

Rulemaking File
Table of Contents
Title18. Public Revenue
Sales and Use Tax
Regulation 1533.2
Diesel Fuel Used in Farming Activities or Food Processing

OAL Approval

Index

1. Final Statement of Reasons
2. Updated informative digest
3. Business Tax Committee Minutes, November 19, 2014
4. Reporter's Transcript Business Taxes Committee, November 19, 2013
5. Estimate of Cost or Savings, January 20, 2015
6. Economic and Fiscal Impact Statements, December 24, 2014
7. Notice of Publications
8. Notice to Interested Parties, January 9, 2015
9. Statement of Compliance
10. Reporter's Transcript, Item F1, February 24, 2015
11. Draft Minutes, December F1, February 24, 2015, and Exhibits

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
Sacramento, CA 95814
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DEBRA M. CORNEZ
Director

MEMORANDUM

TO: Richard Bennion
FROM: OAL Front Desk *jo*
DATE: 5/7/2015
RE: Return of Approved Rulemaking Materials
OAL File No. 2015-0324-05S

OAL hereby returns this file your agency submitted for our review (OAL File No. 2015-0324-05S regarding Diesel Fuel Used in Farming Activities or Food Processing).

If this is an approved file, it contains a copy of the regulation(s) stamped “ENDORSED APPROVED” by the Office of Administrative Law and “ENDORSED FILED” by the Secretary of State. The effective date of an approved regulation is specified on the Form 400 (see item B.5). **Beginning January 1, 2013**, unless an exemption applies, Government Code section 11343.4 states the effective date of an approved regulation is determined by the date the regulation is filed with the Secretary of State (see the date the Form 400 was stamped “ENDORSED FILED” by the Secretary of State) as follows:

- (1) **January 1** if the regulation or order of repeal is filed on September 1 to November 30, inclusive.
- (2) **April 1** if the regulation or order of repeal is filed on December 1 to February 29, inclusive.
- (3) **July 1** if the regulation or order of repeal is filed on March 1 to May 31, inclusive.
- (4) **October 1** if the regulation or order of repeal is filed on June 1 to August 31, inclusive.

If an exemption applies concerning the effective date of the regulation approved in this file, then it will be specified on the Form 400. The Notice of Approval that OAL sends to the state agency will contain the effective date of the regulation. The history note that will appear at the end of the regulation section in the California Code of Regulations will also include the regulation’s effective date. Additionally, the effective date of the regulation will be noted on OAL’s Web site once OAL posts the Internet Web site link to the full text of the regulation that is received from the state agency. (Gov. Code, secs. 11343 and 11344.)

Please note this new requirement: Unless an exemption applies, Government Code section 11343 now requires:

1. **Section 11343(c)(1):** Within 15 days of OAL filing a state agency’s regulation with the Secretary of State, the state agency is required to post the regulation on its Internet Web site in an easily marked and identifiable location. The state agency shall keep the regulation posted on its Internet Web site for at least six months from the date the regulation is filed with the Secretary of State.
2. **Section 11343(c)(2):** Within five (5) days of posting its regulation on its Internet Web site, the state agency shall send to OAL the Internet Web site link of each regulation that the agency posts on its Internet Web site pursuant to section 11343(c)(1).

OAL has established an email address for state agencies to send the Internet Web site link to for each regulation the agency posts. Please send the Internet Web site link for each regulation posted to OAL at postedregslink@oal.ca.gov.

NOTE ABOUT EXEMPTIONS. Posting and linking requirements do not apply to emergency regulations; regulations adopted by FPPC or Conflict of Interest regulations approved by FPPC; and regulations not subject to OAL/APA review. However, an exempt agency may choose to comply with these requirements, and OAL will post the information accordingly.

DO NOT DISCARD OR DESTROY THIS FILE

Due to its legal significance, you are required by law to preserve this rulemaking record. Government Code section 11347.3(d) requires that this record be available to the public and to the courts for possible later review. Government Code section 11347.3(e) further provides that "...no item contained in the file shall be removed, altered, or destroyed or otherwise disposed of." See also the State Records Management Act (Government Code section 14740 et seq.) and the State Administrative Manual (SAM) section 1600 et seq.) regarding retention of your records.

If you decide not to keep the rulemaking records at your agency/office or at the State Records Center, you may transmit it to the State Archives with instructions that the Secretary of State shall not remove, alter, or destroy or otherwise dispose of any item contained in the file. See Government Code section 11347.3(f).

Enclosures

**State of California
Office of Administrative Law**

In re:
Board of Equalization

**NOTICE OF APPROVAL OF REGULATORY
ACTION**

Regulatory Action:

Government Code Section 11349.3

Title 18, California Code of Regulations

OAL File No. 2015-0324-05 S

Adopt sections:

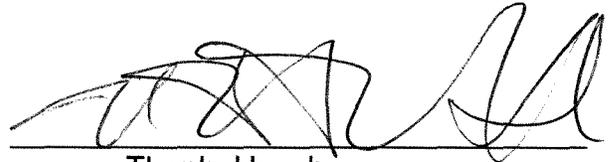
Amend sections: 1533.2

Repeal sections:

In this regulatory action, the Board is amending section 1533.2 of title 18 of the California Code of Regulations to update the definition of diesel fuel.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 7/1/2015.

Date: 5/6/2015



**Thanh Huynh
Senior Attorney**

**For: DEBRA M. CORNEZ
Director**

**Original: Cynthia Bridges
Copy: Richard Bennion**

RECEIVED
MAY 7 - 2015
Board Proceedings

NOTICE PUBLICATION/REGULATIONS SUBMISSION

REGULAR

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2014-1224-02	REGULATORY ACTION NUMBER 2015-0324-055	EMERGENCY NUMBER
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For use by Office of Administrative Law (OAL) only

2015 MAR 24 PM 3:32
OFFICE OF
ADMINISTRATIVE LAW

ENDORSED - FILED
In the office of the Secretary of State
of the State of California

MAY 06 2015

1:55 PM

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
State Board of Equalization

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER 2015, 22	PUBLICATION DATE 11/9/2015

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Diesel Fuel Used in Farming Activities or Food Processing	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) 2014-1224-02 per agency request 5/6/15 (TR)
2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT
	AMEND 1533.2
TITLE(S) 18	REPEAL
3. TYPE OF FILING	
<input checked="" type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))	<input type="checkbox"/> File & Print
<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> Other (Specify) _____
<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)	<input type="checkbox"/> Print Only
4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)	
5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)	
<input checked="" type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input type="checkbox"/> Effective on filing with Secretary of State
<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____
6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY	
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission
<input type="checkbox"/> Other (Specify) _____	<input type="checkbox"/> State Fire Marshal
7. CONTACT PERSON Richard E. Bennion	TELEPHONE NUMBER (916) 445-2130
FAX NUMBER (Optional) (916) 324-3984	E-MAIL ADDRESS (Optional) rbennion@boe.ca.gov

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE <i>Joann Richmond</i>	DATE March 23, 2015
TYPED NAME AND TITLE OF SIGNATORY Joann Richmond, Chief, Board Proceedings Division	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

MAY 06 2015

Office of Administrative Law

**Final Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1533.2**

1533.2. Diesel Fuel Used in Farming Activities or Food Processing.

(a) General. Commencing on and after September 1, 2001, section 6357.1 of the Revenue and Taxation Code partially exempts from sales and use tax the sale of, and the storage, use, or other consumption in this state, of diesel fuel used in farming activities or food processing. The terms “farming activities” and “food processing” are defined below.

For the period commencing on September 1, 2001, and ending on December 31, 2001, the partial exemption applies to the taxes imposed by sections 6051 and 6201 of the Revenue and Taxation Code (4.75%), but does not apply to the taxes imposed pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on January 1, 2002, and ending on June 30, 2004, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6201, and 6201.3 of the Revenue and Taxation Code (5%), but does not apply to the taxes imposed pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on July 1, 2004, and ending on March 31, 2009, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6201, 6201.3, and 6201.5 of the Revenue and Taxation Code (5.25%), but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on April 1, 2009, and ending on June 30, 2011, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6051.7, 6201, 6201.3, 6201.5, and 6201.7 of the Revenue and Taxation Code (6.25%), but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on July 1, 2011, and ending on December 31, 2012, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6051.8, 6201, 6201.3, 6201.5, and 6201.8 of the Revenue and Taxation Code, but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on January 1, 2013, the partial exemption applies to the taxes imposed by section 36 of article XIII of the California Constitution and sections 6051, 6051.3, 6051.5, 6051.8, 6201, 6201.3, 6201.5, and 6201.8 of the Revenue and Taxation Code, but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the

Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution. Given the varying rates of the taxes imposed by sections 6051.8 and 6201.8, the partial exemption applies to the following cumulative sales and use tax rates:

- (1) 7.12 percent for the period July 1, 2011, through June 30, 2012;
- (2) 7.42 percent for the period July 1, 2012, through December 31, 2012;
- (3) 7.67 percent for the period January 1, 2013, through June 30, 2013;
- (4) 7.44 percent for the period July 1, 2013, through June 30, 2014; and
- (5) 7.25 percent on or after July 1, 2014.

(b) Definitions. For purposes of this regulation:

(1) "Farming activities" mean a trade or business involving the cultivation of land or the raising or harvesting of any agricultural or horticultural commodity that may be legally sold to or offered for sale to others. These include the trade or business of operating a nursery or sod farm; the raising or harvesting of trees bearing fruit or nuts, or of other crops (e.g., grains, vegetables, or cotton); the raising of ornamental trees (other than evergreen trees that are more than six years old at the time they are severed from their roots); and the raising, shearing, feeding, caring for, training, and management of animals. The raising of animals includes the delivery of feed to the animal feeding operation, whether by the owner or the supplier of the feed. Operating a garden plot, orchard, or farm for the purpose of growing plants or animals for a person's own use shall not be considered a farming activity. Harvesting involves the gathering of any agricultural or horticultural commodity and includes activities such as crop drying, cotton ginning, and fruit ripening. Harvesting an agricultural commodity also includes the washing of the agricultural commodity, the inspection and grading of the agricultural commodity or livestock, and the packaging of the agricultural commodity for shipment as well as those activities delineated in Codes 0723 and 0724 of the Standard Industrial Classification Manual published by the United States Office of Management and Budget, 1987 edition (hereafter SIC Manual). For purposes of this regulation, merely buying and reselling plants or animals grown or raised entirely by another is not raising an agricultural or horticultural commodity. A person is engaged in raising a plant or animal, rather than the mere selling of a plant or animal, if the plant or animal is held for further cultivation and development prior to sale. In determining whether a plant or animal is held for further cultivation and development prior to sale, consideration will be given to all of the facts and circumstances, including: the value added by a person to the plant or animal through agricultural or horticultural processes; the length of time between the person's acquisition of the plant or animal and the time that the person makes the plant or animal available for sale; and in the case of a plant, whether the plant is kept in the container in which purchased, replanted in the ground, or replanted in a series of larger containers as it is grown to a larger size.

Farming activities also include the transportation and delivery of the agricultural or horticultural commodity, as described herein, from the trade or business that cultivated, raised or harvested the commodity to the marketplace, as described in subdivision (b)(5), and any empty haul related to the transportation of that agricultural or horticultural commodity.

Farming activities do not include food processing or transportation and delivery of processed food products to the marketplace.

Example A: A commercial hauler travels from its company yard to Grower A's field to pick up a load of tomatoes. The tomatoes are hauled to a processing plant. The hauler returns to the field with empty trailers. The sale of diesel fuel to the commercial hauler for use in this activity is partially exempt from tax.

Example B: A commercial hauler travels from its company yard to Grower A's field to pick up a load of fresh bell peppers. The bell peppers are sold to a grocery store and are delivered to the grocery store's distribution center. At the distribution center, the hauler picks up a load of pallets to deliver to another customer. The sale of diesel fuel to the commercial hauler for use from the yard to the field and from the field to the grocery store's distribution center is partially exempt from tax. The sale of diesel fuel to the commercial hauler for use in delivering the pallets is not partially exempt from tax.

Example C: A nursery owner transports its horticultural products to a distribution center. After delivering the product, the nursery owner makes two stops. The first stop is to pick up fertilizer for use at the nursery. The second stop is personal business unrelated to the nursery operation. The sale of diesel fuel to the nursery owner for use in this example is partially exempt from tax up to and including the first stop.

(2) "Plants" mean an agricultural or horticultural commodity produced in a farming activity which includes, but is not limited to, trees bearing fruit or nuts, other crops, an ornamental tree, a vine, a bush, or sod. Sea plants are produced in a farming activity if they are tended and cultivated as opposed to merely harvested.

(3) "Animals" mean a life form produced in a farming activity which includes, but is not limited to, any livestock, poultry or other bird, and fish or other sea life. Fish and other sea life are produced in a farming activity if they are raised on a fish farm. A fish farm is an area where fish or other sea life are grown or raised as opposed to merely caught or harvested.

(4) "Food processing" means the activities described in Industry Groups 201, 202, 203, 204, and 207, or Codes 2068 and 2084 of the SIC Manual. Food processing activities also includes transporting raw product, supplies and materials to the processing facility, transporting partially processed food products between various divisions of the same food processing entity for further processing operations, and any empty hauls related to the transportation of that product. Food processing does not include transportation and delivery of processed food products to the marketplace. A food processor is not required to be engaged 50 percent or more of the time in such activities as described herein.

Example A: A for-hire carrier, contracted for by a cheese plant, transports unprocessed milk from a dairy farm to the cheese plant for processing and then returns to the carrier's truck yard. The diesel used in this example is eligible for the partial sales tax exemption.

Example B: A flour mill transports flour sacks from a bag manufacturer to the mill's facility, and then transports those sacks to other flour mills owned by the same entity. The diesel used to transport the sacks in this example is eligible for the partial sales tax exemption, but the transportation of flour is not.

Example C: Cannery A and Cannery B are different divisions of the same food processing entity. Cannery A processes unprocessed tomatoes into tomato paste and then transports the paste to Cannery B for further processing. Cannery B processes the paste into tomato soup which is then transported to a grocery distribution warehouse. From the distribution warehouse the processed product is transported by the buyer to individual grocery stores and other distribution warehouses. Only the movement of paste from Cannery A to Cannery B is eligible for the partial sales tax exemption. The subsequent movement of product to the first distribution center and to retail stores and other warehouses is not eligible for the exemption.

(5) "Marketplace" means the place where a commodity is sold for resale, at retail or for consumption at an animal feeding operation, notwithstanding any intervening activities to prepare the product for sale in the marketplace. Such preparation activities include, but are not limited to, cooling, sorting, inspection, grading, drying, packing, handling, washing, slaughtering and butchering (except as otherwise described in Codes 2011 and 2015 of the SIC Manual), candling, sterilizing, freezing, pasteurizing, homogenizing, and packaging. Producers of agricultural or horticultural products may prepare and market their products through a cooperative, joint venture, corporation or partnership in which they have a financial interest, or other such enterprises, and the diesel used in these enterprises to transport products to the marketplace is eligible for the sales tax exemption.

(6) "Diesel fuel" means, for purposes of this regulation only, any liquid fuel that is commonly or commercially known, or sold or represented as a diesel fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle.

However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered vehicle.

~~No. 1-D or No. 2-D, pursuant to the specifications in American Society for Testing and Materials Standard Specification for Diesel Fuel Oils ("ASTM") D-975-81, which is incorporated herein by reference. Diesel fuel, for purposes of this regulation only, also includes Environmental Protection Agency rated diesel fuel commonly known as "federal fuel" sold for use in locomotives, or which is used in generators, pumps, dehydrators and any other equipment used in the conduct of farming and food processing activities. "Diesel fuel" does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous~~

~~form, or alcohol, aviation fuel, except diesel fuel sold for use in aircraft designed for agricultural aerial applications that meets the specifications of ASTM D 1655, jet fuel, bunker fuel, or other like substance used as a fuel. Qualifying Diesel fuel shall be identified accordingly on the invoice of sale.~~

(7) "Qualified activity" means farming activities as defined in subdivision (b)(1) or food processing, as defined in subdivision (b)(4).

(c) Partial Exemption Certificates.

(1) In General. A person who purchases diesel fuel for use in a qualified activity from an in-state retailer, or an out-of state retailer obligated to collect use tax, must provide the retailer with a partial exemption certificate in order for the retailer to claim the partial exemption. If the retailer takes a partial exemption certificate timely and in good faith, as defined in subdivision (c)(5), from a person who purchases diesel fuel for use in a qualified activity, the partial exemption certificate relieves the retailer from the liability for the sales tax subject to partial exemption under this regulation or the duty of collecting the use tax subject to partial exemption under this regulation. A partial exemption certificate will be considered timely if it is taken any time before the retailer bills the purchaser for the diesel fuel, any time within the retailer's normal billing or payment cycle, any time at or prior to delivery of the diesel fuel to the purchaser, or no later than 15 days after the date of purchase. A partial exemption certificate which is not taken timely will not relieve the retailer of the liability for tax excluded by the partial exemption; however the retailer may present satisfactory evidence to the Board that the retailer sold the diesel fuel to a person that used it in a qualified activity. A partial exemption from the sales and use tax under this part shall not be allowed unless the retailer claims the partial exemption on its sales and use tax return for the reporting period during which the transaction subject to the partial exemption occurred. Where the retailer fails to claim the partial exemption as set forth above, the retailer may file a claim for refund as set forth in subdivision (e).

The partial exemption certificate form set forth in Appendix A may be used to claim the partial exemption.

(2) Blanket Partial Exemption Certificates. In lieu of requiring a partial exemption certificate for each transaction, a person who purchases diesel fuel for use in a qualified activity may issue a blanket partial exemption certificate. The partial exemption certificate form set forth in Appendix A may be used as a blanket partial exemption certificate. Appendix A may also be used as a specific partial exemption certificate if the purchaser provides the purchase order or sales invoice number and a precise description of the property being purchased. A person who purchases diesel fuel for use in a qualified activity must include in the partial exemption certificate how much or what percentage of the diesel fuel purchased will be used in a qualified activity. If purchasing diesel fuel not qualifying for the partial exemption, the purchaser must clearly state in documents such as a written purchase order, sales agreement, or contract that the sale or purchase is not subject to the blanket partial exemption certificate.

(3) Form of Partial Exemption Certificate. Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a partial exemption certificate with respect to the sale or purchase of diesel fuel if it contains all of the following essential elements:

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name, address and telephone number of the purchaser.

(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement of how much or what percentage of the diesel fuel purchased will be used in a qualified farming or food processing activity.

(E) Date of execution of document.

(4) Retention and Availability of Partial Exemption Certificates. A retailer must retain each partial exemption certificate received from a person who purchases diesel fuel for use in a qualified activity for a period of not less than four years from the date on which the retailer claims a partial exemption based on the partial exemption certificate.

While the Board will not normally require the filing of the partial exemption certificate with a sales and use tax return, when necessary for the efficient administration of the Sales and Use Tax Law, the Board may, on 30 days' written notice, require a retailer to commence filing with its sales and use tax returns copies of all partial exemption certificates. The Board may also require, within 45 days of the Board's request, retailers provide the Board access to any and all partial exemption certificates, or copies thereof, accepted for the purposes of supporting the partial exemption.

(5) Good Faith. A seller will be presumed to have taken a partial exemption certificate in good faith in the absence of evidence to the contrary. A seller, without knowledge to the contrary, may accept a partial exemption certificate in good faith where the purchaser states that a certain percentage of the diesel fuel purchased will be used in farming activities or food processing. However, a partial exemption certificate cannot be accepted in good faith where the seller has knowledge that the diesel fuel is not subject to a partial exemption, or will not be otherwise used in a partially exempt manner.

(d) Partial Exemption Certificate for Use Tax. The partial exemption certificate must be completed by a person who purchases diesel fuel for use in a qualified activity to claim a partial exemption from use tax from an out-of-state retailer not obligated to collect the use tax. A partial

exemption from the use tax shall not be allowed unless the purchaser or retailer claims the partial exemption on its individual use tax return, sales and use tax return, or consumer use tax return for the reporting period during which the transaction subject to the partial exemption occurred. Where the purchaser or retailer fails to claim the partial exemption as set forth above, the purchaser or retailer may file a claim for refund as set forth in subdivision (e).

The purchaser who files an individual use tax return must attach a completed partial exemption certificate to the return. The purchaser who is registered with the Board as a retailer or consumer and files a sales and use tax return or consumer use tax return must, within 45 days of the Board's request, provide the Board access to any and all documents that support the claimed partial exemption.

The partial exemption certificate form set forth in Appendix A may be used to claim the partial exemption.

(e) Refund of Partial Exemption.

(1) For the period commencing on September 1, 2001, and ending on April 30, 2002, a person who purchases diesel fuel for use in a qualified activity may claim the partial exemption on qualified purchases from an in-state retailer or an out-of-state retailer obligated to collect the use tax by furnishing the retailer with a partial exemption certificate on or before July 31, 2002. The retailer must refund the tax or tax reimbursement directly to a purchaser of diesel fuel for use in a qualified activity or, at the purchaser's sole option, the purchaser may be credited with such amount.

(2) A retailer who paid sales tax on a qualified sale or a person who paid use tax on a qualified purchase and who failed to claim the partial exemption as provided by this regulation may file a claim for refund equal to the amount of the partial exemption that he or she could have claimed pursuant to this regulation. The procedure for filing a claim shall be the same as for other claims for refund filed pursuant to Revenue and Taxation Code section 6901. For transactions subject to use tax, a person who purchases diesel fuel for use in a qualified activity filing a claim for refund of the partial exemption has the burden of establishing that he or she was entitled to claim the partial exemption with respect to the amount of refund claimed under this part. For transactions subject to sales tax, a person filing a claim for refund of the partial exemption has the burden of establishing that the purchaser of the diesel fuel otherwise met all the requirements of a person who purchases diesel fuel for use in a qualified activity at the time of the purchase subject to the refund claimed under this part.

(f) Improper Use of Partial Exemption. Notwithstanding subdivision (a), tax applies to any sale of, and the storage, use, or other consumption in this state of diesel fuel that is used in a manner not qualifying for the partial exemption under this regulation.

(g) Purchaser's Liability for the Payment of Sales Tax.

(1) If a purchaser timely submits a copy of a partial exemption certificate to the retailer or partial exemption certificate for use tax to the Board, and then uses the diesel fuel in a manner not qualifying for the partial exemption, the purchaser shall be liable for payment of the sales tax, with applicable interest, to the same extent as if the purchaser were a retailer making a retail sale of the diesel fuel at the time the diesel fuel was so removed, converted, or used.

(2) A purchaser providing a partial exemption certificate accepted in good faith by the retailer or a partial exemption certificate for use tax to the Board for diesel fuel that does not qualify for the partial exemption is liable for payment of the sales tax, with applicable interest, to the same extent as if the purchaser were a retailer making a retail sale of the diesel fuel at the time the diesel fuel was purchased.

(h) Records. Adequate and complete records must be maintained by the person who purchases diesel fuel for use in a qualified activity as evidence that the diesel fuel purchased was used in a qualified activity.

(i) Operative Date. This regulation is operative as of September 1, 2001.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6357.1, Revenue and Taxation Code.

60022 and

*per agency
request
5/6/15 (TH)*

Appendix A

PARTIAL EXEMPTION CERTIFICATE

STATE BOARD OF EQUALIZATION

Qualified Sales and Purchases of Diesel and Farm Equipment and Machinery

NOTE: This is an exemption only from the state ~~general fund~~ portion of the sales and use tax rate. You are not relieved from your obligations for the local and district taxes on this transaction. This partial exemption also does not apply to any tax levied pursuant to Section 6051.2 and 6201.2 of the Revenue and Taxation Code, or pursuant to Section 35 of article XIII of the California Constitution. This partial exemption also applies to lease payments made on or after September 1, 2001, for tangible personal property even if the lease agreement was entered into prior to September 1, 2001.

SELLER'S/LESSOR'S NAME
SELLER'S/LESSOR'S ADDRESS (Street, City, State, Zip Code)

Diesel Fuel Used in Farming Activities or Food Processing* - I as the undersigned purchaser, hereby certify that of the diesel purchased, _____ % will be used in qualified farming activities or food processing in accordance with Revenue and Taxation Code Section 6357.1.

Farm Equipment and Machinery (or parts¹ thereof)* - I as the undersigned purchaser, hereby certify I am engaged in an agricultural business described in Codes 0111 to 0291 of the Standard Industrial Classification (SIC) Manual, or I perform an agricultural service described in Codes 0711 to 0783 of the SIC Manual for such classified persons. The property purchased or leased will be used primarily in producing and harvesting agricultural products in accordance with Revenue & Taxation Code Section 6356.5.²

Type of Farm Equipment and Machinery (or parts thereof) _____

*If you also want this certificate to be used as a blanket certificate for future purchases, describe generally the type of property you will be purchasing and ask your vendor to keep this certificate on file. If this is a specific partial exemption certificate, provide the purchase order or sales invoice number and a precise description of the property being purchased.

I understand that if such property is not used in the manner qualifying for the partial exemption, or if I am not a qualified person, as applicable, that I am required by the Sales and Use Tax Law to report and pay the state tax measured by the sales price/rentals payable of the property to/by me. I also understand that this partial exemption certificate is in effect as of the date shown below and will remain in effect until revoked in writing.

PURCHASER'S NAME OR COMPANY NAME (if applicable)		DATE
SIGNATURE (signature of the purchaser, purchaser's employee, or authorized representative of the purchaser)		TELEPHONE NUMBER
TITLE		PERMIT NUMBER (if applicable) ³
ADDRESS	CITY	STATE, ZIP

¹ If you are purchasing oil, grease, or lubricating or other qualifying fluids, indicate what percentage will be used in farm equipment and machinery performing qualified producing and harvesting activities.
² Vehicles that qualify as farm equipment and machinery, as defined in Regulation 1533.1(b)(1)(B), must be used exclusively in producing and harvesting agricultural products.
³ If you are not required to hold a seller's permit, please enter "Not Applicable."

hereby designated as the close of the written comment period. It is requested, but not required, that written statements or arguments be submitted in triplicate.

CONTACT

Inquiries concerning the action described in this notice may be directed to Mr. Hector Garcia, PHHSBG Coordinator, at (916) 445-7729 or Hector.Garcia@cdph.ca.gov or the Chronic Disease Control Branch at (916) 552-9900 or mail to: CDCB@cdph.ca.gov. In any such inquiries, please identify the action by using the Department Control letters "PHHSBG" in the Subject Line.

AVAILABILITY OF INFORMATION FOR REVIEW

The Agenda and the FFY 2015 State Plan will be available for review in the CDPH lobby located at 1616 Capitol Avenue, Sacramento, California from 8:00 a.m. to 5:00 p.m., May 20, 2015 through June 4, 2015.

The documents will also be available on the following website: [http://www.cdph.ca.gov/programs/cdcb/Pages/CaliforniaPreventiveHealthandHealthServicesBlockGrant\(PHHSBG\).aspx](http://www.cdph.ca.gov/programs/cdcb/Pages/CaliforniaPreventiveHealthandHealthServicesBlockGrant(PHHSBG).aspx) from 8:00 a.m. to 5:00 p.m., May 20, 2015 through June 4, 2015.

In addition, the notice will be made available in appropriate alternative formats, upon request by any person with a disability as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the applicable federal rules and regulations. Any request for such information must be received by the CDPH 7 days prior to June 4, 2015.

<p>SUMMARY OF REGULATORY ACTIONS</p>

REGULATIONS FILED WITH SECRETARY OF STATE

This Summary of Regulatory Actions lists regulations filed with the Secretary of State on the dates indicated. Copies of the regulations may be obtained by contacting the agency or from the Secretary of State, Archives, 1020 O Street, Sacramento, CA 95814, (916) 653-7715. Please have the agency name and the date filed (see below) when making a request.

File# 2015-0323-02
BOARD OF EQUALIZATION
 Sales to Common Carriers

These changes without regulatory effect by the Board of Equalization ("BOE") amend section 1621 in title 18 of the California Code of Regulations. Revenue and Taxation Code section 6385 was amended by Senate Bill No. 1243 (2011-2012 Reg. Sess.) to, inter alia, (1) replace the term "bunkered" with the term "transferred" in the definition of "first out-of-state destination" and (2) extend the sunset date of the statute from January 1, 2014, to January 1, 2024. Section 1621 is being amended to align subdivision (b)(3)(C) with these amendments to Revenue and Taxation Code section 6385. BOE is also moving the Authority and Reference citations so that they appear before the exemption certificates at the end of Section 1621. Lastly, Section 1621 provides five different exemption certificates, which subdivision (c) refers to as "appearing in the appendix" of the regulation. The certificates are currently formatted as part of the body of Section 1621. Therefore, an "Appendix" heading is being added to the beginning of the exemption certificates portion of Section 1621.

Title 18
 California Code of Regulations
 AMEND: 1621
 Filed 04/30/2015
 Agency Contact:
 Richard E. Bennion (916) 445-2130

File# 2015-0324-05
BOARD OF EQUALIZATION
 Diesel Fuel Used in Farming Activities or Food Processing

In this regulatory action, the Board is amending section 1533.2 of title 18 of the California Code of Regulations to update the definition of diesel fuel.

Title 18
 California Code of Regulations
 AMEND: 1533.2
 Filed 05/06/2015
 Effective 07/01/2015
 Agency Contact:
 Richard E. Bennion (916) 445-2130

File# 2015-0324-04
BOARD OF EQUALIZATION
 Diesel Fuel Prepayment Exemption

This action amends (1) the regulatory definition of diesel fuel to conform to amended statute; and (2) provisions clarifying the calculation of applicable diesel fuel sales and use taxes.

Rulemaking File Index
Title 18. Public Revenue
Sales and Use Tax

Regulation 1533.2
Diesel Fuel Used in Farming Activities or Food Processing

1. [Final Statement of Reasons](#)
2. [Updated informative digest](#)
3. [Business Tax Committee Minutes, November 19, 2014](#)
 - Minutes
 - Deputy Director memo dated November 7, 2014
 - BTC Agenda
 - Formail Issue Paper Number 14-009
 - Exhibit 1 Revenue Estimate
 - Exhibit 2 Text Regulation 1533.2
 - Exhibit 3 Text Regulation 1598.1
4. [Reporter's Transcript Business Taxes Committee, November 19, 2013](#)
5. [Estimate of Cost or Savings, January 20, 2015](#)
6. [Economic and Fiscal Impact Statements, December 24, 2014](#)
7. [Notice of Publications](#)
 - Form 400 and Notice, Publication Date January 9, 2015
 - Email sent to Interested Parties, January 9, 2015
 - CA Regulatory Notice Register 2015, Volume No. 02-Z
8. [Notice to Interested Parties, January 9, 2015](#)

The following items are exhibited:

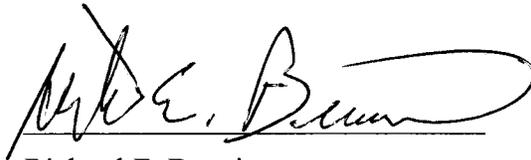
 - Notice of Hearing
 - Initial Statement of Reasons
 - Proposed Text of Regulation 1533.2
 - Regulation History
9. [Statement of Compliance](#)
10. [Reporter's Transcript, Item F1, February 24, 2015](#)
11. [Draft Minutes, December F1, February 24, 2015, and Exhibits](#)
 - Notice of Proposed Regulatory Action
 - Initial Statement of Reasons
 - Proposed Text of Regulation 1533.2
 - Regulation History

VERIFICATION

I, Richard E. Bennion, Regulations Coordinator of the State Board of Equalization, state that the rulemaking file of which the contents as listed in the index is complete, and that the record was closed on March 23, 2015 and that the attached copy is complete.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

March 23, 2015

A handwritten signature in black ink, appearing to read "Richard E. Bennion", written over a horizontal line.

Richard E. Bennion
Regulations Coordinator
State Board of Equalization

**Final Statement of Reasons for
Proposed Amendments to California Code of Regulations,
Title 18, Section 1533.2, *Diesel Fuel Used in Farming Activities or Food
Processing***

Update of Information in the Initial Statement of Reasons

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, on February 24, 2015. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1533.2 without making any substantive changes. However, the Board did make minor nonsubstantial changes to the final text of the proposed amendments to Regulation 1533.2. The Board deleted an inadvertently inserted line from after the word “grocery” in the fourth sentence in subdivision (b)(1), Example B, consistently reformatted the right hand side margin in the partial exemption certificate in Appendix A, and increased the size of the font used in the first and last paragraphs in the partial exemption certificate in Appendix A. The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on February 24, 2015, to comment on the proposed regulatory action.

The factual basis, specific purpose, and necessity for, the problem to be addressed by, and the anticipated benefits from the adoption of the proposed amendments to Regulation 1533.2 are the same as provided in the initial statement of reasons. The Board anticipates that the proposed amendments to Regulation 1533.2 will reduce confusion, promote fairness, and benefit retailers, consumers, Board staff, and the Board by making the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition for the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions, and clarifying that biodiesel is diesel fuel for purposes of the partial exemption from sales and use tax for diesel fuel used in farming activities or food processing.

The adoption of the proposed amendments to Regulation 1533.2 is not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to Regulation 1533.2 or the proposed amendments to Regulation 1533.2.

The Board did not rely on any data or any technical, theoretical, or empirical study, report, or similar document in proposing or adopting the proposed amendments to Regulation 1533.2 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 the Board’s initial determination that the proposed regulatory action will not have a significant adverse economic impact on business, the Board’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,

and the Board's economic impact assessment, which determined that the Board'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 Regulation 1533.2 to the health and welfare of California residents, worker safety, or the state's environment.

The proposed amendments to Regulation 1533.2 may affect small business.

No Mandate on Local Agencies or School Districts

The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 does not impose a mandate on local agencies or school districts.

No Public Comments

The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on February 24, 2015, to comment on the proposed regulatory action.

Determinations Regarding Alternatives

By its motion on February 24, 2015, the Board determined that no alternative to the proposed amendments to Regulation 1533.2 would be more effective in carrying out the purpose for which the amendments are proposed, would be as effective and less burdensome to affected private persons than the adopted amendments, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

The Board did not reject any reasonable alternatives to the proposed amendments to Regulation 1533.2 that would lessen any adverse impact the proposed amendments may have on small business.

No reasonable alternatives have been identified and brought to the Board'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.

**Updated Informative Digest for the State Board of Equalization's
Adoption of Proposed Amendments to California Code of Regulations,
Title 18, Section 1533.2, *Diesel Fuel Used in Farming Activities or Food
Processing***

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1533.2, *Diesel Fuel Used in Farming Activities*, on February 24, 2015. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1533.2 without making any substantive changes. However, the Board did make minor nonsubstantial changes to the final text of the proposed amendments to Regulation 1533.2. The Board deleted an inadvertently inserted line from after the word "grocery" in the fourth sentence in subdivision (b)(1), Example B, consistently reformatted the right hand side margin in the partial exemption certificate in Appendix A, and increased the size of the font used in the first and last paragraphs in the partial exemption certificate in Appendix A.

The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on February 24, 2015, to comment on the proposed regulatory action. There have not been any changes to the applicable laws or the effect of, the objective of, and anticipated benefits from the adoption of the proposed amendments to Regulation 1533.2 described in the informative digest included in the notice of proposed regulatory action. The informative digest included in the notice of proposed regulatory action provides:

Summary of Existing Laws and Regulations

RTC section 6357.1 provides a partial exemption from sales and use tax on the sale and purchase of diesel fuel for use in farming activities or food processing, but does not define the term "diesel fuel." In 2002, the Board adopted Regulation 1533.2 to implement, interpret, and make specific the provisions of RTC section 6357.1. Regulation 1533.2 clarifies the conditions under which a sale or use of diesel fuel qualifies for the partial exemption provided by RTC section 6377.1. Also, as relevant here, Regulation 1533.2 provides a definition for the term diesel fuel solely for purposes of the partial exemption provided by RTC section 6357.1, which was based, in part, on the California Air Resources Board's (ARB's) definition of diesel fuel codified in California Code of Regulations, title 13, section (ARB Regulation) 2281, subdivision (b)(1), at the time the regulation was adopted. However, in 2004, the ARB amended its definition for the term diesel fuel, and the definition for diesel fuel in Regulation 1533.2 is no longer consistent with the ARB's definition for diesel fuel in ARB Regulation 2281. In addition, the Diesel Fuel Tax Law (RTC § 60001 et seq.) also provides a definition for the term diesel fuel in RTC section 60022, which is applicable to diesel fuel transactions.

The exemption provided by RTC section 6357.1 is referred to as a partial exemption because section 6357.1, subdivision (c), provides that the exemption for diesel fuel used in farming activities and food processing does not apply to specified sales and use taxes included in the statewide sales and use tax rate. Also, Regulation 1533.2, subdivision (c), prescribes the content of the partial exemption certificate that purchasers are required to provide to retailers to claim the partial exemption provided by RTC section 6357.1. Subdivision (c) provides that any document satisfying the requirements may be used as an exemption certificate, and Appendix A to Regulation 1533.1 provides a partial exemption certificate form. And, as relevant here, the note section in Appendix A provides that the exemption provided by RTC section 6357.1 “is an exemption only from the state general fund portion of the sales and use tax rate” because that was the case when the Board adopted Regulation 1533.2. However, the partial exemption provided by RTC section 6357.1 now applies to state sales and use taxes that are not required to be deposited in the general fund, such as the sales and use tax imposed by section 36 of article XIII of the California Constitution that goes to the state’s Education Protection Account (as already provided in Regulation 1533.2, subdivision (a)).

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1533.2

Due to the 2004 amendments to ARB Regulation 2281, subdivision (b), the definition of diesel fuel in Regulation 1533.2, which refers to the American Society for Testing and Materials Standard Specification for Diesel Fuel Oils (“ASTM”) D 975-81, is no longer consistent with the provisions of ARB Regulation 2281, subdivision (b)(1), which no longer refer to the “ASTM Standard Specification for Diesel Fuel Oils D975-81.” Therefore, Board staff considered whether it was necessary to amend the definition of diesel fuel in Regulation 1533.2 due to the 2004 amendments to the definition of diesel fuel in ARB Regulation 2281. And, staff found that, for purposes of the administering the partial exemption provided by RTC section 6357.1, it would be more effective to amend the definition of diesel fuel in Regulation 1533.2 so that the definition will no longer be based upon the ARB definition, but instead will be based upon the definition of the term diesel fuel contained in section 60022 of the Diesel Fuel Tax Law. This is because staff determined that revising the definition of diesel fuel so that it is consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide more clarity to taxpayers and staff.

Interested Parties Process

The Board's Business Taxes Committee (BTC) staff prepared draft amendments to subdivision (b)(6) of Regulation 1533.2 to revise the definition of diesel fuel to be consistent with the definition of diesel fuel in RTC section 60022. BTC staff subsequently prepared a discussion paper, and provided the discussion paper and its draft amendments to Regulation 1533.2 to the interested parties. On July 15, 2014, BTC staff conducted an interested parties meeting to discuss the draft amendments.

Since BTC staff did not receive any inquiries or written comments regarding its draft amendments during or subsequent to the July 15, 2014, interested parties meeting and staff had no changes to its recommendation to amend Regulation 1533.2, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff's draft amendments. Staff also notified interested parties that comments could be submitted up to September 25, 2014, for consideration in the preparation of the Formal Issue Paper regarding the draft amendments. However, staff did not receive any other comments.

November 19, 2014 BTC Meeting

Subsequently, staff prepared Formal Issue Paper 14-009 and distributed it to the Board Members for consideration at the Board's November 19, 2014, BTC meeting. Formal Issue Paper 14-009 recommended that the Board approve and authorize publication of the amendments to Regulation 1533.2 (discussed above) in order to revise the definition of the term diesel fuel in Regulation 1533.2, subdivision (b)(6), so that the term has the same meaning as defined in section 60022 of the Diesel Fuel Tax Law. Formal Issue Paper 14-009 recommended that the Board add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, and to remove the reference to the "general fund" in the note section of Appendix A to Regulation 1533.2. Formal Issue Paper 14-009 also recommended that the Board replace the capital "S" with a lower case "s" at the beginnings of the words "Section" throughout Appendix A to Regulation 1533.2 to make the words consistent with the references to "section" and "sections" in the body of the regulation and consistent with the citation format prescribed in the California Style Manual.

During the November 19, 2014, meeting, the Board Members unanimously voted to propose the amendments to Regulation 1533.2 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1533.2 are necessary to have the effect and accomplish the objective of making the definition for the term diesel fuel in Regulations 1533.2 consistent with the definition of the term

diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions.

The Board also anticipates that the proposed amendments to Regulation 1533.2 will reduce confusion, promote fairness, and benefit retailers, consumers, Board staff, and the Board by making the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition for the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions and clarifying that biodiesel is diesel fuel for purposes of the partial exemption from sales and use tax for diesel fuel used in farming activities or food processing.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1533.2 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1533.2 is the only state regulation providing a partial sales tax exemption for diesel fuel used in farming activities or food processing. The Board is aware that California Code of Regulations, title 18, section (Regulation) 1598.1, *Diesel Fuel Prepayment Exemption*, also defines the term “diesel fuel” and the Board is separately proposing to amend the definition for the term diesel fuel in Regulation 1598.1 so that it consistent with the current definition of the term diesel fuel in RTC section 60022 and the proposed amendments to the definition of the term diesel fuel in Regulation 1533.2. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1533.2 or the proposed amendments to Regulation 1533.2.



BOARD OF EQUALIZATION
BUSINESS TAXES COMMITTEE MEETING MINUTES
HONORABLE MICHELLE STEEL, COMMITTEE CHAIR
450 N STREET, SACRAMENTO
MEETING DATE: NOVEMBER 19, 2014, TIME: 10:00 A.M.

ACTION ITEMS & STATUS REPORT ITEMS

Agenda Item No: 1

Title: Proposed Amendments to Regulation 1574, *Vending Machine Operators*

Issue:

Whether the Board should amend Sales and Use Tax Regulation 1574, *Vending Machine Operators*, to update the tax rates in the example, table, and formula, and provide uniformity in rounding in the computation of the cold food factor percentage.

Committee Discussion:

This item was removed from the agenda.

Committee Action:

No action taken.

Agenda Item No: 2

Title: Proposed Amendments to Regulations 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, and 1598.1, *Diesel Fuel Prepayment Exemption*.

