

Memorandum

To : Mr. Ramon J. Hirsig
Executive Director, MIC:73

Date: January 3, 2006

From : Kristine Cazadd, Chief Counsel
Legal Department, MIC:83

Subject : Regulation 1707, *Electronic Funds Transfer*
Chief Counsel's Rulemaking Calendar
Board Meeting—January 31, 2006

Prior to recent legislative changes, Revenue and Taxation Code (RTC) section 6479.3 provided that persons with an estimated sales and use tax liability of twenty thousand dollars (\$20,000) or more per month are required to remit amounts due by electronic funds transfer. Effective June 26, 2003, the Board promulgated Regulation 1707, *Electronic Funds Transfer*, in part to implement and interpret RTC section 6479.3. Last July, the budget trailer bill, Assembly Bill 139 (Ch. 74, Statutes of 2005) amended RTC section 6479.3 to reduce the threshold for mandatory participation in the electronic funds transfer (EFT) program from an estimated monthly tax liability of \$20,000 or more to \$10,000 or more, operative July 19, 2005. Subsequently, Assembly Bill 1765 (Ch. 519, Statutes of 2005) changed the operative date for the reduction in the threshold for mandatory participation in the EFT program from July 19, 2005 to January 1, 2006. Assembly Bill 1765 also deleted a provision in RTC section 6479.3 that states a person whose monthly tax liability does not meet or exceed the threshold for mandatory participation in the EFT program, but who voluntarily participates in the EFT program, must do so for a minimum of one year. Accordingly, revisions to the regulation are necessary to specify the reduction in the threshold for mandatory participation in the EFT program, and to delete the language that explained that a person who voluntarily participates in the EFT program must remain in the program for a minimum of one year.

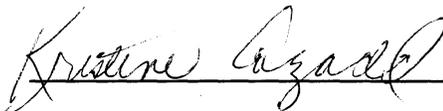
One additional revision to the regulation is proposed for clarification only. In subdivision (b)(2), Regulation 1707 explains that to participate in the EFT program on a voluntary basis, a person must first "register" with the Board. The word "register" could lead to confusion, since "register" often is used to mean "obtain a seller's permit." As explained in Operations Memo 1024, a person must file an "authorization agreement" with the Board prior to voluntary participation in the EFT program. For clarification, replacing the word "register" with the phrase "file an authorization agreement" is proposed.

We request your approval to place the matter on the Chief Counsel's Rulemaking Calendar on January 31, 2006 for Board authorization to amend the regulation as Rule 100 changes, without the normal notice and hearing process. These changes are appropriate for processing under Rule 100 because they implement new legislation and clarify an existing requirement of the EFT program without altering taxpayers' responsibilities under that program.

Attached is the strikeout and underlined version of the regulation.

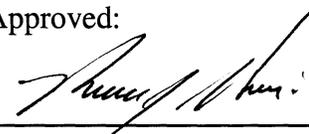
If you have any questions regarding this request, please let me know or contact Ms. Lisa Andrews at 322-5989.

Recommendation by:



Kristine Cazadd, Chief Counsel

Approved:



Ramon J. Hirsig, Executive Director

Approved:



Randie L. Henry, Deputy Director
Sales and Use Tax Department

BOARD APPROVED

At the _____ Board Meeting

Deborah Pellegrini, Chief
Board Proceedings Division

Attachment

cc (all with attachment):
Ms. Randie L. Henry (MIC 43)
Ms. Deborah Pellegrini (MIC 81)
Ms. Selvi Stanislaus (MIC 82)
Mr. Randy Ferris (MIC 82)
Mr. John Waid (MIC 82)
Mr. Jeffrey L. McGuire (MIC 92)
Mr. Geoffrey E. Lyle (MIC 50)
Ms. Leila Khabbaz (MIC 50)
Ms. Lisa Andrews (MIC 50)

Section 100. Publication of “Changes Without Regulatory Effect.”

(a) Subject to the approval of OAL as provided in subsections (c) and (d), an agency may add to, revise or delete text published in the California Code of Regulations without complying with the rulemaking procedure specified in Article 5 of the APA only if the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision. The addition, revision or deletion is a “change without regulatory effect.” Changes without regulatory effect include, but are not limited to:”

- (1) renumbering, reordering, or relocating a regulatory provision;
- (2) deleting a regulatory provision for which all statutory or constitutional authority has been repealed;
- (3) deleting a regulatory provision held invalid in a judgment that has become final, entered by a California court of competent jurisdiction, a United States District Court located in the State of California, the United States Court of Appeals for the Ninth Circuit, or the United States Supreme Court; however, OAL shall not approve any proposed change without regulatory effect if the change is based on a superior court decision which invalidated the regulatory provision solely on the grounds that the underlying statute was unconstitutional;
- (4) revising structure, syntax, cross-reference, grammar, or punctuation;
- (5) changing an “authority” or “reference” citation for a regulation; and,
- (6) making a regulatory provision consistent with a changed California statute if both the following conditions are met:
 - (A) the regulatory provision is inconsistent with an superseded by the changed statute, and
 - (B) the adopting agency has no discretion to adopt a change which differs in substance from the one chosen.

