

Rulemaking File
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Sales and Use Tax
Regulation 1588, *Seeds, Plants and Fertilizer*

OAL Approval

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**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. 2015-0127-01 S

Adopt sections:
Amend sections: 1588
Repeal sections:

The Board of Equalization proposed this action to amend section 1588(b) of title 18 of the California Code of Regulations to include carbon dioxide in the definition of fertilizer, and to specify that carbon dioxide is not an auxiliary soil and plant substance, for purposes of the tax exemption for fertilizer provided in Revenue and Taxation Code section 6358(d). The proposed action makes other nonsubstantive amendments to section 1588.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 4/1/2015.

Date: 2/9/2015



Richard L. Smith
Senior Attorney

For: DEBRA M. CORNEZ
Director

Original: Cynthia Bridges
Copy: Richard Bennion

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826



DEBRA M. CORNEZ
Director

MEMORANDUM

TO: Richard Bennion
FROM: OAL Front Desk *W*
DATE: 2/10/2015
RE: Return of Approved Rulemaking Materials
OAL File No. 2015-0127-01S

OAL hereby returns this file your agency submitted for our review (OAL File No. 2015-0127-01S regarding Seeds, Plants and Fertilizers).

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

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-2014-1020-01	REGULATORY ACTION NUMBER 2015-0127-01S	EMERGENCY NUMBER
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For use by Office of Administrative Law (OAL) only

<p>2015 JAN 27 AM 9:33</p> <p>OFFICE OF ADMINISTRATIVE LAW</p>	<p>NOTICE</p>
<p>REGULATIONS</p>	

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

FEB 09 2015
2:32 PM

AGENCY WITH RULEMAKING AUTHORITY State Board of Equalization	AGENCY FILE NUMBER (if any)
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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	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		NOTICE REGISTER NUMBER 2014 442	PUBLICATION DATE 10/31/2014	

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Seeds, Plants and Fertilizer	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
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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 1588
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"/> 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 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) _____
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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 Richard E. Bennion	TELEPHONE NUMBER (916) 445-2130	FAX NUMBER (Optional) (916) 324-3984	E-MAIL ADDRESS (Optional) rbennion@boe.ca.gov
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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 January 22, 2015
TYPED NAME AND TITLE OF SIGNATORY Joann Richmond, Chief, Board Proceedings Division	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

FEB 09 2015

Office of Administrative Law

**Final Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1588**

1588. Seeds, Plants and Fertilizer.

(a) Seeds and Plants. Tax does not apply to sales of seeds, annual plants, and operative January 1, 1999, non-annual plants, the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business including fruit trees, berry vines, and grape rootlings or rootstock, or cuttings of every variety. Tax does not apply to sales of seed, the products of which will be used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business.

(b) Fertilizer.

(1) Definition. The term "fertilizer" includes commercial fertilizers, agricultural minerals, ~~and manure, and carbon dioxide~~. The terms "commercial fertilizers" and "agricultural minerals" as used herein are defined in Sections 14522 (commercial fertilizer) and 14512 (agricultural minerals) of the Food and Agricultural Code. "Manure" means the excreta of any domestic animal or domestic fowl which is not artificially mixed with any material except a material which has been used for bedding, sanitary, or feeding purposes for such an animal or fowl or for the preservation of the manure. The term "fertilizer" does not include "packaged soil amendments" or "auxiliary soil and plant substances" as these terms are defined (with the exceptions noted below) in Sections 14552 (packaged soil amendments) and 14513 (auxiliary soil and plant substances) of the Food and Agricultural Code. For the purposes of this regulation, "manures sold without guarantees for plant nutrients" as described in Section 14552 of the Food and Agricultural Code are not packaged soil amendments and carbon dioxide is not an auxiliary soil and plant substance as that term is defined in section 14513 of the Food and Agricultural Code.

(2) Application of Tax. Tax does not apply to sales of fertilizer to be applied to land or (including in foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

When insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land or (including in foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6358, Revenue and Taxation Code.

principles to cause **female reproductive toxicity**. BPA is being brought to the DARTIC at this time, consistent with the committee's request at its July 15, 2009 meeting to re-visit consideration of BPA if additional epidemiological or other specific types of data on reproductive and developmental toxicity became available. Substantial new epidemiological and toxicological data on BPA and female reproductive toxicity have become available since 2009, and thus OEHHA has assembled materials on BPA and female reproductive toxicity for the DARTIC's consideration.

The May 7 meeting will be held in the Coastal Hearing Room at the Cal/EPA Headquarters building, 1001 I Street, Sacramento, CA. The meeting will begin at 10:00 a.m. and will last until all business is conducted or until 5:00 p.m. If the DARTIC does not complete its deliberations on May 7, the meeting will be continued on **May 21, 2015** at the same location. The agenda for the May 7 meeting will be provided in a future public notice published in advance of the meeting.

OEHHA announces the availability for public review of hazard identification materials on BPA and female reproductive toxicity. The DARTIC will consider these materials in making any listing decision on this chemical. These materials include a recent 2014 scientific review of BPA, other recent relevant scientific publications, and documents provided in 2009 to the DARTIC for its previous consideration of BPA.

Copies of the materials are available from OEHHA's website at the following address: <http://www.oehha.ca.gov/prop65.html>. The materials may also be requested from OEHHA's Proposition 65 Implementation Office by calling (916) 445-6900.

This notice marks the beginning of a 45-day public comment period on these materials. **OEHHA must receive comments and any supporting documentation by 5:00 p.m. on Tuesday, April 6, 2015.** We encourage you to submit comments in electronic form, rather than in paper form. Comments transmitted by e-mail should be addressed to P65Public.Comments@oehha.ca.gov. Please include "BPA-female reproductive toxicity" in the subject line. Comments submitted in paper form may be mailed, faxed, or delivered in person to the addresses below:

Mailing

Address: Ms. Monet Vela
Office of Environmental Health
Hazard Assessment
P.O. Box 4010, MS-58D
Sacramento, California
95812-4010

Street
Address: 1001 I Street
Sacramento, California 95814
Fax: (916) 323-2265

OEHHA will organize and index the comments received and forward the information to the DARTIC members prior to the May 7 meeting. Comments will also be posted on the OEHHA website in advance of the meeting.

SUMMARY OF REGULATORY ACTIONS

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# 2015-0127-01
BOARD OF EQUALIZATION
Seeds, Plants and Fertilizers

The Board of Equalization amended section 1588(b) of title 18 of the California Code of Regulations to include carbon dioxide in the definition of fertilizer, and specified that carbon dioxide is not an auxiliary soil and plant substance, for purposes of the tax exemption for fertilizer provided in Revenue and Taxation Code section 6358(d). The action makes other nonsubstantive amendments to section 1588.

Title 18
California Code of Regulations
AMEND: 1588
Filed 02/09/2015
Effective 04/01/2015
Agency Contact:
Richard E. Bennion (916) 445-2130

File# 2015-0126-02
CALIFORNIA HEALTH BENEFIT EXCHANGE
2016
Qualified Health Plan Recertification and New Entrant

This emergency rulemaking by the California Health Benefit Exchange ("HBEX") adopts 10 CCR §§ 6428 and 6430. Specifically, these regulations establish the

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

Regulation 1588, *Seeds, Plants and Fertilizer*

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2. [Updated Informative Digest](#)
3. [Business Tax Committee Minutes, September 23, 2014](#)
 - Minutes
 - Deputy Director memo dated September 12, 2014
 - BTC Agenda
 - Formal Issue Paper Number 14-005
 - Exhibit 1 Revenue Estimate
 - Exhibit 2 Text Regulation 1588
 - Exhibit 3 Food and Agriculture Code Regulations
 - History
4. [Reporter's Transcript Business Taxes Committee, September 23, 2014](#)
5. [Estimate of Cost or Savings, October 15, 2014](#)
6. [Economic and Fiscal Impact Statements, October 20, 2014](#)
7. [Notice of Publications](#)
 - Form 400 and Notice, Publication Date October 31, 2014
 - Email sent to Interested Parties, , 2014
 - CA Regulatory Notice Register 2014, Volume No. 44-Z
8. [Notice to Interested Parties, October 31, 2014](#)

The following items are exhibited:

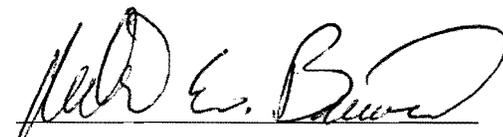
 - Notice of Hearing
 - Initial Statement of Reasons
 - Proposed Text of Regulation 1588
 - Regulation History
9. [Statement of Compliance](#)
10. [Reporter's Transcript, Item F4, December 18, 2014](#)
11. [Draft Minutes, December 18, 2014, and Exhibits](#)
 - Notice of Proposed Regulatory Action
 - Initial Statement of Reasons
 - Proposed Text of Regulation 1588
 - 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 January 21, 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.

January 21, 2015


Richard E. Bennion
Regulations Coordinator
State Board of Equalization

**Final Statement of Reasons for the Adoption of the
Proposed Amendments to California Code of Regulations,
Title 18, Section 1588, *Seeds, Plants and Fertilizer***

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) 1588, *Seeds, Plants and Fertilizer*, on December 18, 2014. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1588 without making any changes. The Board did not receive any written comments regarding the proposed regulatory action. Mr. John Gamper, from the California Farm Bureau Federation, appeared at the public hearing and expressed support for the proposed amendments.

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 1588 are the same as provided in the initial statement of reasons. The Board anticipates that the proposed amendments will promote fairness and benefit taxpayers, including hydroponic farmers, Board staff and the Board by clarifying that the exemption provided by Revenue and Taxation Code section 6358 applies to carbon dioxide and fertilizer used in hydroponic farming, by:

- Specifying in subdivision (b)(1) that the term fertilizer includes carbon dioxide;
- Providing in subdivision (b)(1) that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513; and
- Clarifying in subdivision (b) that the exemption may apply to sales of fertilizer applied to land or in foliar application.

The adoption of the proposed amendments to Regulation 1588 is not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to Regulation 1588 or the proposed amendments to Regulation 1588.

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 1588 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 amendments to Regulation 1588 are 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 1588 to the health and welfare of California residents, worker safety, or the state's environment.

The proposed amendments to Regulation 1588 may affect small businesses.

No Mandate on Local Agencies or School Districts

The Board has determined that the adoption of the proposed amendments to Regulation 1588 does not impose a mandate on local agencies or school districts.

Public Comments

The Board did not receive any written comments regarding the proposed regulatory action. Mr. John Gamper, from the California Farm Bureau Federation, appeared at the public hearing and expressed support for the proposed amendments.

Determinations Regarding Alternatives

By its motion on December 18, 2014, the Board determined that no alternative to the proposed amendments to Regulation 1588 would be more effective in carrying out the purposes 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 provisions of law.

The Board did not reject any reasonable alternative to the proposed amendments to Regulation 1588 that would lessen any adverse impact the proposed action may have on small business.

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.

**Updated Informative Digest for the State Board of Equalization’s
Adoption of Proposed Amendments to California Code of Regulations,
Title 18, Section 1588, *Seeds, Plants and Fertilizer***

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1588, *Seeds, Plants and Fertilizer*, on December 18, 2014. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1588 without making any changes.

The Board did not receive any written comments regarding the proposed regulatory action. Mr. John Gamper, from the California Farm Bureau Federation, appeared at the public hearing and expressed support for the proposed amendments. There have not been any changes to the applicable laws or the effect of, the objectives of, and anticipated benefits from the adoption of the proposed amendments to Regulation 1588 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:

Current Law

RTC section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588 defines the term “fertilizer.”

The current provisions of Regulation 1588, subdivision (b)(1) define the term “fertilizer” to include manure, commercial fertilizers, as defined in Food & Ag. Code section 14522, and agricultural minerals, as defined in Food & Agr. Code section 14512. Specifically excluded from the definition of fertilizer in Regulation 1588 are soil amendments, as defined in Food & Ag. Code section 14552, and auxiliary soil and plant substances, as defined in Food & Ag. Code section 14513.

In addition, the current provisions of Regulation 1588, subdivision (b)(2) specifically provide that, as a result of the exemption provided by RTC section 6358, subdivision (d), “[t]ax does not apply to sales of fertilizer to be applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.” Also, the last sentence in Regulation 1588, subdivision (b) provides that, “[w]hen insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the

fertilizer may be excluded from the measure of the tax if the mixed product is applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business."