Issue:

Whether the Board should amend Regulations 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, and 1598.1, *Diesel Fuel Prepayment Exemption*.

Committee Discussion:

There was no discussion of this item.

Committee Action:

Upon motion by Ms. Yee and seconded by Mr. Runner, without objection, the Committee approved and authorized for publication the proposed amendments to Regulations 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, and 1598.1, *Diesel Fuel Prepayment Exemption*. Copies of the proposed amendments to Regulations 1533.2 and 1598.1 are attached.

Agenda Item No: 3**Title: Proposed Amendments to Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*****Issue:**

Whether the Board should amend Sales and Use Tax Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*, to update the definition of the average state, local, and district sales and use tax rate by removing the specific reference to “Section 35” of article XIII of the California Constitution.

Committee Discussion:

There was no discussion of this item.

Committee Action/Recommendation/Direction:

Upon motion by Mr. Horton, seconded by Ms. Yee, without objection, the Committee approved and authorized for publication the proposed amendments to Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*. A copy of the proposed amendments to Regulation 1685.5 is attached.

Agenda Item No: 4**Title: Proposed Amendments to Regulation 1591, *Medicines and Medical Devices*****Issue:**

Whether the Board should amend Sales and Use Tax Regulation 1591, *Medicines and Medical Devices*, to clarify that the definition of “medicines” includes devices implanted to mark the location of a medical condition.

Committee Discussion:

Staff introduced the amendments to Regulation 1591 explaining the four action items included one area of agreement and three areas where alternative language was suggested by interested parties. Mr. Wade Downey of Downey, Smith & Fier thanked staff for the language regarding the breast tissue markers and clarification of FDA approval. He stated his goal throughout this process was to clarify subdivisions (a)(9)(A) and (c)(2) as they relate to fully implanted items. Mr. Roderick Calub of Downey, Smith & Fier requested the Board adopt language to include in the definition of medicines fully implanted devices that are FDA approved but do not assist the functioning of the human body. Mr. Jacob Bholat of Equity Recovery Solutions, Inc., also thanked staff for addressing the complex and difficult process of dealing with medicines. However, citing four examples where the Board has allowed a broader interpretation of the definition, he believes staff has continued to apply a narrow interpretation.

Staff continued the discussion by stating that the existing language in subdivision (c)(2) is taken directly from statute.

Questions involving port-a-caths were brought up by Board Members. Staff clarified that their recommendation to remove a sentence in subdivision (b)(2) was done so that articles listed in the subdivision may qualify as a medicine under a different section. Staff also explained the use of port-a-caths in the revenue estimate was appropriate as the language proposed for both

alternatives to staff's recommendation would allow the port-a-caths to be exempt under subdivision (a)(9)(A).

Ms. Yee stated that the intent of the regulation was to define medicines and not to provide an exhaustive list of devices. She added that staff's recommendations helped provide a good road map to clarify what constitutes a medicine. Mr. Runner expressed his concern that we may be missing the opportunity to create greater clarification and staff's recommended amendments may not reduce future appeals cases. Mr. Horton stated the statute was clear and suggested the audit staff could be provided additional guidance in the audit manual.

A consensus was reached amongst Board Members, staff, and the interested parties in attendance regarding staff's recommendations for action items 1 through 3. It was further discussed that no action should be taken on item 4. It was also suggested that the audit manual could be updated to provide guidance to staff on the application of Regulation 1591 and the interrelationship of subdivisions (a), (b), and (c) defining medicines.

Committee Action/Direction:

Upon motion by Ms. Yee, seconded by Mr. Runner, without objection, the Committee approved and authorized publication of staff's recommended amendments with respect to Action Items 1, 2 and 3. The committee further directed staff to provide guidance in the audit manual on the application of Regulation 1591 and the interrelationship of subdivisions (a), (b), and (c) defining medicines. No action was taken on Item 4.

A copy of the proposed amendments to Regulation 1591 is attached.



Honorable Michelle Steel, Committee Chair



Cynthia Bridges, Executive Director

BOARD APPROVED

at the 12/18/14 Board Meeting



Joann Richmond, Chief
Board Proceedings Division

Sales and Use Tax Regulation 1533.2. Diesel Fuel Used in Farming Activities or Food Processing.

(a) General. Commencing on and after September 1, 2001, section 6357.1 of the Revenue and Taxation Code partially exempts from sales and use tax the sale of, and the storage, use, or other consumption in this state, of diesel fuel used in farming activities or food processing. The terms “farming activities” and “food processing” are defined below.

For the period commencing on September 1, 2001, and ending on December 31, 2001, the partial exemption applies to the taxes imposed by sections 6051 and 6201 of the Revenue and Taxation Code (4.75%), but does not apply to the taxes imposed pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on January 1, 2002, and ending on June 30, 2004, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6201, and 6201.3 of the Revenue and Taxation Code (5%), but does not apply to the taxes imposed pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on July 1, 2004, and ending on March 31, 2009, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6201, 6201.3, and 6201.5 of the Revenue and Taxation Code (5.25%), but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on April 1, 2009, and ending on June 30, 2011, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6051.7, 6201, 6201.3, 6201.5, and 6201.7 of the Revenue and Taxation Code (6.25%), but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on July 1, 2011, and ending on December 31, 2012, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6051.8, 6201, 6201.3, 6201.5, and 6201.8 of the Revenue and Taxation Code, but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on January 1, 2013, the partial exemption applies to the taxes imposed by section 36 of article XIII of the California Constitution and sections 6051, 6051.3, 6051.5, 6051.8, 6201, 6201.3, 6201.5, and 6201.8 of the Revenue and Taxation Code, but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

Given the varying rates of the taxes imposed by sections 6051.8 and 6201.8, the partial exemption applies to the following cumulative sales and use tax rates:

- (1) 7.12 percent for the period July 1, 2011, through June 30, 2012;
- (2) 7.42 percent for the period July 1, 2012, through December 31, 2012;
- (3) 7.67 percent for the period January 1, 2013 through June 30, 2013;
- (4) 7.44 percent for the period July 1, 2013, through June 30, 2014; and
- (5) 7.25 percent on or after July 1, 2014.

(b) Definitions. For purposes of this regulation:

(1) "Farming activities" mean a trade or business involving the cultivation of land or the raising or harvesting of any agricultural or horticultural commodity that may be legally sold to or offered for sale to others. These include the trade or business of operating a nursery or sod farm; the raising or harvesting of trees bearing fruit or nuts, or of other crops (e.g., grains, vegetables, or cotton); the raising of ornamental trees (other than evergreen trees that are more than six years old at the time they are severed from their roots); and the raising, shearing, feeding, caring for, training, and management of animals. The raising of animals includes the delivery of feed to the animal feeding operation, whether by the owner or the supplier of the feed. Operating a garden plot, orchard, or farm for the purpose of growing plants or animals for a person's own use shall not be considered a farming activity. Harvesting involves the gathering of any agricultural or horticultural commodity and includes activities such as crop drying, cotton ginning, and fruit ripening. Harvesting an agricultural commodity also includes the washing of the agricultural commodity, the inspection and grading of the agricultural commodity or livestock, and the packaging of the agricultural commodity for shipment as well as those activities delineated in Codes 0723 and 0724 of the Standard Industrial Classification Manual published by the United States Office of Management and Budget, 1987 edition (hereafter SIC Manual). For purposes of this regulation, merely buying and reselling plants or animals grown or raised entirely by another is not raising an agricultural or horticultural commodity. A person is engaged in raising a plant or animal, rather than the mere selling of a plant or animal, if the plant or animal is held for further cultivation and development prior to sale. In determining whether a plant or animal is held for further cultivation and development prior to sale, consideration will be given to all of the facts and circumstances, including: the value added by a person to the plant or animal through agricultural or horticultural processes; the length of time between the person's acquisition of the plant or animal and the time that the person makes the plant or animal available for sale; and in the case of a plant, whether the plant is kept in the container in which purchased, replanted in the ground, or replanted in a series of larger containers as it is grown to a larger size.

Farming activities also include the transportation and delivery of the agricultural or horticultural commodity, as described herein, from the trade or business that cultivated, raised or harvested the commodity to the marketplace, as described in subdivision (b)(5), and any empty haul related to the transportation of that agricultural or horticultural commodity.

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

Farming activities do not include food processing or transportation and delivery of processed food products to the marketplace.

Example A: A commercial hauler travels from its company yard to Grower A's field to pick up a load of tomatoes. The tomatoes are hauled to a processing plant. The hauler returns to the field with empty trailers. The sale of diesel fuel to the commercial hauler for use in this activity is partially exempt from tax.

Example B: A commercial hauler travels from its company yard to Grower A's field to pick up a load of fresh bell peppers. The bell peppers are sold to a grocery store and are delivered to the grocery store's distribution center. At the distribution center, the hauler picks up a load of pallets to deliver to another customer. The sale of diesel fuel to the commercial hauler for use from the yard to the field and from the field to the grocery store's distribution center is partially exempt from tax. The sale of diesel fuel to the commercial hauler for use in delivering the pallets is not partially exempt from tax.

Example C: A nursery owner transports its horticultural products to a distribution center. After delivering the product, the nursery owner makes two stops. The first stop is to pick up fertilizer for use at the nursery. The second stop is personal business unrelated to the nursery operation. The sale of diesel fuel to the nursery owner for use in this example is partially exempt from tax up to and including the first stop.

(2) "Plants" mean an agricultural or horticultural commodity produced in a farming activity which includes, but is not limited to, trees bearing fruit or nuts, other crops, an ornamental tree, a vine, a bush, or sod. Sea plants are produced in a farming activity if they are tended and cultivated as opposed to merely harvested.

(3) "Animals" mean a life form produced in a farming activity which includes, but is not limited to, any livestock, poultry or other bird, and fish or other sea life. Fish and other sea life are produced in a farming activity if they are raised on a fish farm. A fish farm is an area where fish or other sea life are grown or raised as opposed to merely caught or harvested.

(4) "Food processing" means the activities described in Industry Groups 201, 202, 203, 204, and 207, or Codes 2068 and 2084 of the SIC Manual. Food processing activities also includes transporting raw product, supplies and materials to the processing facility, transporting partially processed food products between various divisions of the same food processing entity for further processing operations, and any empty hauls related to the transportation of that product. Food processing does not include transportation and delivery of processed food products to the marketplace. A food processor is not required to be engaged 50 percent or more of the time in such activities as described herein.

Example A: A for-hire carrier, contracted for by a cheese plant, transports unprocessed milk from a dairy farm to the cheese plant for processing and then returns to the carrier's truck yard. The diesel used in this example is eligible for the partial sales tax exemption.

Example B: A flour mill transports flour sacks from a bag manufacturer to the mill's facility, and then transports those sacks to other flour mills owned by the same entity. The diesel used to transport the sacks in this example is eligible for the partial sales tax exemption, but the transportation of flour is not.

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Example C: Cannery A and Cannery B are different divisions of the same food processing entity. Cannery A processes unprocessed tomatoes into tomato paste and then transports the paste to Cannery B for further processing. Cannery B processes the paste into tomato soup which is then transported to a grocery distribution warehouse. From the distribution warehouse the processed product is transported by the buyer to individual grocery stores and other distribution warehouses. Only the movement of paste from Cannery A to Cannery B is eligible for the partial sales tax exemption. The subsequent movement of product to the first distribution center and to retail stores and other warehouses is not eligible for the exemption.

(5) "Marketplace" means the place where a commodity is sold for resale, at retail or for consumption at an animal feeding operation, notwithstanding any intervening activities to prepare the product for sale in the marketplace. Such preparation activities include, but are not limited to, cooling, sorting, inspection, grading, drying, packing, handling, washing, slaughtering and butchering (except as otherwise described in Codes 2011 and 2015 of the SIC Manual), candling, sterilizing, freezing, pasteurizing, homogenizing, and packaging. Producers of agricultural or horticultural products may prepare and market their products through a cooperative, joint venture, corporation or partnership in which they have a financial interest, or other such enterprises, and the diesel used in these enterprises to transport products to the marketplace is eligible for the sales tax exemption.

(6) "Diesel fuel" means, for purposes of this regulation only, any liquid fuel that is commonly or commercially known, or sold or represented as a diesel fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle.

However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered vehicle.

~~No. 1-D or No. 2-D, pursuant to the specifications in American Society for Testing and Materials Standard Specification for Diesel Fuel Oils ("ASTM") D-975-81, which is incorporated herein by reference. Diesel fuel, for purposes of this regulation only, also includes Environmental Protection Agency-rated diesel fuel commonly known as "federal fuel" sold for use in locomotives, or which is used in generators, pumps, dehydrators and any other equipment used in the conduct of farming and food processing activities.~~

~~"Diesel fuel" does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, or alcohol, aviation fuel, except diesel fuel sold for use in aircraft designed for agricultural aerial applications that meets the specifications of ASTM D-1655, jet fuel, bunker fuel, or other like substance used as a fuel. Qualifying diesel fuel shall be identified accordingly on the invoice of sale.~~

(7) "Qualified activity" means farming activities as defined in subdivision (b)(1) or food processing, as defined in subdivision (b)(4).

(c) Partial Exemption Certificates.

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

(1) In General. A person who purchases diesel fuel for use in a qualified activity from an in-state retailer, or an out-of state retailer obligated to collect use tax, must provide the retailer with a partial exemption certificate in order for the retailer to claim the partial exemption. If the retailer takes a partial exemption certificate timely and in good faith, as defined in subdivision (c)(5), from a person who purchases diesel fuel for use in a qualified activity, the partial exemption certificate relieves the retailer from the liability for the sales tax subject to partial exemption under this regulation or the duty of collecting the use tax subject to partial exemption under this regulation. A partial exemption certificate will be considered timely if it is taken any time before the retailer bills the purchaser for the diesel fuel, any time within the retailer's normal billing or payment cycle, any time at or prior to delivery of the diesel fuel to the purchaser, or no later than 15 days after the date of purchase. A partial exemption certificate which is not taken timely will not relieve the retailer of the liability for tax excluded by the partial exemption; however the retailer may present satisfactory evidence to the Board that the retailer sold the diesel fuel to a person that used it in a qualified activity. A partial exemption from the sales and use tax under this part shall not be allowed unless the retailer claims the partial exemption on its sales and use tax return for the reporting period during which the transaction subject to the partial exemption occurred. Where the retailer fails to claim the partial exemption as set forth above, the retailer may file a claim for refund as set forth in subdivision (e).

The partial exemption certificate form set forth in Appendix A may be used to claim the partial exemption.

(2) Blanket Partial Exemption Certificates. In lieu of requiring a partial exemption certificate for each transaction, a person who purchases diesel fuel for use in a qualified activity may issue a blanket partial exemption certificate. The partial exemption certificate form set forth in Appendix A may be used as a blanket partial exemption certificate. Appendix A may also be used as a specific partial exemption certificate if the purchaser provides the purchase order or sales invoice number and a precise description of the property being purchased. A person who purchases diesel fuel for use in a qualified activity must include in the partial exemption certificate how much or what percentage of the diesel fuel purchased will be used in a qualified activity. If purchasing diesel fuel not qualifying for the partial exemption, the purchaser must clearly state in documents such as a written purchase order, sales agreement, or contract that the sale or purchase is not subject to the blanket partial exemption certificate.

(3) Form of Partial Exemption Certificate. Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a partial exemption certificate with respect to the sale or purchase of diesel fuel if it contains all of the following essential elements:

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name, address and telephone number of the purchaser.

(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail

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sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement of how much or what percentage of the diesel fuel purchased will be used in a qualified farming or food processing activity.

(E) Date of execution of document.

(4) Retention and Availability of Partial Exemption Certificates. A retailer must retain each partial exemption certificate received from a person who purchases diesel fuel for use in a qualified activity for a period of not less than four years from the date on which the retailer claims a partial exemption based on the partial exemption certificate.

While the Board will not normally require the filing of the partial exemption certificate with a sales and use tax return, when necessary for the efficient administration of the Sales and Use Tax Law, the Board may, on 30 days' written notice, require a retailer to commence filing with its sales and use tax returns copies of all partial exemption certificates. The Board may also require, within 45 days of the Board's request, retailers provide the Board access to any and all partial exemption certificates, or copies thereof, accepted for the purposes of supporting the partial exemption.

(5) Good Faith. A seller will be presumed to have taken a partial exemption certificate in good faith in the absence of evidence to the contrary. A seller, without knowledge to the contrary, may accept a partial exemption certificate in good faith where the purchaser states that a certain percentage of the diesel fuel purchased will be used in farming activities or food processing. However, a partial exemption certificate cannot be accepted in good faith where the seller has knowledge that the diesel fuel is not subject to a partial exemption, or will not be otherwise used in a partially exempt manner.

(d) Partial Exemption Certificate for Use Tax. The partial exemption certificate must be completed by a person who purchases diesel fuel for use in a qualified activity to claim a partial exemption from use tax from an out-of-state retailer not obligated to collect the use tax. A partial exemption from the use tax shall not be allowed unless the purchaser or retailer claims the partial exemption on its individual use tax return, sales and use tax return, or consumer use tax return for the reporting period during which the transaction subject to the partial exemption occurred. Where the purchaser or retailer fails to claim the partial exemption as set forth above, the purchaser or retailer may file a claim for refund as set forth in subdivision (e).

The purchaser who files an individual use tax return must attach a completed partial exemption certificate to the return. The purchaser who is registered with the Board as a retailer or consumer and files a sales and use tax return or consumer use tax return must, within 45 days of the Board's request, provide the Board access to any and all documents that support the claimed partial exemption.

The partial exemption certificate form set forth in Appendix A may be used to claim the partial exemption.

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

(e) Refund of Partial Exemption.

(1) For the period commencing on September 1, 2001, and ending on April 30, 2002, a person who purchases diesel fuel for use in a qualified activity may claim the partial exemption on qualified purchases from an in-state retailer or an out-of-state retailer obligated to collect the use tax by furnishing the retailer with a partial exemption certificate on or before July 31, 2002. The retailer must refund the tax or tax reimbursement directly to a purchaser of diesel fuel for use in a qualified activity or, at the purchaser's sole option, the purchaser may be credited with such amount.

(2) A retailer who paid sales tax on a qualified sale or a person who paid use tax on a qualified purchase and who failed to claim the partial exemption as provided by this regulation may file a claim for refund equal to the amount of the partial exemption that he or she could have claimed pursuant to this regulation. The procedure for filing a claim shall be the same as for other claims for refund filed pursuant to Revenue and Taxation Code section 6901. For transactions subject to use tax, a person who purchases diesel fuel for use in a qualified activity filing a claim for refund of the partial exemption has the burden of establishing that he or she was entitled to claim the partial exemption with respect to the amount of refund claimed under this part. For transactions subject to sales tax, a person filing a claim for refund of the partial exemption has the burden of establishing that the purchaser of the diesel fuel otherwise met all the requirements of a person who purchases diesel fuel for use in a qualified activity at the time of the purchase subject to the refund claimed under this part.

(f) Improper Use of Partial Exemption. Notwithstanding subdivision (a), tax applies to any sale of, and the storage, use, or other consumption in this state of diesel fuel that is used in a manner not qualifying for the partial exemption under this regulation.

(g) Purchaser's Liability for the Payment of Sales Tax.

(1) If a purchaser timely submits a copy of a partial exemption certificate to the retailer or partial exemption certificate for use tax to the Board, and then uses the diesel fuel in a manner not qualifying for the partial exemption, the purchaser shall be liable for payment of the sales tax, with applicable interest, to the same extent as if the purchaser were a retailer making a retail sale of the diesel fuel at the time the diesel fuel was so removed, converted, or used.

(2) A purchaser providing a partial exemption certificate accepted in good faith by the retailer or a partial exemption certificate for use tax to the Board for diesel fuel that does not qualify for the partial exemption is liable for payment of the sales tax, with applicable interest, to the same extent as if the purchaser were a retailer making a retail sale of the diesel fuel at the time the diesel fuel was purchased.

(h) Records. Adequate and complete records must be maintained by the person who purchases diesel fuel for use in a qualified activity as evidence that the diesel fuel purchased was used in a qualified activity.

(i) Operative Date. This regulation is operative as of September 1, 2001.

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

Appendix A

PARTIAL EXEMPTION CERTIFICATE

STATE BOARD OF EQUALIZATION

Qualified Sales and Purchases of Diesel and Farm Equipment and Machinery

NOTE: This is an exemption only from the state general fund portion of the sales and use tax rate. You are not relieved from your obligations for the local and district taxes on this transaction. This partial exemption also does not apply to any tax levied pursuant to Section 6051.2 and 6201.2 of the Revenue and Taxation Code, or pursuant to Section 35 of article XIII of the California Constitution. This partial exemption also applies to lease payments made on or after September 1, 2001, for tangible personal property even if the lease agreement was entered into prior to September 1, 2001.

SELLER'S/LESSOR'S NAME
SELLER'S/LESSOR'S ADDRESS (Street, City, State, Zip Code)

Diesel Fuel Used in Farming Activities or Food Processing* - I as the undersigned purchaser, hereby certify that of the diesel purchased, % will be used in qualified farming activities or food processing in accordance with Revenue



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

1000 N STREET, SACRAMENTO, CALIFORNIA
P O BOX 942879, SACRAMENTO, CALIFORNIA 94279-0092
1-916-324-1825 • FAX 1-916-322-4530
www.boe.ca.gov

BETTY T. YEE
First District, San Francisco

SEN. GEORGE RUNNER (Ret.)
Second District, Lancaster

MICHELLE STEEL
Third District, Orange County

JEROME E. HORTON
Fourth District, Los Angeles

JOHN CHIANG
State Controller

CYNTHIA BRIDGES
Executive Director

November 7, 2014

Dear Interested Party:

Enclosed are the Agenda, Issue Paper, and Revenue Estimate for proposed amendments to Regulations 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, and 1598.1, *Diesel Fuel Prepayment Exemption*, which will be discussed at the Business Taxes Committee meeting on November 19, 2014. The proposed amendments revise the definition of diesel fuel to be consistent with the definition in the Diesel Fuel Tax Law.

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 November 19, 2014** in Room 121 at the address shown above.

Sincerely,

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

SB:rsw

Enclosures

cc: (all with enclosures)

Honorable Jerome E. Horton, Chairman, Fourth District
Honorable Michelle Steel, Vice Chair, Third District
Honorable Betty T. Yee, Member, First District (MIC 71)
Senator George Runner (Ret.), Member, Second District (via email)
Honorable John Chiang, State Controller, c/o Ms. Marcy Jo Mandel

(via email)

Mr. David Hunter, Board Member's Office, Fourth District
Ms. Jaclyn Appleby, Board Member's Office, Fourth District
Mr. Neil Shah, Board Member's Office, Third District
Mr. Tim Treichelt, Board Member's Office, Third District
Mr. Alan LoFaso, Board Member's Office, First District
Ms. Yvette Stowers, Board Member's Office, First District
Mr. Ramon Salazar, Board Member's Office, First District
Mr. Sean Wallentine, Board Member's Office, Second District
Mr. James Kuhl, Board Member's Office, Second District
Mr. Lee Williams, Board Member's Office, Second District
Mr. Alan Giorgi, Board Member's Office, Second District
Ms. Tanya Vandrick, Board Member's Office, Second District
Ms. Natasha Ralston Ratcliff, State Controller's Office
Ms. Cynthia Bridges (MIC 73)
Mr. Randy Ferris (MIC 83)
Mr. David Gau (MIC 101)
Mr. Jeffrey L. McGuire (MIC 43)
Mr. Robert Tucker (MIC 82)
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. Clifford Oakes (MIC 50)
Mr. Marc Alviso (MIC 101)
Mr. Chris Lee (MIC 101)
Mr. Bradley Miller (MIC 92)
Mr. Michael Patno (MIC 50)
Mr. Robert Wilke (MIC 50)

AGENDA — November 19, 2014 Business Taxes Committee Meeting
Proposed amendments to Regulations 1533.2, Diesel Fuel Used in Farming Activities or Food Processing, and 1598.1, Diesel Fuel Prepayment Exemption, to revise the definition of diesel fuel

<p>Action 1 — Agreed Upon Items</p> <p>Issue Paper Alternative 1 – Staff Recommendation</p> <p>See Agenda, pages 2-3 (Regulation 1533.2) pages 4-5 (Regulation 1598.1)</p> <p>Issue Paper Alternative 2</p>	<p>Alternative 1</p> <p>Approve and authorize publication of proposed amendments to Regulations 1533.2, <i>Diesel Fuel Used in Farming Activities or Food Processing</i>, and 1598.1, <i>Diesel Fuel Prepayment Exemption</i>, to revise the definition of diesel fuel to be consistent with the definition in the Diesel Fuel Tax Law. The proposed amendments include other technical and non-substantive revisions.</p> <p align="center">OR</p> <p>Alternative 2</p> <p>Do not approve proposed amendments to Regulations 1533.2 and 1598.1.</p>
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AGENDA — November 19, 2014 Business Taxes Committee Meeting

Proposed amendments to Regulations 1533.2, Diesel Fuel Used in Farming Activities or Food Processing, and 1598.1, Diesel Fuel Prepayment Exemption, to revise the definition of diesel fuel

<p>Action 1 — Staff Recommendation</p>	<p><i>(Only the proposed amendments are provided. Staff has omitted other subdivisions or sections of the regulations that are not being amended.)</i></p>
<p>Regulation 1533.2 subdivision (b)(6)</p>	<p>Regulation 1533.2. Diesel Fuel Used in Farming Activities or Food Processing.</p> <p>(6) “Diesel fuel” means, for purposes of this regulation only, any <u>liquid fuel</u> that is commonly or commercially known, <u>or sold or represented as a diesel fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle.</u></p> <p><u>However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered vehicle.</u></p> <p>No. 1-D or No. 2-D, pursuant to the specifications in American Society for Testing and Materials Standard Specification for Diesel Fuel Oils (“ASTM”) D 975-81, which is incorporated herein by reference. Diesel fuel, for purposes of this regulation only, also includes Environmental Protection Agency rated diesel fuel commonly known as “federal fuel” sold for use in locomotives, or which is used in generators, pumps, dehydrators and any other equipment used in the conduct of farming and food processing activities.</p> <p>“Diesel fuel” does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, <u>or alcohol, aviation fuel, except diesel fuel sold for use in aircraft designed for agricultural aerial applications that meets the specifications of ASTM D 1655, jet fuel, bunker fuel, or other like substance used as a fuel. Qualifying diesel fuel shall be identified accordingly on the invoice of sale.</u></p>
<p>Regulation 1533.2 subdivision (b)(1) Example B</p>	<p>Example B: A commercial hauler travels from its company yard to Grower A’s field to pick up a load of fresh bell peppers. The bell peppers are sold to a grocery store and are delivered to the grocery store’s distribution center. At the distribution center, the hauler picks up a load of pallets to deliver to another customer. The sale of diesel fuel to the commercial hauler for use from the yard <u>to</u> the field and <u>from the field</u> to the grocery store’s distribution center is partially exempt from tax. The sale of diesel fuel to the commercial hauler for use in delivering the pallets is not partially exempt from tax.</p>

AGENDA — November 19, 2014 Business Taxes Committee Meeting
Proposed amendments to Regulations 1533.2, Diesel Fuel Used in Farming Activities or Food Processing, and
1598.1, Diesel Fuel Prepayment Exemption, to revise the definition of diesel fuel

<p>Action 1 — Staff Recommendation</p>	<p>Appendix A</p>
<p>Regulation 1533.2 Appendix A paragraphs one through four</p>	<p align="center">PARTIAL EXEMPTION CERTIFICATE STATE BOARD OF EQUALIZATION</p> <p align="center">Qualified Sales and Purchases of Diesel and Farm Equipment and Machinery</p> <p>NOTE: This is an exemption only from the state general fund portion of the sales and use tax rate. You are not relieved from your obligations for the local and district taxes on this transaction. This partial exemption also does not apply to any tax levied pursuant to Section 6051.2 and 6201.2 of the Revenue and Taxation Code, or pursuant to Section 35 of article XIII of the California Constitution. This partial exemption also applies to lease payments made on or after September 1, 2001, for tangible personal property even if the lease agreement was entered into prior to September 1, 2001.</p> <hr/> <p>SELLER'S/LESSOR'S NAME</p> <hr/> <p>SELLER'S/LESSOR'S ADDRESS (Street, City, State, Zip Code)</p> <hr/> <p>Diesel Fuel Used in Farming Activities or Food Processing* - I as the undersigned purchaser, hereby certify that of the diesel purchased, _____ % will be used in qualified farming activities or food processing in accordance with Revenue and Taxation Code Section 6357.1.</p> <p>Farm Equipment and Machinery (or parts¹ thereof)* - I as the undersigned purchaser, hereby certify I am engaged in an agricultural business described in Codes 0111 to 0291 of the Standard Industrial Classification (SIC) Manual, or I perform an agricultural service described in Codes 0711 to 0783 of the SIC Manual for such classified persons. The property purchased or leased will be used primarily in producing and harvesting agricultural products in accordance with Revenue & Taxation Code Section 6356.5.²</p> <hr/>

AGENDA — November 19, 2014 Business Taxes Committee Meeting
Proposed amendments to Regulations 1533.2, Diesel Fuel Used in Farming Activities or Food Processing, and 1598.1, Diesel Fuel Prepayment Exemption, to revise the definition of diesel fuel

<p>Action 1 — Staff Recommendation</p>	<p>Regulation 1598.1. Diesel Fuel Prepayment Exemption.</p>
<p>Regulation 1598.1 subdivision(a)(4)</p>	<p>(4) “Diesel fuel,” for purposes of the imposition of the prepayment of sales tax, is defined in Revenue and Taxation Code section 6480(c) (by reference to Revenue and Taxation Code section 60022) and means any liquid that is commonly or commercially known or sold as a fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle. However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered highway vehicle.</p> <p>Diesel fuel does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, or alcohol.</p> <p>Diesel fuel does not include the water in a diesel fuel and water emulsion of two immiscible liquids of diesel fuel and water, which emulsion contains an additive that causes the water droplets to remain suspended within the diesel fuel, provided the diesel fuel emulsion meets standards set by the California Air Resources Board.</p>
<p>Regulation 1598.1 subdivision(b) last paragraph</p>	<p>For purposes of calculating the percentage set forth in subdivision (b)(4) above, the numerator shall be the sum total of amounts entered on Form BOE 401GS line 10(e)(4) (Amount Ssubject to the partial state tax exemption for Diesel Fuel Used in Farming and Food Processing Exemption) for each return filed during the preceding calendar year and the denominator shall be the sum total of amounts entered on line 14(a) (Transactions Ssubject to County Tax) for each return filed during the preceding calendar year.</p>

AGENDA — November 19, 2014 Business Taxes Committee Meeting
Proposed amendments to Regulations 1533.2, Diesel Fuel Used in Farming Activities or Food Processing, and 1598.1, Diesel Fuel Prepayment Exemption, to revise the definition of diesel fuel

<p>Regulation 1598.1 Appendix paragraph four</p>	<p>By signing below, I acknowledge I am liable for the taxes imposed under the Bradley-Burns Uniform Local Sales and Use Tax Law or imposed by the Transactions and Use Tax Law, and for the taxes imposed under RTC section 6051.2 or 6201.2, or under section 35 of Article XIII of the California Constitution. I also acknowledge I am liable for all sales taxes on any portion of the gross receipts derived from the sale of diesel fuel not sold in a manner that qualifies for the partial exemption under RTC section 6357.1 and Regulation 1533.2, Diesel Fuel Used in Farming Activities or Food Processing. I further acknowledge that I am required to report and pay these taxes with the return for the reporting period in which I sell the diesel fuel.</p> <p>-----</p>
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Issue Paper Number 14-009



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

**Proposed Amendments to Regulations 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, and 1598.1, *Diesel Fuel Prepayment Exemption*
(Revisions to the Definition of Diesel Fuel)**

I. Issue

Whether Regulations 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, and 1598.1, *Diesel Fuel Prepayment Exemption*, should be amended to revise the definition of diesel fuel to be consistent with the definition in the Diesel Fuel Tax Law.

II. Alternative 1 – Staff Recommendation

Staff recommends the Board approve and authorize publication of the proposed amendments to Regulations 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, and 1598.1, *Diesel Fuel Prepayment Exemption*, as set forth in Exhibits 2 and 3 respectively. Staff's proposed amendments revise the definition of diesel fuel to be consistent with the definition in the Diesel Fuel Tax Law (commencing with Revenue and Taxation Code (RTC) section 60001). Staff's recommendation includes other technical and non-substantive revisions.

For a more detailed explanation of Alternative 1 - Staff Recommendation, refer to section VI of this paper.

III. Other Alternatives Considered

Do not approve the proposed amendments to Regulations 1533.2 and 1598.1.

IV. Background

The definitions of diesel fuel found in Regulations 1533.2 and 1598.1 took into consideration definitions used by the California Air Resources Board (ARB) and RTC section 60022, respectively. Due to subsequent revisions to the definitions of diesel fuel used by ARB and in RTC section 60022, the definitions of diesel fuel in Regulations 1533.2 and 1598.1 are no longer consistent with the provisions they were based upon.

Partial Exemption on Sales and Purchases of Diesel Fuel (Regulation 1533.2)

In 2002, the Board adopted Regulation 1533.2 to implement, interpret, and make specific the provisions of RTC section 6357.1, which provides a partial sales and use tax exemption on the sale and purchase of diesel fuel for use in farming activities or food processing. Regulation 1533.2 clarifies the conditions under which a sale or use of diesel fuel qualifies for a partial exemption from the sales and use tax and, as relevant to this issue, provides a definition of diesel fuel. Regulation 1533.2, subdivision (b)(6) specifies that:

“Diesel fuel” means, for purposes of this regulation only, any fuel that is commonly or commercially known, sold or represented as diesel fuel No. 1-D or No. 2-D, pursuant to the specifications in American Society for Testing and Materials Standard Specification for Diesel Fuel Oils (“ASTM”) D 975-81, which is incorporated herein by reference. Diesel fuel, for purposes of this regulation only, also includes Environmental Protection Agency rated diesel fuel commonly known as “federal fuel” sold for use in locomotives, or which is used in generators, pumps, dehydrators and any other equipment used in the conduct of farming and food processing activities. “Diesel fuel” does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, alcohol, aviation fuel, except diesel fuel sold for use in aircraft designed for agricultural aerial applications that meets the specifications of ASTM D 1655, jet fuel, bunker fuel, or other like substance used as a fuel. Qualifying diesel fuel shall be identified accordingly on the invoice of sale.

When the Board adopted Regulation 1533.2, the definition of diesel fuel was based, in part, on the ARB’s definition of diesel fuel. (California Code of Regulations, Title 13, section 2281(b)(1).) In 2004, section 2281(b)(1) was amended and the following text reflects the 2004 amendments using “strikethrough” and “underline” font:

"Diesel fuel" means any fuel that is commonly or commercially known, sold or represented as diesel fuel ~~No. 1-D or No. 2-D, pursuant to the specifications in ASTM Standard Specification for Diesel Fuel Oils D975-81, which is incorporated herein by reference,~~ including any mixture of primarily liquid hydrocarbons – organic compounds consisting exclusively of the elements carbon and hydrogen – that is sold or represented as suitable for use in an internal combustion, compression-ignition engine.

Per the ARB’s *Proposed Amendments to the Diesel Fuel Regulations*, Final Statement of Reasons (June 2004):

“[t]he amendments to the definitions of diesel fuel [were] intended to clarify the broad applicability of the sulfur and aromatic hydrocarbon standards to fuels that are

burned in diesel engines and are primarily hydrocarbons. Under the amendments, a fuel that is sold or represented as suitable for use in internal combustion, compression-ignition (diesel) engines, and is a blend of more than 50 percent by volume hydrocarbon fuel with some other non-hydrocarbon component or components, is subject to the sulfur and aromatic hydrocarbon standards.

[sentence omitted] There have been instances where parties have marketed products characterized as kerosene or "Jet A" to consumers of diesel fuel for use in vehicular diesel engines, and have claimed that the fuel is not subject to the sulfur and aromatic hydrocarbon content standards because the fuel does not – or has not been represented as – meeting the ASTM D 975-81 specifications. It has been the position of ARB counsel that the sale or supply of a fuel in these circumstances *is* subject to the standards as long as the fuel is a petroleum distillate that is suitable for use in the vehicular diesel engines for which the common grades No. 1-D or 2-D are specified. Similarly, if a vendor is explicitly or implicitly offering a fuel as suitable for use in those engines, it meets the definition of diesel fuel. This includes circumstances in which the vendor of a petroleum distillate knows or reasonably should know that the fuel being provided will be used by the customer as a fuel for diesel engines in motor vehicles. The amendments remove any ambiguity that might exist regarding the applicability of the sulfur and aromatics regulations."

Due to the 2004 amendments to section 2281(b), the definition of diesel fuel in Regulation 1533.2 with reference to ASTM standards is no longer consistent with the provision of section 2281(b)(1).

Exemption from the Prepayment of Sales Tax on Diesel Fuel (Regulation 1598.1)

RTC section 6480.1 provides, in part, that at any time the diesel fuel tax is imposed or would be imposed on any removal, entry, or sale in this state of diesel fuel, the supplier shall collect prepayment of retail sales tax from the person to whom the diesel fuel is sold. For purposes of the imposition of the prepayment of sales tax on diesel fuel, RTC section 6480(c) provides that the term "diesel fuel" is defined pursuant to the Diesel Fuel Tax Law (commencing with RTC section 60001). RTC section 6480.9 provides an exemption from the sales tax prepayment requirement on certain sales of diesel fuel for agricultural purposes.

Regulation 1598.1 specifies the conditions under which the exemption, provided in RTC section 6480.9, applies to the prepayment of sales tax on diesel fuel. The regulation refers to RTC section 6480(c) and the Diesel Fuel Tax Law for purposes of defining diesel fuel.

Regulation 1598.1, subdivision (a)(4), provides the following:

"Diesel fuel," for purposes of the imposition of the prepayment of sales tax, is defined in Revenue and Taxation Code section 6480(c) (by reference to Revenue and Taxation Code section 60022) and means any liquid that is commonly or commercially known or sold as a fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle. However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered highway vehicle.

Diesel fuel does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, or alcohol.

Diesel fuel does not include the water in a diesel fuel and water emulsion of two immiscible liquids of diesel fuel and water, which emulsion contains an additive that causes the water droplets to remain suspended within the diesel fuel, provided the diesel fuel emulsion meets standards set by the California Air Resources Board.

By contrast, the current provisions of RTC section 60022¹, subdivision (a), only provide that:

“Diesel fuel” means any liquid that is commonly or commercially known or sold as a fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle.

However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered highway vehicle.

"Diesel fuel" does not include kerosene, gasoline, liquified petroleum gas, natural gas in liquid or gaseous form, or alcohol.

To the extent that Regulation 1598.1 includes the language from RTC section 60022 repealed on January 1, 2007¹, the definition of diesel fuel in Regulation 1598.1 is no longer consistent with the current provisions of RTC section 60022.

V. Discussion

Staff held an interested parties meeting on July 15, 2014 and suggested that the definition of diesel fuel be revised to be consistent with the definition of diesel fuel as specified in RTC section 60022. At the meeting, there was overall support for the proposed amendments. Staff has not received any written comments on this issue.

Staff would like to note that biodiesel may not meet the ASTM standards specified in the current version of Regulation 1533.2. However, biodiesel is included in the definition of diesel fuel pursuant to RTC section 60022 and staff has historically considered biodiesel a qualifying fuel for the partial sales and use tax exemption for diesel fuel used in farming activities and food processing. To that extent, staff believes the proposed amendments will clarify that biodiesel is considered diesel fuel for purposes of the partial exemption.

Other Amendments

In addition to the proposed amendments regarding the definition of diesel fuel, staff proposes other technical and non-substantive amendments. In Regulation 1533.2(b)(1), Example B, staff suggests adding the words “to” and “from the field” to clarify which trips qualify for the partial exemption. In

¹As of January 1, 2007, the following language in RTC section 60022 was repealed: “[d]iesel fuel does not include the water in a diesel fuel and water emulsion of two immiscible liquids of diesel fuel and water, which emulsion contains an additive that causes the water droplets to remain suspended within the diesel fuel, provided the diesel fuel emulsion meets standards set by the California Air Resources Board.”

addition, staff suggests removing the reference to “general fund” in the “note” section of Appendix A to Regulation 1533.2 as there are other state funds for which the exemption applies. Furthermore, Regulation 1598.1(b) includes guidance in the second paragraph for calculating the percentage of a retailer’s total taxable sales to diesel fuel consumers. The guidance refers to amounts entered on specific lines of a sales and use tax return for purposes of making the calculation. When a taxpayer files its return via the Board of Equalization’s online services, specific line numbers are not included. As such, staff’s recommendation includes revising the guidance in subdivision (b) to reference general descriptions of the amounts so that a taxpayer filing a return online will have an appropriate reference to make the calculation.

VI. Alternative 1 - Staff Recommendation

A. Description of Alternative 1

Staff recommends the Board approve and authorize publication of the proposed amendments to Regulations 1533.2 and 1598.1, as provided in Exhibits 2 and 3, respectively, to:

- Revise the definition of the term diesel fuel in Regulation 1533.2 so that the term has the same meaning as defined in section 60022 of the Diesel Fuel Tax Law. (Regulation 1533.2(b)(6).)
- Add language to Regulation 1533.2(b)(1), Example B, to provide a complete sentence and to clarify which specific trips qualify for the partial exemption.
- Remove reference to the “general fund” in the note section of Appendix A to Regulation 1533.2.
- Delete the third paragraph in Regulation 1598.1(a)(4) so the definition of diesel fuel is consistent with the operative provisions of RTC section 60022.
- Revise Regulation 1598.1(b) to reference general descriptions of the amounts entered on the sales and use tax return for the purpose of calculating the percentage of a retailer’s total taxable sales to diesel fuel consumers.

B. Pros of Alternative 1

- Provides consistency with respect to the definition of diesel fuel in Regulations 1533.2 and 1598.1 and the Diesel Fuel Tax Law.
- Clarifies that biodiesel is considered diesel fuel for purposes of the partial exemption for diesel fuel used in farming activities or food processing.

C. Cons of Alternative 1

None.

D. Statutory or Regulatory Change for Alternative 1

No statutory change is required. However, staff’s recommendation does require a regulatory change.