(b) In submitting a change without regulatory effect to OAL for review the agency shall:

- (1) submit seven copies of the regulation with an addition shown in underline or italics and a deletion shown in strike-out; and
- (2) attach to each copy a completed Form 400, with at least one Form 400 bearing an original signature; and
- (3) submit a written statement explaining why the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.

(c) OAL shall determine whether a change submitted is a change without regulatory effect within 30 working days of its receipt. OAL shall send written notification of the determination to the agency which submitted the changes.

(d) If OAL determines that the submitted change is a change without regulatory effect, OAL shall file it with the Secretary of State and have it published in the California Code of Regulations.

BOARD OF EQUALIZATION
REGULATORY ACTION IN ACCORDANCE
WITH OAL SECTION 100 (CHANGE WITHOUT REGULATORY EFFECT)

RULE/REG 1707

REASON FOR CHANGE (check those applicable)

renumbering, reordering, or relocating regulatory provision

deleting regulatory provision for which all statutory or constitutional authority has been repealed

deleting regulatory provision held invalid in a judgment that has become final, entered by a California court of competent jurisdiction, a US District Court located in the State of California, the US Court of Appeals for the Ninth Circuit, or the US Supreme Court

revising structure, syntax, cross-reference, grammar, or punctuation

changing an "authority" or "reference" citation

making consistent with changed California statute if (A) provision is inconsistent with and superseded by changed statute; and (B) Board has no discretion to adopt a change which differs in substance from this proposal

Therefore, I recommend that these amendments be submitted to OAL as a change without regulatory effect and without public hearing.

Prepared by Lisa Andrews Date 12/9/05

Approvals
Division Chief [Signature] Date 12/15/05

Deputy Director [Signature] Date 12-29-05

Assistant Chief Counsel [Signature] Date 12-29-05

Chief Counsel [Signature] Date 1/5/06

Chief, Board Proceedings [Signature] Date 1/10/06

INSTRUCTIONS:
After approval, forward to next on list. In the event of disapproval, return to preparer.

Regulation 1707. ELECTRONIC FUNDS TRANSFER

Reference: Sections 6479.3 and 6479.5, Revenue and Taxation Code.

(a) DEFINITIONS.

(1) "Electronic funds transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, that is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape, so as to order, instruct, or authorize a financial institution to debit or credit an account. Electronic funds transfers shall be accomplished by an automated clearinghouse debit, an automated clearinghouse credit, or by Federal Reserve Wire Transfer.

(2) "Automated clearinghouse" means any federal reserve bank, or an organization established in agreement with the National Automated Clearing House Association, that operates as a clearinghouse for transmitting or receiving entries between banks or bank accounts and which authorizes an electronic transfer of funds between these banks or bank accounts.

(3) "Automated clearinghouse debit" means a transaction in which the state, through its designated depository bank, originates an automated clearinghouse transaction debiting the person's bank account and crediting the state's bank account for the amount due. Banking costs incurred for the automated clearinghouse debit transaction shall be paid by the state.

(4) "Automated clearinghouse credit" means an automated clearinghouse transaction in which the person through his or her own bank, originates an entry crediting the state's bank account and debiting his or her own bank account. Banking costs incurred for the automated clearinghouse credit transaction charged to the state shall be paid by the person originating the credit.

(5) "Federal Reserve Wire Transfer" means any transaction originated by a person and utilizing the national electronic payment system to transfer funds through the federal reserve banks, when that person debits his or her own bank account and credits the state's bank account. Electronic funds transfers pursuant to Revenue and Taxation Code section 6479.3 may be made by Federal Reserve Wire Transfer only if payment cannot, for good cause, be made according to subdivision (a)(1) of this regulation, and the use of Federal Reserve Wire Transfer is preapproved pursuant to subdivision (h) of this regulation. Banking costs incurred for the Federal Reserve Wire Transfer transaction charged to the person and to the state shall be paid by the person originating the transaction.

(b) PARTICIPATION.

