

Rulemaking File  
Table of Contents  
Title 18. Public Revenue  
Sales and Use Tax  
Regulation 1685.5 *Calculation of Estimated Use Tax – Use Tax Table*

*OAL Approval*

*Index*

1. Final Statement of Reasons
2. Updated Informative Digest
3. Business Tax Committee Minutes, January 15, 2013
4. Reporter's Transcript Business Taxes Committee, January 15, 2013
5. Estimate of Cost or Savings, March 18, 2013
6. Economic and Fiscal Impact Statements, February 20, 2013
7. Notice of Publications
8. Notice to Interested Parties, March 8, 2013
9. Statement of Compliance
10. Public Comment Ann Hauer
11. Public Comment Tsuneaki Tanaka
12. Reporter's Transcript, Item F2, April 24, 2013
13. Draft Minutes, April 24, 2013, and Exhibits

**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. 2013-0503-01 S**

**Adopt sections:**  
**Amend sections: 1685.5**  
**Repeal sections:**

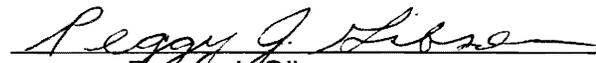
---

The Board of Equalization (BOE) is amending section 1685.5 in Title 18 of the California Code of Regulations. This amendment updates the manner in which the BOE shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income for calendar year 2013 and subsequent years. BOE is required annually to estimate the use tax due, based on various U.S. Census Bureau data reported each May 1, and to make those estimates available to the Franchise Tax Board by July 30 of each year in the form of a use-tax table for inclusion in FTB's tax form instructions. However, taxpayers are still free to use the worksheets in the instructions to calculate and pay their actual use tax liability.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 7/1/2013.

Date: 5/28/2013

**RECEIVED**  
**MAY 31 2013**  
**Board Proceedings**

  
Peggy J. Gibson  
Senior Counsel

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  
DATE: 5/29/2013  
RE: Return of Approved Rulemaking Materials  
OAL File No. 2013-0503-01S

OAL hereby returns this file your agency submitted for our review (OAL File No. 2013-0503-01S regarding Calculation of Estimated Use Tax - Use Tax Table).

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:** 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](mailto:postedregslink@oal.ca.gov).

**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 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

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS <b>Z-</b>	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER <b>2013-0503-015</b>	EMERGENCY NUMBER
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	

MAILED FILED  
OFFICE OF  
2013 MAY 28 PM 2:41

*John*  
OPEN

AGENCY WITH RULEMAKING AUTHORITY  
State Board of Equalization

AGENCY FILE NUMBER (if any)

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

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER <b>2013.10.2</b>	PUBLICATION DATE <b>03-08-2013</b>

**B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)**

1a. SUBJECT OF REGULATION(S) Calculation of Estimated Use Tax – Use Tax Table	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
----------------------------------------------------------------------------------	----------------------------------------------------------

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 1685.5
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)

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
-----------------------------------------	------------------------------------	-----------------------------------------	--------------------------------------------------

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 May 3, 2013
TYPED NAME AND TITLE OF SIGNATORY Joann Richmond, Chief, Board Proceedings Division	

For use by Office of Administrative Law (OAL) only

**ENDORSED APPROVED**

MAY 28 2013

Office of Administrative Law

**Final Text of Proposed Amendments to  
California Code of Regulations, Title 18, Section 1685.5**

**1685.5. Calculation of Estimated Use Tax - Use Tax Table.**

(a) In General.

(1) Estimated Use Tax and Use Tax Table. The Board of Equalization (BOE) is required to annually calculate the estimated amount of use tax due according to a person's adjusted gross income (AGI) and make such amounts available to the Franchise Tax Board (FTB), by July 30 of each year, in the form of a use tax table for inclusion in the instructions to the FTB's returns.

(2) Who is Eligible to Use BOE Use Tax Tables.

(A) Consumers may elect to use the use tax tables included in the instructions to their FTB returns to report their estimated use tax liabilities for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand (\$1,000) on their FTB returns. However, eligible consumers may still calculate their actual use tax liabilities using the worksheets in the instructions to their FTB returns and report their actual use tax liabilities on their FTB returns. Consumers are not required to use the use tax tables included in the instructions to their FTB returns.

(B) The use tax table may not be used to estimate use tax liabilities for business purchases, including purchases made by businesses required to hold a seller's permit or to register with the BOE under the Sales and Use Tax Law and report their use tax liabilities directly to the BOE.

(3) Safe Harbor. If eligible consumers use the use tax tables included in the instructions to their FTB returns to estimate their use tax liabilities for qualified nonbusiness purchases and correctly report their estimated use tax liabilities for their qualified nonbusiness purchases in accordance with their AGI ranges, then the BOE may not assess the difference, if any, between the estimated use tax liabilities reported in accordance with the use tax tables and the consumers' actual use tax liabilities for qualified nonbusiness purchases.

(b) Definitions and Data Sources.