E. Operational Impact of Alternative 1

Staff will publish the proposed amendments to Regulations 1533.2 and 1598.1 and begin the formal rulemaking process. Staff will also revise publication 66, *Agricultural Industry*, and related industry guidance affected by the proposed amendments.

F. Administrative Impact of Alternative 1

1. Cost Impact

The workload associated with publishing the regulations and updating the publication and industry guidance 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. Taxpayer/Customer Impact of Alternative 1

Revising the definition of diesel fuel so that it is consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide clarity to taxpayers and staff.

H. Critical Time Frames of Alternative 1

None.

VII. Alternative 2

A. Description of Alternative 2

Do not amend Regulations 1533.2 and 1598.1.

B. Pros of Alternative 2

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

C. Cons of Alternative 2

The definitions of diesel fuel within Regulations 1533.2 and 1598.1 will not be consistent with the provisions which they were based upon.

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. Taxpayer/Customer Impact of Alternative 2

Without regulatory amendments, the definitions of diesel fuel will be inconsistent which may be confusing to taxpayers and staff.

H. Critical Time Frames for Alternative 2

None.

Preparer/Reviewer Information

Prepared by: Tax Policy Division, Sales and Use Tax Department

Current as of: October 30, 2014

REVENUE ESTIMATE

STATE OF CALIFORNIA
BOARD OF EQUALIZATION



Proposed Amendments to Regulations 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, and 1598.1, *Diesel Fuel Prepayment Exemption* (Revisions to the Definition of Diesel Fuel)

I. Issue

Whether Regulations 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, and 1598.1, *Diesel Fuel Prepayment Exemption*, should be amended to revise the definition of diesel fuel to be consistent with the definition in the Diesel Fuel Tax Law.

II. Alternative 1 - Staff Recommendation

Staff recommends the Board approve and authorize publication of the proposed amendments to Regulations 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, and 1598.1, *Diesel Fuel Prepayment Exemption*, as set forth in Exhibits 2 and 3 respectively. Staff's proposed amendments revise the definition of diesel fuel to be consistent with the definition in the Diesel Fuel Tax Law (commencing with Revenue and Taxation Code (RTC) section 60001). Staff's recommendation includes other technical and non-substantive revisions.

III. Other Alternative(s) Considered

Do not approve the proposed amendments to Regulations 1533.2 and 1598.1.

Background, Methodology, and Assumptions

Alternative 1 – Staff Recommendation

Staff recommendation will only provide consistency to the definition of diesel fuel in Regulations 1533.2 and 1598.1 and the Diesel Fuel Tax Law and, therefore, will not have an impact on revenue.

Staff recommends the Board approve and authorize publication of the proposed amendments to Regulations 1533.2 and 1598.1, as provided in Exhibits 2 and 3 respectively, to:

- Revise the definition of the term diesel fuel in Regulation 1533.2 so that the term has the same meaning as defined in section 60022 of the Diesel Fuel Tax Law. (Regulation 1533.2(b)(6).)
- Add language to Regulation 1533.2(b)(1), Example B, to provide a complete sentence and to clarify which specific trips qualify for the partial exemption.
- Remove reference to the “general fund” in the note section of Appendix A to Regulation 1533.2.
- Delete the third paragraph in Regulation 1598.1(a)(4) so the definition of diesel fuel is consistent with the operative provisions of RTC section 60022.
- Revise Regulation 1598.1(b) to reference general descriptions of the amounts entered on the sales and use tax return for the purpose of calculating the percentage of a retailer’s total taxable sales to diesel fuel consumers.

Other Alternatives Considered

Do not amend Regulation 1533.2 and 1598.1.

Revenue Summary

Alternative 1 – staff recommendation will not have revenue impact.

Alternative 2 – this alternative will not have a revenue impact.

Preparation

Mr. Bill Benson, Jr., 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 Ms. Susanne Buehler, Chief, Tax Policy Division, Sales and Use Tax Department. For additional information, please contact Mr. Benson at (916) 445-0840.

Current as of October 30, 2014.

Sales and Use Tax Regulation 1533.2. *Diesel Fuel Used in Farming Activities or Food Processing.*

(a) General. Commencing on and after September 1, 2001, section 6357.1 of the Revenue and Taxation Code partially exempts from sales and use tax the sale of, and the storage, use, or other consumption in this state, of diesel fuel used in farming activities or food processing. The terms "farming activities" and "food processing" are defined below.

For the period commencing on September 1, 2001, and ending on December 31, 2001, the partial exemption applies to the taxes imposed by sections 6051 and 6201 of the Revenue and Taxation Code (4.75%), but does not apply to the taxes imposed pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on January 1, 2002, and ending on June 30, 2004, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6201, and 6201.3 of the Revenue and Taxation Code (5%), but does not apply to the taxes imposed pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on July 1, 2004, and ending on March 31, 2009, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6201, 6201.3, and 6201.5 of the Revenue and Taxation Code (5.25%), but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on April 1, 2009, and ending on June 30, 2011, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6051.7, 6201, 6201.3, 6201.5, and 6201.7 of the Revenue and Taxation Code (6.25%), but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on July 1, 2011, and ending on December 31, 2012, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6051.8, 6201, 6201.3, 6201.5, and 6201.8 of the Revenue and Taxation Code, but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on January 1, 2013, the partial exemption applies to the taxes imposed by section 36 of article XIII of the California Constitution and sections 6051, 6051.3, 6051.5, 6051.8, 6201, 6201.3, 6201.5, and 6201.8 of the Revenue and Taxation Code, but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

Given the varying rates of the taxes imposed by sections 6051.8 and 6201.8, the partial exemption applies to the following cumulative sales and use tax rates:

- (1) 7.12 percent for the period July 1, 2011, through June 30, 2012;
- (2) 7.42 percent for the period July 1, 2012, through December 31, 2012;
- (3) 7.67 percent for the period January 1, 2013 through June 30, 2013;
- (4) 7.44 percent for the period July 1, 2013, through June 30, 2014; and
- (5) 7.25 percent on or after July 1, 2014.

(b) Definitions. For purposes of this regulation:

(1) "Farming activities" mean a trade or business involving the cultivation of land or the raising or harvesting of any agricultural or horticultural commodity that may be legally sold to or offered for sale to others. These include the trade or business of operating a nursery or sod farm; the raising or harvesting of trees bearing fruit or nuts, or of other crops (e.g., grains, vegetables, or cotton); the raising of ornamental trees (other than evergreen trees that are more than six years old at the time they are severed from their roots); and the raising, shearing, feeding, caring for, training, and management of animals. The raising of animals includes the delivery of feed to the animal feeding operation, whether by the owner or the supplier of the feed. Operating a garden plot, orchard, or farm for the purpose of growing plants or animals for a person's own use shall not be considered a farming activity. Harvesting involves the gathering of any agricultural or horticultural commodity and includes activities such as crop drying, cotton ginning, and fruit ripening. Harvesting an agricultural commodity also includes the washing of the agricultural commodity, the inspection and grading of the agricultural commodity or livestock, and the packaging of the agricultural commodity for shipment as well as those activities delineated in Codes 0723 and 0724 of the Standard Industrial Classification Manual published by the United States Office of Management and Budget, 1987 edition (hereafter SIC Manual). For purposes of this regulation, merely buying and reselling plants or animals grown or raised entirely by another is not raising an agricultural or horticultural commodity. A person is engaged in raising a plant or animal, rather than the mere selling of a plant or animal, if the plant or animal is held for further cultivation and development prior to sale. In determining whether a plant or animal is held for further cultivation and development prior to sale, consideration will be given to all of the facts and circumstances, including: the value added by a person to the plant or animal through agricultural or horticultural processes; the length of time between the person's acquisition of the plant or animal and the time that the person makes the plant or animal available for sale; and in the case of a plant, whether the plant is kept in the container in which purchased, replanted in the ground, or replanted in a series of larger containers as it is grown to a larger size.

Farming activities also include the transportation and delivery of the agricultural or horticultural commodity, as described herein, from the trade or business that cultivated, raised or harvested the commodity to the marketplace, as described in subdivision (b)(5), and any empty haul related to the transportation of that agricultural or horticultural commodity.

Farming activities do not include food processing or transportation and delivery of processed food products to the marketplace.

Example A: A commercial hauler travels from its company yard to Grower A's field to pick up a load of tomatoes. The tomatoes are hauled to a processing plant. The hauler returns to the field with empty trailers. The sale of diesel fuel to the commercial hauler for use in this activity is partially exempt from tax.

Example B: A commercial hauler travels from its company yard to Grower A's field to pick up a load of fresh bell peppers. The bell peppers are sold to a grocery store and are delivered to the grocery store's distribution center. At the distribution center, the hauler picks up a load of pallets to deliver to another customer. The sale of diesel fuel to the commercial hauler for use from the yard to the field and from the field to the grocery store's distribution center is partially exempt from tax. The sale of diesel fuel to the commercial hauler for use in delivering the pallets is not partially exempt from tax.

Example C: A nursery owner transports its horticultural products to a distribution center. After delivering the product, the nursery owner makes two stops. The first stop is to pick up fertilizer for use at the nursery. The second stop is personal business unrelated to the nursery operation. The sale of diesel fuel to the nursery owner for use in this example is partially exempt from tax up to and including the first stop.

(2) "Plants" mean an agricultural or horticultural commodity produced in a farming activity which includes, but is not limited to, trees bearing fruit or nuts, other crops, an ornamental tree, a vine, a bush, or sod. Sea plants are produced in a farming activity if they are tended and cultivated as opposed to merely harvested.

(3) "Animals" mean a life form produced in a farming activity which includes, but is not limited to, any livestock, poultry or other bird, and fish or other sea life. Fish and other sea life are produced in a farming activity if they are raised on a fish farm. A fish farm is an area where fish or other sea life are grown or raised as opposed to merely caught or harvested.

(4) "Food processing" means the activities described in Industry Groups 201, 202, 203, 204, and 207, or Codes 2068 and 2084 of the SIC Manual. Food processing activities also includes transporting raw product, supplies and materials to the processing facility, transporting partially processed food products between various divisions of the same food processing entity for further processing operations, and any empty hauls related to the transportation of that product. Food processing does not include transportation and delivery of processed food products to the marketplace. A food processor is not required to be engaged 50 percent or more of the time in such activities as described herein.

Example A: A for-hire carrier, contracted for by a cheese plant, transports unprocessed milk from a dairy farm to the cheese plant for processing and then returns to the carrier's truck yard. The diesel used in this example is eligible for the partial sales tax exemption.

Example B: A flour mill transports flour sacks from a bag manufacturer to the mill's facility, and then transports those sacks to other flour mills owned by the same entity. The diesel

used to transport the sacks in this example is eligible for the partial sales tax exemption, but the transportation of flour is not.

Example C: Cannery A and Cannery B are different divisions of the same food processing entity. Cannery A processes unprocessed tomatoes into tomato paste and then transports the paste to Cannery B for further processing. Cannery B processes the paste into tomato soup which is then transported to a grocery distribution warehouse. From the distribution warehouse the processed product is transported by the buyer to individual grocery stores and other distribution warehouses. Only the movement of paste from Cannery A to Cannery B is eligible for the partial sales tax exemption. The subsequent movement of product to the first distribution center and to retail stores and other warehouses is not eligible for the exemption.

(5) "Marketplace" means the place where a commodity is sold for resale, at retail or for consumption at an animal feeding operation, notwithstanding any intervening activities to prepare the product for sale in the marketplace. Such preparation activities include, but are not limited to, cooling, sorting, inspection, grading, drying, packing, handling, washing, slaughtering and butchering (except as otherwise described in Codes 2011 and 2015 of the SIC Manual), candling, sterilizing, freezing, pasteurizing, homogenizing, and packaging. Producers of agricultural or horticultural products may prepare and market their products through a cooperative, joint venture, corporation or partnership in which they have a financial interest, or other such enterprises, and the diesel used in these enterprises to transport products to the marketplace is eligible for the sales tax exemption.

(6) "Diesel fuel" means, for purposes of this regulation only, any liquid fuel that is commonly or commercially known, or sold or represented as a diesel fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle.

However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered vehicle.

~~No. 1-D or No. 2-D, pursuant to the specifications in American Society for Testing and Materials Standard Specification for Diesel Fuel Oils ("ASTM") D-975-81, which is incorporated herein by reference. Diesel fuel, for purposes of this regulation only, also includes Environmental Protection Agency rated diesel fuel commonly known as "federal fuel" sold for use in locomotives, or which is used in generators, pumps, dehydrators and any other equipment used in the conduct of farming and food processing activities.~~

"Diesel fuel" does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, or alcohol, aviation fuel, except diesel fuel sold for use in aircraft designed for agricultural aerial applications that meets the specifications of ASTM D-1655, jet fuel, bunker fuel, or other like substance used as a fuel. Qualifying diesel fuel shall be identified accordingly on the invoice of sale.

(7) "Qualified activity" means farming activities as defined in subdivision (b)(1) or food processing, as defined in subdivision (b)(4).

(c) Partial Exemption Certificates.

(1) In General. A person who purchases diesel fuel for use in a qualified activity from an in-state retailer, or an out-of state retailer obligated to collect use tax, must provide the retailer with a partial exemption certificate in order for the retailer to claim the partial exemption. If the retailer takes a partial exemption certificate timely and in good faith, as defined in subdivision (c)(5), from a person who purchases diesel fuel for use in a qualified activity, the partial exemption certificate relieves the retailer from the liability for the sales tax subject to partial exemption under this regulation or the duty of collecting the use tax subject to partial exemption under this regulation. A partial exemption certificate will be considered timely if it is taken any time before the retailer bills the purchaser for the diesel fuel, any time within the retailer's normal billing or payment cycle, any time at or prior to delivery of the diesel fuel to the purchaser, or no later than 15 days after the date of purchase. A partial exemption certificate which is not taken timely will not relieve the retailer of the liability for tax excluded by the partial exemption; however the retailer may present satisfactory evidence to the Board that the retailer sold the diesel fuel to a person that used it in a qualified activity. A partial exemption from the sales and use tax under this part shall not be allowed unless the retailer claims the partial exemption on its sales and use tax return for the reporting period during which the transaction subject to the partial exemption occurred. Where the retailer fails to claim the partial exemption as set forth above, the retailer may file a claim for refund as set forth in subdivision (e).

The partial exemption certificate form set forth in Appendix A may be used to claim the partial exemption.

(2) Blanket Partial Exemption Certificates. In lieu of requiring a partial exemption certificate for each transaction, a person who purchases diesel fuel for use in a qualified activity may issue a blanket partial exemption certificate. The partial exemption certificate form set forth in Appendix A may be used as a blanket partial exemption certificate. Appendix A may also be used as a specific partial exemption certificate if the purchaser provides the purchase order or sales invoice number and a precise description of the property being purchased. A person who purchases diesel fuel for use in a qualified activity must include in the partial exemption certificate how much or what percentage of the diesel fuel purchased will be used in a qualified activity. If purchasing diesel fuel not qualifying for the partial exemption, the purchaser must clearly state in documents such as a written purchase order, sales agreement, or contract that the sale or purchase is not subject to the blanket partial exemption certificate.

(3) Form of Partial Exemption Certificate. Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a partial exemption certificate with respect to the sale or purchase of diesel fuel if it contains all of the following essential elements:

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name, address and telephone number of the purchaser.

(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement of how much or what percentage of the diesel fuel purchased will be used in a qualified farming or food processing activity.

(E) Date of execution of document.

(4) **Retention and Availability of Partial Exemption Certificates.** A retailer must retain each partial exemption certificate received from a person who purchases diesel fuel for use in a qualified activity for a period of not less than four years from the date on which the retailer claims a partial exemption based on the partial exemption certificate.

While the Board will not normally require the filing of the partial exemption certificate with a sales and use tax return, when necessary for the efficient administration of the Sales and Use Tax Law, the Board may, on 30 days' written notice, require a retailer to commence filing with its sales and use tax returns copies of all partial exemption certificates. The Board may also require, within 45 days of the Board's request, retailers provide the Board access to any and all partial exemption certificates, or copies thereof, accepted for the purposes of supporting the partial exemption.

(5) **Good Faith.** A seller will be presumed to have taken a partial exemption certificate in good faith in the absence of evidence to the contrary. A seller, without knowledge to the contrary, may accept a partial exemption certificate in good faith where the purchaser states that a certain percentage of the diesel fuel purchased will be used in farming activities or food processing. However, a partial exemption certificate cannot be accepted in good faith where the seller has knowledge that the diesel fuel is not subject to a partial exemption, or will not be otherwise used in a partially exempt manner.

(d) **Partial Exemption Certificate for Use Tax.** The partial exemption certificate must be completed by a person who purchases diesel fuel for use in a qualified activity to claim a partial exemption from use tax from an out-of-state retailer not obligated to collect the use tax. A partial exemption from the use tax shall not be allowed unless the purchaser or retailer claims the partial exemption on its individual use tax return, sales and use tax return, or consumer use tax return for the reporting period during which the transaction subject to the partial exemption occurred. Where the purchaser or retailer fails to claim the partial exemption as set forth above, the purchaser or retailer may file a claim for refund as set forth in subdivision (e).

The purchaser who files an individual use tax return must attach a completed partial exemption certificate to the return. The purchaser who is registered with the Board as a retailer or consumer and files a sales and use tax return or consumer use tax return must, within 45 days of the Board's request, provide the Board access to any and all documents that support the claimed partial exemption.

The partial exemption certificate form set forth in Appendix A may be used to claim the partial exemption.

(e) Refund of Partial Exemption.

(1) For the period commencing on September 1, 2001, and ending on April 30, 2002, a person who purchases diesel fuel for use in a qualified activity may claim the partial exemption on qualified purchases from an in-state retailer or an out-of-state retailer obligated to collect the use tax by furnishing the retailer with a partial exemption certificate on or before July 31, 2002. The retailer must refund the tax or tax reimbursement directly to a purchaser of diesel fuel for use in a qualified activity or, at the purchaser's sole option, the purchaser may be credited with such amount.

(2) A retailer who paid sales tax on a qualified sale or a person who paid use tax on a qualified purchase and who failed to claim the partial exemption as provided by this regulation may file a claim for refund equal to the amount of the partial exemption that he or she could have claimed pursuant to this regulation. The procedure for filing a claim shall be the same as for other claims for refund filed pursuant to Revenue and Taxation Code section 6901. For transactions subject to use tax, a person who purchases diesel fuel for use in a qualified activity filing a claim for refund of the partial exemption has the burden of establishing that he or she was entitled to claim the partial exemption with respect to the amount of refund claimed under this part. For transactions subject to sales tax, a person filing a claim for refund of the partial exemption has the burden of establishing that the purchaser of the diesel fuel otherwise met all the requirements of a person who purchases diesel fuel for use in a qualified activity at the time of the purchase subject to the refund claimed under this part.

(f) Improper Use of Partial Exemption. Notwithstanding subdivision (a), tax applies to any sale of, and the storage, use, or other consumption in this state of diesel fuel that is used in a manner not qualifying for the partial exemption under this regulation.

(g) Purchaser's Liability for the Payment of Sales Tax.

(1) If a purchaser timely submits a copy of a partial exemption certificate to the retailer or partial exemption certificate for use tax to the Board, and then uses the diesel fuel in a manner not qualifying for the partial exemption, the purchaser shall be liable for payment of the sales tax, with applicable interest, to the same extent as if the purchaser were a retailer making a retail sale of the diesel fuel at the time the diesel fuel was so removed, converted, or used.

(2) A purchaser providing a partial exemption certificate accepted in good faith by the retailer or a partial exemption certificate for use tax to the Board for diesel fuel that does not qualify for the partial exemption is liable for payment of the sales tax, with applicable interest, to the same extent as if the purchaser were a retailer making a retail sale of the diesel fuel at the time the diesel fuel was purchased.

(h) Records. Adequate and complete records must be maintained by the person who purchases diesel fuel for use in a qualified activity as evidence that the diesel fuel purchased was used in a qualified activity.

(i) Operative Date. This regulation is operative as of September 1, 2001.

Appendix A

PARTIAL EXEMPTION CERTIFICATE

STATE BOARD OF EQUALIZATION

Qualified Sales and Purchases of Diesel and Farm Equipment and Machinery

NOTE: This is an exemption only from the state ~~general fund~~-portion of the sales and use tax rate. You are not relieved from your obligations for the local and district taxes on this transaction. This partial exemption also does not apply to any tax levied pursuant to ~~Section~~ 6051.2 and 6201.2 of the Revenue and Taxation Code, or pursuant to ~~Section~~ 35 of article XIII of the California Constitution. This partial exemption also applies to lease payments made on or after September 1, 2001, for tangible personal property even if the lease agreement was entered into prior to September 1, 2001.

SELLER'S/LESSOR'S NAME
SELLER'S/LESSOR'S ADDRESS (Street, City, State, Zip Code)

Diesel Fuel Used in Farming Activities or Food Processing* - I as the undersigned purchaser, hereby certify that of the diesel purchased, _____ % will be used in qualified farming activities or food processing in accordance with Revenue and Taxation Code ~~Section~~ 6357.1.

Farm Equipment and Machinery (or parts¹ thereof)* - I as the undersigned purchaser, hereby certify I am engaged in an agricultural business described in Codes 0111 to 0291 of the Standard Industrial Classification (SIC) Manual, or I perform an agricultural service described in Codes 0711 to 0783 of the SIC Manual for such classified persons. The property purchased or leased will be used primarily in producing and harvesting agricultural products in accordance with Revenue & Taxation Code ~~Section~~ 6356.5.²

Type of Farm Equipment and Machinery (or parts thereof) _____

*If you also want this certificate to be used as a blanket certificate for future purchases, describe generally the type of property you will be purchasing and ask your vendor to keep this certificate on file. If this is a specific partial exemption certificate, provide the purchase order or sales invoice number and a precise description of the property being purchased.

I understand that if such property is not used in the manner qualifying for the partial exemption, or if I am not a qualified person, as applicable, that I am required by the Sales and Use Tax Law to report and pay the state tax measured by the sales price/rentals payable of the property to/by me. I also understand that this partial exemption certificate is in effect as of the date shown below and will remain in effect until revoked in writing.

PURCHASER'S NAME OR COMPANY NAME (if applicable)		DATE
SIGNATURE (signature of the purchaser, purchaser's employee, or authorized representative of the purchaser)		TELEPHONE NUMBER
TITLE		PERMIT NUMBER (if applicable) ³
ADDRESS	CITY	STATE, ZIP

¹ If you are purchasing oil, grease, or lubricating or other qualifying fluids, indicate what percentage will be used in farm equipment and machinery performing qualified producing and harvesting activities.
² Vehicles that qualify as farm equipment and machinery, as defined in Regulation 1533.1(b)(1)(B), must be used exclusively in producing and harvesting agricultural products.
³ If you are not required to hold a seller's permit, please enter "Not Applicable."

Sales and Use Tax Regulation 1598.1. Diesel Fuel Prepayment Exemption.

(a) Definitions.

- (1) "Bulk deliveries" mean transfers of diesel fuel into storage tanks holding 500 gallons or more.
- (2) "Cardlock, keylock, or other unattended mechanism" means an unattended, completely automated fueling station at which a purchaser obtains diesel fuel through use of a coded card or key and an access code. Charges for sales of diesel fuel to customers are usually consolidated at a central location and periodically invoiced to the purchaser.
- (3) A "diesel fuel consumer" or "diesel fuel consumers" mean a person or persons that use diesel fuel in a manner that qualifies for the partial sales and use tax exemption set forth in Revenue and Taxation Code section 6357.1 and Regulation 1533.2, Diesel Fuel Used in Farming Activities or Food Processing.
- (4) "Diesel fuel," for purposes of the imposition of the prepayment of sales tax, is defined in Revenue and Taxation Code section 6480(c) (by reference to Revenue and Taxation Code section 60022) and means any liquid that is commonly or commercially known or sold as a fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle. However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered highway vehicle.

Diesel fuel does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, or alcohol.

~~Diesel fuel does not include the water in a diesel fuel and water emulsion of two immiscible liquids of diesel fuel and water, which emulsion contains an additive that causes the water droplets to remain suspended within the diesel fuel, provided the diesel fuel emulsion meets standards set by the California Air Resources Board.~~

- (5) "Qualified retailer" means a person who meets the requirements of subdivisions (b)(1) through (b)(5).
- (6) "Seller" means either the supplier or the wholesaler, as those terms are defined in Revenue and Taxation Code section 6480(c), that sells diesel fuel to a qualified retailer.
- (7) "Total taxable sales" means the gross receipts from the sale of tangible personal property subject to tax, including sales of diesel fuel.

(b) Application of Tax. Commencing on and after October 9, 2002, a seller of diesel fuel is not required to collect the prepayment of sales tax on that percentage of diesel fuel specified in the retailer's diesel fuel prepayment exemption certificate that is otherwise required by Revenue and Taxation Code section 6480.1, provided the diesel fuel is sold to a retailer who:

- (1) Will resell the diesel fuel in the ordinary course of business,
- (2) Issues a diesel fuel prepayment exemption certificate to the seller as set forth in subdivision (c),
- (3) Sells diesel fuel to a diesel fuel consumer,
- (4) During the calendar year immediately preceding any purchases of diesel fuel, sold diesel fuel to diesel fuel consumers in which the gross receipts from such sales exceeded 25 percent of that retailer's total taxable sales, and
- (5) Sold more than 50% of its diesel fuel through bulk deliveries or through a cardlock, keylock, or other unattended mechanism, or both.

For purposes of calculating the percentage set forth in subdivision (b)(4) above, the numerator shall be the sum total of amounts ~~entered on Form BOE 401GS line 10(e)(4) (Amount Ssubject to the partial state tax exemption for Diesel Fuel Used in Farming and Food Processing-Exemption)~~ for each return filed during the preceding calendar year and the denominator shall be the sum total of amounts ~~entered on line 14(a) (Transactions Ssubject to County Tax)~~ for each return filed during the preceding calendar year.

(c) Prepayment Exemption Certificate.

(1) In General. A seller of diesel fuel who takes a diesel fuel prepayment exemption certificate timely and in good faith, as defined in subdivision (c)(5), from a qualified retailer, is relieved from the liability for the sales tax prepayment subject to the exemption under this regulation, or the duty of collecting the sales tax prepayment subject to exemption under this regulation. A diesel fuel prepayment exemption certificate will be considered timely if it is taken any time before the seller bills the qualified retailer for the diesel fuel, any time within the seller's normal billing or payment cycle, or any time at or prior to delivery of the diesel fuel to the qualified retailer. A diesel fuel prepayment exemption certificate which is not taken timely will not relieve the seller of the liability for the sales tax prepayment excluded by the exemption; however, the seller may present satisfactory evidence to the Board that the seller sold the diesel fuel to a qualified retailer. A diesel fuel prepayment exemption under this part shall not be allowed unless the seller claims the exemption on its sales and use tax return for the reporting period during which the transaction subject to the diesel fuel prepayment exemption occurred. The diesel fuel prepayment exemption certificate form set forth in the Appendix may be used to claim the diesel fuel prepayment exemption.

(3) Form of Prepayment Exemption Certificate. Any document, such as a letter or purchase order, timely provided by the qualified retailer to the seller will be regarded as a diesel fuel prepayment exemption certificate with respect to the sale of diesel fuel if it contains all of the following essential elements:

(A) The signature of the qualified retailer, qualified retailer's employee, or authorized representative of the qualified retailer.

(B) The name, address and telephone number of the qualified retailer.

(C) The number of the seller's permit held by the qualified retailer.

(D) A statement setting forth the requirements of subdivisions (b)(1) through (b)(5).

(E) A statement of what percentage of total diesel fuel purchases will be resold to diesel fuel consumers.

(F) Date of execution of document.

(4) Retention and Availability of Prepayment Exemption Certificates. A seller must retain each diesel fuel prepayment exemption certificate received from a qualified retailer who purchases diesel fuel for resale to diesel fuel consumers for a period of not less than four years from the date on which the qualified retailer claims an exemption for sales tax prepayment based on the diesel fuel prepayment exemption certificate. The Board may require, within 45 days of the Board's request, sellers to provide the Board access to any and all diesel fuel prepayment exemption certificates, or copies thereof, accepted for the purposes of supporting the diesel fuel prepayment exemption.

(5) Good Faith. A seller will be presumed to have taken a diesel fuel prepayment exemption certificate in good faith in the absence of evidence to the contrary. However, a diesel fuel prepayment exemption certificate cannot be accepted in good faith where the seller has knowledge that the diesel fuel will not be sold to a retailer who meets the requirements of subdivisions (b)(1) through (b)(5), will not otherwise be used by diesel fuel consumers, or that the percentage listed on the exemption certificate for sales tax prepayment is inaccurate. A blanket diesel fuel prepayment exemption certificate utilized for sales occurring in a subsequent calendar year in which the blanket diesel fuel prepayment exemption certificate was initially provided to the seller is not accepted in good faith for sales occurring in that subsequent calendar year.

(d) Retailer's Liability for the Payment of Tax.

(1) A qualified retailer providing a diesel fuel prepayment exemption certificate pursuant to subdivision (c) is liable for the taxes imposed by the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, and the tax that is imposed under Revenue and Taxation Code section 6051.2 or 6201.2, or under section 35 of article XIII of the California Constitution on the sale of diesel fuel to diesel fuel consumers.

(2) A qualified retailer providing a diesel fuel prepayment exemption certificate pursuant to subdivision (c) is liable for sales tax on any portion of the gross receipts derived from the sale of diesel fuel that is not sold to diesel fuel consumers.

(3) A qualified retailer that is liable for the tax under the provisions of subdivisions (d)(1) or (d)(2) shall report and pay that tax with the sales and use tax return filed for the reporting period during which the qualified retailer sells the diesel fuel.

(e) **Improper Use of Prepayment Exemption Certificate.** Any person who gives a diesel fuel prepayment exemption certificate pursuant to this regulation for the purpose of evading the prepayment of sales tax on sales of diesel fuel that he or she knows at the time of sale do not qualify for the diesel fuel prepayment exemption is guilty of a misdemeanor punishable as provided in Revenue and Taxation Code section 7153. In addition, such person shall be liable to the state for a penalty of one thousand dollars (\$1,000) for each diesel fuel prepayment exemption certificate issued for personal gain or to evade the prepayment of sales tax.

(f) **Records.** Adequate and complete records must be maintained by the seller and qualified retailer as evidence that the diesel fuel qualifies for the diesel fuel prepayment exemption.

(g) **Operative Date.** This regulation is operative as of October 9, 2002.

**DIESEL FUEL PREPAYMENT EXEMPTION CERTIFICATE
SECTION 6480.3**

Please Note: This is an exemption only from the prepayment of sales tax required by Revenue and Taxation Code (RTC) section 6480.1. This exemption applies only to the prepayment of the sales tax on sales of diesel fuel that you purchase for resale to persons qualifying for the partial exemption from sales and use tax on the sale or use of diesel fuel pursuant to RTC section 6357.1 and Regulation 1533.2, Diesel Fuel Used in Farming Activities or Food Processing. You are not relieved of your obligation to report and pay sales tax on the non-exempt portion of your partially exempt diesel fuel sales or on other retail sales.

DIESEL FUEL SELLER'S NAME

DIESEL FUEL SELLER'S ADDRESS (street, city, state, zip code)

I, the undersigned diesel fuel retailer, hereby certify that, of the diesel fuel purchased for resale from the above diesel fuel seller, I reasonably expect that _____ % will be sold to consumers engaged in farming activities or food processing who qualify for the diesel fuel partial exemption pursuant to RTC section 6357.1 and Regulation 1533.2, Diesel Fuel Used in Farming Activities or Food Processing. I further certify that:

1. During the calendar year immediately preceding my purchases of diesel fuel, I sold diesel fuel to consumers that qualified for the RTC section 6357.1 and Regulation 1533.2 partial sales and use tax exemption and that these sales were in excess of 25% of my total taxable sales; and,
2. More than 50% of my diesel fuel sales occur through deliveries into storage tanks of 500 gallons or more, or through a cardlock, keylock, or other unattended mechanism, or both.

By signing below, I acknowledge I am liable for the taxes imposed under the Bradley-Burns Uniform Local Sales and Use Tax Law or imposed by the Transactions and Use Tax Law, and for the taxes imposed under RTC section 6051.2 or 6201.2, or under section 35 of Article XIII of the California Constitution. I also acknowledge I am liable for all sales taxes on any portion of the gross receipts derived from the sale of diesel fuel not sold in a manner that qualifies for the partial exemption under RTC section 6357.1 and Regulation 1533.2, Diesel Fuel Used in Farming Activities or Food Processing. I further acknowledge that I am required to report and pay these taxes with the return for the reporting period in which I sell the diesel fuel.

I understand that any person who gives this diesel fuel prepayment exemption certificate for the purpose of evading the prepayment of sales tax on sales of diesel fuel that he or she knows at the time of purchase do not qualify for the diesel fuel prepayment exemption is guilty of a misdemeanor punishable as provided in RTC section 7153. I also understand that such person shall be liable to the state for a penalty of one thousand dollars (\$1,000) for each diesel fuel prepayment exemption certificate issued for personal gain or to evade the prepayment or payment of taxes.

Important: This diesel fuel prepayment exemption certificate constitutes a blanket diesel fuel prepayment exemption certificate for future purchases and is only valid during the calendar year in which it is provided to the diesel fuel seller unless the diesel fuel prepayment exemption certificate is otherwise specified as a specific diesel fuel prepayment exemption certificate. The diesel fuel seller shall require a retailer to provide a new blanket diesel fuel prepayment exemption certificate for any future purchases of diesel fuel in each subsequent calendar year. If this is a specific diesel fuel prepayment exemption certificate, provide the purchase order or sales invoice number in the following space:

RETAILER'S NAME OR COMPANY NAME	DATE
SIGNATURE (signature of the retailer, retailer's employee, or authorized representative of the retailer)	TELEPHONE NUMBER ()
TITLE	PERMIT NUMBER
ADDRESS (STREET, CITY, STATE, ZIP CODE)	CUSTOMER ACCOUNT NUMBER

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

450 N STREET

SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT

NOVEMBER 19, 2014

BUSINESS TAXES COMMITTEE

REPORTED BY: Kathleen Skidgel

CSR NO. 9039

Juli Price Jackson

CSR NO. 5214

P R E S E N T

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For the Committee:

Michelle Steel
Chair

Betty T. Yee
Member

Jerome E. Horton
Member

George Runner
Member

Marcy Jo Mandel
Appearing for John
Chiang, State Controller
(per Government Code
Section 7.9)

Joann Richmond
Chief, Board Proceedings
Division

For Board of
Equalization Staff:

Susanne Buehler
Chief, Tax Policy Division

Kevin Smith
Tax Counsel III
Legal Department

Bradley Heller
Tax Counsel IV
Legal Department

Scott Claremon
Tax Counsel
Legal Department

Lawrence Mendel
Tax Counsel III
Legal Department

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INDEX OF SPEAKERS

1		
2	SPEAKER	PAGE
3	Wade Downey	9
4	Roderick Calub	16
5	Jacob Bholat	17

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- 7
- 8
- 9
- 10
- 11
- 12
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1 450 N STREET
2 SACRAMENTO, CALIFORNIA
3 NOVEMBER 19, 2014

4 ----oOo----

5 MR. HORTON: Members, let us call the
6 meeting of the Board of Equalization to order.

7 Ms. Richmond, what is our first matter?

8 MS. RICHMOND: Good morning, Chairman and
9 Board Members.

10 Our first item on this morning's agenda is
11 the Business Taxes Committee. Ms. Steel is the
12 Chair of that committee.

13 Ms. Steel.

14 MS. STEEL: I call the Business Taxes
15 Committee meeting to order. And I have staff coming
16 up. And we have three items here.

17 MS. BUEHLER: Good morning. I am Susanne
18 Buehler with the Sales and Use Tax Department.

19 We have three agenda items for your
20 consideration today. We will take each agenda item
21 and their respective action item separately before
22 moving to the next.

23 With me for Agenda Item 2 is Mr. Kevin
24 Smith from our Legal Department.

25 For this agenda item we request your
26 approval and authorization to publish proposed
27 amendments to Sales and Use Tax Regulations 1533.2,
28 Diesel Fuel Used in Farming Activities or Food

1 Processing, and 1598.1, Diesel Fuel Prepayment
2 Exemption.

3 Staff's recommended amendments revise the
4 definition of diesel fuel to be consistent with the
5 definition in the Diesel Fuel Tax Law.

6 We would be happy to answer any questions
7 you may have on this topic.

8 MS. STEEL: Any comments?

9 Members, there is a motion.

10 MS. YEE: Move to approve and authorize
11 publication.

12 MR. RUNNER: Second.

13 MR. HORTON: Sec --

14 MS. STEEL: Okay. Member Yee moved and
15 Member Runner second.

16 So it's been moved.

17 So next item.

18 MS. BUEHLER: Okay. With me for Agenda
19 Item 3 will be Mr. Bradley Heller from our Legal
20 Department.

21 For this agenda item we request your
22 approval and authorization to publish proposed
23 amendments to Sales and Use Tax Regulation 1685.5,
24 Calculation of Estimated Use Tax - Use Tax Table.

25 Staff's recommended amendments update the
26 definition of the average state, local and district
27 sales and use tax rate by removing the specific
28 reference to Section 35 of Article XIII of the

1 California Constitution, to make the language
2 consistent with the statute.

3 No interested parties meetings were held on
4 this issue since staff's recommended amendments are
5 technical in nature.

6 We would be happy to answer any questions
7 you may have on this topic.

8 MR. HORTON: Move adoption.

9 MS. YEE: Second.

10 MS. STEEL: Perfect. Okay.

11 Mr. Chair made a motion, and then second by
12 Ms. Yee. And it's been moved.

13 And next one we have actually three
14 speakers. So all the speakers please come up.

15 And could you introduce?

16 MS. BUEHLER: Certainly.

17 With me for Agenda Item 4 are Mr. Larry
18 Mendel and Mr. Scott Claremon from our Legal
19 Department.

20 For this agenda item we request your
21 approval and authorization to publish proposed
22 amendments to Sales and Use Tax Regulation 1591,
23 Medicines and Medical Devices.

24 We have four action items; one concurred
25 item and three which have alternate recommendations.
26 I will be going through all four before we turn it
27 over to our guest speakers.

28 In Action 1, it represents those areas

1 agreed upon by staff and interested parties and
2 provides the following:

3 It clarifies that articles permanently
4 implanted in the human body to mark the location of
5 medical -- a medical condition are included in the
6 definition of medicines, and clarifies that approval
7 by the United States Food and Drug Administration
8 means any device in which the agency cleared a
9 pre-market notification or approved an application
10 for pre-market approval.

11 In Action 2, we ask that the Board approve
12 and authorize for publication either staff's
13 recommendation to add language at the end of
14 subdivision (a)(9), clarifying that medicines are
15 further defined in subdivisions (b) and (c);

16 Or, Alternative 2 from Downey, Smith and
17 Fier which deletes the opening phrase, quote,
18 "except where taxable for all uses as provided in
19 subdivision (c)," end quote, from subdivision
20 (a)(9)(A) and inserts, quote, "unless this item is
21 specifically excluded from the definition of
22 medicine under subdivision (c) for all uses," end
23 quote, at the end of the subdivision;

24 Or, Alternative 3 from Equity Recovery
25 Solutions, Incorporated which also deletes the
26 opening phrase of subdivision (a)(9)(A) but inserts,
27 quote, "except where taxable as provided in
28 subdivision (c)" at the end of the subdivision.

1 In Action 3 we ask that the Board approve
2 and authorize for publication either staff's
3 recommendation to delete the last sentence in
4 subdivision (b)(2) which states "implantable
5 articles that do not qualify as permanently
6 implanted medicines are subject to tax when sold or
7 used."

8 Or, the recommendation from Equity Recovery
9 Solutions, Incorporated which adds language to the
10 last sentence of subdivision (b)(2) that stated
11 specific -- "specified devices are taxable only if
12 intended to be implanted in the human body on a
13 temporary basis."

14 Lastly, in Action 4 we ask that the Board
15 approve and authorize for publication either staff's
16 recommendation to make no changes to the existing
17 language of subdivision (c)(2) which is based on the
18 fact that the current language is taken from
19 statute;

20 Or, Alternative 2 from Downey, Smith and
21 Fier which recommends adding parenthetical language
22 to subdivision (c)(2) that articles which are fully
23 implanted would not be excluded from the definition
24 of medicines;

25 Or, Alternative 3 from Equity Recovery
26 Solutions, Incorporated which recommends adding
27 language to subdivision (c)(2) that articles which
28 are fully and permanently implanted or they're fully

1 worn components would not be excluded from the
2 definition of medicines.

3 Please note that page 18 of the agenda
4 erroneously omitted the word "not" from the
5 underlying sentence; it should read, quote, "that
6 are not fully and permanently implanted or they're
7 fully worn components," end quote. And that is part
8 of Alternative 3 from Equity Recovery Solutions,
9 Incorporated.

10 We have speakers on the action items, and
11 we would be happy to answer any questions you may
12 have after their presentations.

13 MS. STEEL: Sure. It seems like we have
14 four speakers.

15 No, actually -- three, because one recorded
16 two times.

17 Okay. Mr. Wade Downey. Go ahead.

18 ---oOo---

19 WADE DOWNEY

20 ---oOo---

21 MR. DOWNEY: Great. My name's Wade Downey.
22 I'm a partner with Downey, Smith and Fier, state and
23 local tax consulting firm.

24 First of all, I wanted to make sure that
25 the Board has received the letter that we issued
26 relative to the misstatement, I guess, of the
27 revenue impact related to the changes that we're
28 proposing.

1 Our proposal has no change to the treatment
2 of the Port-a-Cath as reported in the information.

3 So Chairman and Members of the Board, thank
4 you for the opportunity to present related to
5 proposed Regulation 1591 changes.

6 DSF has participated in each of the
7 interested party discussions. We'd like to thank
8 staff and -- for their work, specifically to address
9 breast tissue markers, and their leadership
10 throughout this process.

11 I'd also like to thank staff, the Policy
12 Group and the Legal Department, for not mistaking my
13 passion and boisterous expression at times for
14 anything other than dedication to this process and
15 the goal to come up with a regulation that is
16 clearer than we have today.

17 I truly believe, at the most basic level,
18 we're all here with a common goal to clarify this
19 regulation that causes so much confusion.