Leaves are able to absorb fertilizer through the pores on their surface. Fertilizer is applied in a foliar application when it is applied directly to leaves (or foliage). Regulation 1588, subdivision (b) has provided that the exemption provided by RTC section 6358, subdivision (d) applies to fertilizer applied in "foliar application" since 1970.

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1588

Need for Clarification

The Board's Legal Department has previously determined, as early as 1960, that carbon dioxide is a fertilizer when applied to land in farming. This determination is found in Sales and Use Tax Annotation 510.0580:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer." 5/6/60.

The May 6, 1960, legal ruling, which is summarized in the annotation, explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems, and used to assist in the neutralization of alkaline soils. It also explains that, at the time the legal ruling was written, the Department of Agriculture already considered carbon dioxide sold for such a purpose to be an "agricultural mineral," which is included in the definition of fertilizer for sales and use tax purposes. (Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached in selected legal rulings. See, Reg. 5700, *Annotations*.)

More recently, a question has arisen as to whether carbon dioxide should be classified as fertilizer, when used by a hydroponic farmer. (Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.) In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (through foliar application) in order to support the life of the plant. Board staff questioned whether carbon dioxide used in hydroponic farming should still be classified as an agricultural mineral,

which is included in the definition of fertilizer in Regulation 1588, or whether such use makes the carbon dioxide an auxiliary soil and plant substance, which is specifically not a fertilizer under Regulation 1588. Board staff concluded that carbon dioxide used in hydroponic farming is a fertilizer because the Board had previously concluded that carbon dioxide is a fertilizer when used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant's growth, and Regulation 1588 provides for fertilizer to be applied through foliar application. Board staff also concluded that it would be helpful to amend Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and specify that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes.

Interested Parties Process

Business Taxes Committee staff drafted amendments to Regulation 1588, subdivision (b) to clarify the treatment of carbon dioxide and fertilizer used in hydroponic farming. The draft amendments suggested adding language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The draft amendments suggested revising Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The draft amendments to Regulation 1588, subdivision (b)(1) also add the word "packaged" before the references to "soil amendments" to be consistent with Food & Ag. Code section 14552.

Business Taxes Committee staff subsequently provided its draft amendments to Regulation 1588 to the interested parties and conducted an interested party meeting on May 21, 2014, to discuss the draft amendments. No formal comments were submitted, however, staff worked with interested parties' suggestions to refine the draft amendments. No further comments or concerns were expressed by interested parties.

September 23, 2014, Business Taxes Committee Meeting

Subsequently, staff prepared Formal Issue Paper 14-005 and distributed it to the Board Members for consideration at the Board's September 23, 2014, Business Taxes Committee meeting. Formal Issue Paper 14-005 recommended that the Board propose to add language to Regulation 1588, subdivision (b)(1) to specify that the term fertilizer includes carbon dioxide and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The formal issue paper also recommended that the Board propose to revise

Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The issue paper also recommended that the Board propose to update the references to “soil amendments” in Regulation 1588, subdivision (b)(1) so that they refer to “packaged” soil amendments to be consistent with Food & Ag. Code section 14552.

Mr. John Gamper, from the California Farm Bureau Federation, appeared during the September 23, 2014, Business Taxes Committee meeting and expressed support for the proposed amendments. Ms. Jeanette Lombardo, from California Food and Agribusiness Advocates, representing Houweling’s Tomatoes, appeared along with Mr. Martin Weijters, Senior Corporate Grower, Houweling’s Tomatoes, and stated that they were available to answer any question the Members may have.

At the conclusion of the Board’s discussion of Formal Issue Paper 14-005 during the September 23, 2014, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1588 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1588 are reasonably necessary to have the effect and accomplish the objective of addressing the issue regarding carbon dioxide used in hydroponic farming (discussed above).

The Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, Board staff, and the Board by clarifying that RTC section 1588 applies to carbon dioxide and fertilizer used in hydroponic farming.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1588 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 1588 is the only state regulation implementing, interpreting, and making specific the exemption provided by RTC section 6358, subdivision (d). In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1588 or the proposed amendments to Regulation 1588.



BOARD OF EQUALIZATION

BUSINESS TAXES COMMITTEE MEETING MINUTES

HONORABLE MICHELLE STEEL, COMMITTEE CHAIR

450 N STREET, SACRAMENTO

MEETING DATE: SEPTEMBER 23, 2014, TIME: 10:00 A.M.

ACTION ITEMS & STATUS REPORT ITEMS**Agenda Item No: 1****Title: Proposed Amendments to Regulation 1588, *Seeds, Plants and Fertilizer* (Carbon Dioxide)****Issue:**

Whether the Board should amend Sales and Use Tax Regulation 1588, *Seeds, Plants and Fertilizer*, to specifically include carbon dioxide in the definition of fertilizer.

Committee Discussion:

Staff introduced the issue. Mr. John Gamper, from the California Farm Bureau Federation, expressed support for the proposed amendments. Ms. Jeanette Lombardo, from California Food and Agribusiness Advocates, representing Houweling's Tomatoes, appeared along with Mr. Martin Weijters, Senior Corporate Grower, Houweling's Tomatoes, to state that they were available to answer any questions the Members may have.

Committee Action:

Upon motion by Mr. Horton and seconded by Mr. Runner, without objection, the Committee approved and authorized for publication the proposed amendments to Regulation 1588, *Seeds, Plants and Fertilizer*. A copy of the proposed amendments to Regulation 1588 is attached.

Handwritten signature of Michelle Steel in cursive.

Honorable Michelle Steel, Committee Chair

Handwritten signature of Cynthia Bridges in cursive.

Cynthia Bridges, Executive Director

BOARD APPROVED

at the 9/23/14 Board Meeting

Handwritten signature of Joann Richmond in cursive.

Joann Richmond, Chief
Board Proceedings Division

REGULATION 1588. SEEDS, PLANTS AND FERTILIZER.

(a) SEEDS AND PLANTS. Tax does not apply to sales of seeds, annual plants, and operative January 1, 1999, non-annual plants, the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business, including fruit trees, berry vines, and grape rootlings or rootstock, or cuttings of every variety. Tax does not apply to sales of seed, the products of which will be used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business.

(b) FERTILIZER.

(1) DEFINITION. The term "fertilizer" includes commercial fertilizers, agricultural minerals, ~~and manure, and carbon dioxide~~. The terms "commercial fertilizers" and "agricultural minerals" as used herein are defined in ~~S~~sections 14522 (commercial fertilizer) and 14512 (agricultural minerals) of the Food and Agricultural Code. "Manure" means the excreta of any domestic animal or domestic fowl which is not artificially mixed with any material except a material which has been used for bedding, sanitary, or feeding purposes for such an animal or fowl or for the preservation of the manure. The term "fertilizer" does not include "packaged soil amendments" or "auxiliary soil and plant substances" as these terms are defined (with the exceptions noted below) in ~~S~~sections 14552 (packaged soil amendments) and 14513 (auxiliary soil and plant substances) of the Food and Agricultural Code. For the purposes of this regulation, "manures sold without guarantees for plant nutrients" as described in ~~S~~section 14552 of the Food and Agricultural Code are not packaged soil amendments and carbon dioxide is not an auxiliary soil and plant substance as that term is defined in section 14513 of the Food and Agricultural Code.

(2) APPLICATION OF TAX. Tax does not apply to sales of fertilizer to be applied to land ~~or (including in foliar application)~~ the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

When insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land ~~or (including in foliar application)~~ the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

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



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0092
PHONE 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

September 12, 2014

Dear Interested Party:

Enclosed are the Agenda, Issue Paper, and Revenue Estimate for the September 23, 2014 Business Taxes Committee meeting. This meeting will address the proposed amendments to Regulation 1588, *Seeds, Plants and Fertilizer*, to specifically include carbon dioxide in the definition of fertilizer.

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

Thank you for your input on these issues and I look forward to seeing you at the Business Taxes Committee meeting at **10:00 a.m.** on **September 23, 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. Mengjun He, 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. Marc Alviso (MIC:101)
Mr. Chris Lee (MIC:101)
Mr. John Thiella (MIC:73)
Mr. Jeffrey L. McGuire (MIC:43)
Mr. Robert Tucker (MIC:82)
Mr. Bradley Heller (MIC:82)
Mr. Lawrence Mendel (MIC:82)
Ms. Monica Silva (MIC:82)
Ms. Kirsten Stark (MIC:50)
Mr. Clifford Oakes (MIC:50)
Mr. Bradley Miller (MIC:92)
Mr. Michael Patno (MIC:50)
Mr. Robert Wilke (MIC:50)

AGENDA — September 23, 2014 Business Taxes Committee Meeting
Proposed Amendments to Regulation 1588, Seeds, Plants and Fertilizer

<p>Action 1 — Agreed Upon Items</p> <p>See Agenda, page 2</p>	<p>Alternative 1</p> <p>Approve and authorize publication of proposed amendments to Regulation 1588 to clarify that carbon dioxide is included in the definition of “fertilizer.”</p> <p align="center">OR</p> <p>Alternative 2</p> <p>Do not approve proposed amendments to Regulation 1588.</p>
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**AGENDA — September 23, 2014 Business Taxes Committee Meeting
Proposed Amendments to Regulation 1588, Seeds, Plants and Fertilizer**

<p>Action 1 — Staff Recommendation</p>	<p>REGULATION 1588. SEEDS, PLANTS AND FERTILIZER.</p> <p>(a) SEEDS AND PLANTS. Tax does not apply to sales of seeds, annual plants, and operative January 1, 1999, non-annual plants, the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business, including fruit trees, berry vines, and grape rootlings or rootstock, or cuttings of every variety. Tax does not apply to sales of seed, the products of which will be used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business.</p> <p>(b) FERTILIZER.</p> <p>(1) DEFINITION. The term "fertilizer" includes commercial fertilizers, agricultural minerals, and manure, and carbon dioxide. The terms "commercial fertilizers" and "agricultural minerals" as used herein are defined in §sections 14522 (commercial fertilizer) and 14512 (agricultural minerals) of the Food and Agricultural Code. "Manure" means the excreta of any domestic animal or domestic fowl which is not artificially mixed with any material except a material which has been used for bedding, sanitary, or feeding purposes for such an animal or fowl or for the preservation of the manure. The term "fertilizer" does not include "<u>packaged soil amendments</u>" or "auxiliary soil and plant substances" as these terms are defined (with the exceptions noted below) in §sections 14552 (<u>packaged soil amendments</u>) and 14513 (auxiliary soil and plant substances) of the Food and Agricultural Code. For <u>the purposes of this regulation, "manures sold without guarantees for plant nutrients" as described in §section 14552 of the Food and Agricultural Code are not <u>packaged soil amendments and carbon dioxide is not an auxiliary soil and plant substance as that term is defined in section 14513 of the Food and Agricultural Code.</u></u></p> <p>(2) APPLICATION OF TAX. Tax does not apply to sales of fertilizer to be applied to land or (including in foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.</p> <p>When insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land or (including in foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.</p>
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Issue Paper Number 14-005



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

Proposed Amendments to Regulation 1588, *Seeds, Plants and Fertilizer* (Carbon Dioxide)

I. Issue

Whether the Board should amend Regulation 1588, *Seeds, Plants and Fertilizer*, to specifically include carbon dioxide in the definition of fertilizer.

II. Alternative 1 – Staff Recommendation

Staff recommends the Board approve and authorize publication of the proposed amendments to Regulation 1588, as set forth in Exhibit 2. Staff’s proposed amendments clarify that carbon dioxide is included in the definition of “fertilizer.” This recommendation is supported by Mr. John Gamper from the California Farm Bureau.

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 Regulation 1588.

IV. Background

Revenue and Taxation Code section 6358, *Animal life; feed; seeds; plants; fertilizer*, subdivision (d) provides an exemption from tax for the gross receipts from the sale and use of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588, *Seeds, Plants and Fertilizer*, defines “fertilizer.”

The current provisions of Regulation 1588, subdivision (b)(1) define the term “fertilizer” to include manure, commercial fertilizers (as defined in Food and Agricultural Code (Food & Agr. Code) section 14522), and agricultural minerals (as defined in Food & Agr. Code section 14512). Specifically excluded from the definition of fertilizer in Regulation 1588 are soil amendments (as defined in Food & Agr. Code section 14552) and auxiliary soil and plant substances (as defined in Food & Agr. Code section 14513). (See Exhibit 3 for relevant Food & Agr. Code definitions.)