(1) AGI Ranges. The use tax table shall be separated into fifteen (15) AGI ranges as follows:

(A) AGI less than \$10,000;

(B) AGI of \$10,000 to \$19,999;

(C) AGI of \$20,000 to \$29,999;

- (D) AGI of \$30,000 to \$39,999;
- (E) AGI of \$40,000 to \$49,999;
- (F) AGI of \$50,000 to \$59,999;
- (G) AGI of \$60,000 to \$69,999;
- (H) AGI of \$70,000 to \$79,999;
- (I) AGI of \$80,000 to \$89,999;
- (J) AGI of \$90,000 to \$99,999;
- (K) AGI of \$100,000 to \$124,999;
- (L) AGI of \$125,000 to \$149,999;
- (M) AGI of \$150,000 to \$174,999;
- (N) AGI of \$175,000 to \$199,999;
- (O) AGI more than \$199,999.

(2) Use Tax Liability Factor or Use Tax Table Percentage. For the 2011 calendar year the use tax liability factor or use tax table percentage shall be 0.070 percent (.0007). On June 1, 2012, ~~and each June 1 thereafter~~, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.37, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent. On June 1, 2013, and each June 1 thereafter, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.23, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent.

(3) Total Personal Income. Total personal income shall be determined by reference to the most current personal income data published by the United States Bureau of Economic Analysis.

(4) Total Spending at Electronic Shopping and Mail Order Houses. Total spending at electronic shopping and mail order houses shall be determined by reference to the most current electronic shopping and mail order house spending data published by the United States Census Bureau.

(5) Total Spending on Taxable Purchases. Total spending on taxable purchases shall be determined by:

(A) Determining the percentage, rounded to the nearest tenth of a percent, of total spending at electronic shopping and mail order houses that are not included in the following categories of items, by reference to the most current retail trade product lines statistics by kind of business data published by the United States Census Bureau:

(i) Groceries and other foods for human consumption off premises, excluding bottled, canned, or packaged soft drinks;

(ii) Prescriptions;

(iii) Video content downloads;

(iv) Audio content downloads;

(v) Prepackaged computer software, including software downloads; and

(vi) All nonmerchandise receipts.

(B) Adding ten billion dollars (\$10,000,000,000) to the total spending at electronic shopping and mail order houses to account for spending that is not included in the spending data published by the United States Census Bureau; and

(C) Multiplying the sum calculated in (B) by the percentage of total spending at electronic shopping and mail order houses that are not included in the categories of items listed in (A) above so that the result does not include spending on nontaxable purchases, and then rounding the result to the nearest tenth of a percent.

(6) Percentage of Income Spent on Taxable Purchases. The percentage of income spent on taxable purchases during a calendar year shall be calculated by dividing the total spending on taxable purchases for that year by the total personal income for that year, multiplying the result by 100, and rounding the result to the nearest tenth of a percent.

(7) Average State, Local, and District Sales and Use Tax Rate. The average state, local, and district sales and use tax rate for a calendar year shall be the total of:

(A) The rates of the statewide sales and use taxes imposed under section 35 of article XIII of the California Constitution and the Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) in effect on January 1 of that year;

(B) The statewide rate of local tax imposed under the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. & Tax. Code, § 7200 et seq.) in effect on January 1 of that year; and

(C) The weighted average rate of the district taxes imposed under the Transactions and Use Tax Law (Rev. & Tax Code, § 7251 et seq.) in effect in the various jurisdictions throughout the state on January 1 of that year after taking into account the proportion of the total statewide taxable transactions (by dollar) reported for each jurisdiction during the fourth quarter of the calendar year that is two years prior to the calendar year for which the calculation is made. For example, the total reported taxable transactions (by dollar) for the fourth quarter of 2010 shall be used to determine the weighted average rate of the district tax rates in effect on January 1, 2012, to calculate the weighted average rate of district taxes for calendar year 2012.

(c) Calculation of the Estimated Use Tax Liability.

(1) The estimated use tax liability for the AGI range described in subdivision (b)(1)(A) shall be determined by multiplying \$5,000 by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(2) The estimated use tax liability for the AGI ranges described in subdivision (b)(1)(B) through (N) shall be determined by multiplying the midpoint of each AGI range by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(3) The estimated use tax liability for the AGI range described in subdivision (b)(1)(O) shall be determined by multiplying each range member's actual AGI by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(d) Use Tax Table Format.

(1) The use tax table for calendar year 2011 shall provide as follows:

Adjusted Gross Income (AGI) Range	Use Tax Liability
Less Than \$20,000	\$7
\$20,000 to \$39,999	\$21
\$40,000 to \$59,999	\$35
\$60,000 to \$79,999	\$49
\$80,000 to \$99,999	\$63
\$100,000 to \$149,999	\$88
\$150,000 to \$199,999	\$123
More than \$199,999 - Multiply AGI by 0.070% (.0007)	

(2) The use tax tables for calendar year 2012 and subsequent years shall utilize the same format as follows:

Adjusted Gross Income (AGI)		Use Tax Liability
Range		
Less Than \$10,000		\$
\$10,000	to \$19,999	\$
\$20,000	to \$29,999	\$
\$30,000	to \$39,999	\$
\$40,000	to \$49,999	\$
\$50,000	to \$59,999	\$
\$60,000	to \$69,999	\$
\$70,000	to \$79,999	\$
\$80,000	to \$89,999	\$
\$90,000	to \$99,999	\$
\$100,000	to \$124,999	\$
\$125,000	to \$149,000	\$
\$150,000	to \$174,999	\$
\$175,000	to \$199,999	\$
More than \$199,999 -Multiply AGI by		%( .000 )

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6452.1, Revenue and Taxation Code.

sidered, **OEHHA must receive comments by 5:00 p.m. on Tuesday, July 8, 2013.** We encourage you to submit comments in electronic form, rather than in paper form. Comments transmitted by email should be addressed to [P65Comments@oehha.ca.gov](mailto:P65Comments@oehha.ca.gov) with “NOIL — emissions from combustion of coal” in the subject line. Comments submitted in paper form may be mailed, faxed, or delivered in person to the addresses below:

Mailing Address: Ms. Cynthia Oshita  
Office of Environmental  
Health Hazard Assessment  
P.O. Box 4010, MS-19B  
Sacramento, CA 95812-4010  
Fax: (916) 323-2265  
Street Address: 1001 I Street  
Sacramento, California 95814

Comments received during the public comment period will be posted on the OEHHA web site after the close of the comment period.

If you have any questions, please contact Ms. Oshita at [cynthia.oshita@oehha.ca.gov](mailto:cynthia.oshita@oehha.ca.gov) or at (916) 445-6900.

**References**

International Agency for Research on Cancer (IARC, 2010). *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Volume 95, Household Use of Solid Fuels and High-temperature Frying*, pp. 225, 226, 303, and 307, IARC, World Health Organization, Lyon, France, available at <http://monographs.iarc.fr/ENG/Monographs/vol95/mono95.pdf>.

Liang CK, Quan NY, Cao SR *et al.* (1988). Natural inhalation exposure to coal smoke and wood smoke induces lung cancer in mice and rats. *Biomed Environ Sci* 1:42-50. PMID: 3268107

Lin C, Dai X, Sun X (1995). [Expression of oncogene and anti-oncogene in mouse lung cancer induced by coal-burning smoke]. *Zhonghua Zhong Liu Za Zhi* 17:432-434. PMID: 8697995.

**AVAILABILITY OF INDEX OF PRECEDENTIAL DECISIONS**

**DEPARTMENT OF SOCIAL SERVICES**

Notice of Availability of Precedential Decisions Index

Notice is hereby given that the California Department of Social Services (CDSS) maintains an index of cases CDSS has designated as precedential decisions. The in-

dex is available on the Internet at <http://cclld.ca.gov/PG505.htm>.

This notice is published pursuant to California Government Code section 11425.60, subdivision (c).

**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# 2013-0503-01  
BOARD OF EQUALIZATION  
Calculation of Estimated Use Tax — Use Tax Table

The Board of Equalization (BOE) amended section 1685.5 in Title 18 of the California Code of Regulations. This amendment updates the manner in which the BOE shall annually calculate the estimated amount of use tax due according to a person’s adjusted gross income for calendar year 2013 and subsequent years. BOE is required annually to estimate the use tax due, based on various U.S. Census Bureau data reported each May 1, and to make those estimates available to the Franchise Tax Board by July 30 of each year in the form of a use-tax table for inclusion in FTB’s tax form instructions. However, taxpayers are still free to use the worksheets in the instructions to calculate and pay their actual use tax liability.

Title 18  
California Code of Regulations  
AMEND: 1685.5  
Filed 05/28/2013  
Effective 07/01/2013  
Agency Contact:  
Richard E. Bennion (916) 445-2130

File#2013-0423-02  
California Alternative Energy and Advanced Transportation Financing Authority  
ABX1 14 Clean Energy Upgrade Financing Program

This Certificate of Compliance makes permanent the emergency regulatory action (OAL file no. 2013-0117-03EE ) adopting Article 3 beginning with Section 10050 of Division 13 of Title 4 of the California Code of Regulations. Article 3 contains regulations for

Rulemaking File Index  
Title 18. Public Revenue  
Sales and Use Tax  
Regulation 1685.5 *Calculation of Estimated Use Tax – Use Tax Table*

1. [Final Statement of Reasons](#)
2. [Updated Informative Digest](#)
3. [Business Tax Committee Minutes, January 15, 2013](#)
  - Minutes
  - BTC Agenda
  - Deputy Director’s Memo dated January 4, 2013
  - Exhibit 1 Text Regulation 1685.5
4. [Reporter’s Transcript Business Taxes Committee, January 15, 2013](#)
5. [Estimate of Cost or Savings, March 18, 2013](#)
6. [Economic and Fiscal Impact Statements, February 20, 2013](#)
7. [Notice of Publications](#)
  - Form 400 and Notice, Publication Date March 8, 2013
  - Proposed Text of Regulation 1685.5
  - Email sent to Interested Parties, March 8, 2013
  - CA Regulatory Notice Register 2013, Volume No. 10-Z
8. [Notice to Interested Parties, March 8, 2013](#)