(1) MANDATORY PARTICIPATION. ~~Prior to January 1, 2006, persons with an estimated monthly tax liability of twenty thousand dollars (\$20,000) or more are required to remit amounts due by electronic funds transfer under procedures set forth in this regulation. Operative January 1, 2006, persons with an estimated monthly tax liability of ten thousand dollars (\$10,000) or more are required to remit amounts due by electronic funds transfer under procedures set forth in this regulation.~~ To identify mandatory participants, the Board shall conduct an annual review of all persons with sales and use tax permits. The review is performed by calculating an average monthly tax liability for a twelve-month period. Persons whose average monthly tax liability equals or exceeds ~~twenty thousand dollars~~ the threshold for mandatory participation will be required to remit payments by electronic funds transfer. If a person did not begin making sales until after the beginning of the designated twelve-month review period, then the monthly tax liability will be calculated based upon the number of months in which sales were made (for example, in a calendar year review period, if the person obtains a seller's permit and begins making sales in May, the total tax liability would be divided by eight to determine the average monthly tax liability since there are eight months remaining in the evaluation period). Persons registering to report and pay sales or use tax for the first time, except certain successors, will not be required to participate in the electronic funds transfer program until an annual review is conducted.

A successor will be regarded as having an estimated tax liability of ~~twenty thousand dollars (\$20,000) or more per month that equals or exceeds the threshold for mandatory participation in the electronic funds transfer program~~ when the monthly tax liability of the predecessor equalled or exceeded ~~twenty thousand dollars per month~~ the threshold for mandatory participation or the predecessor was a mandatory participant in the electronic funds transfer program. If the successor purchases a portion of a business that is required to participate in the mandatory electronic funds

transfer program (e.g. a multiple outlet business that only sells some, but not all, of its locations), the average monthly tax liability of the purchased locations will be computed to determine if the successor meets the threshold to be identified as a mandatory participant in the electronic funds transfer program.

After an annual review, if a person drops below the threshold for mandatory participation, the Board shall provide notification, in writing, that the status has been changed from mandatory participation to voluntary participation in the electronic funds transfer program. If, at that time, a person wishes to discontinue making electronic funds transfer payments, a written request must be made to the Board. Payments must continue to be remitted by electronic funds transfer until the taxpayer is notified by the Board, in writing, of an effective date of withdrawal from the program. Any person who fails to comply with the mandatory participation requirements under this subdivision shall be liable for penalty as provided under Revenue and Taxation Code section 6479.3.

(2) **VOLUNTARY PARTICIPATION.** Any person not meeting the criteria for mandatory participation set forth in subdivision (b)(1) may participate in the program on a voluntary basis. A person must ~~register~~ file an authorization agreement with the Board prior to participation, ~~and must remain in the program for a minimum of one year. After that time,~~ if a person wishes to discontinue making electronic funds transfer payments, a written request must be made to the Board. Payments must continue to be remitted by electronic funds transfer until notified by the Board, in writing, of an effective date of withdrawal from the program.

(c) **DATE OF PAYMENT.** Payment is deemed complete on the date the electronic funds transfer is initiated, if the settlement to the state's demand account occurs on or before the banking day following the date the transfer is initiated. If the settlement to the state's demand account does not occur on or before the banking day following the date the transfer is initiated, payment is deemed to occur on the date settlement occurs.

(d) **FILING OF RETURNS.** In addition to a tax payment made by electronic funds transfer, a return must be filed on or before the due date. Any person who fails to comply with this provision shall be subject to penalty charges as provided under Revenue and Taxation Code section 6479.3.

(e) **FAILURE TO PAY BY ELECTRONIC FUNDS TRANSFER.** Any person required to pay taxes by electronic funds transfer must continue to do so until the Board advises that person otherwise in writing. Any person required to pay taxes by electronic funds transfer, as set forth in subdivision (b)(1), who does not pay through electronic funds transfer but uses another means (e.g. pay by check), will be assessed a penalty as provided by Revenue and Taxation Code section 6479.3.

(f) **REPORTING PREPAYMENTS.** Any person required to make prepayments will not receive and is not required to file prepayment forms; however, a payment must still be made by electronic funds transfer.

(g) **ZERO AMOUNT DUE.** When no tax is due for a given period, a zero dollar transaction must be made by electronic funds transfer or the Board must receive written notification stating that no tax is due for that period.

(h) **EMERGENCIES.** In emergency situations, a Federal Reserve Wire Transfer transaction may be used to transmit a payment. A Federal Reserve Wire Transfer is an electronic payment system used by federal reserve banks to transfer funds instantaneously. Generally, this method of payment is not approved for recurring transactions. Authorization must be received from the Board prior to making a payment by Federal Reserve Wire Transfer. The person who originates the transfer shall be responsible for any fees incurred by the Federal Reserve Wire Transfer transaction.