The Sales and Use Tax Department’s (SUTD) regulation files show that the exemption is based on the premise that fertilizer is applied to land for the purpose of furnishing elements to be absorbed by the plant. Those elements enter into the food supply of the plants themselves and become a part of the product grown. If that product is sold, the fertilizer is not taxable as it is regarded as a sale for resale. The same reasoning applies to products grown for human consumption and to products used as feed for animal life that are food for human consumption. The absorption of the fertilizer into the food supply of the plants themselves is different than the function of soil amendments or auxiliary soil and plant substances, which do not, in any material quantity, enter into the food supply of the plants themselves, and are not included in the definition of fertilizer.

V. Discussion

Staff has previously considered carbon dioxide to be fertilizer when applied to land in farming. This direction is found in Sales and Use Tax Annotation¹ 510.0580:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer." 5/6/60.

The backup letter to the annotation explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems. At the time the legal opinion was written, the Department of Agriculture considered carbon dioxide sold for such a purpose to be an agricultural mineral, which was included in the definition of fertilizer for sales and use tax purposes.

More recently, a question has arisen as to whether carbon dioxide, when used by a hydroponic² farmer, should be considered fertilizer as it was not applied to land. In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (foliar application) in order to support the life of the plant. After reviewing the current Food & Agr. Code definitions, SUTD staff questioned whether carbon dioxide should be considered an

¹ Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached by staff counsel as applied to specific factual situations. They are a research tool intended to provide guidance regarding the interpretation of Board statutes and regulations. Annotations are not regulations and do not have the force or effect of law.

² Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.

FORMAL ISSUE PAPER 14-005

agricultural mineral, which is included in the definition of fertilizer, or an auxiliary soil and plant substance, which is not.

Revising Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer, and specifying that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes, is consistent with the Board’s historical treatment of carbon dioxide as fertilizer, and its use is consistent with the basis for the exemption from tax as a fertilizer. Specifically, the carbon dioxide is used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant’s growth.

VI. Alternative 1 - Staff Recommendation

A. Description of Alternative 1

Staff recommends the Board approve and authorize publication of the proposed amendments to Regulation 1588, as provided in Exhibit 2, to:

- Specify that the term fertilizer includes carbon dioxide. (Subdivision (b)(1).)
- Provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Agr. Code section 14513. (Subdivision (b)(1).)
- Clarify that the exemption may apply to sales of fertilizer applied to land or in foliar application. (Subdivision (b)(2).)
- Update references from “soil amendments” to “packaged” soil amendments to be consistent with Food & Agr. Code section 14552. (Subdivision (b)(1).)

B. Pros of Alternative 1

Provides clear guidance to taxpayers and Board of Equalization (BOE) staff regarding the application of tax to carbon dioxide sold as a fertilizer.

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 Regulation 1588 and begin the formal rulemaking process. Staff will also revise any applicable publications relevant to the proposed amendments.

F. Administrative Impact of Alternative 1

1. Cost Impact

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

FORMAL ISSUE PAPER 14-005

2. Revenue Impact

None. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact of Alternative 1

Amendments to Regulation 1588 to expressly provide that carbon dioxide is considered fertilizer will clarify the issue for BOE staff and taxpayers.

H. Critical Time Frames of Alternative 1

None.

VII. Alternative 2

A. Description of Alternative 2

Do not amend Regulation 1588.

B. Pros of Alternative 2

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

C. Cons of Alternative 2

Taxpayers and BOE staff would not have guidance beyond Annotation 510.0580 to explain the application of tax to carbon dioxide.

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 the regulatory amendment, there may continue to be confusion regarding whether carbon dioxide should be considered a fertilizer.

H. Critical Time Frames for Alternative 2

None.

Preparer/Reviewer Information

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

Current as of: September 4, 2014

REVENUE ESTIMATE

STATE OF CALIFORNIA
BOARD OF EQUALIZATION



Proposed Amendments to Regulation 1588, *Seeds, Plants and Fertilizer* (Carbon Dioxide)

I. Issue

Whether the Board should amend Regulation 1588, *Seeds, Plants and Fertilizer*, to specifically include carbon dioxide in the definition of fertilizer.

II. Alternative 1 - Staff Recommendation

Staff recommends the Board approve and authorize publication of the proposed amendments to Regulation 1588. Staff's proposed amendments clarify that carbon dioxide is included in the definition of "fertilizer." This recommendation is supported by Mr. John Gamper from the California Farm Bureau.

III. Other Alternative(s) Considered

Do not approve proposed amendments to Regulation 1588.

Background, Methodology, and Assumptions

Alternative 1 – Staff Recommendation

There is nothing in the staff recommendation that would have an impact on revenues. Staff recommendation will provide clear guidance to taxpayers and Board of Equalization (BOE) staff regarding the application of tax to carbon dioxide sold as a fertilizer.

Other Alternatives Considered

Do not amend Regulation 1588.

Revenue Summary

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

The other alternative considered does 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. Joe Fitz, Chief, 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 September 4, 2014.

REGULATION 1588. SEEDS, PLANTS AND FERTILIZER.

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FOOD AND AGRICULTURAL CODE – (FOOD & AGR. CODE)

DIVISION 7. AGRICULTURAL CHEMICALS, LIVESTOCK REMEDIES, AND COMMERCIAL FEEDS [12500 - 15340]

(Division 7 enacted by Stats. 1967, Ch. 15.)

CHAPTER 5. Fertilizing Materials [14501 - 14682]

(Chapter 5 repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

ARTICLE 2. Definitions [14511 - 14564]

(Article 2 added by Stats. 1990, Ch. 504, Sec. 2.)

Included in “fertilizer” per Regulation 1588

14512.

“Agricultural mineral” means any substance with nitrogen (N), available phosphoric acid (P₂O₅), and soluble potash (K₂O), singly or in combination, in amounts less than 5 percent which is distributed for farm use, or any substance only containing recognized essential secondary nutrients or micronutrients in amounts equal or greater than minimum amounts specified by the director, by regulation, and distributed in this state as a source of these nutrients for the purpose of promoting plant growth. It shall include gypsum, liming materials, manure, wood fly ash, sewage sludge not qualifying as commercial fertilizer, and captured dilute solutions.

(Repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

14522.

“Commercial fertilizer” means any substance which contains 5 percent or more of nitrogen (N), available phosphoric acid (P₂O₅), or soluble potash (K₂O), singly or collectively, which is distributed in this state for promoting or stimulating plant growth. “Commercial fertilizer” includes both agricultural and specialty fertilizers. “Specialty fertilizers” may contain less than 5 percent nitrogen (N), available phosphoric acid (P₂O₅), or soluble potash (K₂O), singly or collectively.

(Repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

Specifically excluded per Regulation 1588 (except for 14552(h))

14513.

“Auxiliary soil and plant substance” means any chemical or biological substance or mixture of substances or device distributed in this state to be applied to soil, plants, or seeds for soil corrective purposes; or that is intended to improve germination, growth, yield, product quality, reproduction, flavor, or other desirable characteristics of plants; or that is intended to produce any chemical, biochemical, biological, or physical change in soil; but does not include commercial fertilizers, agricultural minerals, pesticides, soil amendments, or manures. It shall include the following:

- (a) Bacterial inoculants.
- (b) Biotics.
- (c) Lignin or humus preparations.
- (d) Microbial products, including genetically engineered microorganisms.
- (e) Soil binding agents.
- (f) Synthetic polyelectrolytes.
- (g) Wetting agents to promote water penetration.
- (h) Any similar product intended to be used for influencing soils, plant growth, or crop or plant quality.

(Amended by Stats. 1996, Ch. 361, Sec. 99. Effective January 1, 1997.)

14552.

“Packaged soil amendment” means any substance distributed for the purpose of promoting plant growth or improving the quality of crops by conditioning soils solely through physical means. It includes all of the following:

- (a) Hay.
- (b) Straw.
- (c) Peat moss.
- (d) Leaf mold.
- (e) Sand.
- (f) Wood products.
- (g) Any product or mixture of products intended for use as a potting medium, planting mix, or soilless growing media.
- (h) Manures sold without guarantees for plant nutrients.
- (i) Any other substance or product which is intended for use solely because of its physical properties.

(Repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

REGULATION HISTORY

TYPE OF REGULATION: Sales and Use Tax
REGULATION: 1588
TITLE: *Seeds, Plants and Fertilizer*
PREPARATION: Robert Wilke / Michael Patno
LEGAL CONTACT: Monica Silva / Lawrence Mendel

Request for Board approval and authorization to publish proposed amendments to Regulation 1588 to clarify that carbon dioxide is included in the definition of fertilizer.

HISTORY OF PROPOSED AMENDMENTS:

September 23, 2014: Business Taxes Committee (BTC) Meeting
May 21, 2014: 1st Interested Parties Meeting
April 7, 2014: Topic placed on BTC Calendar

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

450 N STREET

SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT

SEPTEMBER 23, 2014

BUSINESS TAXES COMMITTEE

Reported by: Juli Price Jackson

No. CSR 5214

P R E S E N T

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For the Board
of Equalization:

Michelle Steel
Chair

Jerome Horton
Member

Betty T. Yee
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 Staff:

Susanne Buehler
Chief, Tax Policy
Division
Sales and Use Tax

Lawrence Mendel
Tax Counsel III

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INDEX OF SPEAKERS

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Jeanette Lombardo	6	25
Martin Weijters	7	13

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1 450 N STREET
2 SACRAMENTO, CALIFORNIA
3 SEPTEMBER 23, 2014

4 ----oOo----

5 MR. HORTON: Ms. Richmond, what is our next
6 item?

7 MS. RICHMOND: Our next item is the Business
8 Taxes Committee. Ms. Steel is the Chair of that
9 committee.

10 Ms. Steel.

11 MS.STEEL: I call the Business Taxes
12 Committee meeting to order. There is -- there are
13 three speakers. So, please come up.

14 And we have only one item on the agenda,
15 Regulation 1588, seeds, plants and fertilizer.

16 And Ms. Buehler.

17 MS. BUEHLER: Good morning, I'm Susanne
18 Buehler with the Sales and Use Tax Department. With
19 me today is Lawrence Mendel from our Legal
20 Department.

21 We have one agenda item for your
22 consideration this morning. We request your
23 approval and authorization to publish proposed
24 amendments to Sales and Use Tax Regulation 1588,
25 Seeds, Plants and Fertilizer.

26 Staff's recommended amendments specify
27 that carbon dioxide is included in the definition of
28 fertilizer and clarified that the exemption may

1 apply to sales of fertilizer applied to land or in a
2 foliar application.

3 We do have speakers on this agenda item and
4 we'd be happy to answer any questions you may have
5 after their presentation.

6 MS. STEEL: Sure. Mr. John Gamper.

7 ---o0o---

8 JOHN GAMPER

9 ---o0o---

10 MR. GAMPER: Madam Chair and Members, John
11 Gamper representing the California Farm Bureau
12 Federation.

13 We support the staff recommendation and
14 believe that the treatment of carbon dioxide as a
15 fertilizer is consistent with past Board policy.

16 Part of my career with the Farm Bureau in
17 -- beginning in 1978 -- I was a grad student at
18 UC Davis, studying vegetable crops, plant nutrition
19 and plant physiology. I actually grew tomatoes in
20 Hoagland solution in a greenhouse environment. So,
21 I'm familiar with photosynthesis, which carbon
22 dioxide is obviously a critical component in our
23 atmosphere to create glucose and carbohydrates,
24 which is then consumed either by -- by other animals
25 or humans and converted to energy through the Krebs
26 cycle of respiration.

27 So, in a closed environment with CO₂, with
28 all the nutrition provided in Hoagland's solution in

1 a hydroponic situation, CO2 is a dramatic fertilizer
2 as stimulating plant growth because all the
3 nutrients are in the solution and increasing -- a
4 modest increase in atmospheric CO2 enriched in the
5 environment increases photosynthesis and is far and
6 away more productive than any chemical fertilizer
7 you would ever apply to the soil. We're talking 20
8 to 40 percent increases in yields, which you would
9 never get from adding nitrogen, phosphorus or
10 potassium to soil.

11 So, we're very supportive of this. We
12 think it's consistent and the CO2 is fixed by the
13 plants in the closed environment of the greenhouse.

14 And if it wasn't enriched, the CO2 would
15 actually be consumed by the plants in the greenhouse
16 and without proper ventilation you could actually
17 see a decrease in the yield. So, maintaining a
18 level of CO2 through perforated pipes, foliar
19 application actually stimulates yield and
20 production.