20 Our goal in participating in interested
21 party process was not limited to adding BTMs to the
22 regulation; that's the easy part. It was -- it was
23 a much loftier goal. And that was to actually
24 clarify the language of 1591(a)(9)(A) to be
25 consistent with Board's decision, the statute, and
26 how industry reads and applies that section.

27 Whether the adopted language includes or
28 excludes any specific medical product, the

1 regulation language needs to be clear, unambiguous,
2 and not contain underlining interpretations as are
3 currently the case.

4 To reject Alternative 2 -- that is, only
5 addressing the specific BTM product -- does not
6 resolve the disconnect between the Board's decisions
7 and how staff applies this regulation. It also
8 continues the patchwork nature of the regulation,
9 provides little guidance to address emerging
10 technology and new advances in diagnostic implants.

11 It leaves ambiguous the treatment of
12 FDA-approved implants that are to diagnose,
13 mitigate, treat or prevent disease. Implants that
14 are covered by 6369(c), those that specifically
15 replace a body function, are already clearly
16 addressed in the regulation. We're not dealing with
17 those.

18 At the beginning of this process we
19 reflected on the BT -- BTM appeal and attempted to
20 frame the specific elements of the regulation that
21 were unclear or caused confusion during the audit
22 and appeals process. And we've provided Exhibit
23 A -- hopefully everyone has a copy -- that lays out
24 those. And they're summarized, the FDA approval,
25 and staff has done a nice job of addressing that.

26 The second is the application of (c)(2) as
27 it relates to fully implanted items and
28 clarification as to whether (a)(9)(A) provides an

1 independent definition of medicines separate from
2 the alliance -- reliance on little (b).

3 It's our understanding, based on the
4 decision and providence, that the Board sought the
5 same clarification. The decision specifically
6 stated:

7 "Clarify the provisions of 1591 as it
8 relates to Class II medical devices that
9 are fully implanted."

10 We've not addressed -- or Alternative 1
11 certainly clarifies FDA approval and specifically
12 includes BTMs. However, the proposed language does
13 not address points two and three.

14 Staff's recommended sentence -- "medicines
15 are further defined in subdivision (b) and (c)" --
16 does little to clarify the asserted dependency on
17 little (b).

18 Further defined in that section or added by
19 staff, coupled with subdivision (b) that begins "in
20 addition to the definition set forth in (a)(9)"
21 creates an ambiguity as to whether (a)(9) provides
22 an independent definition of medicine. Such
23 ambiguity -- ambiguous language is concerning.

24 Throughout the appeal and this interested
25 party process, staff has maintained that (a)(9) does
26 not create an independent definition of medicine
27 separate from (b). However, they have been
28 unwilling, when we proposed, to include any specific

1 language to inform taxpayers of this position,
2 leaving uncertainty and unwary taxpayers to apply
3 (a)(9) incorrectly based on its plain language which
4 says:

5 "Medicines include fully implanted
6 FDA-approved devices used to diagnose,
7 cure, mitigate, treat and prevent disease."

8 The second component of staff's underlying
9 interpretation involves the scope of little (c),
10 specifically (c)(2), as it relates to implanted
11 products.

12 During the BTM appeal process, staff reads
13 this section that includes the term "article" to
14 clearly exclude fully implanted products that are
15 FDA-approved to diagnose, cure, mitigate disease.
16 However, the Board rejected that interpretation.

17 The Alternative 2 language was at the
18 request of staff, and that was simply to just make
19 clear where it says "or article," which is so
20 ambiguous, just to say that does not include a fully
21 implanted product that we've already defined in
22 (a)(9)(A). And that's -- that's it. It's simple.
23 It's clear.

24 And we would propose if -- if staff wants
25 to tax those, or if the Board wants to tax implants
26 of that nature, then we should say the opposite in
27 that section. And it doesn't matter to us whether
28 they tax them or don't tax them, we just need to be

1 clear in terms of what the Board's position is.
2 Because the way staff reads the regulation and how
3 the Board has ruled in a number of -- of opinions,
4 are the exact opposite. And I think that's been the
5 biggest challenge throughout this process is that we
6 have a disconnect that we each disagree in terms of
7 what that section says.

8 In closing -- I also have other comments,
9 but in closing, you know, we believe the language of
10 Alternative 2 provides a long-needed clarity to
11 (a) (9) (A) and (a) (9) (B), provides an independent
12 definition of medicines that are supported by
13 6369(b) which include "diagnose, cure, mitigate,
14 treat, prevent disease by internal or external
15 application to the human body."

16 And we've attached Exhibit B. And so if we
17 look at Exhibit B, we have the statute on the left
18 and we have the regulation on the right. And the
19 statute, 6369(b) says "medicines means," and it
20 includes the language "diagnose, cure, mitigate,
21 treat or prevent disease."

22 When we look at the regulation, the --
23 the -- the comparable part of the regulation is
24 (a) (9) (A) and (a) (9) (B) which both use the same
25 exact language "diagnose, cure, mitigate, treat or
26 prevent disease."

27 So, we believe that that definition stands
28 on its own. So if you look at the bottom, 6369(c),

1 which is not dependent on (b) above, is where we get
2 the exemption for only implants that assist a body
3 function. However, that's not dependent on (b)
4 above. When you get the regulation, the comparable
5 section is little (b) and staff is saying, well,
6 that is dependent on the -- on (a)(9)(A).

7 And I don't know if I just confused the
8 heck out of it, but that's -- that's my best
9 attempt.

10 Note, the more restrictive language that
11 defines implants as an item that replaces a body
12 function are clearly listed in 6369(c) and clearly
13 listed in little (b). That's not the section that
14 we're looking at.

15 The issue that needs to be resolved and the
16 issue in the appeal is (a)(9)(A) and whether that is
17 intended to exclude implants that are not otherwise
18 listed in (b). And if it is, then we should just
19 say it excludes -- unless you can find your implant
20 in (b), it's excluded in (c).

21 MS. STEEL: Thank you very much.

22 MR. DOWNEY: Thanks.

23 MS. STEEL: We're going to go all the
24 speakers before staff respond.

25 And second person is Roderick Calub.

26 If I mispronounced your name, sorry. But
27 go ahead.

28 ---oOo---

1 RODERICK CALUB

2 ---oOo---

3 MR. CALUB: That's okay.

4 MS. STEEL: Yeah.

5 MR. CALUB: Good morning. My name is
6 Roderick Calub, senior manager at Downey, Smith and
7 Fier, and help lead our healthcare practice.

8 A very large portion of my responsibilities
9 include assisting our clients with assigning tax
10 codes to the various products that they either sell
11 or purchase. And this is almost a daily activity as
12 more and more products are being added.

13 As background, vendors -- medical
14 vendors -- and health facilities administer and
15 maintain their taxability based on a class or a
16 bucket of products. And, as such, we believe that
17 the regulation should be something that would apply
18 to similar type products within that same class or
19 category.

20 Recently, I've been concerned about the --
21 providing accurate guidance to my clients because
22 there are -- or I'm concerned with advising -- or
23 properly advising on the class of products that are
24 fully implanted, used to cure, mitigate, prevent
25 disease, as these, to me, clearly meet the
26 definition in (a)(9)(A), consistent with the
27 decision in the breast tissue marker case and
28 consistent with all the materials distributed when

1 (a)(9) was adopted. But I'm hesitant because staff
2 continues to say that in order for an item to meet
3 the definition of medicine, it must meet the
4 requirements in subdivision (b).

5 With emerging technology, there has been
6 development of new products fully implanted, used to
7 treat patients by diagnosing, monitoring medical --
8 medical conditions. Again, to me, this meets the
9 definition of a medicine under (a)(9)(A) but staff
10 would assert that they wouldn't because they don't
11 replace or assist a body function.

12 As such, I respectfully ask the Board to
13 adopt language to clarify whether a fully implanted
14 FDA-approved article to cure, mitigate, prevent,
15 treat disease but does not replace or assist a body
16 function meet the definition of a medicine. And I
17 believe this can be achieved by addressing the two
18 elements that Mr. Downey just discussed; and that
19 is, does (a)(9)(A) provide a separate, distinct
20 definition separate from those in little (b) and the
21 subdivision (c) exclusions include permanently
22 implanted items.

23 MS. STEEL: Okay, thank you.

24 MR. CALUB: Thank you.

25 MS. STEEL: Mr. Jacob Bholat.

26 ---oOo---

27 JACOB BHOLAT

28 ---oOo---

1 MR. BHOLAT: Correct.

2 Hi. My name is Jacob Bholat. I am a
3 partner with Equity Recovery Solutions.

4 I -- first, I'd like to thank the staff as
5 well, the Interested Parties Committee, and this
6 Board for the opportunity to collaborate to help
7 clarify portions of Regulation 1591.

8 I think we can all agree that this area is
9 complex and always changing. And overall, staff, I
10 think, does a good job of evaluating most products.

11 Apparently, I guess in my recommendations
12 of language I guess I created a little bit of a
13 stir, and -- and -- but that wasn't my intention. I
14 was just trying to provide some clarity, or at least
15 try to help provide clarity.

16 Our position -- and I'll try to keep this a
17 little simple. Our position is basically over the
18 last many years this Board has had several different
19 types of implanted products brought before it. And
20 consistently, the Board has ruled that these types
21 of implanted products are exempt. And staff has
22 always brought various arguments of why these
23 particular implants should be taxable.

24 Examples of the four major ones that come
25 to mind were the cochlear implants, the dental bone
26 screws, the reconstructive cosmetic implants, and
27 then now, just recently, with the BTMs, tissue
28 markers.

1 Consistently, you guys have provided, or
2 the Board has provided guidance that an item
3 implanted into the patient meets the definition of a
4 medicine under Regulation 1591 and Regulation -- and
5 law section 6369. Consistently, staff has taken
6 these rulings away and very narrowly applied them.
7 Their proposed revisions to 1591 continue this
8 approach.

9 The -- the one thing that I would like to
10 address is the specific ruling on the Port-a-Cath
11 because that's something that I actually added to
12 the -- or recommended to the language.

13 In that particular ruling that was
14 provided, the staff again took an implanted item and
15 said, we know it's permanently implanted, we
16 understand it meets all the criteria of being
17 permanently implanted; however, we believe that it
18 doesn't meet based on certain regulation -- or on
19 the law section, and we're excluding this por -- the
20 section from section (a) and (c) and not applying it
21 to (b).

22 Based on this historical trend of the Board
23 consistently ruling that -- that implanted products
24 are exempt, we ask the Board to help provide clear
25 guidance so that staff can be more comfortable with
26 their decisions.

27 Our recommendation on section (b) pertains
28 to permanently implanted items. In that section, as

1 you read the different descriptions of the different
2 products, the beginning of that law section -- or
3 that paragraph talks about "permanently implanted,"
4 and then they go in and they describe three or four
5 different products. And in those different
6 products, some of those items are permanently
7 implanted.

8 So that's where the confusion in my mind
9 comes in, from that particular paragraph, and that's
10 why we recommended those changes.

11 Our goal and overall objection is to
12 provide -- or our recommendation's for the following
13 premise: That all items fully implanted fall under
14 the jurisdiction of Regulation -- that -- that fall
15 under the Regulation 1591 should be exempt. Our
16 goal is not to expand the regulation. Rather, we
17 would like to help audit staff to provide consistent
18 and accurate application of the law and regulation.

19 That being said, I would like to make a
20 couple comments. First, we agree that anything
21 that's temporarily implanted doesn't meet the
22 definition of a permanent implant and should remain
23 taxable as currently structured.

24 Second, we don't believe that our
25 recommendations alter the spirit of the law or any
26 of your previous rulings. Permanent implants should
27 be exempt when placed in the patient under a
28 hospital or doctor care.

1 Third, the -- the question or comment that
2 we had relates to the financial impact that was put
3 into that recent discussion paper. We believe that
4 that estimate is highly overstated.

5 The particular claim that they're citing is
6 coming from a very large medical center, probably
7 two to four times overstated, somewhere in that
8 neighborhood. We don't know exactly, but we do
9 believe it's overstated.

10 That -- that facility is a very large
11 facility, so multiplying that by the number of
12 hospitals doesn't really make sense.

13 Finally, the value of the financial impact,
14 we believe, shouldn't be a deterrent to the
15 decision.

16 Our goal, and hopefully everybody -- and I
17 believe staff and your goal is to provide clarity.
18 And we are only seeking consistent treatment. And
19 we seem to continue to have the Board rule, staff
20 narrowly apply the rule and we go back to the
21 circle. And -- and it's been three or four times
22 over the many years. And so hopefully we can
23 provide some clarity.

24 Thank you.

25 MS. STEEL: Thank you.

26 It seems like there's four action items.
27 And Action Item 1 is everybody agreed, right? So
28 all the speakers.

1 So let's, you know, clarify a little bit
2 about, you know, what these speakers want. Just,
3 you know, can you answer that some of those requests
4 of the temporary ones, it's taxable and permanent
5 ones?

6 MR. CLAREMON: I could respond to the --
7 the ele -- the items laid out in Exhibit A,
8 specifically Mr. Downey's concern with the
9 application of Regulation 1591 section (c)(2).

10 That is -- that is language that is taken
11 directly from the statute which excludes from the
12 definition of medicine all articles, including
13 devices.

14 So staff reads that as to exclude all
15 devices --

16 MS. STEEL: Mm-hmm.

17 MR. CLAREMON: -- unless there -- there's
18 an exception to that general exclusion contained in
19 subdivision (b) of the regulation which -- and there
20 are several categories of items or devices that
21 are -- that are in those -- in subdivision (b). And
22 those, too, those categories are also taken directly
23 from the statute.

24 So staff reads it as a device, based on the
25 statute, is excluded from the definition of medicine
26 unless it falls within one of those categories.

27 So, there is no general -- there's no
28 exception to that general exclusion for fully

1 implanted items that treat, mitigate, prevent
2 disease. So to add that language to (c)(2) or to
3 add language -- an exception to that language,
4 anywhere in the regulation, would go beyond what
5 the statute -- how the statute defines medicines.
6 So that is -- that's how we would respond to -- to
7 that item.

8 With regard to the Number 3 -- does
9 Regulation 1591(a)(9)(A) create an independent
10 definition of medicine -- well, staff looks at the
11 plain language of (a)(9)(A), and this is why we
12 actually wanted to leave the plain language in
13 place.

14 And it starts with the statement that
15 "except where taxable for all uses as provided in
16 subdivision (c)..." That's the very first thing in
17 (a)(9)(A). So immediately the answer is no, it is
18 not independent of (c). It specifically says that
19 it's reliant on "except where taxable for all uses
20 in (c)."

21 And if you go to (c), the very first
22 sentence of (c) states "except as otherwise provided
23 in subdivision (b)." So right there you have the
24 framework that staff follows that (a)(9)(A) is
25 dependent on (c) which is -- has exceptions to that
26 general exclusion from -- in (b).

27 So that is why staff doesn't want to move
28 that first sentence. They want it to be clear to

1 taxpayers that they need to look at (c). And that's
2 why staff wants to add that last sentence which says
3 you need to look at (b) and (c) as well, just to
4 reinforce that.

5 MS. STEEL: Thank you.

6 Any comments, Members?

7 Member Yee.

8 MS. YEE: Mm-hmm.

9 Thank you, Madam Chairman.

10 Just a question for staff. I just wanted
11 to understand this a little bit better with respect
12 to the speaker's assertion about the Port-a-Cath
13 product.

14 So is there a disagreement about how that
15 was treated under the proposed language by staff?

16 MR. CLAREMON: I mean, I don't -- I don't
17 know --

18 MS. YEE: Or maybe comment on their
19 alternative that they proposed. I guess there was
20 some suggestion that it would have a revenue impact.
21 And I thought that the application of tax was not
22 going to change in the alternative that they
23 proposed. And so I'm just trying to understand what
24 the revenue impact was about.

25 MR. CLAREMON: So there's Action Item 3,
26 which is in subdivision (b)(2), which specifically
27 relates to that statement that Port-a-Caths are not
28 a medicine.

1 MS. YEE: Yeah.

2 MR. CLAREMON: In that action item we
3 believe that we're trying to reach the same goal,
4 which is to say that if they are a medicine in some
5 other subdivision --

6 MS. YEE: Right.

7 MR. CLAREMON: -- that this wouldn't
8 exclude them from being a medicine. And that's why
9 we just want to -- we think the best way to do that
10 is to remove that statement, "The sale or use of
11 these items is subject to tax."

12 But going to Action Item 4, we believe that
13 the recommended language from both interested
14 parties, Alternative 2 and Alternative 3, if you
15 were to add this language, which we feel isn't
16 within the statute, excepting a fully or a fully and
17 permanently implanted article -- device from (c)(2),
18 what that would do is it would -- it would allow
19 Port-a-Caths to be considered a medicine under
20 (a)(9)(A).

21 MS. YEE: Oh, I see. Okay.

22 MR. CLAREMON: So we do think that the
23 language in either alternative in Action Item 4
24 would make a Port-a-Cath a medicine under
25 (a)(9)(A).

26 MS. YEE: Okay. Okay.

27 MS. MANDEL: Can I just ask him to clarify
28 something?

1 MS. YEE: Yeah.

2 MS. MANDEL: At the beginning when you were
3 talking about the (c) provision and taking out the
4 last sentence that talked about taxable --

5 MR. CLAREMON: Mm-hmm.

6 MS. MANDEL: -- I thought -- I thought what
7 you were saying was that the items that are
8 specifically listed in (c), whatever it is --

9 MR. MENDEL: Within (b).

10 MR. CLAREMON: -- (b) -- (b)(2).

11 MS. MANDEL: Oh, it's (b)(2).

12 MR. CLAREMON: Yeah.

13 MS. MANDEL: Okay, wait a second.

14 MR. CLAREMON: It's the last sentence of
15 (b)(2).

16 MS. MANDEL: I feel like I'm -- and
17 sometimes this regulation makes me feel like that
18 Monty Python, my head is stuck in a cupboard and my
19 brain hurts.

20 I thought what I heard was that there was
21 some possibility -- maybe I just read it
22 somewhere -- that the items -- the articles that are
23 specifically listed, under some circumstances might
24 be exempt.

25 MR. CLAREMON: Yeah, we agreed with
26 interested parties. And we believe this is what
27 they were stating, was that what (b)(2) says is that
28 it does not meet this definition of medicine, but

1 that it could meet a different definition of
2 medicine. For instance, it could be a prosthetic
3 device or an orthotic device.

4 MS. MANDEL: Okay.

5 MR. CLAREMON: So that -- that last
6 sentence is ambiguous, that we want to remove, in
7 the sense that it implies that it could not meet
8 another definition of medicine. And we agree that
9 it should be removed.

10 MS. MANDEL: And is that the provision
11 where -- where's the -- which is the provision that
12 had -- that has "Port-a-Cath" in it?

13 MR. CLAREMON: It's the -- it's that same
14 paragraph.

15 MS. MANDEL: Oh, okay.

16 MR. CLAREMON: Yeah.

17 MS. MANDEL: Then I just was remembering
18 the wrong --

19 MR. CLAREMON: Yeah.

20 MS. MANDEL: Okay. So you -- so -- because
21 when I was looking at this I was thinking, well,
22 whatever it said in the revenue analysis, the
23 Port-a-Cath claim is not in front of us. If it ever
24 comes before the Board, you know, the -- our office
25 sort of looks at all of the facts and circumstances
26 in each case, and I was concerned about a ruling one
27 way or the other.

28 You know, I don't know anything about

1 Port-a-Caths, so I wasn't really prepared to say a
2 Port-a-Cath is in or a Port-a-Cath is out under
3 particular circumstances.

4 So you are saying that the staff
5 recommended change to that paragraph that mentions
6 Port-a-Caths and all the other things that it
7 mentions, that you're not -- you're not necessarily
8 saying that under every single circumstance all of
9 those things forever are taxable because they might
10 fit under some other provision.

11 MR. CLAREMON: Absolutely, yes.

12 MS. MANDEL: Including the Port-a-Cath.

13 MR. CLAREMON: Yes.

14 MS. MANDEL: Okay. Thanks.

15 MS. YEE: Mr. Downey?

16 MR. DOWNEY: I -- I was just going to say,
17 if -- I have a couple comments on the other things.
18 But if the Port-a-Cath fits some other definition
19 under (b), then it's exempt under (a)(9)(A) for all
20 uses.

21 So that doesn't -- if the Board thinks that
22 there is an exempt use of that product under --
23 under (b), then it should be exempt under (a)(9)(A)
24 because that's what the plain language says. It's
25 exempt for all uses if you have one exempt use.

26 MS. YEE: Get staff to comment on that?

27 MR. CLAREMON: That -- that would -- if
28 that were the case, that would create somewhat of an

1 ambiguity. Because that's correct, (a)(9)(A) would
2 make it exempt for all uses but you have a use
3 that's specifically cited as not a medicine.

4 But the point is that we -- we don't know
5 of any use, for instance, of a Port-a-Cath that
6 meets the definition of medicine at this point. If
7 you were to make the changes recommended in Action
8 Item 4, Alternative 2 or 3, it -- that would create
9 -- it would create that -- that use and it would
10 make a Port-a-Cath a medicine, arguably, for all
11 uses.

12 MR. DOWNEY: (c) says "except as otherwise
13 stated in (b)." If (b) specifically says it's
14 taxable --

15 MR. RUNNER: It's taxable.

16 MR. DOWNEY: -- what's the unclarity?
17 What's -- what's unclear?

18 MR. CLAREMON: The clar -- yeah.

19 MR. MENDEL: (b) doesn't say it's taxable,
20 (b) just says Port-a-Caths, when used in these
21 fashions, are not included in the definition of
22 medicine.

23 Consistent with (a)(9)(A), in staff's
24 opinion, that that was overreaching, that there is a
25 possibility that all of those items listed might be
26 used in a different fashion that would come within
27 another section in (b) that would make them a
28 medicine. And we just didn't want to absolutely

1 preclude that.

2 MS. MANDEL: And -- and the reason -- I
3 mean he's raising his hand again. But because
4 you're suggesting taking out -- you're recommending
5 taking out the sentence that says "sales of such
6 items are subject to the tax."

7 MR. MENDEL: Yes, exactly. We're -- we're
8 trying to make it broader, not --

9 MS. YEE: Right.

10 MR. MENDEL: -- not limit it such that
11 Port-a-Caths will never ever be considered a
12 medicine no matter how used or how defined.
13 We're -- we're making it more consistent with the
14 rest of the regulation which simply defines what is
15 or is not a medicine rather than setting down "These
16 are taxable, period."

17 MS. STEEL: Mr. Bholat?

18 Is that okay?

19 Yeah, go ahead.

20 MR. DOWNEY: I was just going to say
21 isn't -- isn't the whole proposal here that we're
22 going to specifically address BTMs and we're going
23 to add BTMs because that's the latest opinion, doing
24 the exact opposite of what was just discussed?

25 He's saying we don't -- we don't want to
26 have a specific rule in (b), but all we have are
27 specific rules in (b). We have all kinds of
28 products that are specific in (b). And -- and we're

1 proposing to add BTMs to (b), to be specific.

2 MS. STEEL: Let's give --

3 MR. DOWNEY: So it doesn't make sense.

4 MS. STEEL: -- Mr. Bholat a chance to
5 speak.

6 MR. DOWNEY: Yeah.

7 MR. BHOLAT: From a personal note, I
8 actually have a nephew who has a Port-a-Cath
9 implanted in him. And just to give Mrs. Mandel's
10 question earlier about how it works, basically what
11 happens is is that there's a catheter
12 placed inside -- implanted inside the patient of the
13 body and then it's connected to a vein or a --
14 usually a large vein.

15 And the reason why it's placed -- and my
16 nephew has it because he has a serious condition.
17 And the reason why it's placed is because he
18 consistently goes through various types of
19 treatments. And when they do those accesses
20 consistently, what happens is is that the blood
21 vessels in the arm or in the leg, wherever they
22 access it from, gets damaged. So the -- the patient
23 then has to go through significant pain, difficulty,
24 and it's damaging the patient.

25 So the Port-a-Cath is put in to assist and
26 facilitate the blood system so that it isn't damaged
27 during the treatment process. So there is a
28 component of what it does.

1 The other thing that I would like to add
2 is -- which is confusing, and -- and this is the
3 struggle that I've had. Because in dealing with --
4 when we prepared this claim -- and it's being held
5 under abeyance currently because we're waiting for
6 this -- this decision. Staff and the refund section
7 has basically said, well -- and they went back and
8 forth in this whole process. They were -- first,
9 they were saying, "Yes, we believe it's exempt."
10 Then they were saying, "No, we don't." Then they
11 were saying, "Yes." And then they were "No." Then
12 they said, "We don't know."

13 The challenge is that when you list a
14 specific item in the regulation, in the implant
15 section, and say that doesn't meet the definition of
16 a permanent implant, if you only read part of that
17 sentence and you only read that specific product,
18 which is what the confusion comes about, then staff
19 is going to say, well, we don't really know, so
20 therefore we're going to treat it as taxable.

21 Because if you read the sentence or that
22 paragraph, those items are specifically included.
23 And when you have that item that's permanently
24 implanted in that permanent implant paragraph, it
25 creates a circular, a circular reference. And
26 what's the answer? We don't really know.

27 And that's what we -- that was our
28 objective in adding that portion in the bottom of

1 (b) was to say that this section only applies to
2 items that are temporarily implanted or not fully or
3 permanently implanted. And that was our
4 objection -- or our objective.

5 Maybe there's a way to improve the language
6 that staff can live with, but we see this problem
7 and -- and going about their resolution of saying,
8 well, it may qualify under some potential, possible
9 exemption later on, is going to be counter-intuitive
10 to what staff and what the field auditors are going
11 to do.

12 MS. YEE: Madam Chair.

13 MS. STEEL: Yes, Ms. Yee. Member Yee.

14 MS. YEE: I think the confusion arises from
15 the intent of these -- well, actually the intent of
16 this regulation is to define what constitutes
17 medicine for then the application of tax. It's not
18 meant to be an exhaustive listing of products to
19 which we would then say tax is applied or not.

20 And I think what staff has done is actually
21 quite -- I think it's to your favor in terms of
22 really trying to preserve some ability to look at
23 perhaps some use of the Port-a-Cath that may not be
24 subject to tax down the road.

25 And I guess as I'm looking at some of the
26 proposed changes, I just want to have us keep in
27 mind that this really is about what constitutes
28 medicine. And as we look then at reading

1 subdivision (a) paragraph (9) subparagraph (A) and
2 how we've placed -- and directed really the --
3 whoever's going to read the regulation about how to
4 determine what constitutes a medicine, I think it's
5 a pretty good roadmap with respect to how you look
6 and relate the various subdivisions.

7 So I'm -- I'm a little concerned about some
8 of the suggestions that I believe adds confusion.
9 But I think if we keep a mind of what we're trying
10 to do here is to really clarify what constitutes
11 medicine and then really -- and I think the staff
12 took it a step further in terms of whatever's -- our
13 latitude under the statute in terms of then
14 understanding that there could be some use of
15 particular products that may be exempt from tax down
16 the road.

17 So I do believe the staff alternative
18 accomplishes all that and some of the concerns I've
19 had about the alternative language really buries, I
20 think, the -- some elements of the roadmap that
21 would lead one to read this regulation to where they
22 really do have to kind of dig into a particular
23 subdivision before understanding that, oh, we've got
24 to look at another related subdivision to see
25 whether, you know, that really is more instructive
26 than the initial (a)(9)(A).

27 So I'm -- I'm -- I'm going to support the
28 staff regulation. But I think the -- my main

1 concern was really whether there was a
2 misunderstanding with respect to how we're looking
3 at the Port-a-Cath product and the application of
4 tax currently. But that wasn't really the intent of
5 the -- of this rule change after the hearing. It
6 was really to reflect our decision with respect to
7 the breast tissue markers. And, again, this is a
8 regulation that -- that guides us with respect to
9 what constitutes medicine, and I think it works with
10 respect to the interaction between the various
11 subdivisions.

12 MS. STEEL: Thank you.

13 Any more comments?

14 MS. MANDEL: Yeah.

15 MS. STEEL: Member Mandel.

16 MS. MANDEL: I just have one sort of
17 language question. And I know you lump all of the
18 Downey languages, you know, sort of like it was one
19 alternative, but I have a question about the
20 (a)(9)(A). And I thought I had -- that -- that --
21 where some of this started was that there -- that
22 the existing language which you all would leave, the
23 staff would leave -- "except where taxable for all
24 uses as provided in subdivision (c)" -- I thought
25 someone had said somewhere along the line that that
26 was a little bit -- that that phrase was a little
27 confusing.

28 And if (c) is a "these things are

1 specifically excluded," my question was kind of
2 why -- whether you put it at the beginning of the
3 sentence so that somebody will stop reading and go
4 down to (c) first, or at the end of the sentence so
5 they'll remember to go down to (c) and read (c)?
6 Why the language about "unless an item is
7 specifically excluded from the definition under
8 subdivision (c)" -- I don't know about this "for all
9 uses" -- I was just wondering if it was a -- if you
10 had some issue with more clear language on that
11 phrasing or if you think that -- if you gave thought
12 to changing the words?

13 MR. CLAREMON: We -- we did actually. And
14 I think staff's first recommendation was to move
15 it.

16 MS. MANDEL: But you were just moving the
17 same words.

18 MR. CLAREMON: We were. And I'd have to go
19 back and look, but we may have actually changed it
20 from "except" to "unless."

21 But there were actually during, I think,
22 the first interested parties meeting it seemed to
23 create more confusion moving it than leaving it
24 where it was. And it seemed to create the
25 impression that we were changing it and we weren't
26 trying to change it.

27 And that's why, leading up to the second
28 interested parties meeting -- and -- and we actually

1 thought we were in agreement on that point with
2 interested parties. But that's why leading into the
3 second interested parties meeting we thought we
4 would leave it where it was because it was as clear
5 as it could be.

6 MS. MANDEL: So you -- you didn't -- did --

7 I guess my question on words is whether
8 you -- you gave thought to saying, um --

9 Oh, I see. So you're just saying that you
10 were concerned that if you changed the words at all
11 even if you changed it to make -- to say
12 "specifically excluded from definition of medicines
13 under (c)," that people would think somehow that was
14 materially different --

15 MR. CLAREMON: That what we've seen --

16 MS. MANDEL: -- than what was there before,
17 and so that you were just better off leaving it the
18 way it was.

19 MR. CLAREMON: We didn't want to signal
20 that there was a change. Yeah.

21 MS. MANDEL: Okay, okay. I think that that
22 was the only other question that I had.

23 Yeah, okay. Thank you.

24 MS. STEEL: Member Runner.

25 MR. RUNNER: Yeah, let me -- let me start
26 with the -- again, this whole discussion is trying
27 to figure out -- well, I find it interesting our
28 concern is that we don't want to create ambiguities.

1 And it seems to me that's what this session is all
2 about in regards to ambiguities that we're
3 struggling with that were already existing.

4 And so my concern is that are we actually
5 missing an opportunity to give greater clarity
6 long-term? And I'm concerned about if we are
7 parsing and piecemealing this too tightly, that
8 all's it's gonna do is just add for a series of
9 future appeals and us clarifying issues one at a
10 time. And, you know, I don't think that does us any
11 good. I don't think it does the state any good, and
12 it certainly doesn't -- think it does folks who are
13 trying to interpret and understand the, uh -- the
14 law and the regulation any good.

15 Let's -- let's start with the idea of the
16 statute. Because clearly the bedrock of what the
17 concern is, is this is extra -- this just goes
18 beyond the intent of the statute.

19 I've got -- point -- can you help
20 me find -- point to me where you believe this is --
21 goes beyond statute in regards to if we were to
22 accept the language that is -- is -- has been
23 recommended.

24 MR. MENDEL: In the statute, in subpart (b)
25 of the statute --

26 MR. RUNNER: Okay, (b), uh-huh.

27 MR. MENDEL: -- starts about discussing
28 substances of preparations. And then the last line

1 of (b) says:

2 "However, medicines does not include
3 any of the following..."

4 And (2) of that reads:

5 "Articles that are in the nature of
6 splints, bandages, pads, compresses,
7 supports, dressings, instruments,
8 apparatus, contrivances, appliances,
9 devices or other mechanical electronic
10 optical or physical equipment or article or
11 the component, parts or accessories
12 thereof."

13 MR. RUNNER: Okay.

14 MR. MENDEL: And then it goes down to (c),
15 similar to the way the regulation is set up,
16 notwithstanding what I just read.

17 MR. RUNNER: Mm-hmm.

18 MR. MENDEL: "Medicines as used in the
19 section includes any of the following ..."

20 And --

21 MR. RUNNER: Okay.

22 MR. MENDEL: -- number two is:

23 "Bone screws, bone pins, pacemakers and
24 other articles, other than dentures,
25 permanently implanted in the human body to
26 assist the functioning of any natural
27 organ."

28 And then down again in (4) "Prosthetic

1 devices and replacement parts" --

2 MR. RUNNER: Okay.

3 MR. MENDEL: -- "for those devices designed
4 to be worn on or in the body of the user to replace
5 or assist the functioning of the nature of a natural
6 part of the human body."

7 MR. RUNNER: Okay.

8 MR. MENDEL: Those two phrases are what we
9 see as being the key restriction.

10 MR. RUNNER: Well, wouldn't this, under
11 your definition then, make our decision in regards
12 to the -- the markers outside the definition of the
13 law?

14 MR. MENDEL: We are inter -- trying to
15 interpret the definition of markers narrowly based
16 more on their function, that they are -- as was
17 discussed at the Board hearing; that in fact they
18 are a technological advance that is replacing
19 something that used to be done with dyes and other
20 substances that were injected. And so rather than
21 say, well, we have to change the --

22 MR. RUNNER: Are you trying to artfully get
23 through how to make markers work?

24 MR. MENDEL: Yes. We are trying to
25 artfully get through how to make markers work.
26 However --

27 MR. RUNNER: Within the statute.

28 MR. MENDEL: With the statute.

1 MR. RUNNER: Okay.

2 MR. MENDEL: We felt that global changes to
3 (c) that were suggested by the interested parties
4 would simply eliminate those restrictions in the
5 statute.

6 MR. RUNNER: But isn't the -- I guess my
7 concern is, and that's why I'm concerned that we're
8 opening up the door for a series of appeals.
9 Because I think the Board has pretty consistently
10 dealt with these permanently implanted medical
11 devices. And it seems to me every time we've been
12 including them. And so I'm concerned that the next
13 time you're going to have to artfully do it again.

14 MR. MENDEL: I'm -- I'm afraid that to
15 avoid artfully doing it would require a -- a
16 legislative change to actually --

17 MR. RUNNER: So what line was -- hold it.
18 So the next one that comes that we're going to ask
19 you to do creates a legislative -- a statute
20 dilemma. This -- the -- the last one we did didn't.

21 MR. MENDEL: That was our opinion, yes.

22 MR. RUNNER: So is it just by the number of
23 'em we ask you to look at?

24 MR. MENDEL: No. It's -- it's in the
25 nature of medical devices. Each --

26 I mean when we look at a device, we look at
27 that very specific device. We look at how it's
28 used, what it's used for. We look at whether it's

1 simply replacing something that has already been
2 found to be a medicine. We have traditionally tried
3 to move the statute and regulation along with
4 technology the best we can without violating the
5 statute, by not reading the statute so literally
6 that a technological advance will, every time,
7 require a legislative change.

8 MR. RUNNER: Okay. Let me go back to the
9 taxpayers or the representatives here in terms of
10 that and -- and ask specifically in regards to --
11 because, again, I -- I mean it seems to me I see
12 room in the statute for some broader definitions
13 than what it is that I'm hearing from the staff.

14 So help -- from -- from your perspective,
15 why would you believe the staff is too narrowly
16 interpreting the statute, going back to the statute?

17 MR. DOWNEY: I think that it's the use of
18 "diagnose, cure, treat, mitigate, prevent disease,"
19 that that broad language of a product that does that
20 as -- as defined in (a)(9)(A) defines medicine. And
21 that definition is something that we should be able
22 to rely on in determining taxability.

23 And, you know, one thing that hit me is
24 they were reading the list of products in little (c)
25 and one point of confusion we had is what -- as we
26 discussed this issue with -- with all of you and
27 staff, there's nothing in that list that tells us or
28 tells a taxpayer that we're trying to exclude an

1 implant.

2 MR. RUNNER: Right.

3 MR. DOWNEY: There's nothing there. It
4 actually is all external things. It's all things
5 used to treat, etcetera.

6 So, that's one of the challenges we have is
7 that really it looks like (a)(9)(A); statutory basis
8 is 6369(b). And there's a couple products --
9 there's a -- there's a product -- there are a
10 handful of products currently that fit within this
11 definition.

12 One of the ones we've seen recently are not
13 being taxed by medical manufacturers, they're not
14 being taxed by hospitals, and they're a diagnostic
15 product that is implanted into the patient to
16 monitor heart failure. And that product tracks
17 blood flow, tracks heart rate, tracks all of these
18 things to help physicians diagnose. And so unlike a
19 pacemaker that would zap the heart when it stopped
20 working, it sends the information to a physician and
21 it says, hey, it's time to replace that valve
22 because we're not getting the flow that we need.
23 There's a stroke that's coming. There's a --
24 there's a heart attack that's coming. And -- and so
25 it seems like, as --

26 Is it "Larry"?

27 MR. MENDEL: Yes.

28 MR. DOWNEY: Yes. So it seemed like as

1 Larry defined the statute, he would say, well,
2 clearly we could fit that under the regulation
3 because that's a medical advance, right, that --
4 that is changing something that we've done in the
5 past. We -- we would, you know, do an angioplasty
6 which is exempt, or we would replace a valve which
7 is exempt. But this -- this diagnostic unit that
8 doesn't assist the body function but helps us to
9 make sure and diagnose when it's failing, that that
10 product would be taxable and I don't think that is
11 the case.

12 And Larry would say, well, if it came
13 before of you, you probably would argue it's exempt
14 because that's a technological advance that would
15 have otherwise been an exempt product if we would
16 have done it differently than we're doing it today.
17 And I think that's the concern.

18 So that's one of the products that's out
19 there. There are two, maybe three, other products
20 that we can come --

21 I represent one of the largest medical
22 supply vendors. They sell a hundred thousand
23 different products. And we're talking about --
24 we're broadening the regulation to exempt three or
25 four products that -- that they sell? How -- how
26 broad are we making this?

27 And the -- the one thing that with our
28 clarity is that we're okay if the Board wants to tax

1 an implant that does not assist a body function,
2 let's just say that in little (c). Add a sentence
3 and say, hey, guys, you're reading this and I know
4 it's talking about hospital beds, etcetera, but we
5 really intended this to cover implants that don't
6 assist a body function and are not covered by (b).
7 And staff said, well, we wouldn't add that because
8 that's not what the Board wants to do, or at least
9 that's the way I interpret it. And that's where the
10 confusion and maybe frustration came throughout this
11 process.

12 MR. RUNNER: Okay. I mean my -- my concern
13 is that, again, it seems to me that the first part
14 of the definition of medicines give us some pretty
15 broad ability to do some interpretation. And
16 clearly, apparently so does -- so -- so -- so does
17 Legal and the Department because you were able to
18 tuck in the breast markers into that -- into it.

19 And so I'm having -- struggling with the
20 idea as to why it is that the next one goes too far
21 when it is that we've already defined some -- our
22 ability to interpret it legally to include those --
23 the markers.

24 I'm much more comfortable with a much --
25 with a broader understanding of "permanently
26 implanted." I think that's gives clear definition.
27 I think it fits under the -- under -- under the
28 definition of medicines in -- in -- in little (b).

1 I think -- and, again, I get the idea, although I
2 don't agree with it, quite frankly, the Port-a-Cath
3 is an interesting issue.

4 I do believe that it's -- I -- I -- I find
5 it curious that we would go ahead and add it to the
6 economic analysis even though the regulation
7 excludes it. You know. And with the idea that
8 said, well, we must have to include it then if we
9 change that.

10 MR. DOWNEY: Well --

11 MR. RUNNER: No, then we'd have to go back
12 and change that. I -- I -- I think. Wouldn't we
13 have to actually change the regulation to --

14 MR. MENDEL: The way -- the way we read
15 their change to (c) --

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1 MR. RUNNER: Huh-uh.

2 MR. MENDEL: To include all permanently
3 implanted articles as medicines we believe would
4 simply make most of those restrictions in B moot
5 because --

6 MR. RUNNER: But doesn't -- isn't
7 Port-a-Cath specifically called out, though, later?

8 MR. MENDEL: No. Port-a-Caths are
9 listed -- Port-a-Caths, as used in certain
10 applications, are listed as not being a medicine
11 under one part of B. However, if you change C -- if
12 you fundamentally change C to include all
13 permanently implanted devices, it essentially makes
14 B moot because it says regardless --

15 MR. RUNNER: We wouldn't have the ability
16 to actually create that broader and then list
17 exceptions? That would be wrong?

18 MR. MENDEL: Not the way it's currently
19 written.

20 MR. RUNNER: I mean --

21 MR. MENDEL: We would have to restructure
22 the -- the -- we would have restructure the
23 regulation.

24 MR. RUNNER: Okay. I can -- it's -- I
25 mean, again -- it's an interesting reach. I'm not
26 sure I'm there with you.

27 Quite frankly, I'm -- I have a basic issue
28 with the Port-a-Cath issue because you all know

1 Sharon, she's got a Port-a-Cath. It's very clear
2 it's part of her medical treatment. It's part --
3 it's a medicine. She has to live with it.

4 So, the whole idea that it's excluded and
5 separate to me doesn't even make sense. I intend to
6 say it's a pretty fundamental part of what I would
7 to go the definition of medicine of medicine and to
8 try to nuance that it seems to me a bit trivial.

9 So, anyhow, let me -- let me just -- let me
10 ask this question just to clarify because we have --
11 we have two different proposals with some language.

12 And for myself, I'd like to kind of get an
13 idea with the DSF language, that -- and the
14 difference, the DSF language, and then also then the
15 language from -- I'm sorry --

16 MR. BHOLAT: Equity.

17 MR. RUNNER: -- Equity, yes.

18 What is the unique nuances between those --
19 that language and -- and can -- how -- I mean, I
20 think one of it goes down to the specific issue of
21 the Port-a-Cath anyhow.

