate off the highway.

In addition, increasing the safe harbor percentage for “garbage trucks” to reflect all “off the highway” activities would embody longstanding California public policy that the purpose of the state fuel tax is to “aid [in] the construction, maintenance and repair of [state] highways,” and as such, fuel used while the vehicle does not operate on a state highway is not subject to the state fuel tax.<sup>6</sup>

In the alternative, Waste Management respectfully requests the Board provide a detailed explanation of the sources and bases used to promulgate the 30% “garbage truck” safe harbor rate.

#### **GUIDELINES FOR CONDUCTING A STUDY**

Waste Management respectfully requests that the Board supplement Revised Regulation 1432 to include additional guidance on the study. Two provisions in Revised Regulation 1432 reference a study.

Subdivision (a)(3) provides that for a claimant to submit an exemption percentage in excess of the safe harbor percentages, the claimant must first “submit a specific study conducted by them and approved by the Board. Approved studies shall be valid for 5 years after the date of approval and must be updated upon expiration. A person may claim exempt diesel fuel consumption in the percentages indicated above without conducting a study.”

Similarly, subdivision (c) provides for a claimant who does not use the safe harbor percentages must “submit a specific study conducted by them following Board-approved test methods, demonstrating the amount of diesel fuel used in a nontaxable manner in excess of the safe harbor percentages. Approved studies shall be valid for 5 years after the date of approval and must be updated upon expiration. It is the responsibility of the person claiming the refund to document and support the amount claimed.”

The two abovementioned provisions do not provide sufficient guidance or certainty that Waste Management needs in order for it to determine whether it is a cost-effective business decision to conduct a study. Therefore, Waste Management respectfully requests that the Board provide additional guidance as to the study’s procedure, sampling methodology, and requisite evidentiary support. For instance, will the Board permit a study that is based primarily on technology and

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<sup>6</sup> *Oswald v. Johnson*, 210 Cal. 321, 322 (Cal. 1930); *See also, De Forest v. Flournoy*, 272 Cal. App. 2d 258, 260 (Cal. App. 3d Dist. 1969).

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data analysis and/or will the Board permit a study that is based on more traditional methodologies (e.g., shadow testing)?<sup>7</sup>

#### **RETROACTIVITY OF 5 YEAR STUDY PERIOD**

It is ambiguous as to whether the five (5) year study validity period provided is on a retroactive or only on a prospective basis.

Subdivision (a)(3) provides-

For transactions occurring on and after April 1, 2016, *prior to submitting a claim* for refund for exempt diesel fuel consumption greater than the percentages provided in subdivision (a)(2), a person must submit a specific study conducted by them and approved by the Board. *Approved studies shall be valid for 5 years after the date of approval* and must be updated upon expiration (emphasis added).

Subdivision (c) provides

Persons claiming a refund for nontaxable use of diesel fuel in auxiliary equipment may use the percentages listed in subdivision (a)(2), or prior to submission of the claim, submit a specific study conducted by them following Board-approved test methods, demonstrating the amount of diesel fuel used in a nontaxable manner in excess of the safe harbor percentages. *Approved studies shall be valid for 5 years after the date of approval* and must be updated upon expiration (emphasis added).

More specifically, Waste Management respectfully requests that the Board clarify whether the language "approved studies shall be valid for 5 years after the date of approval" would permit a study to be used for claims filed after the April 1, 2016 proposed regulation effective date but prior to the study being completed. For example, if Waste Management and the Board approved a study on April 1, 2018, could that study be used for refund claims encompassing the refund period of April 2, 2016 to May 30, 2018 (assuming that the refund period is still within the applicable statute of limitations)?

#### **SAFE HARBOR PERCENTAGES + REFUND STUDY**

Finally, Waste Management respectfully requests the Board to provide clarification as to whether a taxpayer may claim the safe harbor percentages listed in subdivision (a)(2) and subsequently conduct a study and amend their refund claims to claim a higher exemption rate (again assuming that the refund period is still within the applicable statute of limitations)?

For example, consider the following hypothetical:

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<sup>7</sup>The general concept of "shadow testing" is to have two nearly identical vehicles (year, make, model and vehicle type) run identical routes at the same time. The "lead" vehicle will perform all functions (e.g., loading, compacting, sweeping, unloading). The trailing or "shadowing" vehicle will only run the route.

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Waste Management files refund claims for the refund period of January 1, 2017-December 31, 2017 at the safe harbor percentage of 30%. On January 1, 2018, the Board approves a study indicating a 45% exemption percentage. Could Waste Management amend its refund claims to claim the excess difference due to the increased exemption percentage?

Again, Waste Management appreciates the opportunity to submit its comments, the continued outreach that the Board has demonstrated through the Regulation drafting process, and the continued consideration that the Board will give to our comments. Waste Management would be readily willing to have further discussions to clarify these comments or to provide additional information that could be of assistance the Board through this process.

Sincerely,



Leonard Finegold  
Senior Director  
State Transaction Tax  
Waste Management, Inc.

cc: Debbie Kalfsbeek, Chief, California Board of Equalization – Special Taxes Audit and Carrier Division

cc: Russell Lowery, Chief Deputy, Office of Member Diane L. Harkey – Board of Equalization, 4th District

cc: Clifford Oakes, Senior Advisor – Policy, Office of Member Diane L. Harkey – Board of Equalization, 4th District

cc: Ted Matthies, Professional Advisor, Office of Member Diane L. Harkey – Board of Equalization, 4th District