21 Thank you.

22 MS. STEEL: Thank you, Mr. Gamper.

23 Next speaker is Ms. Jeanette Lombardo.

24 ---o0o---

25 JEANETTE LOMBARDO

26 ---o0o---

27 MS. LOMBARDO: Good morning, I'm Jeanette
28 Lombardo with the California Food and Agribusiness

1 Advocates.

2 I'm here as a representative of Houweling's
3 Tomatoes, which is a horticulture house. With me I
4 have their commercial -- Senior Commercial Grower to
5 answer any questions that you might have, technical
6 questions on the production methods they use.

7 MS. STEEL: Thank you very much. Our third
8 speaker is Mr. Martin Weijters.

9 Am I pronouncing it right?

10 MR. WEIJTERS: Correct.

11 MS. STEEL: Okay, good.

12 ---o0o---

13 MARTIN WEIJTERS

14 ---o0o---

15 MR. WEIJTERS: Yes, good morning. My name
16 is Martin Weitjers. I'm the Senior Corporate Grower
17 for Houweling's Tomatoes.

18 And I am here to answer any technical
19 questions.

20 MS. STEEL: Okay, perfect. So, Members,
21 there is any comments?

22 Yes, Mr. Chairman.

23 MR. HORTON: Thank you, Madam Chair.

24 I just wanted to compliment John. I have
25 seen him around for years and years. I just didn't
26 know he was so smart about the use of H2O and all
27 this stuff. It was impressive.

28 That's it.

1 MS. STEEL: Any more comments?

2 You know what, there is no opposition.

3 This is good.

4 Thank you very much.

5 MS BUEHLER: A clarification.

6 MS. STEEL: So, Members, there is a motion?

7 MR. HORTON: So moved.

8 MR. RUNNER: Second.

9 MS. STEEL: Moved by Chairman Horton and
10 seconded by Member Runner and so moved.

11 Thank you very much. And this concludes
12 Business Tax Committee meeting.

13 Thank you.

14 ---o0o---

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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 SEPTEMBER 23, 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 8 constitute
a complete and accurate transcription of the
shorthand writing.

Dated: OCTOBER 6, 2014

JULI PRICE JACKSON
Hearing Reporter

**ESTIMATE OF COST OR SAVINGS RESULTING
FROM PROPOSED REGULATORY ACTION**

Proposed Amendment of Sales and Use Tax Regulation 1588 *Seeds, Plants and Fertilizer*

STATEMENT OF COST OR SAVINGS FOR NOTICE OF PUBLIC HEARING

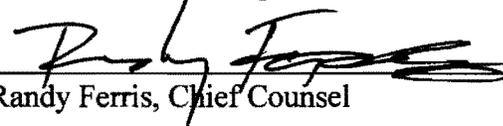
The State Board of Equalization has determined that the proposed action does not impose a mandate on local agencies or school districts. Further, the Board has determined that the action will result in no direct or indirect cost or savings to any State agency, any local agency or school district that 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 10-15-14
Richard Bennion, Regulations Coordinator

Approved by  Date 10/15/14
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

AGENCY 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 1588, Seeds, Plants and Fertilizer			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 e. Imposes reporting requirements
 b. Impacts small businesses f. Imposes prescriptive instead of performance
 c. Impacts jobs or occupations g. Impacts individuals
 d. Impacts California competitiveness 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.*

1. 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)

\$ _____

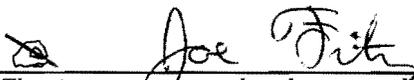
2. Savings in the current State Fiscal Year. (Approximate)

\$ _____

3. No fiscal impact exists. This regulation does not affect any federally funded State agency or program.

4. Other. Explain _____

FISCAL OFFICER SIGNATURE



DATE

October 20, 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

October 20, 2014

once approved 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 1588,
Seeds, Plants and Fertilizer

As explained in more detail in the initial statement of reasons, Revenue and Taxation Code (RTC) section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, California Code of Regulations, title 18, section (Regulation) 1588 defines the term “fertilizer.”

The proposed amendments to Regulation 1588:

- Specify in subdivision (b)(1) that the term fertilizer includes carbon dioxide;
- Provide in subdivision (b)(1) that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food and Agricultural (Food & Ag.) Code section 14513;
- Clarify in subdivision (b) that the exemption may apply to sales of fertilizer applied to land or in foliar application; and
- Update references to “soil amendments” in subdivision (b)(1) so that they refer to “packaged” soil amendments to be consistent with Food & Ag. Code section 14552.

As a result, the proposed amendments are consistent with the State Board of Equalization’s (Board’s) historical treatment of carbon dioxide as fertilizer. The proposed amendments are consistent with the current provisions of Regulation 1588, which provided that the exemption may apply to fertilizer applied to land, including foliar application. And, the proposed amendments update cross-references to make them consistent with the current provisions of Food & Ag. Code section 14552. Therefore, the Board has determined that the proposed amendments are consistent with existing law and that there is nothing in the proposed amendments that would significantly change how individuals and businesses would generally behave in the absence of the proposed amendments. The Board estimates that the proposed amendments will not have a measurable economic impact on the individuals and business. The Board has determined that the proposed amendments to Regulation 1588 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. And, the Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, including manufacturers, Board staff, and the Board by clarifying that the exemption provided by RTC section 6358 applies to carbon dioxide and fertilizer used in hydroponic farming.

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 1588:

- 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, and will result in no cost or savings in federal funding to the State of California;
- Will result in no direct or indirect 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, and will result in no other non-discretionary cost or savings imposed on local agencies; 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.

Finally, Regulation 1588 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 1588 will not affect the benefits of Regulation 1588 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-2014-1020-01	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
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For use by Office of Administrative Law (OAL) only

RECEIVED FOR FILING PUBLICATION DATE OCT 20 '14 OCT 31 '14 Office of Administrative Law	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 Seeds, Plants and Fertilizer	TITLE(S) 18	FIRST SECTION AFFECTED 1588	2. REQUESTED PUBLICATION DATE October 31, 2014
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.**

For use by Office of Administrative Law (OAL) only

SIGNATURE OF AGENCY HEAD OR DESIGNEE	DATE
TYPED NAME AND TITLE OF SIGNATORY	

TITLE 18. BOARD OF EQUALIZATION

The State Board of Equalization Proposes to Adopt Amendments to California Code of Regulations, Title 18, Section 1588, *Seeds, Plants and Fertilizer*

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) 1588, *Seeds, Plants and Fertilizer*. Regulation 1588 implements, interprets, and makes specific RTC section 6358's exemption, as pertinent here, from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. The proposed amendments add language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food and Agricultural (Food & Ag.) Code section 14513. The proposed amendments revise Regulation 1588, subdivision (b)(2) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The proposed amendments to Regulation 1588, subdivision (b)(1) also add the word "packaged" before the references to "soil amendments" to be consistent with Food & Ag. Code section 14552.

PUBLIC HEARING

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on December 17-18, 2014. 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 December 17 or 18, 2014. 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 1588.

AUTHORITY

RTC section 7051

REFERENCE

RTC section 6358

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

RTC section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588 defines the term “fertilizer.”

The current provisions of Regulation 1588, subdivision (b)(1) define the term “fertilizer” to include manure, commercial fertilizers, as defined in Food & Ag. Code section 14522, and agricultural minerals, as defined in Food & Agr. Code section 14512. Specifically excluded from the definition of fertilizer in Regulation 1588 are soil amendments, as defined in Food & Ag. Code section 14552, and auxiliary soil and plant substances, as defined in Food & Ag. Code section 14513.

In addition, the current provisions of Regulation 1588, subdivision (b)(2) specifically provide that, as a result of the exemption provided by RTC section 6358, subdivision (d), “[t]ax does not apply to sales of fertilizer to be applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.” Also, the last sentence in Regulation 1588, subdivision (b) provides that, “[w]hen insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.”

Leaves are able to absorb fertilizer through the pores on their surface. Fertilizer is applied in a foliar application when it is applied directly to leaves (or foliage). Regulation 1588, subdivision (b) has provided that the exemption provided by RTC section 6358, subdivision (d) applies to fertilizer applied in “foliar application” since 1970.

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1588

Need for Clarification

The Board’s Legal Department has previously determined, as early as 1960, that carbon dioxide is a fertilizer when applied to land in farming. This determination is found in Sales and Use Tax Annotation 510.0580:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer." 5/6/60.

The May 6, 1960, legal ruling, which is summarized in the annotation, explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems, and used to assist in the neutralization of alkaline soils. It also explains that, at the time the legal ruling was written, the Department of Agriculture already considered carbon dioxide sold for such a purpose to be an "agricultural mineral," which is included in the definition of fertilizer for sales and use tax purposes. (Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached in selected legal rulings. See, Reg. 5700, *Annotations.*)

More recently, a question has arisen as to whether carbon dioxide should be classified as fertilizer, when used by a hydroponic farmer. (Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.) In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (through foliar application) in order to support the life of the plant. Board staff questioned whether carbon dioxide used in hydroponic farming should still be classified as an agricultural mineral, which is included in the definition of fertilizer in Regulation 1588, or whether such use makes the carbon dioxide an auxiliary soil and plant substance, which is specifically not a fertilizer under Regulation 1588. Board staff concluded that carbon dioxide used in hydroponic farming is a fertilizer because the Board had previously concluded that carbon dioxide is a fertilizer when used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant's growth, and Regulation 1588 provides for fertilizer to be applied through foliar application. Board staff also concluded that it would be helpful to amend Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and specify that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes.

Interested Parties Process

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September 23, 2014, Business Taxes Committee Meeting

Subsequently, staff prepared Formal Issue Paper 14-005 and distributed it to the Board Members for consideration at the Board's September 23, 2014, Business Taxes Committee meeting. Formal Issue Paper 14-005 recommended that the Board propose to add language to Regulation 1588, subdivision (b)(1) to specify that the term fertilizer includes carbon dioxide and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The formal issue paper also recommended that the Board propose to revise Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The issue paper also recommended that the Board propose to update the references to "soil amendments" in Regulation 1588, subdivision (b)(1) so that they refer to "packaged" soil amendments to be consistent with Food & Ag. Code section 14552.

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The Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, Board staff, and the Board by clarifying that RTC section 1588 applies to carbon dioxide and fertilizer used in hydroponic farming.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1588 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 1588 is the only state regulation implementing, interpreting, and making specific the exemption provided by RTC section 6358, subdivision (d). In addition, the Board has determined that there are no

comparable federal regulations or statutes to Regulation 1588 or the proposed amendments to Regulation 1588.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1588 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.

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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 1588 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 1588 may affect small business.

NO KNOWN 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 1588 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 1588 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 1588 will not affect the benefits of Regulation 1588 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 1588 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 Monica Gonzalez Silva, Tax Counsel III, by telephone at (916) 323-3138, by e-mail at Monica.silva@boe.ca.gov, or by mail at State Board of Equalization, Attn: Monica Gonzalez Silva, 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 9:30 a.m. on December 17, 2014, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1588 during the December 17-18, 2014, 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, or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1588. 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 1588 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 1588, 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 1588 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 1588, 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, October 31, 2014 8:20 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; Eaton, Janet; Elliott, Claudia; Epolite, Anthony (Legal); Ferris, Randy (Legal); Ford, Ladeena L; Garcia, Laura; Gau, David; Gilman, Todd; Hamilton, Tabitha; Hanohano, Rebecca; Harvill, Mai; He, Mengjun; Heller, Bradley (Legal); Hellmuth, Leila; Herrera, Cristina; Holmes, Dana; Hughes, Shellie L; Jacobson, Andrew; Kinkle, Sherrie L; Kinst, Lynne; Kruckenberg, Kendra; Kuhl, James; Lambert, Gary; Lambert, Robert (Legal); Lee, Chris; Levine, David H. (Legal); LoFaso, Alan; Madrigal, Claudia; Mandel, Marcy Jo; Matsumoto, Sid; McGuire, Jeff; Melendez-Collier, Alisa; Miller, Brad; Mandel, Marcy Jo @ SCO; Moon, Richard (Legal); Morquecho, Raymond; Nienow, Trecia (Legal); Oakes, Clifford; Pielsticker, Michele; Ralston, Natasha; Richmond, Joann; Riley, Denise (Legal); Salazar, Ramon; Salgado-Ponce, Sylvia; 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; Williams, Lee; Zivkovich, Robert
Subject: State Board of Equalization - Announcement of Regulatory Change 1588

The State Board of Equalization proposes to adopt amendments to Sales and Use Tax Regulation 1588, *Seeds, Plants and Fertilizer*, to specifically include carbon dioxide in the definition of fertilizer. A public hearing regarding the proposed amendments will be held in Room 121, 450 N Street, Sacramento, at 9:30 a.m., or as soon thereafter as the matter may be heard, on December 17 or 18, 2014.