22 So, let me -- let me just ask --

23 MR. BHOLAT: Our proposed language is, I
24 think on (a)(9)(A) and on C, our language is fairly
25 similar. The words are slightly tweaked
26 differently.

27 In Section B, what -- what our proposal is
28 is to provide clarity that when you're listing --

1 that when the Board lists those products in that
2 regulation, that that section only applies to
3 temporarily implanted items.

4 MR. RUNNER: Okay.

5 MR. BHOLAT: Because when you read the
6 paragraph it says, "permanently implanted items,
7 exclude this, this and this."

8 MR. RUNNER: Okay.

9 MR. BHOLAT: And then it says, "Sales tax
10 applies to these items."

11 Staff, when we're dealing with auditors and
12 staff in the field, they read that and they say,

13 "Well, sorry, Jacob, this item
14 is specifically listed in the regulation.
15 There is no way that this product is
16 exempt, period."

17 Without even further analyzing it.

18 And that -- that's the reason why we
19 proposed the language to add, when -- the sales tax
20 is not applied or sales tax would apply, or however
21 we want to structure it -- that when it's
22 permanently implanted that it meets the definition.

23 MR. RUNNER: Okay.

24 MR. DOWNEY: Our proposal does not
25 contemplate any change to little (b).

26 MR. RUNNER: Uh-huh.

27 MR. DOWNEY: And our participation in this
28 process was not trying to exempt any particular

1 product.

2 MR. RUNNER: Okay.

3 MR. DOWNEY: But it was to come here to
4 clarify it.

5 So, if you look at C, C starts, "as
6 provided" -- "except as provided in B."

7 Well, if it's already provided in B that
8 it's taxable, there is no uncertainty.

9 But what does become uncertain, and what we
10 think needs to be clarified, is as you read on,
11 there's nothing in C(2) that tells you we're
12 intending to exclude an FDA-approved implant that is
13 used to diagnose, cure, mitigate or prevent disease.

14 And, so, whether you -- whether you want
15 that to be taxable or you -- or you don't or you
16 want it to cover it or not, we think that there
17 should be language added to that section to take
18 away that uncertainty.

19 Because I don't know if you remember --

20 MR. RUNNER: That's good.

21 MR. DOWNEY: -- yeah.

22 MR. RUNNER: That's fine.

23 MR. DOWNEY: Yeah.

24 MR. RUNNER: So, let's just ask this
25 broader question, and this is what -- again, I had
26 mentioned my concern and that is that I'm concerned
27 that if we again adopt specifically the staff
28 language -- recommended language, that we create

1 additional ambiguities that are going to create
2 additional appeals and we're going to be talking
3 about these things, you know, many, many times in
4 the future.

5 You represent -- you -- you all provide,
6 you know, tax consultation and representation on
7 these issues for these kinds of devices.

8 How do you see that? Do we have a chance
9 to create clarity here? Or if -- that would -- that
10 would make it easier and better for those taxpayers
11 in the field to actually know what the law says? Or
12 if we -- or are we actually opening the door for
13 additional time and appeals and --

14 MR. DOWNEY: I think the real issue here --

15 MR. RUNNER: -- ambiguities?

16 MR. DOWNEY: -- the real issue here is
17 clarifying how industry and vendors are applying
18 (a)(9)(A).

19 You look at the major vendors that sell
20 medical products that don't replace a body function
21 but are implanted, they read (a)(9)(A) and they
22 exempt those products and the sale of those
23 products.

24 And, so -- and that's -- that's what we
25 see.

26 And, so, what we're creating is a situation
27 that -- where -- how everybody reads this regulation
28 that that's not the way staff is reading it.

1 And, so --

2 MR. RUNNER: Okay.

3 MR. DOWNEY: -- you're going to have a
4 series of appeals.

5 MR. RUNNER: Again here my concern is that
6 again I think there's a concern about creating a
7 broader interpretation.

8 I think there's a concern as to whether or
9 not it's within statute authority.

10 But I also believe what we're going to find
11 is -- if I was to guess, based upon what's come
12 before us so far, what came before us -- before this
13 Board before I was here, we usually end up finding
14 and expanding the intent -- or finding -- finding
15 reason to -- to -- to include these devices.

16 I think the nature of the Board would
17 probably be that in the future and I think it's
18 unfortunate, though, that if we don't have this
19 opportunity now to clarify the language, we're going
20 to end up with a series of piecemeal attempts in the
21 future to try to fit them into the statute.

22 So, thank you.

23 MS. STEEL: Mr. Bholat.

24 MR. BHOLAT: Yeah, I think -- to answer the
25 question that you asked earlier --

26 MR. RUNNER: Uh-huh.

27 MR. BHOLAT: -- as far as our
28 recommendation to simplify the language or the

1 approach and that is when -- when -- when a
2 hospital, a retailer of medical products, determines
3 the taxability, generally what they do is they put
4 them into different categories.

5 And the broader the category -- some
6 products fit into multiple categories, but a very
7 broad category is a permanent implant.

8 And if the Board here can decide that we're
9 going to either -- we can provide an exemption for
10 anything that's permanently implanted, it's
11 obviously got -- in order to qualify under 1591,
12 it's got to be under a doctor's orders, it's got to
13 be under prescription, it's got to meet all those
14 definitions.

15 So, we still are working within a
16 hospital/doctor setting. Anything that's
17 permanently implanted into a patient is exempt. And
18 that's the simplest way to approach it.

19 MR. RUNNER: Yeah, thank you.

20 MS. STEEL: Thank you.

21 Chairman Horton.

22 MR. HORTON: Members, I think what we face
23 here is a historical challenge that the Board has
24 had dating back to when the regulation was initially
25 passed.

26 And the inherent challenge is whenever we
27 begin to delineate specific items as being exempt,
28 we run into a potential file of -- of -- going

1 beyond our authority in doing so and after counter
2 interpreting the statute in itself, which brings
3 concerns to me as to whether or not the Office of
4 Administrative Law is going to approve a regulation
5 that actually specifically exempts anything.

6 Because the law -- the statute itself
7 intentionally set forth conditions in which an item
8 would be considered medicine.

9 And I, quite frankly, think the Board was
10 correct in its interpretation of the statute. And
11 therein is the inherent challenge that we face,
12 because the statute, in my mind, is very, very
13 clear.

14 It is when the facts and the functionality
15 of the item before us, whether it fits within the
16 statute or not, is the determination that we have to
17 make.

18 And, so, what seems to have happened in the
19 case before us is is that staff in the field failed
20 to look at the essence of the law and possible --
21 you know, my thoughts was is that we would give
22 staff additional directions that would basically say
23 is that staff -- Section 6369 governs, irrespective
24 of whether this is -- irrespective of what the
25 regulation says.

26 And when we get into these specitivities
27 (sic), we run into an a challenge of running into --
28 afoul of the statute itself.

1 Why -- you know, part of me is saying what
2 we really need here is clarification in the audit
3 manual. And that whenever we embark upon adding and
4 subtracting things to the regulation, all we're
5 really -- without going in and saying, well, as long
6 as this -- as long as it's -- it does what is
7 prescribed in the statute, it diagnoses, cures,
8 mitigates, is a treatment, it's prevention of a
9 disease and lah di dah di dah, we're still
10 referencing back to that language, even in the
11 regulation, which is the language -- the inherent
12 intent of the statute.

13 And, so, years ago when the Board
14 started -- came up with pamphlet, I believe 61, and
15 tried to delineate all these different things that
16 are medicine and not medicine, they recognized that
17 they were -- they were running into this problem
18 articulated by Mr. Runner that every time an item
19 comes up we have to try to determine if this item is
20 medicine or not, when that is not the determination.

21 The determination, I think, is whether or
22 not it functions as a medicine as prescribed in the
23 statute.

24 And, so, these templates are going to cause
25 these problems. And every time we add something
26 it's just going to have an inherent problem in the
27 field.

28 As Mr. Downey indicated, there's another

1 million products. So, do we list all of those
2 products in the regulation? Quite frankly, I think
3 we don't.

4 I think we -- I think the statute is clear.
5 I think if we want to give guidance to the staff, we
6 give it to them, as we have traditionally done, in
7 the audit manual. And that guidance is basically to
8 go back to the statute.

9 And, if -- and evaluate the facts and how
10 this particular item functions. And if it functions
11 in accordance with the statute, then it's exempt.
12 If it doesn't, it's taxable.

13 And, so, you know I'd ask staff to take
14 another look at this altogether and -- and --
15 because, I mean, I read both -- all three
16 alternatives and they're all concerning to me as to,
17 you know, they all create more confusion when, in
18 fact, the statute is just very, very clear, you
19 know, as to when something is considered a medicine.

20 I think industry practice creates a problem
21 because they seek to establish these templates that
22 says, oh, here's a list of items. If it falls in
23 this category, it's easy.

24 Interpreting the law was never meant to
25 eliminate professional judgment in the process.
26 And, so, I think we stay with that professional
27 judgment, stay with that evaluation and stay with
28 the statute and just bring some clarity in the audit

1 manual to make sure that the auditors are aware of
2 the cases that have come before the Board of
3 Equalization and where that distinction has occurred
4 is not the law.

5 I think we are clear on the law. I don't
6 think you have to figure out a way to justify what
7 the Board has said. I think we're clear. We said
8 that this -- this item is part of the diagnostic
9 process that leads to the cure and mitigation of a
10 disease, cancer. That's it, that's all we do.

11 And we said -- also said that the staff's
12 interpretation of the statute was wrong and their
13 application was wrong.

14 And, so, that's where we need the
15 clarification and those types of clarifications
16 occur in the audit manual and not the regulation.

17 I see everyone nodding their head, so, that
18 would be my advice.

19 MR. DOWNEY: I -- that right there provides
20 more clarity than any proposal that we have.

21 And I think we were talking before this
22 meeting that the direction of what the -- what the
23 Board wants and how they want to apply to products
24 is what we, trying to interpret this, needed to
25 hear.

26 And that explanation of, look, if a product
27 is used in the diagnostic process, implanted,
28 et cetera then, you know, we can't just say, hey, it

1 says article in C and it's excluded.

2 And that's our only purpose of coming here
3 is that we don't want this "or article" held over
4 our head and I think that provides clarity.

5 MR. HORTON: Yeah. Mr. Downey, at the rate
6 we're going, it won't be implanted, it won't be on
7 the outside, it will up in the stars somewhere, you
8 know, that is helping these patients as they walk
9 around. You know, but even when that occurs, this
10 statute will be sufficient, if properly
11 interpreted.

12 MS. STEEL: So, Mr. Chairman, what you're
13 suggesting you want staff to go back and bring it
14 back with the broader definition of this regulation,
15 proposed regulation? Or what your exactly
16 suggestion -- your suggestion is?

17 MS. YEE: May I?

18 MS. STEEL: Yes, Member Yee.

19 MS. YEE: I concur with Mr. Chairman's
20 approach about -- and certainly understanding the
21 speakers concerns about how our audit staff will be
22 interpreting, applying this regulation.

23 But I do think where that guidance should
24 occur is in our audit manual and to perhaps use that
25 as a means of providing our audit staff with more
26 clarity about the application of -- of this
27 particular regulation.

28 I -- I hope you weren't suggesting,

1 Mr. Chairman, that we bring this entire process
2 back --

3 MR. HORTON: No.

4 MS. YEE: -- because I'm prepared to adopt
5 the staff recommendation, but direct staff to really
6 look at where there are opportunities to provide
7 that clarity in the audit manual.

8 MS. MANDEL: Yeah, because the taxpayers
9 are going to look at the regulation first.

10 MS. YEE: Uh, I --

11 MS. MANDEL: That was part of the purpose
12 was to --

13 MS. YEE: -- yes.

14 MS. MANDEL: -- right?

15 MS. YEE: Yes, yeah.

16 And I believe the regulation in terms of
17 how it's structured and how the different
18 subdivisions interact with one another is clear.

19 I also think the staff really stretched to
20 the extent possible under the statute to really
21 preserve the option of how some of these products
22 may be characterized with respect to the application
23 of tax going forward.

24 So, I'm -- I think we've gotten that
25 flexibility. And I know it may not feel that way
26 for the speakers, but I think they really did try to
27 address that issue.

28 But I think where the clarity is and where

1 we don't want to see, frankly, additional appeals
2 over just the ambiguity of how this is going to be
3 applied is by providing that guidance to our staff
4 through the audit manual.

5 MR. HORTON: Well -- thank you, Member Yee.

6 I -- I could adopt staff's recommendation,
7 but I think we're continuing down that path of
8 modifying the regulation every time a situation
9 comes and sort confuses staff.

10 MS. YEE: Yeah.

11 MR. HORTON: And, quite frankly, I don't
12 think we need to touch it.

13 And that that clarification can be provided
14 in the audit manual. And I think subsequent
15 training of our staff, as it relates to interpreting
16 the law and the regulation, might be helpful as well
17 is that you have to interpret it in its entirety.

18 And my experience in the field -- and I'm
19 sure many others as well -- is that it takes -- you
20 know, it isn't until you're seasoned a little bit
21 that you -- that you begin to look at the essence of
22 the law and the regulation and -- in your
23 interpretation. And if they're taught to do that
24 earlier on in their careers, it might be helpful.

25 And I just harken back to all those changes
26 over the years to the definition of medicine and
27 this is included that's not included. And I really
28 think that created -- got us to where we are today.

1 And, so, it's a double-edged sword whether
2 we continue along those lines or just leave the
3 regulation alone would be my advice and just to --
4 'cause it's not an issue of law, in my opinion.

5 In my opinion this is an issue of facts,
6 whether it is function -- whether it functions in
7 accordance with the statute or not. And it's fact
8 driven, not legally driven.

9 And I would imagine that the only reason
10 there is like one of these cases before us is
11 because a whole lot of other auditors and
12 supervisors and District reviewers and Appeals folks
13 got it right when it came before them.

14 This one they just got it wrong and it just
15 got through the system because it was so unique and
16 so new in the minds of our team. And, for some
17 reason, we got off the statute, but --

18 MS. MANDEL: Well --

19 MR. HORTON: -- that would be my --

20 MS. STEEL: Member Runner.

21 MR. RUNNER: Well, again, I don't have any
22 issues with the idea of trying to get clarity in the
23 audit manuals.

24 The only trouble is I don't think an audit
25 -- clarity in the audit manual changes somebody's
26 decision to appeal, based upon what they believe is
27 incorrect interpretation of either the -- or
28 application of either the regulation or the statute.

1 So, I think that's really what we're
2 talking about. So, I -- I don't have any issue with
3 us stepping back, taking another look at this.

4 You know what -- if -- does this actually
5 solve a problem or does it create a broader problem?
6 And just -- and just try to re-examine it, asking
7 the broader questions again.

8 Because, again, I'm concerned about us
9 adopting a regulation right now that again creates
10 greater angst and ambiguity rather than clarity.

11 And I couldn't tell you right now if we --
12 I mean, if indeed the current law -- regulation
13 is -- doesn't need to be changed and there's enough
14 room for interpretation given what's there and can
15 be clarified in the audit manual, I don't know.

16 But maybe a broader steep back would be --
17 and a little more time on this could be helpful.

18 Comment?

19 MS. STEEL: Chairman Horton.

20 MR. HORTON: Mr. Runner.

21 MR. RUNNER: I think he had a comment
22 on it.

23 MR. DOWNEY: I was just going to say that I
24 think with the advice and direction that you gave
25 that one of the challenges that both of our sides
26 have had during this interested parties discussion
27 is that I don't think we were certain on what your
28 direction was.

1 And I think it is interpreted to be a
2 little bit different than where we each were. And,
3 so, it's hard to reach language when you both
4 disagree.

5 I am -- I don't see anything that you said
6 that is inconsistent with what our objectives are to
7 clarify this reg. And, so, it would seem like we
8 could reach -- we could work together to come up
9 with language, unless the Board is saying -- or
10 unless staff is saying, no, absolutely everything
11 you said is exactly consistent with what we proposed
12 here.

13 And then I'd say, "Well, should probably
14 adopt Alternative 2 because nothing's going to
15 change."

16 MS. STEEL: Chairman Horton.

17 MR. HORTON: Well, I think, we -- I mean,
18 we are very fortunate to see the exceptions that
19 happens out there in the world -- in the audit
20 world. We see the exceptions.

21 I mean, I have personally conducted these
22 audits and personally thought that many of the items
23 that were not where listed in pamphlet 51 -- 61 and
24 not listed somewhere in the regulation, was exempt
25 because it met the definition of medicine and that
26 that was what was governed.

27 And I would, quite frankly, say that
28 relative -- we don't have a whole lot of appeals

1 coming because folks are doing it right out there
2 and that they are interpreting it right.

3 And I believe the parties can work
4 together. But where we position this clarification
5 of facts and interpretation -- we're not talking
6 about changing the law -- I think everyone is in
7 agreement that the law is clear. We all understand
8 it. We all understand the law.

9 The interpretation of the facts is where
10 we've got a problem. And, so, we're trying to
11 somehow codify something that tells folks what set
12 of facts will lead to a certain conclusion. When,
13 in fact, we all know that facts is one of the things
14 that change on a regular basis.

15 And, so, I don't know, Members, I just am
16 very careful not to govern based on the exception
17 and try to govern based on the rule.

18 MS. MANDEL: Ms. Steel?

19 MS. STEEL: Yes, Member Mandel.

20 MS. MANDEL: It's -- it is a complicated
21 regulation. And my recollection was that part of
22 when the regulation came out in this long way that
23 it is was that there were a lot of annotations and
24 that it was, in part, to try to get things out of
25 the annotations and into the regulations so that
26 everybody would know -- you're nodding yes, I
27 remember something correctly today, yay.

28 And my sense of what staff was trying to do

1 in what they're recommending is clear up some things
2 that -- that the discussion and interested parties
3 meeting made staff realize that there were areas
4 that could be clarified. Like we talked about you
5 guys recommending dropping the forever taxable
6 language because it wasn't quite accurate and some
7 of the discussions of interested parties meetings
8 and things that staff has seen through looking at
9 products meets that.

10 People do write in and ask for advice on
11 new products. I think they're probably continuing
12 to do that, in large part, you know, because of
13 6596. They want to know.

14 So, I -- I don't -- it doesn't -- and I
15 thought that the Board had wanted to see the tissue
16 markers specifically added because the Board had, in
17 fact, made that decision.

18 And that is how a couple of the things that
19 got specifically added came in because they were
20 things where staff wasn't quite ready to go there
21 and they came to hearing and the Board decided, then
22 they were put in the regs.

23 So, I'm not sure that there is anything
24 necessarily wrong with the suggested clarifications.

25 And -- and in terms of the (a)(9)(A), I
26 know the Controller's original concern on that
27 language in (a)(9)(A) was how broad was it? What --
28 what did it really cover approved by FDA? You know,

1 that was a little bit of his concern and there was
2 some discussion at that time at the BTC about it.

3 So, it sounds like what staff's trying to
4 do is just -- bad words coming to my brain -- a
5 surgical strike on the tissue markers.

6 But that doesn't mean that further guidance
7 to audit staff in the manual isn't appropriate. I
8 just don't know what all that would be.

9 You know, we have a tendency to look at the
10 facts of the case as it becomes before us, 'cause
11 that's when we see it and we look at the reg and we
12 look at the statute and see if it -- if we believe
13 that that product fits the definitions as ultimately
14 they go back to the statute.

15 Where -- where staff looking at it thought
16 not, but that's -- that's how you get -- that's just
17 the nature the dispute resolution process. I don't
18 know that you can answer every single question that
19 might come up.

20 MR. RUNNER: Just --

21 MS. STEEL: Let's go to Chairman Horton
22 first and then --

23 MR. HORTON: Members, I wasn't proposing we
24 answer every specific question. I was just
25 proposing that we give guidance on how to interpret
26 this law in -- you know, which is consistent with
27 the statute and they just stay consistent with the
28 statute and that this is fact based, functional

1 base, irrespective of whether it's included or
2 excluded, every item that is included as a medicine
3 could, depending on how it's functionally used, not
4 be a medicine, you know, and could be used for
5 purposes not intended to even cure somebody.

6 So, it's always going back to just the
7 fundamental interpretation of the law. As it
8 relates to staff's alternative, I mean, I think by
9 staff's own admissions, that they were trying to
10 craft something to address what they perceived to be
11 the Board's intent to delineate a specific item
12 as -- and clarify, as opposed to approaching this
13 problem and saying how can we -- how can we assure
14 that the statute is properly interpreted?

15 And I also believe that Member Mandel is
16 absolutely correct that there are segments of the
17 correction that this process had been a good
18 process.

19 And whenever you say something is forever
20 taxable, you are just fundamentally wrong, you know
21 what I mean, and that just shouldn't be anywhere,
22 you know what I mean? And, so, those things
23 probably did need to be cleaned up and we probably
24 can clean those up.

25 But when you start itemizing an item and --
26 you can do it, but you are going to find that you're
27 going to say, "if this item, if consistent with the
28 statute, if for cure of a disease, if for mitigation

1 of a disease," you know.

2 Anyway, that's -- so, I think they can go
3 back and eliminate all that.

4 But if you want to do it, I'm okay with
5 saying okay, well, let's do it this one more time.

6 But when it comes up again, we're going to
7 do it one more time -- therein is the confusion.
8 You get auditors looking for lists instead of
9 looking at the law and interpreting the intent and
10 the essence of law.

11 When we do that, we're going to get it
12 right.

13 MS. STEEL: Member Runner.

14 MR. HORTON: It won't come before us.

15 MR. RUNNER: My -- I was going to suggest,
16 I think the -- you know, going back to what Member
17 Mandel was talking about, I think -- you know,
18 Action 1, I think is a clarification of the FDA
19 issue, which I think everybody is -- understands and
20 that makes -- that makes sense at that point.

21 MR. HORTON: Yeah.

22 MR. RUNNER: I'm wondering if, indeed,
23 there isn't at least a path for us to go ahead and
24 understand that that is a good -- we move forward
25 with that issue.

26 And then at least on the -- on the other
27 issues, which seem to be the point of contention at
28 this point, you know, just go back and ask the staff

1 to come back with some -- some clarity or, you know,
2 try to address it in the audit manual.

3 MR. HORTON: I second that if that's a
4 motion.

5 MR. RUNNER: Okay, I'll make that as a
6 motion.

7 MS. STEEL: You mean all the action items?

8 MS. YEE: All the action items?

9 MR. RUNNER: No, I'm sorry, approve Action
10 Item 1.

11 MS. STEEL: Okay.

12 MS. MANDEL: Well -- and staff's other -- I
13 know there was alternative language in Action
14 Item 3, but --

15 MR. RUNNER: Was there an agreement -- was
16 there agreement -- I think there was agreement on
17 Action Item 3.

18 MS. MANDEL: Yes, on Action Item 3 --

19 MS. STEEL: Member Yee.

20 MS. YEE: Let Ms. Mandel finish.

21 MS. MANDEL: -- well, I'm just looking at
22 the little agenda thing and Action Item -- oh, okay,
23 yeah, I think there would be -- I don't know --
24 Action Item 3, staff is taking out that last
25 sentence about the sale or use is subject to tax?

26 MR. RUNNER: Yeah, maybe --

27 MS. MANDEL: And there was alternative
28 language only from the equity recovery people.

1 MR. RUNNER: Yeah.

2 MS. MANDEL: But if staff's -- maybe they
3 don't disagree if -- if that sentence is taken out?

4 The gentleman on the end?

5 MR. BHOLAT: Yeah, I don't think we don't
6 object to removing that.

7 MS. MANDEL: Okay.

8 MR. BHOLAT: We're in agreement with
9 removing.

10 MR. RUNNER: So, let me restate the
11 motion.

12 MS. STEEL: Okay.

13 MR. RUNNER: That we would approve --

14 MS. STEEL: Okay.

15 MR. HORTON: Wait, Madam Chair --

16 MS. STEEL: Member Yee.

17 MS. YEE: I'm getting a little nervous.

18 My suggestion would be to -- I mean, these
19 amendments are before us because with the Appeals
20 matter that we heard, I thought the action of this
21 Board was directing staff to clarify the permanently
22 implanted device, in this case the breast tissue
23 expander, which helped identify the -- or mark the
24 location of the medical condition because it was
25 actually a device rather than the injected dyes or
26 inks or whatever, that this what gave rise to us
27 wanting to have this incorporated in the regulation.

28 What I'm hearing is a discussion that goes

1 beyond. And I -- I really hope that we can start a
2 separate effort to really look at broader expansion
3 of what constitutes medicine, because I do think
4 that some of the devices, if we're going to think
5 about devices -- and our speakers very concerned
6 about that thousands of their clients are
7 manufacturing or producing or providing -- but I
8 also am concerned about how -- how far can we
9 actually reach under the statute and -- without
10 really requiring a statutory change.

11 MS. STEEL: Right.

12 MS. YEE: And I'm not so sure that our
13 friends up the street are going to be all that
14 enamored if take a broad sweep and start to exempt
15 the application of tax on a whole range of products
16 without looking at a potential statutory change that
17 has broader authority to do that.

18 We've been doing this case by case because,
19 you know, new products are coming into the
20 marketplace. And we're acknowledging that they do
21 fit into the definition of medicine, given the
22 parameters of the statute.

23 But I think our charge today with respect
24 to what's before us was the direction we gave to
25 staff subsequent to our action on the matter
26 regarding breast tissue markers.

27 So, I would really like to take action on
28 this. I like the idea that we can always use the

1 audit manual to provide guidance to the staff and I
2 would recommend that we do that in this regard.

3 But also then start a separate effort with
4 respect to our speakers here of what else you
5 believe we ought to be examining and then having
6 staff really do the evaluation as to whether we have
7 the authority to look at expanding the regulation to
8 encompass that.

9 And my nervousness is that I think with --
10 if the list gets very, very broad, we are going to
11 have some revenue impact. And we really need to be
12 conscious of what that is as we look at amending the
13 regulation.

14 MR. RUNNER: Just to clarify the motion.

15 MS. STEEL: Okay, Member Mandel.

16 MS. MANDEL: Oh, he can -- he can --

17 MS. STEEL: So, he can -- okay.

18 MS. MANDEL: -- he can clarify.

19 MR. RUNNER: Yeah, I just want to make sure
20 we understand what we're -- again because there was
21 some further discussion on -- on Action 3.

22 So, I think the intent of the motion would
23 be to approve Action 1 and Action 3 and then ask
24 that the -- there be -- the issues that have been
25 discussed here then be -- be attempted to get
26 resolved with a -- within -- within -- clarity
27 within the audit manual.

28 That would be the intent of the motion.

1 I'm not sure if that's the same thought as --

2 MS. MANDEL: Well --

3 MR. RUNNER: -- Mr. Horton seconded, I'm
4 not -- I just want to make clear, see if that's
5 truly what's on the table or not so that we know
6 what we're discussing.

7 MR. HORTON: Uhm --

8 MS. YEE: Could we maybe have staff walk
9 through it if we were to adopt?

10 MR. RUNNER: Can we just finish up with the
11 motion? Just make sure -- I'm confused right now
12 what we're discussing, I guess. And my concern is
13 more procedural at this point.

14 MS. YEE: All right.

15 MS. STEEL: Okay, motion is Action 1 and
16 Action 3 --

17 MS. MANDEL: Yeah, staff recommendation.

18 MS. STEEL: -- staff recommendation.

19 MS. MANDEL: Right.

20 MS. STEEL: And then Action 2 and Action 4
21 that we going to have little more broader definition
22 and staff is going to --

23 MR. RUNNER: No, no, I don't think it's --
24 again that's why I'm going to clarify.

25 It's not the idea of broadening the
26 definition, it's the idea of seeing if the issues
27 can be addressed under statute by -- within the
28 audit manual.

1 So, I'm not -- I don't -- my intent of the
2 motion isn't to broaden as much as it is can we --
3 can the audit manual actually seek to solve that
4 problem of the ambiguity that we seem to have there.
5 That's all.

6 So, not -- not to -- not to purposefully
7 broaden it, to just see if the problem can be solved
8 within the audit manual.

9 MS. STEEL: Clarified?

10 MR. RUNNER: Clarified, right.

11 So, that's the motion. I don't know if
12 that motion worded that way is actually on the table
13 or not with a second, that's all.

14 MS. YEE: Is there a second for discussion?

15 MR. HORTON: I -- I think what I'm hearing,
16 Mr. Runner, is that your motion is to adopt Action
17 Item No. --

18 MS. YEE: 1.

19 MS. STEEL: 1.

20 MR. HORTON: -- adopt revision under Action
21 Item No. 1 and adopt staff recommendation on 2, 3
22 and 4?

23 MR. RUNNER: No.

24 MS. MANDEL: 2 --

25 MR. HORTON: Oh, okay.

26 MS. STEEL: 2 and 4.

27 MS. MANDEL: -- 2, the staff recommendation
28 is just to add a sentence that medicines are further

1 defined in B and C.

2 MR. RUNNER: Uh-huh.

3 MS. MANDEL: And 4, staff didn't recommend
4 any alternative language. Their recommendation was
5 leave the reg as it is.

6 MS. YEE: Uh-huh.

7 MR. HORTON: Yeah.

8 MS. MANDEL: Right?

9 MR. HORTON: I'm clear on that.

10 MR. RUNNER: So, the motion is just
11 Action 3, which is the staff -- excuse me, Action 1,
12 which is the staff recommendation.

13 MS. MANDEL: Which everybody agrees.

14 MR. RUNNER: Right.

15 And then -- and then also the motion is
16 Action 3, which everybody agrees, staff
17 recommendation.

18 And then try to address the other issues
19 within clarity in the audit manual. That's the --
20 that's -- that is the intent of the motion.

21 MR. HORTON: Madam Chair --

22 MS. STEEL: Yes.

23 THE COURT: -- may we hear from the parties
24 to make sure that we have understanding -- being
25 cognizant I wouldn't do anything personally, but --

26 MR. RUNNER: Well, we have a need,
27 though --

28 MR. HORTON: -- given all of the -- all of

1 the -- the -- the concerns of my colleagues, I would
2 certainly adhere to the majority.

3 MR. RUNNER: -- can I just speak to the
4 issue, especially in regards to Action -- Action 1
5 is an issue of clarity with the FDA approval.

6 That's one that -- that's a very specific
7 issue to -- which we struggled with, you know, in
8 regards to what does it mean to have FDA approval.

9 So, I think that is just kind of a -- like
10 a -- really clarifying so that we don't have such a
11 narrow thought of what FDA approval means.

12 So --

13 MR. DOWNEY: Right.

14 MR. HORTON: Although, I think it should be
15 in the audit manual.

16 MR. DOWNEY: Well, I was going to speak --
17 I'm not -- and Jacob can reiterate after I state
18 this, but I think we just talked about it.

19 I don't know that we're opposed to the
20 language in Action 2 that staff is proposing. What
21 we really seek is the relationship of C and B when
22 you are referenced to those sections and not
23 changing the reference, but what do those mean?

24 And that's where for issue 3 and item 3 and
25 item -- article 4, that those should go to the
26 audit -- audit manual.

27 We're not opposed to 2 if staff believes
28 that -- that, you know, that that clarifies it, you

1 know, that we look at B and C and then we're going
2 to, you know, go to the audit manual and clarify
3 what B and C mean, great. We would be happy with
4 that.

5 And we would accept their language in 2.
6 And then go to the audit manual and clarify 3 and 4,
7 which are, you know, all back and forth.

8 Jacob, I don't know if that -- is that
9 accurate?

10 MR. BHOLAT: I think it can work.

11 MS. STEEL: Okay, let's --

12 MR. SMITH: I just wanted to --

13 MS. STEEL: -- yeah.

14 MR. SMITH: -- I just wanted to point out
15 one thing.

16 Action Item 1 also includes the addition of
17 the breast tissue marker language. So, I just want
18 to be clear that it doesn't -- it's not just --

19 MR. RUNNER: Okay.

20 MS. YEE: That's --

21 MR. RUNNER: -- it solves -- it
22 specifically speaks to the issue of that one item.

23 MR. SMITH: And then Action Item 4, if the
24 intent is to not make any further changes to the
25 regulation, that is Action Item 4 in terms of
26 staff's recommendation.

27 So, adopting staff's recommendation with
28 regard to Action Item 4 would be consistent with not

1 making a change to the regulation and addressing it
2 with the -- in the audit manual.

3 MR. RUNNER: Okay.

4 MS. STEEL: Okay, so --

5 MR. DOWNEY: Right, but I'd like to see
6 those changes to the audit manual first to see if
7 they are answering that question.

8 MR. RUNNER: Well, there's a process for
9 that.

10 MS. STEEL: Okay. So, Action 1 --

11 MR. DOWNEY: Hold on 4, that was it.

12 MS. STEEL: -- the motion is Action 1,
13 everybody agrees here, so, the staff recommends --
14 staff recommendation.

15 Action 3, everybody agrees, so we do staff
16 recommendations.

17 And Action 2 that we are adding the breast
18 tissue markers that coming -- oh, that's Action 1.

19 MS. YEE: That's Action 1.

20 MR. SMITH: That's part of our --

21 MS. YEE: Yeah.

22 MR. SMITH: -- Action 1.

23 MS. STEEL: You know, we bring this case --
24 I mean, we decide to the proposed regulation
25 amendment on this regulations because the tissue
26 markers we started.

27 MS. YEE: Yeah, that's Action 1.

28 MS. STEEL: And that's the reason we had

1 interest parties.

2 MS. YEE: Right.

3 MS. STEEL: You know what, it seems like a
4 new technology is coming in that, you know, we are
5 having this trouble every time -- that after two
6 months I'm going to be gone and you guys got stuck
7 with it and --

8 MS. YEE: I'm not.

9 MS. STEEL: -- okay.

10 So, Action 4, that clarifies audit manual
11 under the statute, that's clear?

12 So, we -- that's the motion that --

13 MR. HORTON: Madam Chair, if I may?

14 MS. STEEL: -- okay.

15 MR. HORTON: I would agree what staff
16 articulated and ask that they do it one more time
17 and we'll make that the motion and then -- and then
18 we can discuss that.

19 MR. SMITH: Well, I just --

20 MS. STEEL: Can we discuss that without
21 second?

22 We had a motion and nobody seconded yet.

23 MR. RUNNER: Well, I think, we -- I mean, I
24 think staff basically walked through that motion,
25 right?

26 Did I misunderstand something?

27 MR. SMITH: The only thing I was suggesting
28 when referring to Action Item 4, is that I was just

1 suggesting that adopting Action Item 4 would be
2 consistent with what you were saying, which is to
3 not to make further changes to the regulation.

4 MS. MANDEL: Yeah.

5 MR. SMITH: But I'm not saying that's part
6 of --

7 MR. RUNNER: Is it necessary, though?

8 MR. SMITH: I --

9 MR. RUNNER: I mean, if we're going to go
10 ahead and refer to the audit -- have it addressed in
11 the audit manual, is that a necessary action in
12 order to do -- to do the step, which would be try to
13 address it in the audit manual?

14 MS. YEE: I don't think the audit manual
15 then takes the point.

16 MR. RUNNER: Just start there.

17 MR. MENDEL: No, I don't think it's
18 necessary.

19 I think what he was trying to suggest is
20 that simply accepting staff recommendation does
21 everything you're talking about doing --

22 MR. RUNNER: Okay.

23 MR. MENDEL: -- and then having a separate
24 item that recommends that we look at amending the
25 audit manual to add clarification regarding how A, B
26 and C are read together.

27 MS. YEE: Exactly.

28 MR. MENDEL: But that accepting staff

1 recommendation makes the 3 changes -- the FDA, the
2 breast tissue markers --

3 MR. RUNNER: That's Action 1.

4 MR. MENDEL: -- and -- and the change to
5 (a)(9)(A) that says medicines are further defined in
6 B and C, and then eliminating that one sentence in
7 (B)(2) --

8 MR. RUNNER: Which is 4.

9 MR. MENDEL: -- that said --

10 MS. STEEL: That's 3.

11 MR. MENDEL: -- no, that's 3.

12 MS. YEE: That's 3.

13 MR. RUNNER: That's 3, okay.

14 MR. MENDEL: 4 is actually to do nothing
15 further.

16 MR. RUNNER: Okay, yeah.

17 MR. MENDEL: So, if you like 1, 2 and 3,
18 you can simply accept staff recommendation. And
19 then ask staff to do something in addition.

20 MR. HORTON: There you go.

21 MR. RUNNER: Well, let's -- let's -- I'd
22 like to hear -- I mean, that's obviously what is
23 before us and if everybody agreed with that,
24 including the folks before us then we wouldn't be
25 here.

26 MR. DOWNEY: The challenge I'm having is
27 that we're compromising on 1, 2 and 3.

28 And by adopting 4 it's saying that we agree

1 that what it says is right and that isn't what I was
2 hearing.

3 What I was hearing is that we need to look
4 at clarifying that section. And if we put in the
5 reg or the statute or we put in the audit manual,
6 we're going to clarify something.

7 So, that's not accepting that --

8 MR. HORTON: Madam --

9 MR. DOWNEY: -- that we're not doing
10 anything.

11 Or at least that's my -- that was our
12 compromise.

13 MS. STEEL: Chairman Horton.

14 MR. HORTON: -- Madam Chair, I think staff
15 said not accept 4.

16 MR. RUNNER: No, they said accept 4.

17 MR. HORTON: No, they said not.

18 They're right here.

19 MR. RUNNER: They said accept 4, which
20 means --

21 MR. SMITH: Do not make any further
22 changes.

23 MR. HORTON: Right, you're recommending
24 that we accept 4?

25 MR. SMITH: Accept 4, but that we also --

26 MS. MANDEL: Are you saying A-C-C?

27 MR. HORTON: Yeah, the word that you're
28 using --

1 MS. MANDEL: -- or E-X? I think you're --

2 MR. SMITH: I have a cold, so --

3 MS. MANDEL: -- no, I think's he's

4 hearing a different --

5 MR. SMITH: A-C-C, accept.

6 MR. RUNNER: Adopt.

7 MS. MANDEL: -- the staff recommendation.

8 MR. SMITH: Adopt --

9 MR. RUNNER: There you go.

10 MR. SMITH: -- recommendation and then add

11 that -- instruct --

12 MR. MENDEL: I think for clarification,
13 staff's recommendation 4 is that there be no other
14 changes made to the regulation.

15 It doesn't go beyond to say that there
16 could be no other clarifications elsewhere in the
17 audit manual.

18 It's simply -- is recommending that at this
19 time no other changes be made to the regulation.

20 MS. MANDEL: And that's --

21 MS. STEEL: Clarify audit manual under the
22 statute, that's what we been talking about.

23 MR. MENDEL: As a -- as a separate --

24 MS. STEEL: Right.

25 MR. MENDEL: -- direction to staff.

26 MS. STEEL: Right, right.

27 MS. YEE: Madam Chair.

28 MR. DOWNEY: If -- if we can't reach

1 agreement -- sorry, I don't know if it was my
2 turn -- but if we can't reach agreement on what the
3 audit manual says, then we should both bring back a
4 proposed language related to this section.

5 I think if we say we accept this section
6 then we're done this issue and I don't think
7 we're -- the compromise on 1, 2 and 3 was because
8 we're not done with 4, we're going to go look at 4.

9 And we're going to see if we can put it in
10 the audit manual and if we can all agree, 'cause we
11 have much better direction from you.

12 That's how I was taking it.

13 MS. STEEL: What's the next step and what's
14 the process here?

15 When we ask you for Action Item 4 that
16 clarify audit manual under the statute, then what
17 kind of language you bring it? What's the process?

18 MS. BUEHLER: For the audit manual, we
19 typically draft those as a result of policy memos.

20 We take a different objective with this, we
21 can definitely work with our interested parties to
22 draft language.

23 Once that has gone through our internal
24 review, it is posted the internet for a 60-day
25 comment period, where we can receive additional
26 comments and feedback from interested parties.

27 And then it's brought before the Board,
28 typically on consent, when we have agreement from

1 all parties.

2 MS. STEEL: Okay. So, there's a motion?

3 MR. RUNNER: The motion was what?

4 MS. STEEL: Staff already -- I am not going
5 to --

6 MR. RUNNER: Staff doesn't make the
7 motions.

8 MS. STEEL: -- yeah, no, no, staff
9 recommended -- staff made it very clear there that
10 Action 1 -- oh, my God, we're going to start all
11 over again.

12 Action 1, that we going to put the tissue
13 markers in it -- the language.

14 Okay?

15 MS. YEE: Madam Chair?

16 Okay. I don't think this is what I heard
17 unanimously but my understanding of what is before
18 us is to adopt Action 1, 2 and 3 and direct staff to
19 provide guidance through the audit manual that
20 speaks to the interaction between subdivisions A, B
21 and C, in terms of its application. Share that with
22 interested parties.

23 And if there is a broader effort that
24 should arise out of the insufficiency of the
25 guidance provided in the audit manual that that
26 would be a separate effort coming back to the
27 Board.

28 MR. RUNNER: Second.

1 MR. HORTON: Third.

2 MR. RUNNER: Fourth.

3 MS. STEEL: So, moved by Member Yee and
4 second by Member Runner.

5 And it's been adopted.

6 And thank you very much. That concludes
7 Business Tax Committee.

8 MS. BUEHLER: Thank you.

9 MR. DOWNEY: Thank you.

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REPORTER'S CERTIFICATE.

State of California)
) ss
County of Sacramento)

I, KATHLEEN SKIDGEL, Hearing Reporter for the California State Board of Equalization certify that on November 19, 2014 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled hearing; that I transcribed the shorthand writing into typewriting; and that the preceding pages 1 through 46 constitute a complete and accurate transcription of the shorthand writing.

Dated: December 5, 2014

Kathleen Skidgel

KATHLEEN SKIDGEL
Hearing Reporter



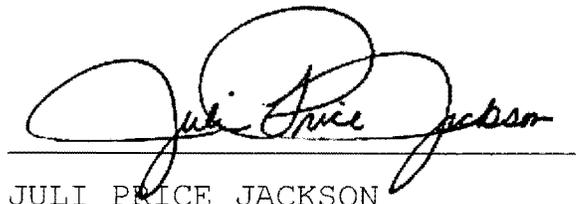
REPORTER'S CERTIFICATE

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State of California)
) ss
County of Sacramento)

I, JULI PRICE JACKSON, Hearing Reporter for
the California State Board of Equalization certify
that on November 19, 2014 I recorded verbatim, in
shorthand, to the best of my ability, the
proceedings in the above-entitled hearing; that I
transcribed the shorthand writing into typewriting;
and that the preceding pages 47 through 86
constitute a complete and accurate transcription of
the shorthand writing.