The following items are exhibited:

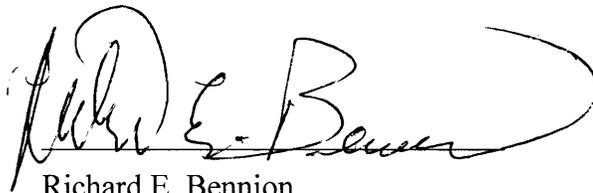
  - Notice of Hearing
  - Initial Statement of Reasons
  - Proposed Text of Regulation 1685.5
  - Regulation History
9. [Statement of Compliance](#)
10. [Public Comment Ann Hauer](#)
11. [Public Comment Tsuneaki Tanaka](#)
12. [Reporter’s Transcript, Item F2, April 24, 2013](#)
13. [Draft Minutes, April 24, 2013, and Exhibits](#)
  - Notice of Proposed Regulatory Action
  - Initial Statement of Reasons
  - Proposed Text of Regulation 1685.5
  - 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 May 2, 2013 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.

May 2, 2013

A handwritten signature in black ink, appearing to read "Richard E. Bennion". The signature is fluid and cursive, with a large initial "R" and "E".

Richard E. Bennion  
Regulations Coordinator  
State Board of Equalization

**Final Statement of Reasons for  
Adoption of Proposed Amendments to California Code of Regulations,  
Title 18, Section 1685.5, *Calculation of Estimated Use Tax - Use Tax Table***

Update of Information in the Initial Statement of Reasons

The factual basis, specific purpose, and necessity for, the problem to be addressed by, and the anticipated benefits from the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*, are the same as provided in the initial statement of reasons.

The adoption of the proposed amendments to Regulation 1685.5 was not mandated by federal law or regulations and there is no federal regulation that is identical to Regulation 1685.5.

The State Board of Equalization (Board) did not rely on any data or any technical, theoretical, or empirical study, report, or similar document in proposing or adopting the amendments to Regulation 1685.5 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 and the Board's economic impact analysis, 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 health and welfare of California residents, worker safety, or the state's environment.

The proposed amendments may affect small business.

No Mandate on Local Agencies or School Districts

The Board has determined that the adoption of the proposed amendments to Regulation 1685.5 does not impose a mandate on local agencies or school districts.

Public Comments

The Board did not receive any written comments specifically objecting to or recommending changes to the proposed amendments to Regulation 1685.5 and no interested parties appeared at the public hearing on April 24, 2013. However, on March 8, 2013, Board staff received an email from one interested party with the subject line "Adjusted Use Tax" that simply said "What a ridiculous idea!" without any further elaboration. Also, on March 11, 2013, Board staff received an email from another

interested party who inquired as to whether the proposed amendments would affect export businesses. Board staff responded to the March 11, 2013, email and explained that staff does not believe that the proposed amendments will affect export businesses because the proposed amendments will not impose any new sales or use taxes or repeal any existing tax exemptions or exclusions, and the Board's use tax tables may not be used to estimate use tax liabilities for business purchases. Board staff did not respond to the March 9, 2013, email, but the Board continues to believe that the proposed amendments to Regulation 1685.5 are reasonably necessary to ensure that the Board's future calculations of estimated use tax are as accurate as possible.

#### Determinations Regarding Alternatives

By its motion, the Board determined that no alternative to the proposed amendments to Regulation 1685.5 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 other provisions of law.

Further, the Board did not reject any reasonable alternatives to the proposed amendments to Regulation 1685.5 that would lessen any adverse impact the proposed amendments may have on small business or that would be less burdensome and equally effective in achieving the purposes of the proposed amendments. 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.

Furthermore, the Board anticipates that the proposed amendments will promote fairness and generally encourage consumers to use the Board's use tax tables by ensuring that eligible consumers' estimated use tax liabilities are as accurate as possible.

**Updated Informative Digest for**  
**Adoption of Proposed Amendments to California Code of Regulations,**  
**Title 18, Section 1685.5, *Calculation of Estimated Use Tax - Use Tax Table***

On April 24, 2013, the State Board of Equalization (Board) held a public hearing on and unanimously voted to adopt the original text of the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*, described in the notice of proposed regulatory action. There have not been any changes to the applicable laws or the effect of the adoption of the proposed amendments to Regulation 1685.5 described in the informative digest included in the notice of proposed regulatory action.

The Board did not receive any written comments specifically objecting to or recommending changes to the proposed amendments to Regulation 1685.5 and no interested parties appeared at the public hearing on April 24, 2013. However, on March 8, 2013, Board staff received an email from one interested party with the subject line "Adjusted Use Tax" that simply said "What a ridiculous idea!" without any further elaboration. Also, on March 11, 2013, Board staff received an email from another interested party who inquired as to whether the proposed amendments would affect export businesses. Board staff responded to the March 11, 2013, email and explained that staff does not believe that the proposed amendments will affect export businesses because the proposed amendments will not impose any new sales or use taxes or repeal any existing tax exemptions or exclusions, and the Board's use tax tables may not be used to estimate use tax liabilities for business purchases. Board staff did not respond to the March 9, 2013, email, but the Board continues to believe that the proposed amendments to Regulation 1685.5 are reasonably necessary to ensure that the Board's future calculations of estimated use tax are as accurate as possible.