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_1588_2014.htm.

Questions regarding the substance of the proposed amendments should be directed to Ms. Monica Silva, Tax Counsel III, at 450 N Street, MIC:82, Sacramento, CA 94279-0082, email Monica.Silva@boe.ca.gov, telephone (916) 323-3138, 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, October 31, 2014 8:43 AM
To: BOE_REGULATIONS@LISTSERV.STATE.CA.GOV
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come part of the public record and can be released to the public upon request.

ARB requests that written and email statements on this item be filed at least 10 days prior to the hearing so that ARB staff and Board members have additional time to consider each comment. The Board encourages members of the public to bring to the attention of staff in advance of the hearing any suggestions for modification of the proposed regulatory action.

Additionally, the Board requests but does not require that persons who submit written comments to the Board reference the title of the proposal in their comments to facilitate review.

AUTHORITY AND REFERENCE

This regulatory action is proposed under the authority granted in Health and Safety Code, sections 38510, 38560, 38562, 38570, 38571, 38580, 39600, 39601, and section 16428.8 of the Government Code. This action is proposed to implement, interpret, and make specific sections 38530, 38560.5, 38564, 38565, 38570 and 39600 of the Health and Safety Code.

HEARING PROCEDURES

The public hearing will be conducted in accordance with the California Administrative Procedure Act, Government Code, title 2, division 3, part 1, chapter 3.5 (commencing with section 11340).

Following the public hearing, the Board may adopt the regulatory language as originally proposed, or with non-substantial or grammatical modifications. The Board may also adopt the proposed regulatory language with other modifications if the text as modified is sufficiently related to the originally proposed text that the public was adequately placed on notice and that the regulatory language as modified could result from the proposed regulatory action; in such event, the full regulatory text, with the modifications clearly indicated, will be made available to the public, for written comment, at least 15-days before it is adopted.

The public may request a copy of the modified regulatory text from ARB's Public Information Office, Air Resources Board, 1001 I Street, Visitors and Environmental Services Center, First Floor, Sacramento, California, 95814, (916) 322-2990.

SPECIAL ACCOMMODATION REQUEST

Consistent with California Government Code Section 7296.2, special accommodation or language needs can be provided for any of the following:

- An interpreter to be available at the hearing;

- Documents made available in an alternate format or another language; or
- A disability-related reasonable accommodation.

To request these special accommodations or language needs, please contact the Clerk of the Board at (916) 322-5594 or by facsimile at (916) 322-3928 as soon as possible, but no later than 10 business days before the scheduled Board hearing. TTY/TDD/Speech to Speech users may dial 711 for the California Relay Service.

Consecuente con la sección 7296.2 del Código de Gobierno de California, una acomodación especial o necesidades lingüísticas pueden ser suministradas para cualquiera de los siguientes:

- Un intérprete que esté disponible en la audiencia
- Documentos disponibles en un formato alternativo u otro idioma
- Una acomodación razonable relacionados con una incapacidad

Para solicitar estas comodidades especiales o necesidades de otro idioma, por favor llame a la oficina del Consejo al (916) 322-5594 o envíe un fax a (916) 322-3928 lo más pronto posible, pero no menos de 10 días de trabajo antes del día programado para la audiencia del Consejo. TTY/TDD/Personas que necesiten este servicio pueden marcar el 711 para el Servicio de Re-transmisión de Mensajes de California.

TITLE 18. BOARD OF EQUALIZATION

The State Board of Equalization Proposes to Adopt

Amendments to California Code of Regulations, Title 18, Section 1588, *Seeds, Plants and Fertilizer*

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) 1588, *Seeds, Plants and Fertilizer*. Regulation 1588 implements, interprets, and makes specific RTC section 6358's exemption, as pertinent here, from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. The proposed amendments add language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food and Agricultural (Food & Ag.) Code section 14513. The proposed amendments revise Regulation 1588, subdivi-

sion (b)(2) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The proposed amendments to Regulation 1588, subdivision (b)(1) also add the word "packaged" before the references to "soil amendments" to be consistent with Food & Ag. Code section 14552.

PUBLIC HEARING

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on December 17–18, 2014. 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 December 17 or 18, 2014. 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 1588.

AUTHORITY

RTC section 7051.

REFERENCE

RTC section 6358.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

RTC section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588 defines the term "fertilizer."

The current provisions of Regulation 1588, subdivision (b)(1) define the term "fertilizer" to include manure, commercial fertilizers, as defined in Food & Ag. Code section 14522, and agricultural minerals, as defined in Food & Agr. Code section 14512. Specifically excluded from the definition of fertilizer in Regulation 1588 are soil amendments, as defined in Food & Ag.

Code section 14552, and auxiliary soil and plant substances, as defined in Food & Ag. Code section 14513.

In addition, the current provisions of Regulation 1588, subdivision (b)(2) specifically provide that, as a result of the exemption provided by RTC section 6358, subdivision (d), "[t]ax does not apply to sales of fertilizer to be applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business." Also, the last sentence in Regulation 1588, subdivision (b) provides that, "[w]hen insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business."

Leaves are able to absorb fertilizer through the pores on their surface. Fertilizer is applied in a foliar application when it is applied directly to leaves (or foliage). Regulation 1588, subdivision (b) has provided that the exemption provided by RTC section 6358, subdivision (d) applies to fertilizer applied in "foliar application" since 1970.

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1588

Need for Clarification

The Board's Legal Department has previously determined, as early as 1960, that carbon dioxide is a fertilizer when applied to land in farming. This determination is found in Sales and Use Tax Annotation 510.0580:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer." 5/6/60.

The May 6, 1960, legal ruling, which is summarized in the annotation, explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems, and used to assist in the neutralization of alkaline soils. It also explains that, at the time the legal ruling was written, the Department of Agriculture already considered carbon dioxide sold for such a purpose to be an "agricultural mineral," which is included in the definition of fertilizer for sales and use tax purposes. (Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached in selected legal rulings. See, Reg. 5700, *Annotations.*)

More recently, a question has arisen as to whether carbon dioxide should be classified as fertilizer, when used by a hydroponic farmer. (Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.) In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (through foliar application) in order to support the life of the plant. Board staff questioned whether carbon dioxide used in hydroponic farming should still be classified as an agricultural mineral, which is included in the definition of fertilizer in Regulation 1588, or whether such use makes the carbon dioxide an auxiliary soil and plant substance, which is specifically not a fertilizer under Regulation 1588. Board staff concluded that carbon dioxide used in hydroponic farming is a fertilizer because the Board had previously concluded that carbon dioxide is a fertilizer when used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant's growth, and Regulation 1588 provides for fertilizer to be applied through foliar application. Board staff also concluded that it would be helpful to amend Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and specify that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes.

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sion (d). In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1588 or the proposed amendments to Regulation 1588.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1588 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 STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1588 will result in no direct or indirect cost or savings to any state agency and will result in no cost or savings in federal funding to the State of California. The Board has also determined that the adoption of the proposed amendments to Regulation 1588 result in no direct or indirect 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, and will result in no other non-discretionary cost or savings imposed on local agencies.

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 1588 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 1588 may affect small business.

NO KNOWN COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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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 1588 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 1588 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 1588 will not affect the benefits of Regulation 1588 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 1588 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 Monica Gonzalez Silva, Tax Counsel III, by telephone at (916) 323-3138, by e-mail at Monica.silva@boe.ca.gov, or by mail at State Board of Equalization, Attn: Monica Gonzalez Silva, 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 9:30 a.m. on December 17, 2014, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1588 during the December 17-18, 2014, 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, or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1588. 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 1588 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 1588, 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 1588 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 1588, 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 22. DEPARTMENT OF HEALTH CARE SERVICES

SUBJECT: Portable Imaging Services, DHCS-14-011

NOTICE IS HEREBY GIVEN that the Department of Health Care Services (Department) proposes to adopt Sections 51193.1 and 51193.3 and amend Sections 51051, 51113, 51311, 51511.6 and 51531, Title 22, Division 3, Chapter 3 of the California Code of Regulations (CCR), after considering all public comments, objections, and recommendations.

WRITTEN COMMENT PERIOD

Any interested person or his or her duly authorized representative may submit written comments to the Department relevant to the regulatory action described in this notice.

Please label any comments as pertaining to Portable Imaging Services, DHCS-14-011 and submit using any of the following methods:

Mail Delivery: Department of Health Care Services
Office of Regulations, MS 0015
P.O. Box 997413
Sacramento, CA 95899-7413



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

50 N STREET, SACRAMENTO, CALIFORNIA
O BOX 942879, SACRAMENTO, CALIFORNIA 94278-80
916-445-2130 • FAX 916-324-3884
www.boe.ca.gov

BETTY T. YEE
First District, San Francisco

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

MICHELLE STEEL
Third District, Rolling Hills Estates

JEROME E. HORTON
Fourth District, Los Angeles

JOHN CHIANG
State Controller

CYNTHIA BRIDGES
Executive Director

February 7, 2014

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 1588, *Seeds, Plants and Fertilizer***

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) 1588, *Seeds, Plants and Fertilizer*. Regulation 1588 implements, interprets, and makes specific RTC section 6358's exemption, as pertinent here, from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. The proposed amendments add language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food and Agricultural (Food & Ag.) Code section 14513. The proposed amendments revise Regulation 1588, subdivision (b)(2) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The proposed amendments to Regulation 1588, subdivision (b)(1) also add the word "packaged" before the references to "soil amendments" to be consistent with Food & Ag. Code section 14552.

PUBLIC HEARING

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on December 17-18, 2014. 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 December 17 or 18, 2014. 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 1588.

AUTHORITY

RTC section 7051

REFERENCE

RTC section 6358

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

RTC section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588 defines the term “fertilizer.”

The current provisions of Regulation 1588, subdivision (b)(1) define the term “fertilizer” to include manure, commercial fertilizers, as defined in Food & Ag. Code section 14522, and agricultural minerals, as defined in Food & Ag. Code section 14512. Specifically excluded from the definition of fertilizer in Regulation 1588 are soil amendments, as defined in Food & Ag. Code section 14552, and auxiliary soil and plant substances, as defined in Food & Ag. Code section 14513.

In addition, the current provisions of Regulation 1588, subdivision (b)(2) specifically provide that, as a result of the exemption provided by RTC section 6358, subdivision (d), “[t]ax does not apply to sales of fertilizer to be applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.” Also, the last sentence in Regulation 1588, subdivision (b) provides that, “[w]hen insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.”

Leaves are able to absorb fertilizer through the pores on their surface. Fertilizer is applied in a foliar application when it is applied directly to leaves (or foliage). Regulation 1588, subdivision (b) has provided that the exemption provided by RTC section 6358, subdivision (d) applies to fertilizer applied in “foliar application” since 1970.

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1588

Need for Clarification

The Board’s Legal Department has previously determined, as early as 1960, that carbon dioxide is a fertilizer when applied to land in farming. This determination is found in Sales and Use Tax Annotation 510.0580:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer."
5/6/60.

The May 6, 1960, legal ruling, which is summarized in the annotation, explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems, and used to assist in the neutralization of alkaline soils. It also explains that, at the time the legal ruling was written, the Department of Agriculture already considered carbon dioxide sold for such a purpose to be an “agricultural mineral,” which is included in the definition of fertilizer for sales and use tax purposes. (Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached in selected legal rulings. See, Reg. 5700, *Annotations*.)

More recently, a question has arisen as to whether carbon dioxide should be classified as fertilizer, when used by a hydroponic farmer. (Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.) In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (through foliar application) in order to support the life of the plant. Board staff questioned whether carbon dioxide used in hydroponic farming should still be classified as an agricultural mineral, which is included in the definition of fertilizer in Regulation 1588, or whether such use makes the carbon dioxide an auxiliary soil and plant substance, which is specifically not a fertilizer under Regulation 1588. Board staff concluded that carbon dioxide used in hydroponic farming is a fertilizer because the Board had previously concluded that carbon dioxide is a fertilizer when used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant’s growth, and Regulation 1588 provides for fertilizer to be applied through foliar application. Board staff also concluded that it would be helpful to amend Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and specify that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes.