Dated: December 5, 2014



JULI PRICE JACKSON
Hearing Reporter

**ESTIMATE OF COST OR SAVINGS RESULTING
FROM PROPOSED REGULATORY ACTION**

**Proposed Amendment of Sales and Use Tax Regulation 1533.2, Diesel Fuel Used in Farming
Activities or Food Processing**

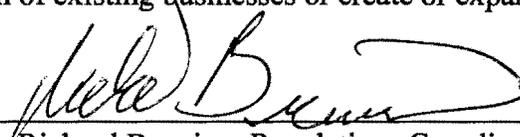
STATEMENT OF COST OR SAVINGS FOR NOTICE OF PUBLIC HEARING

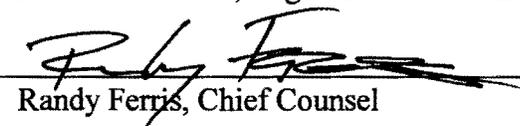
The State Board of Equalization has determined that the proposed action does not impose a mandate on local agencies or school districts. Further, the Board has determined that the action will result in no direct or indirect cost or savings to any State agency, any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code or other non-discretionary cost or savings imposed on local agencies, or cost or savings in Federal funding to the State of California.

The cost impact on private persons or businesses will be insignificant. This proposal will not have a significant adverse economic impact on businesses.

This proposal will not be detrimental to California businesses in competing with businesses in other states.

This proposal will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand business in the State of California.

Statement
Prepared by  Date 1-20-15
Richard Bennion, Regulations Coordinator

Approved by  Date 1/20/15
Randy Ferris, Chief Counsel

**If Costs or Savings are Identified, Signatures of Chief, Fiscal Management Division, and
Chief, Board Proceedings Division, are Required**

Approved by _____ Date _____
Chief, Financial Management Division

Approved by _____ Date _____
Chief, Board Proceedings Division

NOTE: SAM Section 6615 requires that estimates resulting in cost or savings be submitted for Department of Finance concurrence before the notice of proposed regulatory action is released.

**ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)**

STD. 399 (REV. 12/2013)

ECONOMIC IMPACT STATEMENT

DEPARTMENT NAME State Board of Equalization	CONTACT PERSON Richard E. Bennion	EMAIL ADDRESS rbennion@boe.ca.gov	TELEPHONE NUMBER 916-445-2130
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400 Title 18, Section 1533.2, Diesel Fuel Used in Farming Activities or Food Processing			NOTICE FILE NUMBER Z

A. ESTIMATED PRIVATE SECTOR COST IMPACTS *Include calculations and assumptions in the rulemaking record.*

1. Check the appropriate box(es) below to indicate whether this regulation:

- a. Impacts business and/or employees
- b. Impacts small businesses
- c. Impacts jobs or occupations
- d. Impacts California competitiveness
- e. Imposes reporting requirements
- f. Imposes prescriptive instead of performance
- g. Impacts individuals
- h. None of the above (Explain below):

Please see the attached .

***If any box in Items 1 a through g is checked, complete this Economic Impact Statement.
If box in Item 1.h. is checked, complete the Fiscal Impact Statement as appropriate.***

2. The _____ estimates that the economic impact of this regulation (which includes the fiscal impact) is:
(Agency/Department)

- Below \$10 million
- Between \$10 and \$25 million
- Between \$25 and \$50 million
- Over \$50 million *[If the economic impact is over \$50 million, agencies are required to submit a Standardized Regulatory Impact Assessment as specified in Government Code Section 11346.3(c)]*

3. Enter the total number of businesses impacted: _____

Describe the types of businesses (Include nonprofits): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

4. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

5. Indicate the geographic extent of impacts: Statewide
 Local or regional (List areas): _____

6. Enter the number of jobs created: _____ and eliminated: _____

Describe the types of jobs or occupations impacted: _____

7. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here? YES NO

If YES, explain briefly: _____

**ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)**

STD. 399 (REV. 12/2013)

ECONOMIC IMPACT STATEMENT (CONTINUED)

ESTIMATED COSTS *Include calculations and assumptions in the rulemaking record.*

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? \$ _____
 - a. Initial costs for a small business: \$ _____ Annual ongoing costs: \$ _____ Years: _____
 - b. Initial costs for a typical business: \$ _____ Annual ongoing costs: \$ _____ Years: _____
 - c. Initial costs for an individual: \$ _____ Annual ongoing costs: \$ _____ Years: _____
 - d. Describe other economic costs that may occur: _____

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. *Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.* \$ _____

4. Will this regulation directly impact housing costs? YES NO

If YES, enter the annual dollar cost per housing unit: \$ _____

Number of units: _____

5. Are there comparable Federal regulations? YES NO

Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: \$ _____

C. ESTIMATED BENEFITS *Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.*

1. Briefly summarize the benefits of the regulation, which may include among others, the health and welfare of California residents, worker safety and the State's environment: _____

2. Are the benefits the result of: specific statutory requirements, or goals developed by the agency based on broad statutory authority?

Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? \$ _____

4. Briefly describe any expansion of businesses currently doing business within the State of California that would result from this regulation: _____

D. ALTERNATIVES TO THE REGULATION *Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.*

List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

**ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)**

STD. 399 (REV. 12/2013)

ECONOMIC IMPACT STATEMENT (CONTINUED)

Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation: Benefit: \$ _____ Cost: \$ _____

Alternative 1: Benefit: \$ _____ Cost: \$ _____

Alternative 2: Benefit: \$ _____ Cost: \$ _____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? YES NO

Explain: _____

E. MAJOR REGULATIONS *Include calculations and assumptions in the rulemaking record.*

California Environmental Protection Agency (Cal/EPA) boards, offices and departments are required to submit the following (per Health and Safety Code section 57005). Otherwise, skip to E4.

1. Will the estimated costs of this regulation to California business enterprises exceed \$10 million? YES NO

***If YES, complete E2. and E3
If NO, skip to E4***

Briefly describe each alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____
Alternative 2: _____

(Attach additional pages for other alternatives)

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: Total Cost \$ _____ Cost-effectiveness ratio: \$ _____

Alternative 1: Total Cost \$ _____ Cost-effectiveness ratio: \$ _____

Alternative 2: Total Cost \$ _____ Cost-effectiveness ratio: \$ _____

4. Will the regulation subject to OAL review have an estimated economic impact to business enterprises and individuals located in or doing business in California exceeding \$50 million in any 12-month period between the date the major regulation is estimated to be filed with the Secretary of State through 12 months after the major regulation is estimated to be fully implemented?

YES NO

If YES, agencies are required to submit a Standardized Regulatory Impact Assessment (SRIA) as specified in Government Code Section 11346.3(c) and to include the SRIA in the Initial Statement of Reasons.

5. Briefly describe the following:

The increase or decrease of investment in the State: _____

The incentive for innovation in products, materials or processes: _____

The benefits of the regulations, including, but not limited to, benefits to the health, safety, and welfare of California residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency: _____

**ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)**

STD 399 (REV. 12/2013)

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.

- 1. Additional expenditures in the current State Fiscal Year which are reimbursable by the State. (Approximate)
(Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

\$ _____

- a. Funding provided in _____

Budget Act of _____ or Chapter _____, Statutes of _____

- b. Funding will be requested in the Governor's Budget Act of _____

Fiscal Year: _____

- 2. Additional expenditures in the current State Fiscal Year which are NOT reimbursable by the State. (Approximate)
(Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

\$ _____

Check reason(s) this regulation is not reimbursable and provide the appropriate information:

- a. Implements the Federal mandate contained in _____

- b. Implements the court mandate set forth by the _____ Court.

Case of: _____ vs. _____

- c. Implements a mandate of the people of this State expressed in their approval of Proposition No. _____

Date of Election: _____

- d. Issued only in response to a specific request from affected local entity(s).

Local entity(s) affected: _____

- e. Will be fully financed from the fees, revenue, etc. from: _____

Authorized by Section: _____ of the _____ Code;

- f. Provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each;

- g. Creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

- 3. Annual Savings. (approximate)

\$ _____

- 4. No additional costs or savings. This regulation makes only technical, non-substantive or clarifying changes to current law regulations.

- 5. No fiscal impact exists. This regulation does not affect any local entity or program.

- 6. Other. Explain _____

**ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)**

STD. 399 (REV. 12/2013)

FISCAL IMPACT STATEMENT (CONTINUED)**FISCAL EFFECT ON STATE GOVERNMENT** Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years. 1. Additional expenditures in the current State Fiscal Year. (Approximate)

\$ _____

It is anticipated that State agencies will:

 a. Absorb these additional costs within their existing budgets and resources. b. Increase the currently authorized budget level for the _____ Fiscal Year 2. Savings in the current State Fiscal Year. (Approximate)

\$ _____

 3. No fiscal impact exists. This regulation does not affect any State agency or program. 4. Other. Explain _____**C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS** Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years. 1. Additional expenditures in the current State Fiscal Year. (Approximate)

\$ _____

 2. Savings in the current State Fiscal Year. (Approximate)

\$ _____

 3. No fiscal impact exists. This regulation does not affect any federally funded State agency or program. 4. Other. Explain _____

FISCAL OFFICER SIGNATURE

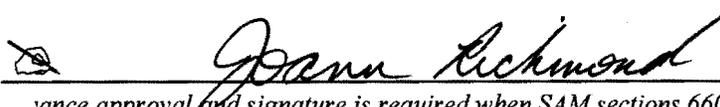


DATE

December 24, 2014

The signature attests that the agency has completed the STD. 399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization.

AGENCY SECRETARY



DATE

December 24, 2014

Agency approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD. 399.

DEPARTMENT OF FINANCE PROGRAM BUDGET MANAGER

Exempt under SAM section 6615

DATE

Attachment to Economic and Fiscal Impact
Statement (STD. 399 (Rev. 12/2013)) for the Proposed Amendments to
California Code of Regulations, Title 18, Section 1533.2,
Diesel Fuel Used in Farming Activities or Food Processing

As explained in more detail in the initial statement of reasons, Revenue and Taxation Code (RTC) section 6357.1 provides a partial exemption from sales and use tax for sales and purchases of “diesel fuel” for use in farming activities or food processing, but does not define the term “diesel fuel.” In 2002, the State Board of Equalization (Board) adopted California Code of Regulations, title 18, section (Regulation) 1533.2, *Diesel Fuel Used in Farming Activities and Food Processing*, to implement, interpret, and make specific the provisions of RTC section 6357.1. Regulation 1533.2 clarifies the conditions under which a sale or use of diesel fuel qualifies for the partial exemption under RTC section 6357.1. Also, as relevant here, Regulation 1533.2 provides a definition for the term “diesel fuel.” The definition of diesel fuel was based, in part, on the California Air Resources Board’s (ARB’s) definition of diesel fuel codified in California Code of Regulations, title 13, section (ARB Regulation) 2281, subdivision (b)(1), at the time the regulation was adopted. However, in 2004, the ARB amended its definition for the term diesel fuel. In addition, the Diesel Fuel Tax Law (RTC § 60001 et seq.) also provides a definition for the term diesel fuel in RTC section 60022.

Due to the 2004 amendments to ARB Regulation 2281, subdivision (b), the definition of diesel fuel in Regulation 1533.2, which refers to the American Society for Testing and Materials Standard Specification for Diesel Fuel Oils (“ASTM”) D 975-81, is no longer consistent with the provision of ARB Regulation 2281, subdivision (b)(1), which no longer refer to the “ASTM Standard Specification for Diesel Fuel Oils D975-81.” And, the Board determined that, for purposes of the administering the partial exemption provided by RTC section 6357.1, it would be more effective to amend the definition of diesel fuel in Regulation 1533.2 so that the definition will no longer be based upon the ARB definition, but instead will be based upon the definition for the term diesel fuel contained in section 60022 of the Diesel Fuel Tax Law that applies to diesel fuel transactions. This is because revising the definition of diesel fuel so that it is consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide more clarity to taxpayers and staff.

Therefore, the proposed amendments make the definition of diesel fuel in Regulation 1533.2 consistent with the definition of diesel fuel in the Diesel Fuel Tax Law, the proposed amendments do not impose any costs on any individuals or businesses because the amendments do not mandate that individuals or businesses do anything that is not already required by the Sales and Use Tax law (RTC § 6001 et seq.), and there is nothing in the proposed amendments that would significantly change how individuals and businesses would generally behave, in the absence of the proposed regulatory action, or that would impact revenue. Therefore, the Board estimates that the proposed amendments will not have a measurable economic impact on individuals and businesses.

Furthermore, the Board anticipates that the proposed amendments to Regulation 1533.2 will reduce confusion, promote fairness, and benefit retailers, consumers, Board staff, and the Board by making the definition of diesel fuel in Regulation 1533.2 consistent with the definition of diesel fuel in the Diesel Fuel Tax Law that already applies to diesel fuel transactions, and

clarifying that biodiesel is diesel fuel for purposes of the partial exemption from sales and use tax for diesel fuel used in farming activities or food processing, consistent with the Board's historical treatment of biodiesel.

Therefore, based upon the foregoing information and all of the information in the rulemaking file, the Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulatory action, and the Board has determined that the proposed amendments to Regulation 1533.2:

- Will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states;
- 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;
- Will not have a significant effect on housing costs;
- Will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California; and
- Will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

The Board has also determined that the proposed amendments to Regulation 1533.2 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed amendments will not have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period.

Finally, Regulation 1533.2 does not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of the proposed amendments to Regulation 1533.2 will not affect the benefits of Regulation 1533.2 to the health and welfare of California residents, worker safety, or the state's environment.

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2014-1224-02	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
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For use by Office of Administrative Law (OAL) only

RECEIVED FOR FILING PUBLICATION DATE DEC 24 '14 JAN 09 '15 Office of Administrative Law	NOTICE REGULATIONS
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 AGENCY WITH RULEMAKING AUTHORITY
 State Board of Equalization

AGENCY FILE NUMBER (if any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE Diesel Fuel Used in Farming Activities	TITLE(S) 18	FIRST SECTION AFFECTED 1533.2	2. REQUESTED PUBLICATION DATE January 9, 2015
3. NOTICE TYPE <input checked="" type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON Richard E. Bennion	TELEPHONE NUMBER (916) 445-2130	FAX NUMBER (Optional) (916) 324-3984
OAL USE ONLY <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	NOTICE REGISTER NUMBER	PUBLICATION DATE	

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
------------------------------	--

*SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT
	AMEND
	REPEAL
TITLE(S)	

3. TYPE OF FILING

<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input type="checkbox"/> Other (Specify) _____	

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____
---	--	--	--

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
-------------------	------------------	-----------------------	---------------------------

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE

TYPED NAME AND TITLE OF SIGNATORY

For use by Office of Administrative Law (OAL) only

TITLE 18. BOARD OF EQUALIZATION

The State Board of Equalization Proposes to Adopt Amendments to California Code of Regulations, Title 18, Section 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*. In 2002, the Board adopted Regulation 1533.2 to implement, interpret, and make specific the provisions of RTC section 6357.1, which provide a partial exemption from sales and use tax for sales and purchases of diesel fuel for use in farming activities or food processing. The proposed amendments will revise the definition for the term diesel fuel in Regulation 1533.2 so that the term is consistent with the definition for the term "diesel fuel" provided in the Diesel Fuel Tax Law (RTC § 60001 et seq.) that applies to diesel fuel transactions. The proposed amendments also add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, remove the reference to the "general fund" in the note section of Appendix A to Regulation 1533.2, and make other non-substantive grammatical and formatting changes.

PUBLIC HEARING

The Board will conduct a meeting in Room 207 at 5901 Green Valley Circle, Culver City, California on February 24-26, 2015. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at www.boe.ca.gov at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on February 24, 25, or 26, 2015. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1533.2.

AUTHORITY

RTC section 7051

REFERENCE

RTC section 6357.1,

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations

RTC section 6357.1 provides a partial exemption from sales and use tax on the sale and purchase of diesel fuel for use in farming activities or food processing, but does not define the term “diesel fuel.” In 2002, the Board adopted Regulation 1533.2 to implement, interpret, and make specific the provisions of RTC section 6357.1. Regulation 1533.2 clarifies the conditions under which a sale or use of diesel fuel qualifies for the partial exemption provided by RTC section 6377.1. Also, as relevant here, Regulation 1533.2 provides a definition for the term diesel fuel solely for purposes of the partial exemption provided by RTC section 6357.1, which was based, in part, on the California Air Resources Board’s (ARB’s) definition of diesel fuel codified in California Code of Regulations, title 13, section (ARB Regulation) 2281, subdivision (b)(1), at the time the regulation was adopted. However, in 2004, the ARB amended its definition for the term diesel fuel, and the definition for diesel fuel in Regulation 1533.2 is no longer consistent with the ARB’s definition for diesel fuel in ARB Regulation 2281. In addition, the Diesel Fuel Tax Law (RTC § 60001 et seq.) also provides a definition for the term diesel fuel in RTC section 60022, which is applicable to diesel fuel transactions.

The exemption provided by RTC section 6357.1 is referred to as a partial exemption because section 6357.1, subdivision (c), provides that the exemption for diesel fuel used in farming activities and food processing does not apply to specified sales and use taxes included in the statewide sales and use tax rate. Also, Regulation 1533.2, subdivision (c), prescribes the content of the partial exemption certificate that purchasers are required to provide to retailers to claim the partial exemption provided by RTC section 6357.1. Subdivision (c) provides that any document satisfying the requirements may be used as an exemption certificate, and Appendix A to Regulation 1533.1 provides a partial exemption certificate form. And, as relevant here, the note section in Appendix A provides that the exemption provided by RTC section 6357.1 “is an exemption only from the state general fund portion of the sales and use tax rate” because that was the case when the Board adopted Regulation 1533.2. However, the partial exemption provided by RTC section 6357.1 now applies to state sales and use taxes that are not required to be deposited in the general fund, such as the sales and use tax imposed by section 36 of article XIII of the California Constitution that goes to the state’s Education Protection Account (as already provided in Regulation 1533.2, subdivision (a)).

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1533.2

Due to the 2004 amendments to ARB Regulation 2281, subdivision (b), the definition of diesel fuel in Regulation 1533.2, which refers to the American Society for Testing and Materials Standard Specification for Diesel Fuel Oils (“ASTM”) D 975-81, is no longer consistent with the provisions of ARB Regulation 2281, subdivision (b)(1), which no longer refer to the “ASTM Standard Specification for Diesel Fuel Oils D975-81.” Therefore, Board staff considered whether it was necessary to amend the definition of

diesel fuel in Regulation 1533.2 due to the 2004 amendments to the definition of diesel fuel in ARB Regulation 2281. And, staff found that, for purposes of the administering the partial exemption provided by RTC section 6357.1, it would be more effective to amend the definition of diesel fuel in Regulation 1533.2 so that the definition will no longer be based upon the ARB definition, but instead will be based upon the definition of the term diesel fuel contained in section 60022 of the Diesel Fuel Tax Law. This is because staff determined that revising the definition of diesel fuel so that it is consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide more clarity to taxpayers and staff.

Interested Parties Process

The Board's Business Taxes Committee (BTC) staff prepared draft amendments to subdivision (b)(6) of Regulation 1533.2 to revise the definition of diesel fuel to be consistent with the definition of diesel fuel in RTC section 60022. BTC staff subsequently prepared a discussion paper, and provided the discussion paper and its draft amendments to Regulation 1533.2 to the interested parties. On July 15, 2014, BTC staff conducted an interested parties meeting to discuss the draft amendments.

Since BTC staff did not receive any inquiries or written comments regarding its draft amendments during or subsequent to the July 15, 2014, interested parties meeting and staff had no changes to its recommendation to amend Regulation 1533.2, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff's draft amendments. Staff also notified interested parties that comments could be submitted up to September 25, 2014, for consideration in the preparation of the Formal Issue Paper regarding the draft amendments. However, staff did not receive any other comments.

November 19, 2014 BTC Meeting

Subsequently, staff prepared Formal Issue Paper 14-009 and distributed it to the Board Members for consideration at the Board's November 19, 2014, BTC meeting. Formal Issue Paper 14-009 recommended that the Board approve and authorize publication of the amendments to Regulation 1533.2 (discussed above) in order to revise the definition of the term diesel fuel in Regulation 1533.2, subdivision (b)(6), so that the term has the same meaning as defined in section 60022 of the Diesel Fuel Tax Law. Formal Issue Paper 14-009 recommended that the Board add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, and to remove the reference to the "general fund" in the note section of Appendix A to Regulation 1533.2. Formal Issue Paper 14-009 also recommended that the Board replace the capital "S" with a lower case "s" at the beginnings of the words "Section" throughout Appendix A to Regulation 1533.2 to make the words consistent with the references to "section" and "sections" in the body of the regulation and consistent with the citation format prescribed in the California Style Manual.

During the November 19, 2014, meeting, the Board Members unanimously voted to propose the amendments to Regulation 1533.2 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1533.2 are necessary to have the effect and accomplish the objective of making the definition for the term diesel fuel in Regulations 1533.2 consistent with the definition of the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions.

The Board also anticipates that the proposed amendments to Regulation 1533.2 will reduce confusion, promote fairness, and benefit retailers, consumers, Board staff, and the Board by making the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition for the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions and clarifying that biodiesel is diesel fuel for purposes of the partial exemption from sales and use tax for diesel fuel used in farming activities or food processing.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1533.2 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1533.2 is the only state regulation providing a partial sales tax exemption for diesel fuel used in farming activities or food processing. The Board is aware that California Code of Regulations, title 18, section (Regulation) 1598.1, *Diesel Fuel Prepayment Exemption*, also defines the term "diesel fuel" and the Board is separately proposing to amend the definition for the term diesel fuel in Regulation 1598.1 so that it consistent with the current definition of the term diesel fuel in RTC section 60022 and the proposed amendments to the definition of the term diesel fuel in Regulation 1533.2. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1533.2 or the proposed amendments to Regulation 1533.2.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

NO COST OR SAVINGS TO ANY STATE AGENCY, LOCAL AGENCY, OR SCHOOL DISTRICT

The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1533.2 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1533.2 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The Board has determined that the proposed amendments to Regulation 1533.2 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 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. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will not affect the benefits of Regulation 1533.2 to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulation 1533.2 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose 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.

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Kevin B. Smith, Tax Counsel III, by telephone at (916) 323-3152, by e-mail at Kevin.Smith@boe.ca.gov, or by mail at State Board of Equalization, Attn: Kevin B. Smith, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends at 10:00 a.m. on February 24, 2015, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1533.2 during the February 24-26, 2015, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1533.2. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1533.2 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1533.2, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at www.boe.ca.gov.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1533.2 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change

clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1533.2, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

Bennion, Richard

From: BOE-Board Meeting Material
Sent: Friday, January 09, 2015 7:50 AM
To: Alonzo, Mary Ann (Legal); Angeja, Jeff (Legal); Angeles, Joel; Appleby, Jaclyn; Armenta, Christopher; Bartolo, Lynn; Bennion, Richard; Benson, Bill; Bisauta, Christine (Legal); Blake, Sue; BOE-Board Meeting Material; Boyle, Kevin; Bridges, Cynthia; Brown, Michele C; Carrigan, Brenn; Chung, Sophia (Legal); Cruz, Giovan; Davis, Toya P.; Delgado, Maria; Dixon, Camille; Duran, David; Durham, Mark; Elliott, Claudia; Epolite, Anthony (Legal); Ferris, Randy (Legal); Ford, Ladeena L; Garcia, Laura; Gau, David; Gilman, Todd; Hamilton, Tabitha; Hanohano, Rebecca; Harrison, Michelle; Harvill, Mai; Heller, Bradley (Legal); Hellmuth, Leila; Herrera, Cristina; Holmes, Dana; Hughes, Shellie L; Jacobson, Andrew; Kinkle, Sherrie L; Kinst, Lynne; Kruckenber, Kendra; Kuhl, James; Lambert, Gary; Lambert, Robert (Legal); Lee, Chris; Levine, David H. (Legal); Lowery, Russell; Madrigal, Claudia; Matsumoto, Sid; Matthies, Ted; McGuire, Jeff; Melendez-Collier, Alisa; Miller, Brad; Moon, Richard (Legal); Morquecho, Raymond; Nienow, Trecia (Legal); Oakes, Clifford; Pielsticker, Michele; Ralston, Natasha; Richmond, Joann; Riley, Denise (Legal); Schultz, Glenna; Shah, Neil; Silva, Monica (Legal); Singh, Sam; Smith, Kevin (Legal); Smith, Rose; Stowers, Yvette; Torres, Rodrigo; Torres, Rodrigo; Tran, Mai (Legal); Treichelt, Tim; Tucker, Robert (Legal); Vandrick, Tanya; Vasquez, Rosalyn; Wallentine, Sean; Whitaker, Lynn; White, Sharon; Wiggins, Brian; Williams, Lee; Zivkovich, Robert
Subject: State Board of Equalization - Announcement of Regulatory Change 1533.2

The State Board of Equalization proposes to adopt amendments to Regulation 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*. A public hearing regarding the proposed amendments will be held in Room 207 at 5901 Green Valley Circle, Culver City, California on February 24-26, 2015.

The proposed amendments revise the definition of diesel fuel in Regulation 1533.2 to be consistent with the definition of diesel fuel in the Diesel Fuel Tax Law.

To view the notice of hearing, initial statement of reasons, proposed text, and history click on the following link:
http://www.boe.ca.gov/regs/reg_1533_2_2015.htm.

Questions regarding the substance of the proposed amendments should be directed to Mr. Kevin Smith, Tax Counsel III, at 450 N Street, MIC:82, Sacramento, CA 94279-0082, email Kevin.Smith@boe.ca.gov, telephone (916) 323-3152, or FAX (916) 323-3387.

Written comments for the Board's consideration, notices of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed regulatory action should be directed to Mr. Rick Bennion, Regulations Coordinator, telephone (916) 445-2130, fax (916) 324-3984, e-mail Richard.Bennion@boe.ca.gov or by mail to: State Board of Equalization, Attn: Rick Bennion, MIC: 80, P.O. Box 942879-0080, Sacramento, CA 94279-0080.

Please do not reply to this message.

Board Proceedings Division, MIC:80
Rick Bennion
Regulations Coordinator
Phone (916) 445-2130
Fax (916) 324-3984
Richard.Bennion@boe.ca.gov

Bennion, Richard

From: State Board of Equalization - Announcement of Regulatory Change
<Legal.Regulations@BOE.CA.GOV>
Sent: Friday, January 09, 2015 8:27 AM
To: BOE_REGULATIONS@LISTSERV.STATE.CA.GOV
Subject: State Board of Equalization - Announcement of Regulatory Change 1533.2

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The proposed amendments revise the definition of diesel fuel in Regulation 1533.2 to be consistent with the definition of diesel fuel in the Diesel Fuel Tax Law.

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CONTACT PERSONS

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WRITTEN COMMENT PERIOD

The written comment period ends at 10:00 a.m. on February 24, 2015; or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1598.1 during the February 24-26, 2015, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1598.1. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1598.1 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1598.1, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rule-making file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of

reasons are also available on the Board's Website at www.boe.ca.gov.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1598.1 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1598.1, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

TITLE 18. BOARD OF EQUALIZATION

The State Board of Equalization Proposes to Adopt Amendments to California Code of Regulations, Title 18, Section 1533.2, Diesel Fuel Used in Farming Activities or Food Processing

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*. In 2002, the Board adopted Regulation 1533.2 to implement, interpret, and make specific the provisions of RTC section 6357.1, which provide a partial exemption from sales and use tax for sales and purchases of diesel fuel for use in farming activities or food processing. The proposed amendments will revise the

definition for the term diesel fuel in Regulation 1533.2 so that the term is consistent with the definition for the term "diesel fuel" provided in the Diesel Fuel Tax Law (RTC § 60001 et seq.) that applies to diesel fuel transactions. The proposed amendments also add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, remove the reference to the "general fund" in the note section of Appendix A to Regulation 1533.2, and make other non-substantive grammatical and formatting changes.

PUBLIC HEARING

The Board will conduct a meeting in Room 207 at 5901 Green Valley Circle, Culver City, California on February 24–26, 2015. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at www.boe.ca.gov at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on February 24, 25, or 26, 2015. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1533.2.

AUTHORITY

RTC section 7051

REFERENCE

RTC section 6357.1.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations

RTC section 6357.1 provides a partial exemption from sales and use tax on the sale and purchase of diesel fuel for use in farming activities or food processing, but does not define the term "diesel fuel." In 2002, the Board adopted Regulation 1533.2 to implement, interpret, and make specific the provisions of RTC section 6357.1. Regulation 1533.2 clarifies the conditions under which a sale or use of diesel fuel qualifies for the partial exemption provided by RTC section 6377.1. Also, as relevant here, Regulation 1533.2 provides a

definition for the term diesel fuel solely for purposes of the partial exemption provided by RTC section 6357.1, which was based, in part, on the California Air Resources Board's (ARB's) definition of diesel fuel codified in California Code of Regulations, title 13, section (ARB Regulation) 2281, subdivision (b)(1), at the time the regulation was adopted. However, in 2004, the ARB amended its definition for the term diesel fuel, and the definition for diesel fuel in Regulation 1533.2 is no longer consistent with the ARB's definition for diesel fuel in ARB Regulation 2281. In addition, the Diesel Fuel Tax Law (RTC § 60001 et seq.) also provides a definition for the term diesel fuel in RTC section 60022, which is applicable to diesel fuel transactions.

The exemption provided by RTC section 6357.1 is referred to as a partial exemption because section 6357.1, subdivision (c), provides that the exemption for diesel fuel used in farming activities and food processing does not apply to specified sales and use taxes included in the statewide sales and use tax rate. Also, Regulation 1533.2, subdivision (c), prescribes the content of the partial exemption certificate that purchasers are required to provide to retailers to claim the partial exemption provided by RTC section 6357.1. Subdivision (c) provides that any document satisfying the requirements may be used as an exemption certificate, and Appendix A to Regulation 1533.1 provides a partial exemption certificate form. And, as relevant here, the note section in Appendix A provides that the exemption provided by RTC section 6357.1 "is an exemption only from the state general fund portion of the sales and use tax rate" because that was the case when the Board adopted Regulation 1533.2. However, the partial exemption provided by RTC section 6357.1 now applies to state sales and use taxes that are not required to be deposited in the general fund, such as the sales and use tax imposed by section 36 of article XIII of the California Constitution that goes to the state's Education Protection Account (as already provided in Regulation 1533.2, subdivision (a)).

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1533.2

Due to the 2004 amendments to ARB Regulation 2281, subdivision (b), the definition of diesel fuel in Regulation 1533.2, which refers to the American Society for Testing and Materials Standard Specification for Diesel Fuel Oils ("ASTM") D975–81, is no longer consistent with the provisions of ARB Regulation 2281, subdivision (b)(1), which no longer refer to the "ASTM Standard Specification for Diesel Fuel Oils D975–81." Therefore, Board staff considered whether it was necessary to amend the definition of diesel fuel in Regulation 1533.2 due to the 2004 amendments to the definition of diesel fuel in ARB Regulation 2281. And, staff found

that, for purposes of the administering the partial exemption provided by RTC section 6357.1, it would be more effective to amend the definition of diesel fuel in Regulation 1533.2 so that the definition will no longer be based upon the ARB definition, but instead will be based upon the definition of the term diesel fuel contained in section 60022 of the Diesel Fuel Tax Law. This is because staff determined that revising the definition of diesel fuel so that it is consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide more clarity to taxpayers and staff.

Interested Parties Process

The Board's Business Taxes Committee (BTC) staff prepared draft amendments to subdivision (b)(6) of Regulation 1533.2 to revise the definition of diesel fuel to be consistent with the definition of diesel fuel in RTC section 60022. BTC staff subsequently prepared a discussion paper, and provided the discussion paper and its draft amendments to Regulation 1533.2 to the interested parties. On July 15, 2014, BTC staff conducted an interested parties meeting to discuss the draft amendments.

Since BTC staff did not receive any inquiries or written comments regarding its draft amendments during or subsequent to the July 15, 2014, interested parties meeting and staff had no changes to its recommendation to amend Regulation 1533.2, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff's draft amendments. Staff also notified interested parties that comments could be submitted up to September 25, 2014, for consideration in the preparation of the Formal Issue Paper regarding the draft amendments. However, staff did not receive any other comments.

November 19, 2014 BTC Meeting

Subsequently, staff prepared Formal Issue Paper 14-009 and distributed it to the Board Members for consideration at the Board's November 19, 2014, BTC meeting. Formal Issue Paper 14-009 recommended that the Board approve and authorize publication of the amendments to Regulation 1533.2 (discussed above) in order to revise the definition of the term diesel fuel in Regulation 1533.2, subdivision (b)(6), so that the term has the same meaning as defined in section 60022 of the Diesel Fuel Tax Law. Formal Issue Paper 14-009 recommended that the Board add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, and to remove the reference to the "general fund" in the note section of Appendix A to Regulation 1533.2. Formal Issue Paper 14-009 also recommended that the Board replace the capital "S" with a lower case "s" at the

beginning of the words "Section" throughout Appendix A to Regulation 1533.2 to make the words consistent with the references to "section" and "sections" in the body of the regulation and consistent with the citation format prescribed in the California Style Manual.

During the November 19, 2014, meeting, the Board Members unanimously voted to propose the amendments to Regulation 1533.2 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1533.2 are necessary to have the effect and accomplish the objective of making the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition of the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions.

The Board also anticipates that the proposed amendments to Regulation 1533.2 will reduce confusion, promote fairness, and benefit retailers, consumers, Board staff, and the Board by making the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition for the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions and clarifying that biodiesel is diesel fuel for purposes of the partial exemption from sales and use tax for diesel fuel used in farming activities or food processing.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1533.2 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1533.2 is the only state regulation providing a partial sales tax exemption for diesel fuel used in farming activities or food processing. The Board is aware that California Code of Regulations, title 18, section (Regulation) 1598.1, *Diesel Fuel Prepayment Exemption*, also defines the term "diesel fuel" and the Board is separately proposing to amend the definition for the term diesel fuel in Regulation 1598.1 so that it is consistent with the current definition of the term diesel fuel in RTC section 60022 and the proposed amendments to the definition of the term diesel fuel in Regulation 1533.2. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1533.2 or the proposed amendments to Regulation 1533.2.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

NO COST OR SAVINGS TO ANY STATE
AGENCY, LOCAL AGENCY, OR
SCHOOL DISTRICT

The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE
ECONOMIC IMPACT DIRECTLY
AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1533.2 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1533.2 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS
OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

RESULTS OF THE ECONOMIC IMPACT
ASSESSMENT REQUIRED BY GOVERNMENT
CODE SECTION 11346.3, SUBDIVISION (b)

The Board has determined that the proposed amendments to Regulation 1533.2 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 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. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will not affect the benefits of Regulation 1533.2

to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON
HOUSING COSTS

The adoption of the proposed amendments to Regulation 1533.2 will not have a significant effect on housing costs.

DETERMINATION REGARDING
ALTERNATIVES

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose 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.

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Kevin B. Smith, Tax Counsel III, by telephone at (916) 323-3152, by e-mail at Kevin.Smith@boe.ca.gov, or by mail at State Board of Equalization, Attn: Kevin B. Smith, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends at 10:00 a.m. on February 24, 2015, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1533.2 during the February 24-26, 2015, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the

statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1533.2. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikethrough version of the text of Regulation 1533.2 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1533.2, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rule-making file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at www.boe.ca.gov.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1533.2 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1533.2, the Board will prepare a final statement of reasons, which will be made available for inspection

at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

GENERAL PUBLIC INTEREST

DEPARTMENT OF FISH AND WILDLIFE

PROPOSED RESEARCH ON FULLY PROTECTED SPECIES

Monitoring and Research on California Clapper Rail and Light-footed Clapper Rail

The Department of Fish and Wildlife (Department) received a proposal on August 24, 2014 from Dr. Courtney J. Conway, on behalf of U.S. Geological Survey, Idaho Cooperative Fish and Wildlife Research Unit, Moscow, Idaho, requesting authorization to take California clapper rail (*Rallus longirostris obsoletus*) and light-footed clapper rail (*R. l. levipes*) ("rails"), Fully Protected birds, for scientific research purposes, consistent with conservation and recovery of the species. The rails are listed as Endangered under the California Endangered Species Act and Endangered under the federal Endangered Species Act.

Dr. Conway is planning to conduct surveys throughout the range of each species in California, in accordance with a standard protocol approved by the Department and the U.S. Fish and Wildlife Service (Service). The proposed research activities consist of searching for vocalizing individuals of the rails, and employing broadcasts of recorded, species-specific vocalizations to determine distribution and status of local populations. Dr. Conway and any others deemed qualified for this purpose would collect data by interpreting calls received from marsh birds responding to the tape and by observing individual rails. There would be no attempt to capture individual rails or to approach nests of the rails, unless specifically approved by the Department. If any rails are found dead, they will be salvaged and donated to a scientific institution open to the public, as designated by the Department and the Service. No adverse effects on individual rails or rail populations are expected.

The Department intends to issue, under specified conditions, a Memorandum of Understanding (MOU) that would authorize qualified professional wildlife researchers, with Dr. Conway as the Principal Investigator, to carry out the proposed activities. The applicants are also required to have a valid federal recovery permit for the rails, and a scientific collecting permit (SCP) to incidentally take other bird species in California.



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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Fourth District, Orange County

BETTY T. YEE
State Controller

CYNTHIA BRIDGES
Executive Director

January 9, 2015

To Interested Parties:

Notice of Proposed Regulatory Action

The State Board of Equalization Proposes to Adopt Amendments to California Code of Regulations, Title 18, Section 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*. In 2002, the Board adopted Regulation 1533.2 to implement, interpret, and make specific the provisions of RTC section 6357.1, which provide a partial exemption from sales and use tax for sales and purchases of diesel fuel for use in farming activities or food processing. The proposed amendments will revise the definition for the term diesel fuel in Regulation 1533.2 so that the term is consistent with the definition for the term “diesel fuel” provided in the Diesel Fuel Tax Law (RTC § 60001 et seq.) that applies to diesel fuel transactions. The proposed amendments also add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, remove the reference to the “general fund” in the note section of Appendix A to Regulation 1533.2, and make other non-substantive grammatical and formatting changes.

PUBLIC HEARING

The Board will conduct a meeting in Room 207 at 5901 Green Valley Circle, Culver City, California on February 24-26, 2015. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board’s Website at www.boe.ca.gov at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on February 24, 25, or 26, 2015. At the hearing, any

interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1533.2.

AUTHORITY

RTC section 7051

REFERENCE

RTC section 6357.1,

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations

RTC section 6357.1 provides a partial exemption from sales and use tax on the sale and purchase of diesel fuel for use in farming activities or food processing, but does not define the term “diesel fuel.” In 2002, the Board adopted Regulation 1533.2 to implement, interpret, and make specific the provisions of RTC section 6357.1. Regulation 1533.2 clarifies the conditions under which a sale or use of diesel fuel qualifies for the partial exemption provided by RTC section 6377.1. Also, as relevant here, Regulation 1533.2 provides a definition for the term diesel fuel solely for purposes of the partial exemption provided by RTC section 6357.1, which was based, in part, on the California Air Resources Board’s (ARB’s) definition of diesel fuel codified in California Code of Regulations, title 13, section (ARB Regulation) 2281, subdivision (b)(1), at the time the regulation was adopted. However, in 2004, the ARB amended its definition for the term diesel fuel, and the definition for diesel fuel in Regulation 1533.2 is no longer consistent with the ARB’s definition for diesel fuel in ARB Regulation 2281. In addition, the Diesel Fuel Tax Law (RTC § 60001 et seq.) also provides a definition for the term diesel fuel in RTC section 60022, which is applicable to diesel fuel transactions.

The exemption provided by RTC section 6357.1 is referred to as a partial exemption because section 6357.1, subdivision (c), provides that the exemption for diesel fuel used in farming activities and food processing does not apply to specified sales and use taxes included in the statewide sales and use tax rate. Also, Regulation 1533.2, subdivision (c), prescribes the content of the partial exemption certificate that purchasers are required to provide to retailers to claim the partial exemption provided by RTC section 6357.1. Subdivision (c) provides that any document satisfying the requirements may be used as an exemption certificate, and Appendix A to Regulation 1533.1 provides a partial exemption certificate form. And, as relevant here, the note section in Appendix A provides that the exemption provided by RTC section 6357.1 “is an exemption only from the state general fund portion of the sales and use tax rate” because that was the case when the Board adopted Regulation 1533.2. However, the partial exemption provided by RTC section 6357.1 now applies to state sales and use taxes that are not required to be deposited in the general fund, such as the sales and use tax imposed by section 36 of article

XIII of the California Constitution that goes to the state's Education Protection Account (as already provided in Regulation 1533.2, subdivision (a)).

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1533.2

Due to the 2004 amendments to ARB Regulation 2281, subdivision (b), the definition of diesel fuel in Regulation 1533.2, which refers to the American Society for Testing and Materials Standard Specification for Diesel Fuel Oils ("ASTM") D 975-81, is no longer consistent with the provisions of ARB Regulation 2281, subdivision (b)(1), which no longer refer to the "ASTM Standard Specification for Diesel Fuel Oils D975-81." Therefore, Board staff considered whether it was necessary to amend the definition of diesel fuel in Regulation 1533.2 due to the 2004 amendments to the definition of diesel fuel in ARB Regulation 2281. And, staff found that, for purposes of the administering the partial exemption provided by RTC section 6357.1, it would be more effective to amend the definition of diesel fuel in Regulation 1533.2 so that the definition will no longer be based upon the ARB definition, but instead will be based upon the definition of the term diesel fuel contained in section 60022 of the Diesel Fuel Tax Law. This is because staff determined that revising the definition of diesel fuel so that it is consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide more clarity to taxpayers and staff.

Interested Parties Process

The Board's Business Taxes Committee (BTC) staff prepared draft amendments to subdivision (b)(6) of Regulation 1533.2 to revise the definition of diesel fuel to be consistent with the definition of diesel fuel in RTC section 60022. BTC staff subsequently prepared a discussion paper, and provided the discussion paper and its draft amendments to Regulation 1533.2 to the interested parties. On July 15, 2014, BTC staff conducted an interested parties meeting to discuss the draft amendments.