The informative digest included in the notice of proposed regulatory action provides:

"Current Law

"Under RTC sections 6202 and 6453, consumers are primarily liable for reporting and paying use tax imposed on the storage, use, or other consumption of tangible personal property in this state. However, under RTC sections 6203, 6226, and 6453, specified retailers are required to register with the Board, collect use tax from their California customers, and report and pay the use tax to the state. Therefore, under Regulation 1685, *Payment of Tax by Purchasers*, consumers are required to report and pay their own use taxes to the state when they purchase tangible personal property for storage, use, or other consumption in this state from unregistered retailers that do not collect California use tax.

"Prior to 2010, consumers could only report and pay their use taxes to the Board. However, RTC section 6452.1 was enacted in 2010 to make it more convenient for consumers to comply with their use tax obligations by permitting consumers to make an irrevocable election to report "qualified use tax" on an "acceptable [income] tax return"

filed with the Franchise Tax Board (FTB). RTC section 6452.1, subdivision (d)(2), as enacted by Statutes 2010, chapter 721, defined the term “qualified use tax” to mean a taxpayer’s actual unpaid use tax liability after applying the state use taxes imposed under the Sales and Use Tax Law (RTC § 6001 et seq.) and article XIII of the California Constitution, and the local and district use taxes imposed in conformity with the Bradley-Burns Uniform Local Sales and Use Tax Law (RTC § 7200 et seq.) or in accordance with the Transactions and Use Tax Law (RTC § 7251 et seq.) to the taxpayer’s purchases of tangible personal property subject to use tax.

“Senate Bill No. (SB) 86 (Stats. 2011, ch. 14) amended RTC section 6452.1 to make it more convenient for taxpayers to comply with their use tax obligations by giving taxpayers the option to report their “estimated use tax liabilities,” based upon their AGIs for income tax purposes, for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand dollars (\$1000), as determined from a use tax table, on their income tax returns, instead of calculating and reporting their actual unpaid use tax liabilities (as described above). In addition, RTC section 6452.1, subdivision (d)(2)(A)(i)(II), as amended by SB 86, requires the Board to “annually calculate the estimated amount of use tax due according to a person’s adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table” for inclusion in the instructions to the FTB’s returns and use by eligible taxpayers.

“The Board adopted Regulation 1685.5 on July 26, 2011, to prescribe the specific use tax table that taxpayers could use to estimate their calendar-year 2011 use taxes based upon their AGIs, prescribe the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person’s AGI for calendar-year 2012 and subsequent years, and prescribe the format of the use tax tables the Board would be required to make available to the FTB for calendar-year 2012 and subsequent years. After discussing Regulation 1685.5 with interested parties, the Board adopted amendments to Regulation 1685.5 on March 20, 2012, to update the manner in which the Board annually calculates the estimated amount of use tax due according to a person’s AGI and makes such amounts available to the FTB in the form of a use tax table for calendar-year 2012 and subsequent years. The Notice of Action for the 2012 amendments explained that:

The proposed [2012] amendments to Regulation 1685.5, subdivision (b)(2), will require that the Board multiply the percentage of income spent on taxable purchases during the preceding year by 0.37, which represents the estimated percentage of California consumers’ total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers. AB 155 (Stats. 2011, ch. 313) expanded the use tax registration requirements so that they apply to some out-of-state retailers, including Internet retailers, that were previously not required to register with the Board to collect and remit use tax on their sales of tangible personal property to California customers.

However, section 6 of AB 155 provides that the new registration requirements will not be operative until either September 15, 2012, or January 1, 2013, and the Board is currently unable to determine whether the new registration requirements will reduce the percentage of California consumers' total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers during 2012 or in subsequent years, and, if so, the extent of such reduction. Therefore, the Board is not proposing to amend Regulation 1685.5 to account for the new registration requirements imposed by AB 155 at this time. However, the Board is continuing to monitor the implementation of AB 155 and considering whether to propose sufficiently related changes to the original text of the proposed amendments to Regulation 1685.5 to account for the enactment of AB 155 or other events that may change the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during 2012 or subsequent years.

“However, the Board did not make sufficiently related changes to the text of the 2012 amendments to Regulation 1685.5 to account for the enactment of AB 155 because the Board could not determine when AB 155’s expanded use tax registration requirements would be operative and could not adequately estimate the effect of the expanded use tax registration requirements when the Board adopted the 2012 amendments. Instead, the Board continued to monitor the implementation of AB 155 and consider whether to propose amendments to Regulation 1685.5 to account for the enactment of AB 155 and the expanded use tax registration requirements effect on the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during calendar-year 2013 and subsequent years.