Interested Parties Process

Business Taxes Committee staff drafted amendments to Regulation 1588, subdivision (b) to clarify the treatment of carbon dioxide and fertilizer used in hydroponic farming. The draft amendments suggested adding language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The draft amendments suggested revising Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The draft amendments to Regulation 1588, subdivision (b)(1) also add the word “packaged” before the references to “soil amendments” to be consistent with Food & Ag. Code section 14552.

Business Taxes Committee staff subsequently provided its draft amendments to Regulation 1588 to the interested parties and conducted an interested party meeting on May 21, 2014, to discuss the draft amendments. No formal comments were submitted, however, staff worked with interested parties’ suggestions to refine the draft amendments. No further comments or concerns were expressed by interested parties.

September 23, 2014, Business Taxes Committee Meeting

Subsequently, staff prepared Formal Issue Paper 14-005 and distributed it to the Board Members for consideration at the Board’s September 23, 2014, Business Taxes Committee meeting. Formal Issue Paper 14-005 recommended that the Board propose to add language to Regulation 1588, subdivision (b)(1) to specify that the term fertilizer includes carbon dioxide and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The formal issue paper also recommended that the Board propose to revise Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The issue paper also recommended that the Board propose to update the references to “soil amendments” in Regulation 1588, subdivision (b)(1) so that they refer to “packaged” soil amendments to be consistent with Food & Ag. Code section 14552.

Mr. John Gamper, from the California Farm Bureau Federation, appeared during the September 23, 2014, Business Taxes Committee meeting and expressed support for the proposed amendments. Ms. Jeanette Lombardo, from California Food and Agribusiness Advocates, representing Houweling’s Tomatoes, appeared along with Mr. Martin Weijters, Senior Corporate Grower, Houweling’s Tomatoes, and stated that they were available to answer any question the Members may have.

At the conclusion of the Board’s discussion of Formal Issue Paper 14-005 during the September 23, 2014, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1588 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1588 are reasonably necessary to have

the effect and accomplish the objective of addressing the issue regarding carbon dioxide used in hydroponic farming (discussed above).

The Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, Board staff, and the Board by clarifying that RTC section 1588 applies to carbon dioxide and fertilizer used in hydroponic farming.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1588 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 1588 is the only state regulation implementing, interpreting, and making specific the exemption provided by RTC section 6358, subdivision (d). In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1588 or the proposed amendments to Regulation 1588.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1588 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 STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1588 will result in no direct or indirect cost or savings to any state agency and will result in no cost or savings in federal funding to the State of California. The Board has also determined that the adoption of the proposed amendments to Regulation 1588 result in no direct or indirect 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, and will result in no other non-discretionary cost or savings imposed on local agencies.

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 1588 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 1588 may affect small business.

NO KNOWN 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 1588 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 1588 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 1588 will not affect the benefits of Regulation 1588 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 1588 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 Monica Gonzalez Silva, Tax Counsel III, by telephone at (916) 323-3138, by e-mail at Monica.silva@boe.ca.gov, or by mail at State Board of Equalization, Attn: Monica Gonzalez Silva, 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 9:30 a.m. on December 17, 2014, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1588 during the December 17-18, 2014, 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, or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1588. 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 1588 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 1588, 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.

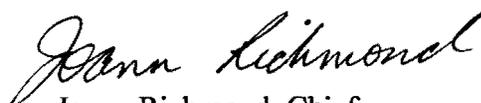
SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1588 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 1588, 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 December 18, 2014 Board Meeting
Joann Richmond
Joann Richmond, Chief
Board Proceedings Division

**Initial Statement of Reasons for
Proposed Amendments to California Code of Regulations,
Title 18, Section 1588, *Seeds, Plants and Fertilizer***

**SPECIFIC PURPOSE, PROBLEM INTENDED TO BE ADDRESSED, NECESSITY, AND
ANTICIPATED BENEFIT**

Current Law

Revenue and Taxation Code (RTC) section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, subdivision (b) of California Code of Regulations, title 18, section (Regulation) 1588, *Seeds, Plants and Fertilizer*, defines the term “fertilizer.”

The current provisions of Regulation 1588, subdivision (b)(1) define the term “fertilizer” to include manure, commercial fertilizers, as defined in Food and Agricultural (Food & Ag.) Code section 14522, and agricultural minerals, as defined in Food & Ag. Code section 14512. Specifically excluded from the definition of fertilizer in Regulation 1588, subdivision (b)(1) are soil amendments, as defined in Food & Ag. Code section 14552, and auxiliary soil and plant substances, as defined in Food & Ag. Code section 14513.

In addition, the current provisions of Regulation 1588, subdivision (b)(2) specifically provide that, as a result of the exemption provided by RTC section 6358, subdivision (d), “[t]ax does not apply to sales of fertilizer to be applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.” Also, the last sentence in Regulation 1588, subdivision (b) provides that, “[w]hen insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.”¹ Regulation 1588, subdivision (b) has provided that the exemption provided by RTC section 6358, subdivision (d) applies to fertilizer applied in “foliar application” since 1970.

The provisions of RTC section 6358, subdivision (d) and Regulation 1588, subdivision (b) are based on the premise that fertilizer is applied to land for the purpose of furnishing elements to be absorbed by the plant. Those elements enter into the food supply of the plants themselves and become a part of the product grown. If that product is sold, the fertilizer is not taxable as it is

¹ Leaves are able to absorb fertilizer through the pores on their surface. Fertilizer is applied in a foliar application when it is applied directly to leaves (or foliage).

regarded as a sale for resale. The same reasoning applies to products grown for human consumption and to products used as feed for animal life that are food for human consumption. The absorption of the fertilizer by into the food supply of the plants themselves is different than the function of soil amendments or auxiliary soil and plant substances, which do not, in any material quantity, enter into the food supply of the plants themselves, and are not included in the definition of fertilizer.

Proposed Amendments

Need for Clarification

The State Board of Equalization's (Board's) Legal Department has previously determined, as early as 1960, that carbon dioxide is a fertilizer when applied to land in farming. This determination is found in Sales and Use Tax Annotation² 510.0580, which provides as follows:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer."
5/6/60.

The May 6, 1960, legal ruling of counsel, which is summarized in the annotation, explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems, and used to assist in the neutralization of alkaline soils. It also explains that, at the time the legal ruling was written, the Department of Agriculture already considered carbon dioxide sold for such a purpose to be an "agricultural mineral," which is included in the definition of fertilizer for sales and use tax purposes.

More recently, a question (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) has arisen as to whether carbon dioxide should be classified as fertilizer, when used by a hydroponic³ farmer. In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (through foliar application) in order to support the life of the plant. Board staff questioned whether carbon dioxide used in hydroponic farming should still be considered an agricultural mineral, which is included in the definition of fertilizer in Regulation 1588, or whether such use makes the carbon dioxide an auxiliary soil and plant substance, which is specifically not a fertilizer under Regulation 1588. Board staff concluded that carbon dioxide used in hydroponic farming is a fertilizer because the Board had previously concluded that carbon dioxide is a fertilizer when used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant's growth, and Regulation 1588 provides for fertilizer to be applied through foliar application. Board staff also concluded that it would be helpful to amend

² Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached in selected legal rulings by staff counsel, as applied to specific factual situations. Annotations do not embellish or interpret the legal rulings of counsel which they summarize and do not have the force and effect of law. (See, Reg. 5700, *Annotations*.)

³ Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.

Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and specify that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes.

Interested Parties Process

Business Taxes Committee staff drafted amendments to Regulation 1588, subdivision (b), to clarify the treatment of carbon dioxide and fertilizer used in hydroponic farming. The draft amendments suggested adding language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The draft amendments suggested revising Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The draft amendments to Regulation 1588, subdivision (b)(1) also suggested adding the word “packaged” before the references to “soil amendments” to be consistent with Food & Ag. Code section 14552.

Business Taxes Committee staff subsequently provided its draft amendments to Regulation 1588 to the interested parties and conducted an interested party meeting on May 21, 2014, to discuss the draft amendments. No formal comments were submitted, however, staff worked with interested parties’ suggestions to refine the draft amendments. No further comments or concerns were expressed by interested parties.

September 23, 2014, Business Taxes Committee Meeting

Subsequently, staff prepared Formal Issue Paper 14-005 and distributed it to the Board Members for consideration at the Board’s September 23, 2014, Business Taxes Committee meeting. Formal Issue Paper 14-005 recommended that the Board propose to add language to Regulation 1588, subdivision (b)(1) to specify that the term fertilizer includes carbon dioxide and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The formal issue paper also recommended that the Board propose to revise Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The issue paper also recommended that the Board update the references to “soil amendments” in Regulation 1588, subdivision (b)(1) so that they refer to “packaged” soil amendments to be consistent with Food & Ag. Code section 14552.

In addition, the issue paper recommended that the Board propose to make minor grammatical and formatting changes to the second, fourth, and fifth sentences in Regulation 1588, subdivision (b)(1). The issue paper recommended changing “Sections” and “Section” to “sections” and “section,” respectively, changing “exception” to “exceptions,” and inserting the word “the.”

Mr. John Gamper, from the California Farm Bureau Federation, appeared during the September 23, 2014, Business Taxes Committee meeting and expressed support for the proposed amendments. Ms. Jeanette Lombardo, from California Food and Agribusiness Advocates, representing Houweling’s Tomatoes, appeared along with Mr. Martin Weijters, Senior Corporate Grower, Houweling’s Tomatoes, and stated that they were available to answer any question the Members may have.

At the conclusion of the Board's discussion of Formal Issue Paper 14-005 during the September 23, 2014, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1588 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1588 are reasonably necessary for the specific purpose of addressing the issue (or problem) presented by the recent question regarding carbon dioxide used in hydroponic farming (discussed above).

The Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, Board staff, and the Board by clarifying that the exemption provided by RTC section 6358 applies to carbon dioxide and fertilizer used in hydroponic farming.

The adoption of the proposed amendments to Regulation 1588 is not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to Regulation 1588 or the proposed amendments to Regulation 1588.

DOCUMENTS RELIED UPON

The Board relied upon Formal Issue Paper 14-005, the exhibits to the issue paper, and the comments made during the Board's discussion of the issue paper during its September 23, 2014, Business Taxes Committee meeting in deciding to propose the amendments to Regulation 1588 described above.

ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1588 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 amendments to Regulation 1588 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 1588 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)(1)

As previously explained, RTC section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or

are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588 defines the term “fertilizer.”

As previously explained, the proposed amendments to Regulation 1588:

- Specify in subdivision (b)(1) that the term fertilizer includes carbon dioxide;
- Provide in subdivision (b)(1) that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513;
- Clarify in subdivision (b) that the exemption may apply to sales of fertilizer applied to land or in foliar application; and
- Update the references to “soil amendments” in subdivision (b)(1) to refer to “packaged” soil amendments.

As a result, the proposed amendments are consistent with the Board’s historical treatment of carbon dioxide as fertilizer. The proposed amendments are consistent with the current provisions of Regulation 1588, which provided that the exemption may apply to fertilizer applied to land, including foliar application. And, the proposed amendments update cross-references to make them consistent with the current provisions of Food & Ag. Code section 14552. Therefore, there is nothing in the proposed amendments that would significantly change how individuals and businesses would generally behave in the absence of the proposed amendments. The Board estimates that the proposed amendments will not have a measurable economic impact on individuals and business. The Board has determined that the proposed amendments to Regulation 1588 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. And, the Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, including manufacturers, Board staff, and the Board by clarifying that the exemption provided by RTC section 6358 applies to carbon dioxide and fertilizer used in hydroponic farming.

In addition, based on these facts and all of the information in the rulemaking file, the Board has determined that the adoption of the proposed amendments to Regulation 1588 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 1588 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 1588 will not affect the benefits of Regulation 1588 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 1588 will not have a significant adverse economic impact on business.

The proposed amendments to Regulation 1588 may affect small businesses.

**Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1588**

1588. Seeds, Plants and Fertilizer.

(a) Seeds and Plants. Tax does not apply to sales of seeds, annual plants, and operative January 1, 1999, non-annual plants, the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business including fruit trees, berry vines, and grape rootlings or rootstock, or cuttings of every variety. Tax does not apply to sales of seed, the products of which will be used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business.

(b) Fertilizer.