Since BTC staff did not receive any inquiries or written comments regarding its draft amendments during or subsequent to the July 15, 2014, interested parties meeting and staff had no changes to its recommendation to amend Regulation 1533.2, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff's draft amendments. Staff also notified interested parties that comments could be submitted up to September 25, 2014, for consideration in the preparation of the Formal Issue Paper regarding the draft amendments. However, staff did not receive any other comments.

November 19, 2014 BTC Meeting

Subsequently, staff prepared Formal Issue Paper 14-009 and distributed it to the Board Members for consideration at the Board's November 19, 2014, BTC meeting. Formal Issue Paper 14-009 recommended that the Board approve and authorize publication of the amendments to Regulation 1533.2 (discussed above) in order to revise the definition of the term diesel fuel in Regulation

1533.2, subdivision (b)(6), so that the term has the same meaning as defined in section 60022 of the Diesel Fuel Tax Law. Formal Issue Paper 14-009 recommended that the Board add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, and to remove the reference to the “general fund” in the note section of Appendix A to Regulation 1533.2. Formal Issue Paper 14-009 also recommended that the Board replace the capital “S” with a lower case “s” at the beginnings of the words “Section” throughout Appendix A to Regulation 1533.2 to make the words consistent with the references to “section” and “sections” in the body of the regulation and consistent with the citation format prescribed in the California Style Manual.

During the November 19, 2014, meeting, the Board Members unanimously voted to propose the amendments to Regulation 1533.2 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1533.2 are necessary to have the effect and accomplish the objective of making the definition for the term diesel fuel in Regulations 1533.2 consistent with the definition of the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions.

The Board also anticipates that the proposed amendments to Regulation 1533.2 will reduce confusion, promote fairness, and benefit retailers, consumers, Board staff, and the Board by making the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition for the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions and clarifying that biodiesel is diesel fuel for purposes of the partial exemption from sales and use tax for diesel fuel used in farming activities or food processing.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1533.2 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1533.2 is the only state regulation providing a partial sales tax exemption for diesel fuel used in farming activities or food processing. The Board is aware that California Code of Regulations, title 18, section (Regulation) 1598.1, *Diesel Fuel Prepayment Exemption*, also defines the term “diesel fuel” and the Board is separately proposing to amend the definition for the term diesel fuel in Regulation 1598.1 so that it consistent with the current definition of the term diesel fuel in RTC section 60022 and the proposed amendments to the definition of the term diesel fuel in Regulation 1533.2. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1533.2 or the proposed amendments to Regulation 1533.2.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

NO COST OR SAVINGS TO ANY STATE AGENCY, LOCAL AGENCY, OR SCHOOL DISTRICT

The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1533.2 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1533.2 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The Board has determined that the proposed amendments to Regulation 1533.2 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 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. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will not affect the benefits of Regulation 1533.2 to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulation 1533.2 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose 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.

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Kevin B. Smith, Tax Counsel III, by telephone at (916) 323-3152, by e-mail at Kevin.Smith@boe.ca.gov, or by mail at State Board of Equalization, Attn: Kevin B. Smith, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends at 10:00 a.m. on February 24, 2015, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1533.2 during the February 24-26, 2015, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1533.2. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1533.2 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1533.2, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed

amendments and the initial statement of reasons are also available on the Board's Website at www.boe.ca.gov.

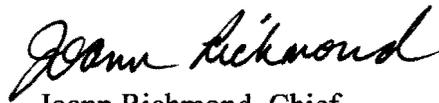
SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1533.2 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1533.2, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

Sincerely,



Joann Richmond, Chief
Board Proceedings Division

JR:reb

STATE BOARD OF EQUALIZATION



BOARD APPROVED

At the February 24, 2015 Board Meeting



Joann Richmond, Chief
Board Proceedings Division

Initial Statement of Reasons for
Proposed Amendments to California Code of Regulations,
Title 18, Section 1533.2, *Diesel Fuel Used in Farming Activities or Food*
Processing

SPECIFIC PURPOSE, PROBLEM INTENDED TO BE ADDRESSED, NECESSITY, AND ANTICIPATED BENEFIT

Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (Rev. & Tax. Code (RTC), § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC, §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Cal. Code Regs., tit. 18, § 1700, subd. (a)(1).)

When sales tax does not apply, California use tax generally applies to the use of tangible personal property purchased from a retailer for storage, use or other consumption in California. (RTC, §§ 6011, 6201.) Unless an exemption or exclusion applies, the use tax is measured by the sales price of tangible personal property and the person actually storing, using, or otherwise consuming the tangible personal property is liable for the tax. (RTC, §§ 6011, 6201, 6202, 6401; Cal. Code Regs., tit. 18, § 1685.) However, every retailer "engaged in business" in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the State Board of Equalization (Board), and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (RTC, § 6203; Cal. Code Regs., tit. 18, § 1684.)

In 2002, the Board adopted California Code of Regulations, title 18, section (Regulation) 1533.2, *Diesel Fuel Used in Farming Activities and Food Processing*, to implement, interpret, and make specific the provisions of RTC section 6357.1, which provides a partial exemption from sales and use tax for sales and purchases of "diesel fuel" for use in farming activities or food processing, but does not define the term "diesel fuel." Regulation 1533.2 clarifies the conditions under which a sale or use of diesel fuel qualifies for the partial exemption provided by RTC section 6357.1. Also, as relevant here, Regulation 1533.2 provides a definition for the term "diesel fuel" solely for purposes of the partial exemption provided by RTC section 6357.1, which is based in part on the definition of "diesel fuel" adopted by the California Air Resources Board (ARB) and codified in California Code of Regulations, title 13, section (ARB Regulation) 2281, *Sulfur Content of Diesel Fuel*, at the time Regulation 1533.2 was adopted. Regulation 1533.2, subdivision (b)(6), currently specifies that:

"Diesel fuel" means, for purposes of this regulation only, any fuel that is commonly or commercially known, sold or represented as diesel fuel No. 1-D or No. 2-D, pursuant to the specifications in American Society for Testing and

Materials Standard Specification for Diesel Fuel Oils (“ASTM”) D 975-81, which is incorporated herein by reference. Diesel fuel, for purposes of this regulation only, also includes Environmental Protection Agency rated diesel fuel commonly known as “federal fuel” sold for use in locomotives, or which is used in generators, pumps, dehydrators and any other equipment used in the conduct of farming and food processing activities. “Diesel fuel” does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, alcohol, aviation fuel, except diesel fuel sold for use in aircraft designed for agricultural aerial applications that meets the specifications of ASTM D 1655, jet fuel, bunker fuel, or other like substance used as a fuel. Qualifying diesel fuel shall be identified accordingly on the invoice of sale.

In 2004, the ARB made substantive amendments to the definition of “diesel fuel” in ARB Regulation 2281, subdivision (b)(1), and the following text reflects the 2004 amendments using “strikeout” and “underline” format:

“Diesel fuel” means any fuel that is commonly or commercially known, sold or represented as diesel fuel ~~No. 1-D or No. 2-D, pursuant to the specifications in ASTM Standard Specification for Diesel Fuel Oils D975-81, which is incorporated herein by reference,~~ including any mixture of primarily liquid hydrocarbons – organic compounds consisting exclusively of the elements carbon and hydrogen – that is sold or represented as suitable for use in an internal combustion, compression-ignition engine.

The ARB’s Final Statement of Reasons (June 2004) for the amendments to Regulation 2281, subdivision (b)(1), explains that:

The amendments to the definitions of diesel fuel [were] intended to clarify the broad applicability of the sulfur and aromatic hydrocarbon standards to fuels that are burned in diesel engines and are primarily hydrocarbons. Under the amendments, a fuel that is sold or represented as suitable for use in internal combustion, compression-ignition (diesel) engines, and is a blend of more than 50 percent by volume hydrocarbon fuel with some other non-hydrocarbon component or components, is subject to the sulfur and aromatic hydrocarbon standards.

The current regulations define “diesel fuel” as “any fuel that is commonly or commercially known, sold or represented as diesel fuel No. 1-D or No. 2-D, pursuant to the specifications in ASTM Standard Specification for Diesel Fuel Oils D 975-81.” There have been instances where parties have marketed products characterized as kerosene or “Jet A” to consumers of diesel fuel for use in vehicular diesel engines, and have claimed that the fuel is not subject to the sulfur and aromatic hydrocarbon content standards because the fuel does not – or has not been represented as – meeting the ASTM D 975-81 specifications. It has been the position of ARB counsel that the sale or supply of a fuel in these circumstances *is* subject to the standards as long as the fuel is a petroleum distillate that is suitable

for use in the vehicular diesel engines for which the common grades No. 1-D or 2-D are specified. Similarly, if a vendor is explicitly or implicitly offering a fuel as suitable for use in those engines, it meets the definition of diesel fuel. This includes circumstances in which the vendor of a petroleum distillate knows or reasonably should know that the fuel being provided will be used by the customer as a fuel for diesel engines in motor vehicles. The amendments remove any ambiguity that might exist regarding the applicability of the sulfur and aromatics regulations.

RTC section 60022 defines the term “diesel fuel” for purposes of the Diesel Fuel Tax Law (RTC, § 60001 et seq.), which is also administered by the Board. RTC section 60022, subdivision (a), currently provides that:

“Diesel fuel” means any liquid that is commonly or commercially known or sold as a fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle.

However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered highway vehicle.

“Diesel fuel” does not include kerosene, gasoline, liquefied petroleum gas, natural gas in liquid or gaseous form, or alcohol.

Biodiesel is expressly included in the definition of diesel fuel in RTC section 60022 and Board staff has historically considered biodiesel to be diesel fuel that can qualify for the partial sales and use tax exemption for diesel fuel used in farming activities and food processing under RTC section 6357.1.

Furthermore, the exemption provided by RTC section 6357.1 is referred to as a partial exemption because section 6357.1, subdivision (c), provides that the exemption for diesel fuel used in farming activities and food processing does not apply to specified sales and use taxes included in the statewide sales and use tax rate. Also, Regulation 1533.2, subdivision (c), prescribes the content of the partial exemption certificate that purchasers are required to provide to retailers to claim the partial exemption provided by RTC section 6357.1. Subdivision (c) provides that any document satisfying the requirements may be used as an exemption certificate, and Appendix A to Regulation 1533.1 provides a partial exemption certificate form. And, as relevant here, the note section in Appendix A provides that the exemption provided by RTC section 6357.1 “is an exemption only from the state general fund portion of the sales and use tax rate” because that was the case when the Board adopted Regulation 1533.2. However, the partial exemption provided by RTC section 6357.1 now applies to state sales and use taxes that are not required to be deposited in the general fund, such as the sales and use tax imposed by section 36 of article XIII of the California Constitution that goes to the state’s Education Protection Account (as already provided in Regulation 1533.2, subdivision (a)).

Proposed Amendments

Need for Consistency

The 2004 amendments to ARB Regulation 2281, subdivision (b), created an issue (or problem within the meaning of Gov. Code, § 11346.2, subdivision (b)(1)). This is because the definition of diesel fuel in Regulation 1533.2, which refers to the American Society for Testing and Materials Standard Specification for Diesel Fuel Oils (“ASTM”) D 975-81, is no longer consistent with the provisions of ARB Regulation 2281, subdivision (b)(1), which no longer refer to the “ASTM Standard Specification for Diesel Fuel Oils D975-81.” Therefore, Board staff considered whether it was necessary to amend the definition of diesel fuel in Regulation 1533.2 due to the 2004 amendments to the definition of diesel fuel in ARB Regulation 2281. And, staff found that, for purposes of the administering the partial exemption provided by RTC section 6357.1, it would be more effective to amend the definition of diesel fuel in Regulation 1533.2 so that the definition will no longer be based upon the ARB definition, but instead will be based upon the definition of the term diesel fuel contained in section 60022 of the Diesel Fuel Tax Law. This is because staff determined that revising the definition of diesel fuel so that it is consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide more clarity to taxpayers and staff.

Interested Parties Process

The Board’s Business Taxes Committee (BTC) staff prepared draft amendments to subdivision (b)(6) of Regulation 1533.2 to revise the definition of diesel fuel to be consistent with the definition of diesel fuel in RTC section 60022. BTC staff subsequently prepared a discussion paper, and provided the discussion paper and proposed amendments to the interested parties. On July 15, 2014, BTC staff conducted an interested parties meeting to discuss the draft amendments.

Since BTC staff did not receive any inquiries or written comments regarding its draft amendments during or subsequent to the July 15, 2014, interested parties meeting and staff had no changes to its recommendation to amend Regulation 1533.2, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff’s draft amendments. Staff also notified interested parties that comments could be submitted up to September 25, 2014, for consideration in the preparation of the Formal Issue Paper regarding the draft amendments. However, staff did not receive any other comments.

November 19, 2014, BTC Meeting

Subsequently, staff prepared Formal Issue Paper 14-009 and distributed it to the Board Members for consideration at the Board’s November 19, 2014, BTC meeting. Formal Issue Paper 14-009 recommended that the Board approve and authorize publication of the amendments to Regulation 1533.2 (discussed above) in order to revise the definition of the term diesel fuel in Regulation 1533.2, subdivision (b)(6), so that the term has the same meaning as defined in section 60022 of

the Diesel Fuel Tax Law. Formal Issue Paper 14-009 recommended that the Board add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, and to remove the reference to the “general fund” in the note section of Appendix A to Regulation 1533.2. Formal Issue Paper 14-009 also recommended that the Board replace the capital “S” with a lower case “s” at the beginnings of the words “Section” throughout Appendix A to Regulation 1533.2 to make the words consistent with the references to “section” and “sections” in the body of the regulation and consistent with the citation format prescribed in the California Style Manual.

During the November 19, 2014, meeting, the Board Members unanimously voted to propose the amendments to Regulation 1533.2 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1533.2 are reasonably necessary for the specific purpose of addressing the issue (or problem) created by the 2004 amendments to ARB Regulation 2281 by making the definition of diesel fuel in Regulations 1533.2 consistent with the definition of the diesel fuel in the Diesel Fuel Tax Law because making the definition of diesel fuel consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide more clarity to taxpayers and staff.¹

The Board anticipates that the proposed amendments to Regulation 1533.2 will reduce confusion, promote fairness, and benefit retailers, consumers, Board staff, and the Board by making the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition for the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions, and clarifying that biodiesel is diesel fuel for purposes of the partial exemption from sales and use tax for diesel fuel used in farming activities or food processing.

In addition, the Board has determined that the proposed amendments are not mandated by federal law or regulations, and there are no federal regulations or statutes that are identical to Regulation 1533.2 or the proposed amendments to Regulation 1533.2.

DOCUMENTS RELIED UPON

The Board relied upon Formal Issue Paper 14-009, the exhibits to the issue paper, and the comments made during the Board’s discussion of the issue paper during its November 19, 2014, BTC meeting in deciding to propose the amendments to Regulation 1533.2 described above.

ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1533.2 at this time or, alternatively, whether to take no action at this time. The Board decided to begin the formal rulemaking process to adopt the proposed

¹ After the November 19, 2014, BTC meeting, Board staff noticed that a comma should have been inserted after the first reference to “2013” in the current text of Regulation 1533.2, subdivision (a)(3), and the inadvertently omitted comma is now included in the text of the proposed amendments to Regulation 1533.2, to make subdivision (a)(3) grammatically correct.

amendments to Regulation 1533.2 at this time because the Board determined that the proposed amendments are reasonably necessary for the reasons set forth above.

The Board did not reject any reasonable alternative to the proposed amendments to Regulation 1533.2 that would lessen any adverse impact the proposed action may have on small business or that would be less burdensome and equally effective in achieving the purposes of the proposed action. No reasonable alternative has been identified and brought to the Board'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.

INFORMATION REQUIRED BY GOVERNMENT CODE SECTION 11346.2, SUBDIVISION (b)(5) AND ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The proposed amendments make the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition for the term diesel fuel in the Diesel Fuel Tax Law, the proposed amendments do not mandate that individuals or businesses do anything that is not already required by the Sales and Use Tax Law, and there is nothing in the proposed amendments that would significantly change how individuals and businesses would generally behave, in the absence of the proposed regulatory action, or that would impact revenue. Therefore, the Board estimates that the proposed amendments will not have a measurable economic impact on individuals and businesses. And, the Board has determined that the proposed amendments to Regulation 1533.2 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed amendments will not have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period.

Further, based on these facts and all of the information in the rulemaking file, the Board has also determined that the adoption of the proposed amendments to Regulation 1533.2 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.

Furthermore, Regulation 1533.2 does not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of the proposed amendments to Regulation 1533.2 will not affect the benefits of Regulation 1533.2 to the health and welfare of California residents, worker safety, or the state's environment.

The forgoing information also provides the factual basis for the Board's initial determination that the adoption of the proposed amendments to Regulation 1533.2 will not have a significant adverse economic impact on business.

The proposed amendments to Regulation 1533.2 may affect small businesses.

**Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1533.2**

1533.2. Diesel Fuel Used in Farming Activities or Food Processing.

(a) General. Commencing on and after September 1, 2001, section 6357.1 of the Revenue and Taxation Code partially exempts from sales and use tax the sale of, and the storage, use, or other consumption in this state, of diesel fuel used in farming activities or food processing. The terms “farming activities” and “food processing” are defined below.

For the period commencing on September 1, 2001, and ending on December 31, 2001, the partial exemption applies to the taxes imposed by sections 6051 and 6201 of the Revenue and Taxation Code (4.75%), but does not apply to the taxes imposed pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on January 1, 2002, and ending on June 30, 2004, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6201, and 6201.3 of the Revenue and Taxation Code (5%), but does not apply to the taxes imposed pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on July 1, 2004, and ending on March 31, 2009, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6201, 6201.3, and 6201.5 of the Revenue and Taxation Code (5.25%), but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on April 1, 2009, and ending on June 30, 2011, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6051.7, 6201, 6201.3, 6201.5, and 6201.7 of the Revenue and Taxation Code (6.25%), but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on July 1, 2011, and ending on December 31, 2012, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6051.8, 6201, 6201.3, 6201.5, and 6201.8 of the Revenue and Taxation Code, but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on January 1, 2013, the partial exemption applies to the taxes imposed by section 36 of article XIII of the California Constitution and sections 6051, 6051.3, 6051.5, 6051.8, 6201, 6201.3, 6201.5, and 6201.8 of the Revenue and Taxation Code, but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the

Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution. Given the varying rates of the taxes imposed by sections 6051.8 and 6201.8, the partial exemption applies to the following cumulative sales and use tax rates:

- (1) 7.12 percent for the period July 1, 2011, through June 30, 2012;
- (2) 7.42 percent for the period July 1, 2012, through December 31, 2012;
- (3) 7.67 percent for the period January 1, 2013, through June 30, 2013;
- (4) 7.44 percent for the period July 1, 2013, through June 30, 2014; and
- (5) 7.25 percent on or after July 1, 2014.

(b) Definitions. For purposes of this regulation:

(1) "Farming activities" mean a trade or business involving the cultivation of land or the raising or harvesting of any agricultural or horticultural commodity that may be legally sold to or offered for sale to others. These include the trade or business of operating a nursery or sod farm; the raising or harvesting of trees bearing fruit or nuts, or of other crops (e.g., grains, vegetables, or cotton); the raising of ornamental trees (other than evergreen trees that are more than six years old at the time they are severed from their roots); and the raising, shearing, feeding, caring for, training, and management of animals. The raising of animals includes the delivery of feed to the animal feeding operation, whether by the owner or the supplier of the feed. Operating a garden plot, orchard, or farm for the purpose of growing plants or animals for a person's own use shall not be considered a farming activity. Harvesting involves the gathering of any agricultural or horticultural commodity and includes activities such as crop drying, cotton ginning, and fruit ripening. Harvesting an agricultural commodity also includes the washing of the agricultural commodity, the inspection and grading of the agricultural commodity or livestock, and the packaging of the agricultural commodity for shipment as well as those activities delineated in Codes 0723 and 0724 of the Standard Industrial Classification Manual published by the United States Office of Management and Budget, 1987 edition (hereafter SIC Manual). For purposes of this regulation, merely buying and reselling plants or animals grown or raised entirely by another is not raising an agricultural or horticultural commodity. A person is engaged in raising a plant or animal, rather than the mere selling of a plant or animal, if the plant or animal is held for further cultivation and development prior to sale. In determining whether a plant or animal is held for further cultivation and development prior to sale, consideration will be given to all of the facts and circumstances, including: the value added by a person to the plant or animal through agricultural or horticultural processes; the length of time between the person's acquisition of the plant or animal and the time that the person makes the plant or animal available for sale; and in the case of a plant, whether the plant is kept in the container in which purchased, replanted in the ground, or replanted in a series of larger containers as it is grown to a larger size.

Farming activities also include the transportation and delivery of the agricultural or horticultural commodity, as described herein, from the trade or business that cultivated, raised or harvested the commodity to the marketplace, as described in subdivision (b)(5), and any empty haul related to the transportation of that agricultural or horticultural commodity.

Farming activities do not include food processing or transportation and delivery of processed food products to the marketplace.

Example A: A commercial hauler travels from its company yard to Grower A's field to pick up a load of tomatoes. The tomatoes are hauled to a processing plant. The hauler returns to the field with empty trailers. The sale of diesel fuel to the commercial hauler for use in this activity is partially exempt from tax.

Example B: A commercial hauler travels from its company yard to Grower A's field to pick up a load of fresh bell peppers. The bell peppers are sold to a grocery store and are delivered to the grocery store's distribution center. At the distribution center, the hauler picks up a load of pallets to deliver to another customer. The sale of diesel fuel to the commercial hauler for use from the yard to the field and from the field to the grocery store's distribution center is partially exempt from tax. The sale of diesel fuel to the commercial hauler for use in delivering the pallets is not partially exempt from tax.

Example C: A nursery owner transports its horticultural products to a distribution center. After delivering the product, the nursery owner makes two stops. The first stop is to pick up fertilizer for use at the nursery. The second stop is personal business unrelated to the nursery operation. The sale of diesel fuel to the nursery owner for use in this example is partially exempt from tax up to and including the first stop.

(2) "Plants" mean an agricultural or horticultural commodity produced in a farming activity which includes, but is not limited to, trees bearing fruit or nuts, other crops, an ornamental tree, a vine, a bush, or sod. Sea plants are produced in a farming activity if they are tended and cultivated as opposed to merely harvested.

(3) "Animals" mean a life form produced in a farming activity which includes, but is not limited to, any livestock, poultry or other bird, and fish or other sea life. Fish and other sea life are produced in a farming activity if they are raised on a fish farm. A fish farm is an area where fish or other sea life are grown or raised as opposed to merely caught or harvested.

(4) "Food processing" means the activities described in Industry Groups 201, 202, 203, 204, and 207, or Codes 2068 and 2084 of the SIC Manual. Food processing activities also includes transporting raw product, supplies and materials to the processing facility, transporting partially processed food products between various divisions of the same food processing entity for further processing operations, and any empty hauls related to the transportation of that product. Food processing does not include transportation and delivery of processed food products to the marketplace. A food processor is not required to be engaged 50 percent or more of the time in such activities as described herein.

Example A: A for-hire carrier, contracted for by a cheese plant, transports unprocessed milk from a dairy farm to the cheese plant for processing and then returns to the carrier's truck yard. The diesel used in this example is eligible for the partial sales tax exemption.

Example B: A flour mill transports flour sacks from a bag manufacturer to the mill's facility, and then transports those sacks to other flour mills owned by the same entity. The diesel used to transport the sacks in this example is eligible for the partial sales tax exemption, but the transportation of flour is not.

Example C: Cannery A and Cannery B are different divisions of the same food processing entity. Cannery A processes unprocessed tomatoes into tomato paste and then transports the paste to Cannery B for further processing. Cannery B processes the paste into tomato soup which is then transported to a grocery distribution warehouse. From the distribution warehouse the processed product is transported by the buyer to individual grocery stores and other distribution warehouses. Only the movement of paste from Cannery A to Cannery B is eligible for the partial sales tax exemption. The subsequent movement of product to the first distribution center and to retail stores and other warehouses is not eligible for the exemption.

(5) "Marketplace" means the place where a commodity is sold for resale, at retail or for consumption at an animal feeding operation, notwithstanding any intervening activities to prepare the product for sale in the marketplace. Such preparation activities include, but are not limited to, cooling, sorting, inspection, grading, drying, packing, handling, washing, slaughtering and butchering (except as otherwise described in Codes 2011 and 2015 of the SIC Manual), candling, sterilizing, freezing, pasteurizing, homogenizing, and packaging. Producers of agricultural or horticultural products may prepare and market their products through a cooperative, joint venture, corporation or partnership in which they have a financial interest, or other such enterprises, and the diesel used in these enterprises to transport products to the marketplace is eligible for the sales tax exemption.

(6) "Diesel fuel" means, for purposes of this regulation only, any liquid fuel that is commonly or commercially known, or sold or represented as a diesel fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle.

However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered vehicle.

~~No. 1 D or No. 2 D, pursuant to the specifications in American Society for Testing and Materials Standard Specification for Diesel Fuel Oils ("ASTM") D 975-81, which is incorporated herein by reference. Diesel fuel, for purposes of this regulation only, also includes Environmental Protection Agency rated diesel fuel commonly known as "federal fuel" sold for use in locomotives, or which is used in generators, pumps, dehydrators and any other equipment used in the conduct of farming and food processing activities. "Diesel fuel" does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous~~

~~form, or alcohol, aviation fuel, except diesel fuel sold for use in aircraft designed for agricultural aerial applications that meets the specifications of ASTM D 1655, jet fuel, bunker fuel, or other like substance used as a fuel. Qualifying d~~Diesel fuel shall be identified accordingly on the invoice of sale.

(7) "Qualified activity" means farming activities as defined in subdivision (b)(1) or food processing, as defined in subdivision (b)(4).

(c) Partial Exemption Certificates.

(1) In General. A person who purchases diesel fuel for use in a qualified activity from an in-state retailer, or an out-of state retailer obligated to collect use tax, must provide the retailer with a partial exemption certificate in order for the retailer to claim the partial exemption. If the retailer takes a partial exemption certificate timely and in good faith, as defined in subdivision (c)(5), from a person who purchases diesel fuel for use in a qualified activity, the partial exemption certificate relieves the retailer from the liability for the sales tax subject to partial exemption under this regulation or the duty of collecting the use tax subject to partial exemption under this regulation. A partial exemption certificate will be considered timely if it is taken any time before the retailer bills the purchaser for the diesel fuel, any time within the retailer's normal billing or payment cycle, any time at or prior to delivery of the diesel fuel to the purchaser, or no later than 15 days after the date of purchase. A partial exemption certificate which is not taken timely will not relieve the retailer of the liability for tax excluded by the partial exemption; however the retailer may present satisfactory evidence to the Board that the retailer sold the diesel fuel to a person that used it in a qualified activity. A partial exemption from the sales and use tax under this part shall not be allowed unless the retailer claims the partial exemption on its sales and use tax return for the reporting period during which the transaction subject to the partial exemption occurred. Where the retailer fails to claim the partial exemption as set forth above, the retailer may file a claim for refund as set forth in subdivision (e).

The partial exemption certificate form set forth in Appendix A may be used to claim the partial exemption.

(2) Blanket Partial Exemption Certificates. In lieu of requiring a partial exemption certificate for each transaction, a person who purchases diesel fuel for use in a qualified activity may issue a blanket partial exemption certificate. The partial exemption certificate form set forth in Appendix A may be used as a blanket partial exemption certificate. Appendix A may also be used as a specific partial exemption certificate if the purchaser provides the purchase order or sales invoice number and a precise description of the property being purchased. A person who purchases diesel fuel for use in a qualified activity must include in the partial exemption certificate how much or what percentage of the diesel fuel purchased will be used in a qualified activity. If purchasing diesel fuel not qualifying for the partial exemption, the purchaser must clearly state in documents such as a written purchase order, sales agreement, or contract that the sale or purchase is not subject to the blanket partial exemption certificate.

(3) Form of Partial Exemption Certificate. Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a partial exemption certificate with respect to the sale or purchase of diesel fuel if it contains all of the following essential elements:

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name, address and telephone number of the purchaser.

(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement of how much or what percentage of the diesel fuel purchased will be used in a qualified farming or food processing activity.

(E) Date of execution of document.

(4) Retention and Availability of Partial Exemption Certificates. A retailer must retain each partial exemption certificate received from a person who purchases diesel fuel for use in a qualified activity for a period of not less than four years from the date on which the retailer claims a partial exemption based on the partial exemption certificate.

While the Board will not normally require the filing of the partial exemption certificate with a sales and use tax return, when necessary for the efficient administration of the Sales and Use Tax Law, the Board may, on 30 days' written notice, require a retailer to commence filing with its sales and use tax returns copies of all partial exemption certificates. The Board may also require, within 45 days of the Board's request, retailers provide the Board access to any and all partial exemption certificates, or copies thereof, accepted for the purposes of supporting the partial exemption.

(5) Good Faith. A seller will be presumed to have taken a partial exemption certificate in good faith in the absence of evidence to the contrary. A seller, without knowledge to the contrary, may accept a partial exemption certificate in good faith where the purchaser states that a certain percentage of the diesel fuel purchased will be used in farming activities or food processing. However, a partial exemption certificate cannot be accepted in good faith where the seller has knowledge that the diesel fuel is not subject to a partial exemption, or will not be otherwise used in a partially exempt manner.

(d) Partial Exemption Certificate for Use Tax. The partial exemption certificate must be completed by a person who purchases diesel fuel for use in a qualified activity to claim a partial exemption from use tax from an out-of-state retailer not obligated to collect the use tax. A partial

exemption from the use tax shall not be allowed unless the purchaser or retailer claims the partial exemption on its individual use tax return, sales and use tax return, or consumer use tax return for the reporting period during which the transaction subject to the partial exemption occurred. Where the purchaser or retailer fails to claim the partial exemption as set forth above, the purchaser or retailer may file a claim for refund as set forth in subdivision (e).

The purchaser who files an individual use tax return must attach a completed partial exemption certificate to the return. The purchaser who is registered with the Board as a retailer or consumer and files a sales and use tax return or consumer use tax return must, within 45 days of the Board's request, provide the Board access to any and all documents that support the claimed partial exemption.

The partial exemption certificate form set forth in Appendix A may be used to claim the partial exemption.

(e) Refund of Partial Exemption.

(1) For the period commencing on September 1, 2001, and ending on April 30, 2002, a person who purchases diesel fuel for use in a qualified activity may claim the partial exemption on qualified purchases from an in-state retailer or an out-of-state retailer obligated to collect the use tax by furnishing the retailer with a partial exemption certificate on or before July 31, 2002. The retailer must refund the tax or tax reimbursement directly to a purchaser of diesel fuel for use in a qualified activity or, at the purchaser's sole option, the purchaser may be credited with such amount.

(2) A retailer who paid sales tax on a qualified sale or a person who paid use tax on a qualified purchase and who failed to claim the partial exemption as provided by this regulation may file a claim for refund equal to the amount of the partial exemption that he or she could have claimed pursuant to this regulation. The procedure for filing a claim shall be the same as for other claims for refund filed pursuant to Revenue and Taxation Code section 6901. For transactions subject to use tax, a person who purchases diesel fuel for use in a qualified activity filing a claim for refund of the partial exemption has the burden of establishing that he or she was entitled to claim the partial exemption with respect to the amount of refund claimed under this part. For transactions subject to sales tax, a person filing a claim for refund of the partial exemption has the burden of establishing that the purchaser of the diesel fuel otherwise met all the requirements of a person who purchases diesel fuel for use in a qualified activity at the time of the purchase subject to the refund claimed under this part.

(f) Improper Use of Partial Exemption. Notwithstanding subdivision (a), tax applies to any sale of, and the storage, use, or other consumption in this state of diesel fuel that is used in a manner not qualifying for the partial exemption under this regulation.

(g) Purchaser's Liability for the Payment of Sales Tax.

(1) If a purchaser timely submits a copy of a partial exemption certificate to the retailer or partial exemption certificate for use tax to the Board, and then uses the diesel fuel in a manner not qualifying for the partial exemption, the purchaser shall be liable for payment of the sales tax, with applicable interest, to the same extent as if the purchaser were a retailer making a retail sale of the diesel fuel at the time the diesel fuel was so removed, converted, or used.

(2) A purchaser providing a partial exemption certificate accepted in good faith by the retailer or a partial exemption certificate for use tax to the Board for diesel fuel that does not qualify for the partial exemption is liable for payment of the sales tax, with applicable interest, to the same extent as if the purchaser were a retailer making a retail sale of the diesel fuel at the time the diesel fuel was purchased.

(h) Records. Adequate and complete records must be maintained by the person who purchases diesel fuel for use in a qualified activity as evidence that the diesel fuel purchased was used in a qualified activity.

(i) Operative Date. This regulation is operative as of September 1, 2001.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6357.1, Revenue and Taxation Code.

Appendix A

PARTIAL EXEMPTION CERTIFICATE

STATE BOARD OF EQUALIZATION

Qualified Sales and Purchases of Diesel and Farm Equipment and Machinery

NOTE: This is an exemption only from the state general-fund-portion of the sales and use tax rate. You are not relieved from your obligations for the local and district taxes on this transaction. This partial exemption also does not apply to any tax levied pursuant to Section 6051.2 and 6201.2 of the Revenue and Taxation Code, or pursuant to Section 35 of article XIII of the California Constitution. This partial exemption also applies to lease payments made on or after September 1, 2001, for tangible personal property even if the lease agreement was entered into prior to September 1, 2001.

SELLER'S/LESSOR'S NAME
SELLER'S/LESSOR'S ADDRESS (Street, City, State, Zip Code)

Diesel Fuel Used in Farming Activities or Food Processing* - I as the undersigned purchaser, hereby certify that of the diesel purchased, _____ % will be used in qualified farming activities or food processing in accordance with Revenue and Taxation Code Section 6357.1.

Farm Equipment and Machinery (or parts¹ thereof)* - I as the undersigned purchaser, hereby certify I am engaged in an agricultural business described in Codes 0111 to 0291 of the Standard Industrial Classification (SIC) Manual, or I perform an agricultural service described in Codes 0711 to 0783 of the SIC Manual for such classified persons. The property purchased or leased will be used primarily in producing and harvesting agricultural products in accordance with Revenue & Taxation Code Section 6356.5.²

Type of Farm Equipment and Machinery (or parts thereof) _____

*If you also want this certificate to be used as a blanket certificate for future purchases, describe generally the type of property you will be purchasing and ask your vendor to keep this certificate on file. If this is a specific partial exemption certificate, provide the purchase order or sales invoice number and a precise description of the property being purchased.

I understand that if such property is not used in the manner qualifying for the partial exemption, or if I am not a qualified person, as applicable, that I am required by the Sales and Use Tax Law to report and pay the state tax measured by the sales price/rentals payable of the property to/by me. I also understand that this partial exemption certificate is in effect as of the date shown below and will remain in effect until revoked in writing.

PURCHASER'S NAME OR COMPANY NAME (if applicable)		DATE
SIGNATURE (signature of the purchaser, purchaser's employee, or authorized representative of the purchaser)		TELEPHONE NUMBER
TITLE		PERMIT NUMBER (if applicable) ³
ADDRESS	CITY	STATE, ZIP

¹ If you are purchasing oil, grease, or lubricating or other qualifying fluids, indicate what percentage will be used in farm equipment and machinery performing qualified producing and harvesting activities.
² Vehicles that qualify as farm equipment and machinery, as defined in Regulation 1533.1(b)(1)(B), must be used exclusively in producing and harvesting agricultural products.
³ If you are not required to hold a seller's permit, please enter "Not Applicable."

Regulation History

Type of Regulation: Sales and Use Tax

Regulation: 1533.2

Title: *Diesel Fuel Used in Farming Activities or Food Processing*

Preparation: Kevin Smith

Legal Contact: Kevin Smith

The State Board of Equalization proposes to adopt amendments to revise the definition of diesel fuel in Sales and Use Tax Regulation 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, to be consistent with the definition of diesel fuel in the Diesel Fuel Tax Law.

History of Proposed Regulation:

February 24-26, 2015	Public Hearing
January 9, 2015	OAL publication date; 45-day public comment period begins; Interested Parties mailing
December 24, 2014	Notice to OAL
November 19, 2014	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA

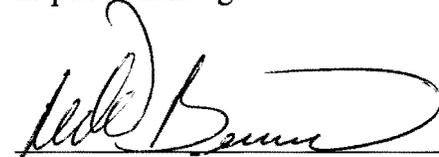
Support: NA

Oppose: NA

Statement of Compliance

The State Board of Equalization, in process of adopting Sales and Use Taxes Regulation 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, did comply with the provision of Government Code section 11346.4(a)(1) through (4). A notice to interested parties was mailed on January 9, 2015, 46 days prior to the public hearing.

February 24, 2015



Richard Bennion
Regulations Coordinator
State Board of Equalization

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION
5901 GREEN VALLEY CIRCLE
CULVER CITY, CALIFORNIA

REPORTER'S TRANSCRIPT
FEBRUARY 24, 2015

PUBLIC HEARINGS
F1 PROPOSED AMENDMENTS TO SALES AND USE TAX
REGULATION 1533.2, DIESEL FUEL USED IN FARMING
ACTIVITIES OR FOOD PROCESSING

REPORTED BY: Kathleen Skidgel
CSR NO. 9039

P R E S E N T

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For the Board
of Equalization:

Jerome E. Horton
Chairman

Sen. George Runner (Ret.)
Vice Chairman

Fiona Ma, CPA
Member

Diane L. Harkey
Member

Yvette Stowers
Appearing for Betty T.
Yee, State Controller
(per Government Code
Section 7.9)

Joann Richmond
Chief
Board Proceedings
Division

For Staff:

Kevin Smith
Legal Department

---oOo---

1 5901 GREEN VALLEY CIRCLE
2 CULVER CITY, CALIFORNIA
3 FEBRUARY 24, 2015

4 ---oOo---

5 MR. HORTON: Thank you, Ms. Richmond. What
6 is our next matter?

7 MS. RICHMOND: Our next matter are our
8 public hearings, Item F. Item F1 we have Proposed
9 Amendments to Sales and Use Tax Regulation 1533.2,
10 Diesel Fuel Used in Farming Activities or Food
11 Processing.

12 MR. HORTON: Thank you.

13 Mr. Smith, would you please present on this
14 item.

15 MR. SMITH: Good afternoon, Chairman Horton
16 and Members of the Board. I'm Kevin Smith from the
17 Board's Legal Department.

18 We are here to request that the Board vote
19 to adopt proposed amendments to Regulation 1533.2,
20 Diesel Fuel Used in Farming Activities of Food
21 Processing.

22 The proposed amendments revise the
23 regulation's definition for the term diesel fuel so
24 that the regulation's definition is consistent with
25 the definition for the term diesel fuel provided in
26 the Diesel Fuel Tax Law.

27 That's it.

28 MR. HORTON: Members --

1 Yeah, I know.

2 MR. RUNNER: Aren't we done with this?

3 MR. HORTON: You could make an excellent
4 poker player. Your -- your face just doesn't change
5 at all.

6 Discussion, Members?

7 Is there a motion?

8 Moved my Member Runner to adopt staff
9 recommendation. Second by Member Ma.

10 Without objection, Members, such will be
11 the order.

12 ---oOo---

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REPORTER'S CERTIFICATE

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State of California)
) ss
County of Sacramento)

I, KATHLEEN SKIDGEL, Hearing Reporter for the California State Board of Equalization certify that on February 24, 2015 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled hearing; that I transcribed the shorthand writing into typewriting; and that the preceding pages 1 through 4 constitute a complete and accurate transcription of the shorthand writing.

Dated: February 3, 2015

Kathleen Skidgel

KATHLEEN SKIDGEL, CSR #9039

Hearing Reporter



Tuesday, February 24, 2015

Issue: Whether appellant has shown that he is entitled to a claimed casualty loss deduction under Internal Revenue Code (IRC) section 165 for 2004.

Appellant's Exhibit: Miscellaneous Documents (Exhibit 2.6)

Action: Upon motion of Ms. Stowers, seconded by Ms. Harkey and unanimously carried, Mr. Horton, Mr. Runner, Ms. Ma, Ms. Harkey and Ms. Stowers voting yes, the Board submitted the appeal for decision.

The Board recessed at 1:08 p.m. and reconvened at 2:01 p.m. with Mr. Horton, Mr. Runner, Ms. Ma, Ms. Harkey and Ms. Stowers present.

ADMINISTRATIVE SESSION

OTHER ADMINISTRATIVE MATTERS

Executive Director's Report

2015/16 Diesel Fuel Tax Rate for Interstate Users Component b (Continued)

Action: Upon motion of Mr. Runner, seconded by Ms. Ma and unanimously carried, Mr. Horton, Mr. Runner, Ms. Ma, Ms. Harkey and Ms. Stowers voting yes, the Board ordered its previous motion expunged.

Upon motion of Mr. Runner, seconded by Ms. Harkey and unanimously carried, Mr. Horton, Mr. Runner, Ms. Ma, Ms. Harkey and Ms. Stowers voting yes, the Board adopted a diesel fuel tax rate for interstate users Component b of \$0.320 per gallon for 2015/16 as recommended by staff.

PUBLIC HEARINGS

Proposed Amendments to Sales and Use Tax Regulation 1533.2, Diesel Fuel Used in Farming Activities or Food Processing

Kevin Smith, Tax Counsel, Taxes and Fee Programs Division, Legal Department, made introductory remarks regarding the adoption of proposed amendments to revise the definition of diesel fuel in Regulation 1533.2 to be consistent with the definition in the Diesel Fuel Tax Law (Exhibit 2.7).

Speakers were invited to address the Board, but there were none.

Action: Upon motion of Mr. Runner, seconded by Ms. Ma and unanimously carried, Mr. Horton, Mr. Runner, Ms. Ma, Ms. Harkey and Ms. Stowers voting yes, the Board adopted the amendments to Regulation 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, as published.

Proposed Amendments to Sales and Use Tax Regulation 1598.1, Diesel Fuel Prepayment Exemption

Kevin Smith, Tax Counsel, Taxes and Fee Programs Division, Legal Department, made introductory remarks regarding the adoption of proposed amendments to revise the definition of diesel fuel in Regulation 1598.1 to be consistent with the definition in the Diesel Fuel Tax Law (Exhibit 2.8).