#### “Effect, Objectives, and Benefits of the Proposed Amendments to Regulation 1685.5

“The expanded registration requirements (discussed above) became operative on September 15, 2012, in accordance with section 6, subdivision (b)(2), of AB 155. The Board did see an increase in the number of out-of-state retailers registered to collect California use tax around that time, and Board staff was subsequently able to determine that those registration activities, including the registration of some retailers that make substantial sales to California consumers, indicate that there will be an overall decrease in the percentage of taxable purchases California consumers make from unregistered out-of-state retailers during calendar-year 2013, and in subsequent years. In addition, Board staff was able to:

- Calculate adjusted total 2011 United States electronic commerce sales;
- Determine that 86.9 percent of those sales were made by the top 500 Internet retailers and 13.1 percent of those sales were made by other Internet retailers;
- Estimate that 14.4 percent of the top 500 Internet retailers and 78 percent of the other Internet retailers were not registered with the Board to collect use tax after the operative date of AB 155; and

- Arrive at a weighted average percentage of sales made by unregistered Internet retailers of 22.7 percent  $((.869 \times .144) + (.131 \times .78))$ .

“Therefore, staff prepared a memorandum dated January 4, 2013, which recommended that “the Board amend Regulation 1685.5, subdivision (b)(2), to change the estimated percentage of California consumers’ total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers from 37 percent to 23 percent to account for the new use tax registration requirements imposed by AB 155 and recent registration activities.” And, Board staff submitted the memorandum to the Board Members for their consideration at the Board’s January 15, 2013, Business Taxes Committee meeting.

“During the January 15, 2013, meeting, Ms. Gina Rodriguez, Vice President of State Tax Policy for the California Taxpayers Association (CalTax), stated that CalTax supports the amendments to Regulation 1685.5 and the Board Members unanimously voted to propose their adoption. The Board determined that the amendments are reasonably necessary to account for the expanded registration requirements imposed by AB 155 operative September 15, 2012, and the recent registration activity discussed above.

“The objective of the proposed amendments is to make the Board’s calculations of the estimated amount of use tax due according to a person’s AGI for calendar-year 2013 and subsequent years as accurate as possible by accounting for the expanded use tax registration requirements imposed by AB 155 and recent registration activities. The Board anticipates that the proposed amendments will promote fairness and generally encourage consumers to use the Board’s use tax tables by ensuring that eligible consumers’ estimated use tax liabilities are as accurate as possible.

“The Board has performed an evaluation of whether the proposed amendments to Regulation 1685.5 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 1685.5 is the only state regulation prescribing the manner in which the Board “shall annually calculate the estimated amount of use tax due according to a person’s adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table,” as required by RTC section 6452.1. There is no federal use tax and there are no comparable federal regulations or statutes to Regulation 1685.5.”



BOARD OF EQUALIZATION

**BUSINESS TAXES COMMITTEE MEETING MINUTES**

HONORABLE BETTY T. YEE, COMMITTEE CHAIR

450 N STREET, SACRAMENTO

MEETING DATE: JANUARY 15, 2013, TIME: 10:00 A.M.

---

**ACTION ITEMS & STATUS REPORT ITEMS****Agenda Item No: 1****Title: Proposed Regulation 4801, *Transfers of Cigarettes and Tobacco Products between Retail Stores Owned by the Same Person.*****Action 1****Proposed Regulation 4801, *Transfers of Cigarettes and Tobacco Products between Retail Stores Owned by the Same Person.*****Issue:**

Request approval and authorization to publish staff's proposed Regulation 4801 formalizing the current policy on transfers of cigarettes and tobacco products between retail stores owned by the same person; or direct staff to draft a proposed regulation that prohibits the transfer of cigarettes and tobacco products between any retail stores regardless of the ownership.

**Committee Discussion:**

Staff introduced the topic for discussion. Mr. Steven Alari, representing SEIU Local 1000, explained that SEIU has removed their previous concerns after additional language to the regulation was added requiring that the transfer logs must be provided to ID staff at the start of the inspection and further stipulate that transfer logs provided during or after the inspection will not be accepted. Mr. Dennis Loper, representing California Distributors Association, opposed staff's proposed Regulation 4801, stating this proposal would make it easier for a retailer to blend un-taxed tobacco products with tax-paid tobacco products and therefore increase evasion, and expressed support for alternative two, which prohibits transfers between any retail stores regardless of the ownership.

Mr. Runner expressed concern with the "no-transfer" alternative because it would require small business owners to maintain a larger inventory at each location to compensate for not allowing transfers and was supportive of staff's proposed regulation.

Mr. Horton noted that there are limited instances where a retailer may need to transfer incidental amounts of cigarettes and tobacco products, but that bulk transfers should be handled by licensed distributors or wholesalers. Mr. Horton expressed his concern that staff's proposed regulation does not limit the amount of cigarette or tobacco products transferred and may make it easier to evade the taxes. Mr. Horton suggested that staff add a requirement to the proposed regulation that would allow only small incidental transfers and continue to maintain the recommended inventory controls in the regulation.

Mr. Loper stated that he opposes any transfers but if transfers are allowed, they should be limited to emergency situations and should only be allowed upon notification to the Board. Mr. Runner stated he would support a limit or cap because he did not envision unlimited transfers but would not support requiring the retailer to contact the Board each time they transfer product.