(1) Definition. The term "fertilizer" includes commercial fertilizers, agricultural minerals, ~~and manure, and carbon dioxide~~. The terms "commercial fertilizers" and "agricultural minerals" as used herein are defined in Sections 14522 (commercial fertilizer) and 14512 (agricultural minerals) of the Food and Agricultural Code. "Manure" means the excreta of any domestic animal or domestic fowl which is not artificially mixed with any material except a material which has been used for bedding, sanitary, or feeding purposes for such an animal or fowl or for the preservation of the manure. The term "fertilizer" does not include "packaged soil amendments" or "auxiliary soil and plant substances" as these terms are defined (with the exceptions noted below) in Sections 14552 (packaged soil amendments) and 14513 (auxiliary soil and plant substances) of the Food and Agricultural Code. For the purposes of this regulation, "manures sold without guarantees for plant nutrients" as described in Section 14552 of the Food and Agricultural Code are not packaged soil amendments and carbon dioxide is not an auxiliary soil and plant substance as that term is defined in section 14513 of the Food and Agricultural Code.

(2) Application of Tax. Tax does not apply to sales of fertilizer to be applied to land or (~~including in~~ foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

When insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land or(~~including in~~ foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6358, Revenue and Taxation Code.

Regulation History

Type of Regulation: Sales and Use Tax

Regulation: 1588

Title: *Seeds, Plants and Fertilizer*

Preparation: Monica Silva

Legal Contact: Monica Silva

The State Board of Equalization proposes to adopt amendments to Sales and Use Tax Regulation 1588, *Seeds, Plants and Fertilizer*, to specifically include carbon dioxide in the definition of fertilizer

History of Proposed Regulation:

December 17-18, 2014	Public Hearing
October 31, 2014	OAL publication date; 45-day public comment period begins; Interested Parties mailing
October 20, 2014	Notice to OAL
September 23, 2014	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA

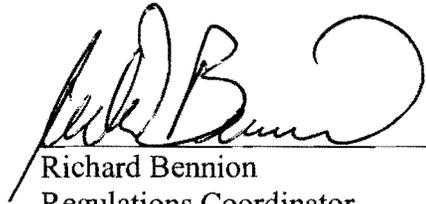
Support: NA

Oppose: NA

Statement of Compliance

The State Board of Equalization, in process of adopting Sales and Use Taxes Regulation 1588, *Seeds, Plants and Fertilizer*, did comply with the provision of Government Code section 11346.4(a)(1) through (4). A notice to interested parties was mailed on October 31, 2014, 48 days prior to the public hearing.

December 17, 2014



Richard Bennion
Regulations Coordinator
State Board of Equalization

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION
450 N STREET
SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT
DECEMBER 18, 2014

F PUBLIC HEARINGS
F4 PROPOSED AMENDMENTS TO SALES AND USE TAX
REGULATION 1588, SEEDS, PLANTS AND FERTILIZER

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

Michelle Steel
Vice-Chairwoman

Betty T. Yee
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 Staff:

Monica Silva
Tax Counsel III
Legal Department

Bradley Heller
Tax Counsel IV
Legal Department

---oOo---

Speaker:

John Gamper
California Farm Bureau
Federation

---oOo---

1 450 N STREET
2 SACRAMENTO, CALIFORNIA
3 DECEMBER 18, 2014

4 ---oOo---

5 MR. HORTON: Ms. Richmond, our next
6 matter.

7 MS. RICHMOND: Our next item is F4,
8 Proposed Amendments to Sales and Use Tax Regulation
9 1588, Seeds, Plants and Fertilizer.

10 And we do have a speaker for this item.

11 MR. HORTON: Greetings.

12 MS. SILVA: Good afternoon, Chairman,
13 Members of the Board. Monica Silva and Brad Heller
14 from the Legal Department.

15 We request that the Board vote to adopt the
16 proposed amendments to Regulation 1588. The
17 proposed amendments add clarifying language to
18 include carbon dioxide in the definition of
19 fertilizer and emphasize that fertilizer can be
20 applied in a foliar application.

21 Other than the persons here today to make
22 comment, no public comments have been received
23 regarding the proposed amendments.

24 MR. HORTON: Thank you.

25 Mr. Gamper. Welcome to the Board of
26 Equalization, sir.

27 Mr. Gamper represents the Director of
28 Taxation and Land Use for the California Farm Bureau

1 Federation.

2 Welcome, sir.

3 ---oOo---

4 JOHN GAMPER

5 ---oOo---

6 MR. GAMPER: Chairman Horton and Members,
7 John Gamper with the California Farm Bureau
8 Federation.

9 I'm here today just to answer any questions
10 you may have. And since I have this opportunity
11 before you, also to say goodbye to Mary Jo
12 (verbatim), and to Betty who's moving a chair over,
13 and to Member Yee -- I mean Member Steel who is also
14 leaving the Board.

15 So I wanted to thank you all for your
16 service and, uh -- and since I have this
17 opportunity, thank you, thank you, thank you.

18 MR. HORTON: Thank you as well for your --
19 your assistance in all -- and the information and
20 data that was provided by the California Farm Bureau
21 as we went through this process.

22 I am constantly impressed with your
23 background.

24 MR. RUNNER: Move adoption of the staff
25 recommendation.

26 MR. HORTON: Member Runner moves
27 adoption.

28 MS. YEE: Second.

1 MR. HORTON: Second by Member Yee.

2 Without objection, Members, such will be
3 the order.

4 Thank you again.

5 ---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 December 18, 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 5 constitute a complete and accurate transcription of the shorthand writing.

Dated: January 5, 2015

Kathleen Skidgel

KATHLEEN SKIDGEL, CSR #9039

Hearing Reporter



2014 MINUTES OF THE STATE BOARD OF EQUALIZATION

Thursday, December 18, 2014

F3 Proposed re-Adoption of Property Tax Rule 474, *Petroleum Refining Properties*

Bradley Heller, Tax Counsel, Tax and Fee Programs Division, Legal Department, made introductory remarks regarding the re-adoption of Rule 474 to establish a rebuttable presumption that petroleum refining property (land, improvements, and fixtures) constitutes a single appraisal unit for determining declines in value (Exhibit 12.4).

Speakers: Albert Ramseyer, Deputy County Counsel, Los Angeles County Assessor's Office
Craig A. Becker, Attorney, Pillsbury Winthrop Shaw Pittman, LLP, representing Western States Petroleum Association (WSPA)
Walt Turville, Senior Property Tax Representative, Chevron
Donald L. Flessner, Executive Vice-President, Baker & O'Brien, Inc., representing Contra Costa County
Rebecca Hooley, Deputy County Counsel, Contra Costa County
Peter Yu, Principal Appraiser, Business Division, Contra Costa County Assessor's Office

Action: Upon motion of Ms. Yee, seconded by Ms. Mandel and duly carried, Mr. Horton, Ms. Yee and Ms. Mandel voting yes, Ms. Steel and Mr. Runner voting no, the Board re-adopted Property Tax Rule 474 as recommended by staff.

F4 Proposed Amendments to Sales and Use Tax Regulation 1588, *Seeds, Plants and Fertilizer*

Monica Silva, Tax Counsel, Tax and Fee Programs Division, Legal Department, made introductory remarks regarding the adoption of proposed amendments to specifically include carbon dioxide in the definition of fertilizer (Exhibit 12.5).

Speaker: John Gamper, California Farm Bureau Federation

Action: Upon motion of Mr. Runner, seconded by Ms. Yee and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board adopted the amendments to Regulation 1588 as published.

ADMINISTRATIVE SESSION

[N] ADMINISTRATIVE MATTERS, CONSENT

With respect to the Administrative Matters, Consent Agenda, upon a single motion of Ms. Steel, seconded by Ms. Yee and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board made the following orders:



STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-80
916-445-2130 • FAX 916-324-3984
www.boe.ca.gov

BETTY T. YEE
First District, San Francisco

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

MICHELLE STEEL
Third District, Rolling Hills Estates

JEROME E. HORTON
Fourth District, Los Angeles

JOHN CHIANG
State Controller

CYNTHIA BRIDGES
Executive Director

February 7, 2014

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 1588, *Seeds, Plants and Fertilizer*

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) 1588, *Seeds, Plants and Fertilizer*. Regulation 1588 implements, interprets, and makes specific RTC section 6358's exemption, as pertinent here, from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. The proposed amendments add language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food and Agricultural (Food & Ag.) Code section 14513. The proposed amendments revise Regulation 1588, subdivision (b)(2) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The proposed amendments to Regulation 1588, subdivision (b)(1) also add the word "packaged" before the references to "soil amendments" to be consistent with Food & Ag. Code section 14552.

PUBLIC HEARING

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on December 17-18, 2014. 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 December 17 or 18, 2014. 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 1588.

AUTHORITY

RTC section 7051

REFERENCE

RTC section 6358

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

RTC section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588 defines the term “fertilizer.”

The current provisions of Regulation 1588, subdivision (b)(1) define the term “fertilizer” to include manure, commercial fertilizers, as defined in Food & Ag. Code section 14522, and agricultural minerals, as defined in Food & Agr. Code section 14512. Specifically excluded from the definition of fertilizer in Regulation 1588 are soil amendments, as defined in Food & Ag. Code section 14552, and auxiliary soil and plant substances, as defined in Food & Ag. Code section 14513.

In addition, the current provisions of Regulation 1588, subdivision (b)(2) specifically provide that, as a result of the exemption provided by RTC section 6358, subdivision (d), “[t]ax does not apply to sales of fertilizer to be applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.” Also, the last sentence in Regulation 1588, subdivision (b) provides that, “[w]hen insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.”

Leaves are able to absorb fertilizer through the pores on their surface. Fertilizer is applied in a foliar application when it is applied directly to leaves (or foliage). Regulation 1588, subdivision (b) has provided that the exemption provided by RTC section 6358, subdivision (d) applies to fertilizer applied in "foliar application" since 1970.

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1588

Need for Clarification

The Board's Legal Department has previously determined, as early as 1960, that carbon dioxide is a fertilizer when applied to land in farming. This determination is found in Sales and Use Tax Annotation 510.0580:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer."
5/6/60.

The May 6, 1960, legal ruling, which is summarized in the annotation, explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems, and used to assist in the neutralization of alkaline soils. It also explains that, at the time the legal ruling was written, the Department of Agriculture already considered carbon dioxide sold for such a purpose to be an "agricultural mineral," which is included in the definition of fertilizer for sales and use tax purposes. (Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached in selected legal rulings. See, Reg. 5700, *Annotations*.)

More recently, a question has arisen as to whether carbon dioxide should be classified as fertilizer, when used by a hydroponic farmer. (Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.) In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (through foliar application) in order to support the life of the plant. Board staff questioned whether carbon dioxide used in hydroponic farming should still be classified as an agricultural mineral, which is included in the definition of fertilizer in Regulation 1588, or whether such use makes the carbon dioxide an auxiliary soil and plant substance, which is specifically not a fertilizer under Regulation 1588. Board staff concluded that carbon dioxide used in hydroponic farming is a fertilizer because the Board had previously concluded that carbon dioxide is a fertilizer when used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant's growth, and Regulation 1588 provides for fertilizer to be applied through foliar application. Board staff also concluded that it would be helpful to amend Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and specify that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes.

Interested Parties Process

Business Taxes Committee staff drafted amendments to Regulation 1588, subdivision (b) to clarify the treatment of carbon dioxide and fertilizer used in hydroponic farming. The draft amendments suggested adding language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The draft amendments suggested revising Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The draft amendments to Regulation 1588, subdivision (b)(1) also add the word “packaged” before the references to “soil amendments” to be consistent with Food & Ag. Code section 14552.

Business Taxes Committee staff subsequently provided its draft amendments to Regulation 1588 to the interested parties and conducted an interested party meeting on May 21, 2014, to discuss the draft amendments. No formal comments were submitted, however, staff worked with interested parties’ suggestions to refine the draft amendments. No further comments or concerns were expressed by interested parties.

September 23, 2014, Business Taxes Committee Meeting

Subsequently, staff prepared Formal Issue Paper 14-005 and distributed it to the Board Members for consideration at the Board’s September 23, 2014, Business Taxes Committee meeting. Formal Issue Paper 14-005 recommended that the Board propose to add language to Regulation 1588, subdivision (b)(1) to specify that the term fertilizer includes carbon dioxide and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The formal issue paper also recommended that the Board propose to revise Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The issue paper also recommended that the Board propose to update the references to “soil amendments” in Regulation 1588, subdivision (b)(1) so that they refer to “packaged” soil amendments to be consistent with Food & Ag. Code section 14552.