Note: These minutes are not final until Board approved.



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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SEN. GEORGE RUNNER (RET.)
First District, Lancaster

FIONA MA, CPA
Second District, San Francisco

JEROME E. HORTON
Third District, Los Angeles County

DIANE L. HARKEY
Fourth District, Orange County

BETTY T. YEE
State Controller

CYNTHIA BRIDGES
Executive Director

January 9, 2015

To Interested Parties:

Notice of Proposed Regulatory Action

**The State Board of Equalization Proposes to Adopt Amendments to
California Code of Regulations, Title 18,**

Section 1533.2, Diesel Fuel Used in Farming Activities or Food Processing

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*. In 2002, the Board adopted Regulation 1533.2 to implement, interpret, and make specific the provisions of RTC section 6357.1, which provide a partial exemption from sales and use tax for sales and purchases of diesel fuel for use in farming activities or food processing. The proposed amendments will revise the definition for the term diesel fuel in Regulation 1533.2 so that the term is consistent with the definition for the term “diesel fuel” provided in the Diesel Fuel Tax Law (RTC § 60001 et seq.) that applies to diesel fuel transactions. The proposed amendments also add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, remove the reference to the “general fund” in the note section of Appendix A to Regulation 1533.2, and make other non-substantive grammatical and formatting changes.

PUBLIC HEARING

The Board will conduct a meeting in Room 207 at 5901 Green Valley Circle, Culver City, California on February 24-26, 2015. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board’s Website at www.boe.ca.gov at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on February 24, 25, or 26, 2015. At the hearing, any

interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1533.2.

AUTHORITY

RTC section 7051

REFERENCE

RTC section 6357.1,

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations

RTC section 6357.1 provides a partial exemption from sales and use tax on the sale and purchase of diesel fuel for use in farming activities or food processing, but does not define the term “diesel fuel.” In 2002, the Board adopted Regulation 1533.2 to implement, interpret, and make specific the provisions of RTC section 6357.1. Regulation 1533.2 clarifies the conditions under which a sale or use of diesel fuel qualifies for the partial exemption provided by RTC section 6377.1. Also, as relevant here, Regulation 1533.2 provides a definition for the term diesel fuel solely for purposes of the partial exemption provided by RTC section 6357.1, which was based, in part, on the California Air Resources Board’s (ARB’s) definition of diesel fuel codified in California Code of Regulations, title 13, section (ARB Regulation) 2281, subdivision (b)(1), at the time the regulation was adopted. However, in 2004, the ARB amended its definition for the term diesel fuel, and the definition for diesel fuel in Regulation 1533.2 is no longer consistent with the ARB’s definition for diesel fuel in ARB Regulation 2281. In addition, the Diesel Fuel Tax Law (RTC § 60001 et seq.) also provides a definition for the term diesel fuel in RTC section 60022, which is applicable to diesel fuel transactions.

The exemption provided by RTC section 6357.1 is referred to as a partial exemption because section 6357.1, subdivision (c), provides that the exemption for diesel fuel used in farming activities and food processing does not apply to specified sales and use taxes included in the statewide sales and use tax rate. Also, Regulation 1533.2, subdivision (c), prescribes the content of the partial exemption certificate that purchasers are required to provide to retailers to claim the partial exemption provided by RTC section 6357.1. Subdivision (c) provides that any document satisfying the requirements may be used as an exemption certificate, and Appendix A to Regulation 1533.1 provides a partial exemption certificate form. And, as relevant here, the note section in Appendix A provides that the exemption provided by RTC section 6357.1 “is an exemption only from the state general fund portion of the sales and use tax rate” because that was the case when the Board adopted Regulation 1533.2. However, the partial exemption provided by RTC section 6357.1 now applies to state sales and use taxes that are not required to be deposited in the general fund, such as the sales and use tax imposed by section 36 of article

XIII of the California Constitution that goes to the state's Education Protection Account (as already provided in Regulation 1533.2, subdivision (a)).

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1533.2

Due to the 2004 amendments to ARB Regulation 2281, subdivision (b), the definition of diesel fuel in Regulation 1533.2, which refers to the American Society for Testing and Materials Standard Specification for Diesel Fuel Oils ("ASTM") D 975-81, is no longer consistent with the provisions of ARB Regulation 2281, subdivision (b)(1), which no longer refer to the "ASTM Standard Specification for Diesel Fuel Oils D975-81." Therefore, Board staff considered whether it was necessary to amend the definition of diesel fuel in Regulation 1533.2 due to the 2004 amendments to the definition of diesel fuel in ARB Regulation 2281. And, staff found that, for purposes of the administering the partial exemption provided by RTC section 6357.1, it would be more effective to amend the definition of diesel fuel in Regulation 1533.2 so that the definition will no longer be based upon the ARB definition, but instead will be based upon the definition of the term diesel fuel contained in section 60022 of the Diesel Fuel Tax Law. This is because staff determined that revising the definition of diesel fuel so that it is consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide more clarity to taxpayers and staff.

Interested Parties Process

The Board's Business Taxes Committee (BTC) staff prepared draft amendments to subdivision (b)(6) of Regulation 1533.2 to revise the definition of diesel fuel to be consistent with the definition of diesel fuel in RTC section 60022. BTC staff subsequently prepared a discussion paper, and provided the discussion paper and its draft amendments to Regulation 1533.2 to the interested parties. On July 15, 2014, BTC staff conducted an interested parties meeting to discuss the draft amendments.

Since BTC staff did not receive any inquiries or written comments regarding its draft amendments during or subsequent to the July 15, 2014, interested parties meeting and staff had no changes to its recommendation to amend Regulation 1533.2, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff's draft amendments. Staff also notified interested parties that comments could be submitted up to September 25, 2014, for consideration in the preparation of the Formal Issue Paper regarding the draft amendments. However, staff did not receive any other comments.

November 19, 2014 BTC Meeting

Subsequently, staff prepared Formal Issue Paper 14-009 and distributed it to the Board Members for consideration at the Board's November 19, 2014, BTC meeting. Formal Issue Paper 14-009 recommended that the Board approve and authorize publication of the amendments to Regulation 1533.2 (discussed above) in order to revise the definition of the term diesel fuel in Regulation

1533.2, subdivision (b)(6), so that the term has the same meaning as defined in section 60022 of the Diesel Fuel Tax Law. Formal Issue Paper 14-009 recommended that the Board add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, and to remove the reference to the “general fund” in the note section of Appendix A to Regulation 1533.2. Formal Issue Paper 14-009 also recommended that the Board replace the capital “S” with a lower case “s” at the beginnings of the words “Section” throughout Appendix A to Regulation 1533.2 to make the words consistent with the references to “section” and “sections” in the body of the regulation and consistent with the citation format prescribed in the California Style Manual.

During the November 19, 2014, meeting, the Board Members unanimously voted to propose the amendments to Regulation 1533.2 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1533.2 are necessary to have the effect and accomplish the objective of making the definition for the term diesel fuel in Regulations 1533.2 consistent with the definition of the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions.

The Board also anticipates that the proposed amendments to Regulation 1533.2 will reduce confusion, promote fairness, and benefit retailers, consumers, Board staff, and the Board by making the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition for the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions and clarifying that biodiesel is diesel fuel for purposes of the partial exemption from sales and use tax for diesel fuel used in farming activities or food processing.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1533.2 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1533.2 is the only state regulation providing a partial sales tax exemption for diesel fuel used in farming activities or food processing. The Board is aware that California Code of Regulations, title 18, section (Regulation) 1598.1, *Diesel Fuel Prepayment Exemption*, also defines the term “diesel fuel” and the Board is separately proposing to amend the definition for the term diesel fuel in Regulation 1598.1 so that it consistent with the current definition of the term diesel fuel in RTC section 60022 and the proposed amendments to the definition of the term diesel fuel in Regulation 1533.2. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1533.2 or the proposed amendments to Regulation 1533.2.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

NO COST OR SAVINGS TO ANY STATE AGENCY, LOCAL AGENCY, OR SCHOOL DISTRICT

The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1533.2 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1533.2 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The Board has determined that the proposed amendments to Regulation 1533.2 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1533.2 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. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1533.2 will not affect the benefits of Regulation 1533.2 to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulation 1533.2 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose 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.

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Kevin B. Smith, Tax Counsel III, by telephone at (916) 323-3152, by e-mail at Kevin.Smith@boe.ca.gov, or by mail at State Board of Equalization, Attn: Kevin B. Smith, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends at 10:00 a.m. on February 24, 2015, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1533.2 during the February 24-26, 2015, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1533.2. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikethrough version of the text of Regulation 1533.2 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1533.2, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed

amendments and the initial statement of reasons are also available on the Board's Website at www.boe.ca.gov.

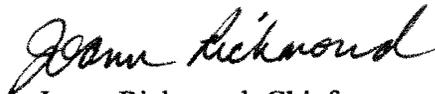
SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1533.2 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1533.2, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

Sincerely,



Joann Richmond, Chief
Board Proceedings Division

JR:reb

Initial Statement of Reasons for
Proposed Amendments to California Code of Regulations,
Title 18, Section 1533.2, *Diesel Fuel Used in Farming Activities or Food*
Processing

SPECIFIC PURPOSE, PROBLEM INTENDED TO BE ADDRESSED, NECESSITY, AND ANTICIPATED BENEFIT

Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (Rev. & Tax. Code (RTC), § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC, §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Cal. Code Regs., tit. 18, § 1700, subd. (a)(1).)

When sales tax does not apply, California use tax generally applies to the use of tangible personal property purchased from a retailer for storage, use or other consumption in California. (RTC, §§ 6011, 6201.) Unless an exemption or exclusion applies, the use tax is measured by the sales price of tangible personal property and the person actually storing, using, or otherwise consuming the tangible personal property is liable for the tax. (RTC, §§ 6011, 6201, 6202, 6401; Cal. Code Regs., tit. 18, § 1685.) However, every retailer "engaged in business" in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the State Board of Equalization (Board), and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (RTC, § 6203; Cal. Code Regs., tit. 18, § 1684.)

In 2002, the Board adopted California Code of Regulations, title 18, section (Regulation) 1533.2, *Diesel Fuel Used in Farming Activities and Food Processing*, to implement, interpret, and make specific the provisions of RTC section 6357.1, which provides a partial exemption from sales and use tax for sales and purchases of "diesel fuel" for use in farming activities or food processing, but does not define the term "diesel fuel." Regulation 1533.2 clarifies the conditions under which a sale or use of diesel fuel qualifies for the partial exemption provided by RTC section 6357.1. Also, as relevant here, Regulation 1533.2 provides a definition for the term "diesel fuel" solely for purposes of the partial exemption provided by RTC section 6357.1, which is based in part on the definition of "diesel fuel" adopted by the California Air Resources Board (ARB) and codified in California Code of Regulations, title 13, section (ARB Regulation) 2281, *Sulfur Content of Diesel Fuel*, at the time Regulation 1533.2 was adopted. Regulation 1533.2, subdivision (b)(6), currently specifies that:

"Diesel fuel" means, for purposes of this regulation only, any fuel that is commonly or commercially known, sold or represented as diesel fuel No. 1-D or No. 2-D, pursuant to the specifications in American Society for Testing and

Materials Standard Specification for Diesel Fuel Oils (“ASTM”) D 975-81, which is incorporated herein by reference. Diesel fuel, for purposes of this regulation only, also includes Environmental Protection Agency rated diesel fuel commonly known as “federal fuel” sold for use in locomotives, or which is used in generators, pumps, dehydrators and any other equipment used in the conduct of farming and food processing activities. “Diesel fuel” does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, alcohol, aviation fuel, except diesel fuel sold for use in aircraft designed for agricultural aerial applications that meets the specifications of ASTM D 1655, jet fuel, bunker fuel, or other like substance used as a fuel. Qualifying diesel fuel shall be identified accordingly on the invoice of sale.

In 2004, the ARB made substantive amendments to the definition of “diesel fuel” in ARB Regulation 2281, subdivision (b)(1), and the following text reflects the 2004 amendments using “strikeout” and “underline” format:

“Diesel fuel” means any fuel that is commonly or commercially known, sold or represented as diesel fuel ~~No. 1-D or No. 2-D, pursuant to the specifications in ASTM Standard Specification for Diesel Fuel Oils D975-81, which is incorporated herein by reference,~~ including any mixture of primarily liquid hydrocarbons – organic compounds consisting exclusively of the elements carbon and hydrogen – that is sold or represented as suitable for use in an internal combustion, compression-ignition engine.

The ARB’s Final Statement of Reasons (June 2004) for the amendments to Regulation 2281, subdivision (b)(1), explains that:

The amendments to the definitions of diesel fuel [were] intended to clarify the broad applicability of the sulfur and aromatic hydrocarbon standards to fuels that are burned in diesel engines and are primarily hydrocarbons. Under the amendments, a fuel that is sold or represented as suitable for use in internal combustion, compression-ignition (diesel) engines, and is a blend of more than 50 percent by volume hydrocarbon fuel with some other non-hydrocarbon component or components, is subject to the sulfur and aromatic hydrocarbon standards.

The current regulations define “diesel fuel” as “any fuel that is commonly or commercially known, sold or represented as diesel fuel No. 1-D or No. 2-D, pursuant to the specifications in ASTM Standard Specification for Diesel Fuel Oils D 975-81.” There have been instances where parties have marketed products characterized as kerosene or “Jet A” to consumers of diesel fuel for use in vehicular diesel engines, and have claimed that the fuel is not subject to the sulfur and aromatic hydrocarbon content standards because the fuel does not – or has not been represented as – meeting the ASTM D 975-81 specifications. It has been the position of ARB counsel that the sale or supply of a fuel in these circumstances is subject to the standards as long as the fuel is a petroleum distillate that is suitable

for use in the vehicular diesel engines for which the common grades No. 1-D or 2-D are specified. Similarly, if a vendor is explicitly or implicitly offering a fuel as suitable for use in those engines, it meets the definition of diesel fuel. This includes circumstances in which the vendor of a petroleum distillate knows or reasonably should know that the fuel being provided will be used by the customer as a fuel for diesel engines in motor vehicles. The amendments remove any ambiguity that might exist regarding the applicability of the sulfur and aromatics regulations.

RTC section 60022 defines the term “diesel fuel” for purposes of the Diesel Fuel Tax Law (RTC, § 60001 et seq.), which is also administered by the Board. RTC section 60022, subdivision (a), currently provides that:

“Diesel fuel” means any liquid that is commonly or commercially known or sold as a fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle.

However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered highway vehicle.

“Diesel fuel” does not include kerosene, gasoline, liquefied petroleum gas, natural gas in liquid or gaseous form, or alcohol.

Biodiesel is expressly included in the definition of diesel fuel in RTC section 60022 and Board staff has historically considered biodiesel to be diesel fuel that can qualify for the partial sales and use tax exemption for diesel fuel used in farming activities and food processing under RTC section 6357.1.

Furthermore, the exemption provided by RTC section 6357.1 is referred to as a partial exemption because section 6357.1, subdivision (c), provides that the exemption for diesel fuel used in farming activities and food processing does not apply to specified sales and use taxes included in the statewide sales and use tax rate. Also, Regulation 1533.2, subdivision (c), prescribes the content of the partial exemption certificate that purchasers are required to provide to retailers to claim the partial exemption provided by RTC section 6357.1. Subdivision (c) provides that any document satisfying the requirements may be used as an exemption certificate, and Appendix A to Regulation 1533.1 provides a partial exemption certificate form. And, as relevant here, the note section in Appendix A provides that the exemption provided by RTC section 6357.1 “is an exemption only from the state general fund portion of the sales and use tax rate” because that was the case when the Board adopted Regulation 1533.2. However, the partial exemption provided by RTC section 6357.1 now applies to state sales and use taxes that are not required to be deposited in the general fund, such as the sales and use tax imposed by section 36 of article XIII of the California Constitution that goes to the state’s Education Protection Account (as already provided in Regulation 1533.2, subdivision (a)).

Proposed Amendments

Need for Consistency

The 2004 amendments to ARB Regulation 2281, subdivision (b), created an issue (or problem within the meaning of Gov. Code, § 11346.2, subdivision (b)(1)). This is because the definition of diesel fuel in Regulation 1533.2, which refers to the American Society for Testing and Materials Standard Specification for Diesel Fuel Oils (“ASTM”) D 975-81, is no longer consistent with the provisions of ARB Regulation 2281, subdivision (b)(1), which no longer refer to the “ASTM Standard Specification for Diesel Fuel Oils D975-81.” Therefore, Board staff considered whether it was necessary to amend the definition of diesel fuel in Regulation 1533.2 due to the 2004 amendments to the definition of diesel fuel in ARB Regulation 2281. And, staff found that, for purposes of the administering the partial exemption provided by RTC section 6357.1, it would be more effective to amend the definition of diesel fuel in Regulation 1533.2 so that the definition will no longer be based upon the ARB definition, but instead will be based upon the definition of the term diesel fuel contained in section 60022 of the Diesel Fuel Tax Law. This is because staff determined that revising the definition of diesel fuel so that it is consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide more clarity to taxpayers and staff.

Interested Parties Process

The Board’s Business Taxes Committee (BTC) staff prepared draft amendments to subdivision (b)(6) of Regulation 1533.2 to revise the definition of diesel fuel to be consistent with the definition of diesel fuel in RTC section 60022. BTC staff subsequently prepared a discussion paper, and provided the discussion paper and proposed amendments to the interested parties. On July 15, 2014, BTC staff conducted an interested parties meeting to discuss the draft amendments.

Since BTC staff did not receive any inquiries or written comments regarding its draft amendments during or subsequent to the July 15, 2014, interested parties meeting and staff had no changes to its recommendation to amend Regulation 1533.2, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff’s draft amendments. Staff also notified interested parties that comments could be submitted up to September 25, 2014, for consideration in the preparation of the Formal Issue Paper regarding the draft amendments. However, staff did not receive any other comments.

November 19, 2014, BTC Meeting

Subsequently, staff prepared Formal Issue Paper 14-009 and distributed it to the Board Members for consideration at the Board’s November 19, 2014, BTC meeting. Formal Issue Paper 14-009 recommended that the Board approve and authorize publication of the amendments to Regulation 1533.2 (discussed above) in order to revise the definition of the term diesel fuel in Regulation 1533.2, subdivision (b)(6), so that the term has the same meaning as defined in section 60022 of

the Diesel Fuel Tax Law. Formal Issue Paper 14-009 recommended that the Board add language to Regulation 1533.2, subdivision (b)(1), Example B, to provide a complete, grammatically correct sentence and to clarify which specific trips qualify for the partial exemption, and to remove the reference to the “general fund” in the note section of Appendix A to Regulation 1533.2. Formal Issue Paper 14-009 also recommended that the Board replace the capital “S” with a lower case “s” at the beginnings of the words “Section” throughout Appendix A to Regulation 1533.2 to make the words consistent with the references to “section” and “sections” in the body of the regulation and consistent with the citation format prescribed in the California Style Manual.

During the November 19, 2014, meeting, the Board Members unanimously voted to propose the amendments to Regulation 1533.2 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1533.2 are reasonably necessary for the specific purpose of addressing the issue (or problem) created by the 2004 amendments to ARB Regulation 2281 by making the definition of diesel fuel in Regulations 1533.2 consistent with the definition of the diesel fuel in the Diesel Fuel Tax Law because making the definition of diesel fuel consistent in the sales and use tax regulations and the Diesel Fuel Tax Law will provide more clarity to taxpayers and staff.¹

The Board anticipates that the proposed amendments to Regulation 1533.2 will reduce confusion, promote fairness, and benefit retailers, consumers, Board staff, and the Board by making the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition for the term diesel fuel in the Diesel Fuel Tax Law that applies to diesel fuel transactions, and clarifying that biodiesel is diesel fuel for purposes of the partial exemption from sales and use tax for diesel fuel used in farming activities or food processing.

In addition, the Board has determined that the proposed amendments are not mandated by federal law or regulations, and there are no federal regulations or statutes that are identical to Regulation 1533.2 or the proposed amendments to Regulation 1533.2.

DOCUMENTS RELIED UPON

The Board relied upon Formal Issue Paper 14-009, the exhibits to the issue paper, and the comments made during the Board’s discussion of the issue paper during its November 19, 2014, BTC meeting in deciding to propose the amendments to Regulation 1533.2 described above.

ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1533.2 at this time or, alternatively, whether to take no action at this time. The Board decided to begin the formal rulemaking process to adopt the proposed

¹ After the November 19, 2014, BTC meeting, Board staff noticed that a comma should have been inserted after the first reference to “2013” in the current text of Regulation 1533.2, subdivision (a)(3), and the inadvertently omitted comma is now included in the text of the proposed amendments to Regulation 1533.2, to make subdivision (a)(3) grammatically correct.

amendments to Regulation 1533.2 at this time because the Board determined that the proposed amendments are reasonably necessary for the reasons set forth above.

The Board did not reject any reasonable alternative to the proposed amendments to Regulation 1533.2 that would lessen any adverse impact the proposed action may have on small business or that would be less burdensome and equally effective in achieving the purposes of the proposed action. No reasonable alternative has been identified and brought to the Board'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.

**INFORMATION REQUIRED BY GOVERNMENT CODE SECTION 11346.2,
SUBDIVISION (b)(5) AND ECONOMIC IMPACT ASSESSMENT REQUIRED BY
GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)**

The proposed amendments make the definition for the term diesel fuel in Regulation 1533.2 consistent with the definition for the term diesel fuel in the Diesel Fuel Tax Law, the proposed amendments do not mandate that individuals or businesses do anything that is not already required by the Sales and Use Tax Law, and there is nothing in the proposed amendments that would significantly change how individuals and businesses would generally behave, in the absence of the proposed regulatory action, or that would impact revenue. Therefore, the Board estimates that the proposed amendments will not have a measurable economic impact on individuals and businesses. And, the Board has determined that the proposed amendments to Regulation 1533.2 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed amendments will not have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period.

Further, based on these facts and all of the information in the rulemaking file, the Board has also determined that the adoption of the proposed amendments to Regulation 1533.2 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.

Furthermore, Regulation 1533.2 does not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of the proposed amendments to Regulation 1533.2 will not affect the benefits of Regulation 1533.2 to the health and welfare of California residents, worker safety, or the state's environment.

The forgoing information also provides the factual basis for the Board's initial determination that the adoption of the proposed amendments to Regulation 1533.2 will not have a significant adverse economic impact on business.

The proposed amendments to Regulation 1533.2 may affect small businesses.

**Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1533.2**

1533.2. Diesel Fuel Used in Farming Activities or Food Processing.

(a) General. Commencing on and after September 1, 2001, section 6357.1 of the Revenue and Taxation Code partially exempts from sales and use tax the sale of, and the storage, use, or other consumption in this state, of diesel fuel used in farming activities or food processing. The terms “farming activities” and “food processing” are defined below.

For the period commencing on September 1, 2001, and ending on December 31, 2001, the partial exemption applies to the taxes imposed by sections 6051 and 6201 of the Revenue and Taxation Code (4.75%), but does not apply to the taxes imposed pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on January 1, 2002, and ending on June 30, 2004, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6201, and 6201.3 of the Revenue and Taxation Code (5%), but does not apply to the taxes imposed pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on July 1, 2004, and ending on March 31, 2009, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6201, 6201.3, and 6201.5 of the Revenue and Taxation Code (5.25%), but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on April 1, 2009, and ending on June 30, 2011, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6051.7, 6201, 6201.3, 6201.5, and 6201.7 of the Revenue and Taxation Code (6.25%), but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on July 1, 2011, and ending on December 31, 2012, the partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.5, 6051.8, 6201, 6201.3, 6201.5, and 6201.8 of the Revenue and Taxation Code, but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

For the period commencing on January 1, 2013, the partial exemption applies to the taxes imposed by section 36 of article XIII of the California Constitution and sections 6051, 6051.3, 6051.5, 6051.8, 6201, 6201.3, 6201.5, and 6201.8 of the Revenue and Taxation Code, but does not apply to the taxes imposed or administered pursuant to sections 6051.2 and 6201.2 of the

Revenue and Taxation Code, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution. Given the varying rates of the taxes imposed by sections 6051.8 and 6201.8, the partial exemption applies to the following cumulative sales and use tax rates:

- (1) 7.12 percent for the period July 1, 2011, through June 30, 2012;
- (2) 7.42 percent for the period July 1, 2012, through December 31, 2012;
- (3) 7.67 percent for the period January 1, 2013, through June 30, 2013;
- (4) 7.44 percent for the period July 1, 2013, through June 30, 2014; and
- (5) 7.25 percent on or after July 1, 2014.

(b) Definitions. For purposes of this regulation:

(1) "Farming activities" mean a trade or business involving the cultivation of land or the raising or harvesting of any agricultural or horticultural commodity that may be legally sold to or offered for sale to others. These include the trade or business of operating a nursery or sod farm; the raising or harvesting of trees bearing fruit or nuts, or of other crops (e.g., grains, vegetables, or cotton); the raising of ornamental trees (other than evergreen trees that are more than six years old at the time they are severed from their roots); and the raising, shearing, feeding, caring for, training, and management of animals. The raising of animals includes the delivery of feed to the animal feeding operation, whether by the owner or the supplier of the feed. Operating a garden plot, orchard, or farm for the purpose of growing plants or animals for a person's own use shall not be considered a farming activity. Harvesting involves the gathering of any agricultural or horticultural commodity and includes activities such as crop drying, cotton ginning, and fruit ripening. Harvesting an agricultural commodity also includes the washing of the agricultural commodity, the inspection and grading of the agricultural commodity or livestock, and the packaging of the agricultural commodity for shipment as well as those activities delineated in Codes 0723 and 0724 of the Standard Industrial Classification Manual published by the United States Office of Management and Budget, 1987 edition (hereafter SIC Manual). For purposes of this regulation, merely buying and reselling plants or animals grown or raised entirely by another is not raising an agricultural or horticultural commodity. A person is engaged in raising a plant or animal, rather than the mere selling of a plant or animal, if the plant or animal is held for further cultivation and development prior to sale. In determining whether a plant or animal is held for further cultivation and development prior to sale, consideration will be given to all of the facts and circumstances, including: the value added by a person to the plant or animal through agricultural or horticultural processes; the length of time between the person's acquisition of the plant or animal and the time that the person makes the plant or animal available for sale; and in the case of a plant, whether the plant is kept in the container in which purchased, replanted in the ground, or replanted in a series of larger containers as it is grown to a larger size.

Farming activities also include the transportation and delivery of the agricultural or horticultural commodity, as described herein, from the trade or business that cultivated, raised or harvested the commodity to the marketplace, as described in subdivision (b)(5), and any empty haul related to the transportation of that agricultural or horticultural commodity.

Farming activities do not include food processing or transportation and delivery of processed food products to the marketplace.

Example A: A commercial hauler travels from its company yard to Grower A's field to pick up a load of tomatoes. The tomatoes are hauled to a processing plant. The hauler returns to the field with empty trailers. The sale of diesel fuel to the commercial hauler for use in this activity is partially exempt from tax.

Example B: A commercial hauler travels from its company yard to Grower A's field to pick up a load of fresh bell peppers. The bell peppers are sold to a grocery store and are delivered to the grocery store's distribution center. At the distribution center, the hauler picks up a load of pallets to deliver to another customer. The sale of diesel fuel to the commercial hauler for use from the yard to the field and from the field to the grocery store's distribution center is partially exempt from tax. The sale of diesel fuel to the commercial hauler for use in delivering the pallets is not partially exempt from tax.

Example C: A nursery owner transports its horticultural products to a distribution center. After delivering the product, the nursery owner makes two stops. The first stop is to pick up fertilizer for use at the nursery. The second stop is personal business unrelated to the nursery operation. The sale of diesel fuel to the nursery owner for use in this example is partially exempt from tax up to and including the first stop.

(2) "Plants" mean an agricultural or horticultural commodity produced in a farming activity which includes, but is not limited to, trees bearing fruit or nuts, other crops, an ornamental tree, a vine, a bush, or sod. Sea plants are produced in a farming activity if they are tended and cultivated as opposed to merely harvested.

(3) "Animals" mean a life form produced in a farming activity which includes, but is not limited to, any livestock, poultry or other bird, and fish or other sea life. Fish and other sea life are produced in a farming activity if they are raised on a fish farm. A fish farm is an area where fish or other sea life are grown or raised as opposed to merely caught or harvested.

(4) "Food processing" means the activities described in Industry Groups 201, 202, 203, 204, and 207, or Codes 2068 and 2084 of the SIC Manual. Food processing activities also includes transporting raw product, supplies and materials to the processing facility, transporting partially processed food products between various divisions of the same food processing entity for further processing operations, and any empty hauls related to the transportation of that product. Food processing does not include transportation and delivery of processed food products to the marketplace. A food processor is not required to be engaged 50 percent or more of the time in such activities as described herein.

Example A: A for-hire carrier, contracted for by a cheese plant, transports unprocessed milk from a dairy farm to the cheese plant for processing and then returns to the carrier's truck yard. The diesel used in this example is eligible for the partial sales tax exemption.

Example B: A flour mill transports flour sacks from a bag manufacturer to the mill's facility, and then transports those sacks to other flour mills owned by the same entity. The diesel used to transport the sacks in this example is eligible for the partial sales tax exemption, but the transportation of flour is not.

Example C: Cannery A and Cannery B are different divisions of the same food processing entity. Cannery A processes unprocessed tomatoes into tomato paste and then transports the paste to Cannery B for further processing. Cannery B processes the paste into tomato soup which is then transported to a grocery distribution warehouse. From the distribution warehouse the processed product is transported by the buyer to individual grocery stores and other distribution warehouses. Only the movement of paste from Cannery A to Cannery B is eligible for the partial sales tax exemption. The subsequent movement of product to the first distribution center and to retail stores and other warehouses is not eligible for the exemption.

(5) "Marketplace" means the place where a commodity is sold for resale, at retail or for consumption at an animal feeding operation, notwithstanding any intervening activities to prepare the product for sale in the marketplace. Such preparation activities include, but are not limited to, cooling, sorting, inspection, grading, drying, packing, handling, washing, slaughtering and butchering (except as otherwise described in Codes 2011 and 2015 of the SIC Manual), candling, sterilizing, freezing, pasteurizing, homogenizing, and packaging. Producers of agricultural or horticultural products may prepare and market their products through a cooperative, joint venture, corporation or partnership in which they have a financial interest, or other such enterprises, and the diesel used in these enterprises to transport products to the marketplace is eligible for the sales tax exemption.

(6) "Diesel fuel" means, for purposes of this regulation only, any liquid fuel that is commonly or commercially known, or sold or represented as a diesel fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the engine of a diesel-powered highway vehicle.

However, a liquid does not possess this practical and commercial fitness solely by reason of its possible or rare use as a fuel in the engine of a diesel-powered vehicle.

~~No. 1-D or No. 2-D, pursuant to the specifications in American Society for Testing and Materials Standard Specification for Diesel Fuel Oils ("ASTM") D-975-81, which is incorporated herein by reference. Diesel fuel, for purposes of this regulation only, also includes Environmental Protection Agency rated diesel fuel commonly known as "federal fuel" sold for use in locomotives, or which is used in generators, pumps, dehydrators and any other equipment used in the conduct of farming and food processing activities. "Diesel fuel" does not include gasoline, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous~~

~~form, or alcohol, aviation fuel, except diesel fuel sold for use in aircraft designed for agricultural aerial applications that meets the specifications of ASTM D 1655, jet fuel, bunker fuel, or other like substance used as a fuel. Qualifying diesel fuel shall be identified accordingly on the invoice of sale.~~

(7) "Qualified activity" means farming activities as defined in subdivision (b)(1) or food processing, as defined in subdivision (b)(4).

(c) Partial Exemption Certificates.

(1) In General. A person who purchases diesel fuel for use in a qualified activity from an in-state retailer, or an out-of state retailer obligated to collect use tax, must provide the retailer with a partial exemption certificate in order for the retailer to claim the partial exemption. If the retailer takes a partial exemption certificate timely and in good faith, as defined in subdivision (c)(5), from a person who purchases diesel fuel for use in a qualified activity, the partial exemption certificate relieves the retailer from the liability for the sales tax subject to partial exemption under this regulation or the duty of collecting the use tax subject to partial exemption under this regulation. A partial exemption certificate will be considered timely if it is taken any time before the retailer bills the purchaser for the diesel fuel, any time within the retailer's normal billing or payment cycle, any time at or prior to delivery of the diesel fuel to the purchaser, or no later than 15 days after the date of purchase. A partial exemption certificate which is not taken timely will not relieve the retailer of the liability for tax excluded by the partial exemption; however the retailer may present satisfactory evidence to the Board that the retailer sold the diesel fuel to a person that used it in a qualified activity. A partial exemption from the sales and use tax under this part shall not be allowed unless the retailer claims the partial exemption on its sales and use tax return for the reporting period during which the transaction subject to the partial exemption occurred. Where the retailer fails to claim the partial exemption as set forth above, the retailer may file a claim for refund as set forth in subdivision (e).

The partial exemption certificate form set forth in Appendix A may be used to claim the partial exemption.

(2) Blanket Partial Exemption Certificates. In lieu of requiring a partial exemption certificate for each transaction, a person who purchases diesel fuel for use in a qualified activity may issue a blanket partial exemption certificate. The partial exemption certificate form set forth in Appendix A may be used as a blanket partial exemption certificate. Appendix A may also be used as a specific partial exemption certificate if the purchaser provides the purchase order or sales invoice number and a precise description of the property being purchased. A person who purchases diesel fuel for use in a qualified activity must include in the partial exemption certificate how much or what percentage of the diesel fuel purchased will be used in a qualified activity. If purchasing diesel fuel not qualifying for the partial exemption, the purchaser must clearly state in documents such as a written purchase order, sales agreement, or contract that the sale or purchase is not subject to the blanket partial exemption certificate.

(3) Form of Partial Exemption Certificate. Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a partial exemption certificate with respect to the sale or purchase of diesel fuel if it contains all of the following essential elements:

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name, address and telephone number of the purchaser.

(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement of how much or what percentage of the diesel fuel purchased will be used in a qualified farming or food processing activity.

(E) Date of execution of document.

(4) Retention and Availability of Partial Exemption Certificates. A retailer must retain each partial exemption certificate received from a person who purchases diesel fuel for use in a qualified activity for a period of not less than four years from the date on which the retailer claims a partial exemption based on the partial exemption certificate.

While the Board will not normally require the filing of the partial exemption certificate with a sales and use tax return, when necessary for the efficient administration of the Sales and Use Tax Law, the Board may, on 30 days' written notice, require a retailer to commence filing with its sales and use tax returns copies of all partial exemption certificates. The Board may also require, within 45 days of the Board's request, retailers provide the Board access to any and all partial exemption certificates, or copies thereof, accepted for the purposes of supporting the partial exemption.

(5) Good Faith. A seller will be presumed to have taken a partial exemption certificate in good faith in the absence of evidence to the contrary. A seller, without knowledge to the contrary, may accept a partial exemption certificate in good faith where the purchaser states that a certain percentage of the diesel fuel purchased will be used in farming activities or food processing. However, a partial exemption certificate cannot be accepted in good faith where the seller has knowledge that the diesel fuel is not subject to a partial exemption, or will not be otherwise used in a partially exempt manner.

(d) Partial Exemption Certificate for Use Tax. The partial exemption certificate must be completed by a person who purchases diesel fuel for use in a qualified activity to claim a partial exemption from use tax from an out-of-state retailer not obligated to collect the use tax. A partial

exemption from the use tax shall not be allowed unless the purchaser or retailer claims the partial exemption on its individual use tax return, sales and use tax return, or consumer use tax return for the reporting period during which the transaction subject to the partial exemption occurred. Where the purchaser or retailer fails to claim the partial exemption as set forth above, the purchaser or retailer may file a claim for refund as set forth in subdivision (e).

The purchaser who files an individual use tax return must attach a completed partial exemption certificate to the return. The purchaser who is registered with the Board as a retailer or consumer and files a sales and use tax return or consumer use tax return must, within 45 days of the Board's request, provide the Board access to any and all documents that support the claimed partial exemption.

The partial exemption certificate form set forth in Appendix A may be used to claim the partial exemption.

(e) Refund of Partial Exemption.

(1) For the period commencing on September 1, 2001, and ending on April 30, 2002, a person who purchases diesel fuel for use in a qualified activity may claim the partial exemption on qualified purchases from an in-state retailer or an out-of-state retailer obligated to collect the use tax by furnishing the retailer with a partial exemption certificate on or before July 31, 2002. The retailer must refund the tax or tax reimbursement directly to a purchaser of diesel fuel for use in a qualified activity or, at the purchaser's sole option, the purchaser may be credited with such amount.

(2) A retailer who paid sales tax on a qualified sale or a person who paid use tax on a qualified purchase and who failed to claim the partial exemption as provided by this regulation may file a claim for refund equal to the amount of the partial exemption that he or she could have claimed pursuant to this regulation. The procedure for filing a claim shall be the same as for other claims for refund filed pursuant to Revenue and Taxation Code section 6901. For transactions subject to use tax, a person who purchases diesel fuel for use in a qualified activity filing a claim for refund of the partial exemption has the burden of establishing that he or she was entitled to claim the partial exemption with respect to the amount of refund claimed under this part. For transactions subject to sales tax, a person filing a claim for refund of the partial exemption has the burden of establishing that the purchaser of the diesel fuel otherwise met all the requirements of a person who purchases diesel fuel for use in a qualified activity at the time of the purchase subject to the refund claimed under this part.

(f) Improper Use of Partial Exemption. Notwithstanding subdivision (a), tax applies to any sale of, and the storage, use, or other consumption in this state of diesel fuel that is used in a manner not qualifying for the partial exemption under this regulation.

(g) Purchaser's Liability for the Payment of Sales Tax.

(1) If a purchaser timely submits a copy of a partial exemption certificate to the retailer or partial exemption certificate for use tax to the Board, and then uses the diesel fuel in a manner not qualifying for the partial exemption, the purchaser shall be liable for payment of the sales tax, with applicable interest, to the same extent as if the purchaser were a retailer making a retail sale of the diesel fuel at the time the diesel fuel was so removed, converted, or used.

(2) A purchaser providing a partial exemption certificate accepted in good faith by the retailer or a partial exemption certificate for use tax to the Board for diesel fuel that does not qualify for the partial exemption is liable for payment of the sales tax, with applicable interest, to the same extent as if the purchaser were a retailer making a retail sale of the diesel fuel at the time the diesel fuel was purchased.

(h) Records. Adequate and complete records must be maintained by the person who purchases diesel fuel for use in a qualified activity as evidence that the diesel fuel purchased was used in a qualified activity.

(i) Operative Date. This regulation is operative as of September 1, 2001.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6357.1, Revenue and Taxation Code.

Appendix A

PARTIAL EXEMPTION CERTIFICATE

STATE BOARD OF EQUALIZATION

Qualified Sales and Purchases of Diesel and Farm Equipment and Machinery

NOTE: This is an exemption only from the state general fund portion of the sales and use tax rate. You are not relieved from your obligations for the local and district taxes on this transaction. This partial exemption also does not apply to any tax levied pursuant to Section 6051.2 and 6201.2 of the Revenue and Taxation Code, or pursuant to Section 35 of article XIII of the California Constitution. This partial exemption also applies to lease payments made on or after September 1, 2001, for tangible personal property even if the lease agreement was entered into prior to September 1, 2001.

SELLER'S/LESSOR'S NAME
SELLER'S/LESSOR'S ADDRESS (Street, City, State, Zip Code)

Diesel Fuel Used in Farming Activities or Food Processing* - I as the undersigned purchaser, hereby certify that of the diesel purchased, _____ % will be used in qualified farming activities or food processing in accordance with Revenue and Taxation Code Section 6357.1.

Farm Equipment and Machinery (or parts¹ thereof)* - I as the undersigned purchaser, hereby certify I am engaged in an agricultural business described in Codes 0111 to 0291 of the Standard Industrial Classification (SIC) Manual, or I perform an agricultural service described in Codes 0711 to 0783 of the SIC Manual for such classified persons. The property purchased or leased will be used primarily in producing and harvesting agricultural products in accordance with Revenue & Taxation Code Section 6356.5.²

Type of Farm Equipment and Machinery (or parts thereof) _____

*If you also want this certificate to be used as a blanket certificate for future purchases, describe generally the type of property you will be purchasing and ask your vendor to keep this certificate on file. If this is a specific partial exemption certificate, provide the purchase order or sales invoice number and a precise description of the property being purchased.

I understand that if such property is not used in the manner qualifying for the partial exemption, or if I am not a qualified person, as applicable, that I am required by the Sales and Use Tax Law to report and pay the state tax measured by the sales price/rentals payable of the property to/by me. I also understand that this partial exemption certificate is in effect as of the date shown below and will remain in effect until revoked in writing.

PURCHASER'S NAME OR COMPANY NAME (if applicable)		DATE
SIGNATURE (signature of the purchaser, purchaser's employee, or authorized representative of the purchaser)		TELEPHONE NUMBER
TITLE		PERMIT NUMBER (if applicable) ³
ADDRESS	CITY	STATE, ZIP

- ¹ If you are purchasing oil, grease, or lubricating or other qualifying fluids, indicate what percentage will be used in farm equipment and machinery performing qualified producing and harvesting activities.
- ² Vehicles that qualify as farm equipment and machinery, as defined in Regulation 1533.1(b)(1)(B), must be used exclusively in producing and harvesting agricultural products.
- ³ If you are not required to hold a seller's permit, please enter "Not Applicable."

Regulation History

Type of Regulation: Sales and Use Tax

Regulation: 1533.2

Title: *Diesel Fuel Used in Farming Activities or Food Processing*

Preparation: Kevin Smith

Legal Contact: Kevin Smith

The State Board of Equalization proposes to adopt amendments to revise the definition of diesel fuel in Sales and Use Tax Regulation 1533.2, *Diesel Fuel Used in Farming Activities or Food Processing*, to be consistent with the definition of diesel fuel in the Diesel Fuel Tax Law.

History of Proposed Regulation:

February 24-26, 2015	Public Hearing
January 9, 2015	OAL publication date; 45-day public comment period begins; Interested Parties mailing
December 24, 2014	Notice to OAL
November 19, 2014	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA

Support: NA

Oppose: NA