After a general discussion, the matter was deferred so staff could reformulate the regulation in order to address limiting transfers and reach out to interested parties to discuss the impact of limiting transfers and to determine a reasonable transfer limit. Additionally, Ms. Mandel noted that since the matter would be deferred, staff should further clarify the term "legal entity" in referring to a natural person.

**Committee Direction:**

The Board directed staff to conduct outreach with interested parties to convey the Board's desire to limit transfers and to determine a reasonable limit. Ms. Yee noted that she would work with staff on a timeframe.

**Action 2**

**Authorize Publication of Amendments Approved at the June 26, 2012, BTC Meeting to Regulations 4601, *Service of a Notice of Violation or Warning Notice*; 4603, *Penalties for Licensed or Unlicensed Retailers*; 4604, *Penalties for Licensed or Unlicensed Wholesalers and Distributors*; and 4605, *Penalties for Licensed or Unlicensed Manufacturers and Importers*.**

**Issue:**

Request approval to publish amendments approved at the June 26, 2012, BTC Meeting to Regulations 4601, *Service of a Notice of Violation or Warning Notice*; 4603, *Penalties for Licensed or Unlicensed Retailers*; 4604, *Penalties for Licensed or Unlicensed Wholesalers and Distributors*; and 4605, *Penalties for Licensed or Unlicensed Manufacturers and Importers*.

**Committee Discussion:**

There was no discussion of this item.

**Committee Action:**

Upon motion by Mr. Horton and seconded by Ms. Steel with direction to staff to come back in a year with a report on staff's use of the five-day suspension period included in the amendments to Regulations 4603, 4604 and 4605, without objection, the Committee approved for publication the proposed regulatory amendments. A copy of the proposed amendments to Regulations 4601, 4603, 4604, and 4605 are attached.

**Agenda Item No: 2****Title: Proposed amendments to Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table.*****Issue:**

Request approval and authorization to publish proposed amendments to account for the new registration requirements imposed on certain retailers.

**Committee Discussion:**

Staff introduced the issue for discussion and explained that the proposed amendments would apply to the 2013 use tax table, which covers purchases made during the 2013 calendar year. Staff also noted that based on data from the Franchise Tax Board (FTB), the number of taxpayers reporting on the use tax line of their FTB returns nearly doubled from 2011 to 2012 with a revenue increase of \$9.8 million. Ms. Gina Rodriguez, representing the California Taxpayers Association, stated that taxpayers were well served by the interested parties' process and staff was responsive to their concerns. Ms. Rodriguez concluded by expressing support for staff's recommendation.

**Committee Action:**

Upon motion by Mr. Horton, seconded by Ms. Mandel, without objection, the Committee approved and authorized for publication the proposed amendments. A copy of the proposed amendments to Regulation 1685.5 is attached.

**Agenda Item No: 3****Title: Regulation 1502, *Computers, Programs, and Data Processing*, and Regulation 1507, *Technology Transfer Agreements.*****Issue:**

Whether to amend Regulation 1502, *Computers, Programs, and Data Processing*, to clarify how sales and use tax applies to transfers of prewritten software recorded on tangible storage media; and/or amend Regulation 1507, *Technology Transfer Agreements*, to clarify how the technology-transfer-agreement statutes apply to transfers of prewritten software recorded on tangible storage media.

**Committee Discussion:**

Staff introduced the topic for discussion. Staff explained that, if staff's recommendation is approved, it anticipates holding one interested parties meeting in March to discuss the application of tax to optional software maintenance contracts that include the transfer of a back-up copy of the same or similar prewritten software recorded on tangible storage media and two interested parties meetings, one in April and one in June, to discuss the application of tax to site license transactions. Staff further stated that they would present both issues to the Board at the August Board meeting.

Mr. Julian Decyk from Paul Hastings LLP clarified that their written submissions did not make specific recommendations to amend Regulation 1507, as indicated in the formal issue paper, and

their purpose was to base the discussion for potential amendments on their understanding of an accurate statement of the facts and law to avoid potential for an invalid regulation. Mr. Decyk also questioned the need for a regulation to implement the statutes. Mr. Decyk also argued that staff's discussion papers failed to substantially respond to asserted factual corrections and legal analysis which he previously presented to staff.

Mr. Mark Nebergall, representing the Software Finance and Tax Executives Council and a broad-based coalition of companies and trade associations (e.g., Silicon Valley Leadership Group), expressed general support for staff's recommendation. Mr. Nebergall also requested the Board consider the proposal to use a percentage split approach, with respect to software sold on TPP other than a separate tangible storage medium (i.e., what staff generally refers to as "embedded software"), to develop a regulation that allows companies to sell products with a clear understanding of their sales and use tax responsibilities.

Ms. Gina Rodriguez, representing the California Taxpayers Association, stated that if there is a need for regulatory amendments, they would like to continue to work with staff on proposed language which considers the needs of the software industry, as well as other industries.

Ms. Yee commented on the need to adopt proposals that are on a solid legal foundation, and clarity is of the utmost importance with respect to implementation, administration, and compliance and audit requirements.