Mr. John Gamper, from the California Farm Bureau Federation, appeared during the September 23, 2014, Business Taxes Committee meeting and expressed support for the proposed amendments. Ms. Jeanette Lombardo, from California Food and Agribusiness Advocates, representing Houweling’s Tomatoes, appeared along with Mr. Martin Weijters, Senior Corporate Grower, Houweling’s Tomatoes, and stated that they were available to answer any question the Members may have.

At the conclusion of the Board’s discussion of Formal Issue Paper 14-005 during the September 23, 2014, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1588 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1588 are reasonably necessary to have

the effect and accomplish the objective of addressing the issue regarding carbon dioxide used in hydroponic farming (discussed above).

The Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, Board staff, and the Board by clarifying that RTC section 1588 applies to carbon dioxide and fertilizer used in hydroponic farming.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1588 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 1588 is the only state regulation implementing, interpreting, and making specific the exemption provided by RTC section 6358, subdivision (d). In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1588 or the proposed amendments to Regulation 1588.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1588 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 STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1588 will result in no direct or indirect cost or savings to any state agency and will result in no cost or savings in federal funding to the State of California. The Board has also determined that the adoption of the proposed amendments to Regulation 1588 result in no direct or indirect 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, and will result in no other non-discretionary cost or savings imposed on local agencies.

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 1588 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 1588 may affect small business.

NO KNOWN 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 1588 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 1588 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 1588 will not affect the benefits of Regulation 1588 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 1588 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 Monica Gonzalez Silva, Tax Counsel III, by telephone at (916) 323-3138, by e-mail at Monica.silva@boe.ca.gov, or by mail at State Board of Equalization, Attn: Monica Gonzalez Silva, 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 9:30 a.m. on December 17, 2014, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1588 during the December 17-18, 2014, 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, or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1588. 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 1588 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 1588, 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

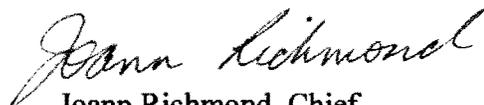
The Board may adopt the proposed amendments to Regulation 1588 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory 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.

October 31, 2014

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1588, 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 1588, *Seeds, Plants and Fertilizer***

SPECIFIC PURPOSE, PROBLEM INTENDED TO BE ADDRESSED, NECESSITY, AND ANTICIPATED BENEFIT

Current Law

Revenue and Taxation Code (RTC) section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, subdivision (b) of California Code of Regulations, title 18, section (Regulation) 1588, *Seeds, Plants and Fertilizer*, defines the term “fertilizer.”

The current provisions of Regulation 1588, subdivision (b)(1) define the term “fertilizer” to include manure, commercial fertilizers, as defined in Food and Agricultural (Food & Ag.) Code section 14522, and agricultural minerals, as defined in Food & Ag. Code section 14512. Specifically excluded from the definition of fertilizer in Regulation 1588, subdivision (b)(1) are soil amendments, as defined in Food & Ag. Code section 14552, and auxiliary soil and plant substances, as defined in Food & Ag. Code section 14513.

In addition, the current provisions of Regulation 1588, subdivision (b)(2) specifically provide that, as a result of the exemption provided by RTC section 6358, subdivision (d), “[t]ax does not apply to sales of fertilizer to be applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.” Also, the last sentence in Regulation 1588, subdivision (b) provides that, “[w]hen insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.”¹ Regulation 1588, subdivision (b) has provided that the exemption provided by RTC section 6358, subdivision (d) applies to fertilizer applied in “foliar application” since 1970.

The provisions of RTC section 6358, subdivision (d) and Regulation 1588, subdivision (b) are based on the premise that fertilizer is applied to land for the purpose of furnishing elements to be absorbed by the plant. Those elements enter into the food supply of the plants themselves and become a part of the product grown. If that product is sold, the fertilizer is not taxable as it is

¹ Leaves are able to absorb fertilizer through the pores on their surface. Fertilizer is applied in a foliar application when it is applied directly to leaves (or foliage).

regarded as a sale for resale. The same reasoning applies to products grown for human consumption and to products used as feed for animal life that are food for human consumption. The absorption of the fertilizer by into the food supply of the plants themselves is different than the function of soil amendments or auxiliary soil and plant substances, which do not, in any material quantity, enter into the food supply of the plants themselves, and are not included in the definition of fertilizer.

Proposed Amendments

Need for Clarification

The State Board of Equalization's (Board's) Legal Department has previously determined, as early as 1960, that carbon dioxide is a fertilizer when applied to land in farming. This determination is found in Sales and Use Tax Annotation² 510.0580, which provides as follows:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer."
5/6/60.

The May 6, 1960, legal ruling of counsel, which is summarized in the annotation, explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems, and used to assist in the neutralization of alkaline soils. It also explains that, at the time the legal ruling was written, the Department of Agriculture already considered carbon dioxide sold for such a purpose to be an "agricultural mineral," which is included in the definition of fertilizer for sales and use tax purposes.

More recently, a question (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) has arisen as to whether carbon dioxide should be classified as fertilizer, when used by a hydroponic³ farmer. In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (through foliar application) in order to support the life of the plant. Board staff questioned whether carbon dioxide used in hydroponic farming should still be considered an agricultural mineral, which is included in the definition of fertilizer in Regulation 1588, or whether such use makes the carbon dioxide an auxiliary soil and plant substance, which is specifically not a fertilizer under Regulation 1588. Board staff concluded that carbon dioxide used in hydroponic farming is a fertilizer because the Board had previously concluded that carbon dioxide is a fertilizer when used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant's growth, and Regulation 1588 provides for fertilizer to be applied through foliar application. Board staff also concluded that it would be helpful to amend

² Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached in selected legal rulings by staff counsel, as applied to specific factual situations. Annotations do not embellish or interpret the legal rulings of counsel which they summarize and do not have the force and effect of law. (See, Reg. 5700, *Annotations*.)

³ Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.

Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and specify that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes.

Interested Parties Process

Business Taxes Committee staff drafted amendments to Regulation 1588, subdivision (b), to clarify the treatment of carbon dioxide and fertilizer used in hydroponic farming. The draft amendments suggested adding language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The draft amendments suggested revising Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The draft amendments to Regulation 1588, subdivision (b)(1) also suggested adding the word “packaged” before the references to “soil amendments” to be consistent with Food & Ag. Code section 14552.

Business Taxes Committee staff subsequently provided its draft amendments to Regulation 1588 to the interested parties and conducted an interested party meeting on May 21, 2014, to discuss the draft amendments. No formal comments were submitted, however, staff worked with interested parties’ suggestions to refine the draft amendments. No further comments or concerns were expressed by interested parties.

September 23, 2014, Business Taxes Committee Meeting

Subsequently, staff prepared Formal Issue Paper 14-005 and distributed it to the Board Members for consideration at the Board’s September 23, 2014, Business Taxes Committee meeting. Formal Issue Paper 14-005 recommended that the Board propose to add language to Regulation 1588, subdivision (b)(1) to specify that the term fertilizer includes carbon dioxide and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The formal issue paper also recommended that the Board propose to revise Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The issue paper also recommended that the Board update the references to “soil amendments” in Regulation 1588, subdivision (b)(1) so that they refer to “packaged” soil amendments to be consistent with Food & Ag. Code section 14552.

In addition, the issue paper recommended that the Board propose to make minor grammatical and formatting changes to the second, fourth, and fifth sentences in Regulation 1588, subdivision (b)(1). The issue paper recommended changing “Sections” and “Section” to “sections” and “section,” respectively, changing “exception” to “exceptions,” and inserting the word “the.”

Mr. John Gamper, from the California Farm Bureau Federation, appeared during the September 23, 2014, Business Taxes Committee meeting and expressed support for the proposed amendments. Ms. Jeanette Lombardo, from California Food and Agribusiness Advocates, representing Houweling’s Tomatoes, appeared along with Mr. Martin Weijters, Senior Corporate Grower, Houweling’s Tomatoes, and stated that they were available to answer any question the Members may have.

At the conclusion of the Board's discussion of Formal Issue Paper 14-005 during the September 23, 2014, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1588 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1588 are reasonably necessary for the specific purpose of addressing the issue (or problem) presented by the recent question regarding carbon dioxide used in hydroponic farming (discussed above).

The Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, Board staff, and the Board by clarifying that the exemption provided by RTC section 6358 applies to carbon dioxide and fertilizer used in hydroponic farming.

The adoption of the proposed amendments to Regulation 1588 is not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to Regulation 1588 or the proposed amendments to Regulation 1588.

DOCUMENTS RELIED UPON

The Board relied upon Formal Issue Paper 14-005, the exhibits to the issue paper, and the comments made during the Board's discussion of the issue paper during its September 23, 2014, Business Taxes Committee meeting in deciding to propose the amendments to Regulation 1588 described above.

ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1588 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 amendments to Regulation 1588 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 1588 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)(1)

As previously explained, RTC section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or

are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588 defines the term “fertilizer.”

As previously explained, the proposed amendments to Regulation 1588:

- Specify in subdivision (b)(1) that the term fertilizer includes carbon dioxide;
- Provide in subdivision (b)(1) that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513;
- Clarify in subdivision (b) that the exemption may apply to sales of fertilizer applied to land or in foliar application; and
- Update the references to “soil amendments” in subdivision (b)(1) to refer to “packaged” soil amendments.

As a result, the proposed amendments are consistent with the Board’s historical treatment of carbon dioxide as fertilizer. The proposed amendments are consistent with the current provisions of Regulation 1588, which provided that the exemption may apply to fertilizer applied to land, including foliar application. And, the proposed amendments update cross-references to make them consistent with the current provisions of Food & Ag. Code section 14552. Therefore, there is nothing in the proposed amendments that would significantly change how individuals and businesses would generally behave in the absence of the proposed amendments. The Board estimates that the proposed amendments will not have a measurable economic impact on individuals and business. The Board has determined that the proposed amendments to Regulation 1588 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. And, the Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, including manufacturers, Board staff, and the Board by clarifying that the exemption provided by RTC section 6358 applies to carbon dioxide and fertilizer used in hydroponic farming.

In addition, based on these facts and all of the information in the rulemaking file, the Board has determined that the adoption of the proposed amendments to Regulation 1588 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 1588 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 1588 will not affect the benefits of Regulation 1588 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 1588 will not have a significant adverse economic impact on business.

The proposed amendments to Regulation 1588 may affect small businesses.

**Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1588**

1588. Seeds, Plants and Fertilizer.

(a) Seeds and Plants. Tax does not apply to sales of seeds, annual plants, and operative January 1, 1999, non-annual plants, the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business including fruit trees, berry vines, and grape rootlings or rootstock, or cuttings of every variety. Tax does not apply to sales of seed, the products of which will be used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business.

(b) Fertilizer.

(1) Definition. The term "fertilizer" includes commercial fertilizers, agricultural minerals, ~~and manure, and carbon dioxide~~. The terms "commercial fertilizers" and "agricultural minerals" as used herein are defined in Sections 14522 (commercial fertilizer) and 14512 (agricultural minerals) of the Food and Agricultural Code. "Manure" means the excreta of any domestic animal or domestic fowl which is not artificially mixed with any material except a material which has been used for bedding, sanitary, or feeding purposes for such an animal or fowl or for the preservation of the manure. The term "fertilizer" does not include "packaged soil amendments" or "auxiliary soil and plant substances" as these terms are defined (with the exceptions noted below) in Sections 14552 (packaged soil amendments) and 14513 (auxiliary soil and plant substances) of the Food and Agricultural Code. For the purposes of this regulation, "manures sold without guarantees for plant nutrients" as described in Section 14552 of the Food and Agricultural Code are not packaged soil amendments and carbon dioxide is not an auxiliary soil and plant substance as that term is defined in section 14513 of the Food and Agricultural Code.

(2) Application of Tax. Tax does not apply to sales of fertilizer to be applied to land or (~~including in~~ foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

When insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land or (~~including in~~ foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6358, Revenue and Taxation Code.

Regulation History

Type of Regulation: Sales and Use Tax

Regulation: 1588

Title: *Seeds, Plants and Fertilizer*

Preparation: Monica Silva

Legal Contact: Monica Silva

The State Board of Equalization proposes to adopt amendments to Sales and Use Tax Regulation 1588, *Seeds, Plants and Fertilizer*, to specifically include carbon dioxide in the definition of fertilizer

History of Proposed Regulation:

December 17-18, 2014	Public Hearing
October 31, 2014	OAL publication date; 45-day public comment period begins; Interested Parties mailing
October 20, 2014	Notice to OAL
September 23, 2014	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA

Support: NA

Oppose: NA