Mr. Horton requested that staff address whether there is a need for a regulation or not. Staff noted that we currently have Regulation 1502 which addresses computer programs and Regulation 1507 that pertains to technology transfer agreements. Staff explained that to the extent that we would further define technology transfer agreements, staff thought it would be most appropriate to incorporate the amendments to Regulation 1507. Staff also explained that if we were to treat computer programs in a manner that is different than other property, staff believes it would be most appropriate to incorporate those amendments in Regulation 1502. Staff further stated that it remains open to further discussion as to the best method of amending either of the regulations.

Mr. Horton expressed the need for clarification and guidance to industry and audit staff and explained that this has historically been codified through the regulatory process rather than the audit manual alone for the purpose of providing guidance to all affected parties.

Lastly, staff initiated a corrective comment regarding the fact that the issue paper misconstrued Ernst & Young's comments with respect to the types of property to which Ernst and Young's comments would apply. Staff stated that it would discuss with Ernst and Young to obtain clarification.

**Committee Action:**

Upon motion by Mr. Horton, seconded by Ms. Steel, the Committee unanimously approved staff's recommendation to continue to work with interested parties to discuss the application of tax to prewritten software.

/s/ Betty T. Yee

Honorable Betty T. Yee, Committee Chair

/s/ Cynthia Bridges

Cynthia Bridges, Executive Director

BOARD APPROVED

at the February 26, 2013 Board Meeting

/s/ Joann Richmond

Joann Richmond, Chief  
Board Proceedings Division

**Regulation 4601. Service of a Notice of Violation or Warning Notice**

Any notice issued under the Cigarette and Tobacco Products Licensing Act may be served personally or by mail in the manner prescribed for service of a notice of determination under Revenue and Taxation Code section 30206 of the Cigarette and Tobacco Products Tax Law. The Notice of Suspension, Notice of Revocation, Notice of Violation or Warning Notice shall be placed in a sealed envelope, with postage paid, addressed to the licensee or unlicensed person at his or her last known address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice at a United States Post Office, a mailbox, sub post office, substation, mail chute, or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, a Notice of Violation may be served personally by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure.

\*\*\*

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

**Regulation 4603. Penalties for Licensed or Unlicensed Retailers**

The following penalties shall be assessed in addition to any other civil or criminal penalty provided by law upon a finding that a retailer has violated any provision of the Act:

**(a)** A first offense of a violation of any of the following provisions shall result in the issuance of a Warning Notice to the licensee or unlicensed person:

- (1) Business and Professions Code section 22974 (retailer’s failure to retain purchase invoices).
- (2) Business and Professions Code section 22980.1, subdivision (c), (d) or (e) (purchase from unlicensed person or person with suspended or revoked license).
- (3) Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subdivision (b)).
- (4) Business and Professions Code section 22980.2, subdivision (a) (sales of cigarettes or tobacco products by an unlicensed person or person with suspended or revoked license).

**(b)** A first offense of a violation of any of the following provisions shall result in the issuance of a 20-day suspension:

- (1) Business and Professions Code section 22973, subdivision (a)(5) (retailer’s false statement on application).
- (2) Business and Professions Code section 22980, subdivision (b) (any person’s refusal to allow inspection).

**(c)** A second or subsequent offense for a violation of the provisions listed in subdivision (a) or (b) above, shall result in both a 30-day suspension or revocation and a fine. The fine shall be determined in accordance with Regulation 4607.

**(d)** A violation of Business and Profession Code section 22974.3 (possession of unstamped cigarettes or untaxed tobacco products) shall result in the following:

- (1) Notwithstanding paragraphs (2) and (3) below, a Warning Notice for a first offense when the licensee has been in business for less than one month and there has been no purchase of new cigarette or tobacco product inventory during that period.
- (2) A 10-day suspension for a first offense for a seizure of less than 20 packages of cigarettes, or the equivalent amount of tobacco products based on wholesale cost.
- (3) A 20-day suspension for a first offense for a seizure of 20 packages of cigarettes or more, or the equivalent amount of tobacco products based on wholesale cost.
- (4) Both a 30-day suspension or revocation and a fine for a second or subsequent offense. The fine shall be determined in accordance with Regulation 4607.

**(e)** In cases involving multiple violations, the violation punishable by the most severe penalty will be used for purposes of determining the penalty assessed.

**(f)** Notwithstanding subdivisions (b) through (e) above, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present, as set forth in Regulation 4606. If any suspension period is reduced, the redetermined period of suspension shall be 0 days, 5 days, 10 days, or 20 days. The existence of mitigating circumstances may also warrant reducing a revocation penalty to a 30-day suspension, unless revocation is mandated pursuant to Business and Professions Code section 22974.3 subdivision (a)(2) or subdivision (a)(4), 22974.4, ~~22978.6,~~ or 22980.3, subdivision (a)(2) or subdivision (d).

\*\*\*

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

**Regulation 4604. Penalties for Licensed or Unlicensed Wholesalers and Distributors**

The following penalties shall be assessed in addition to any other civil or criminal penalty provided by law upon a finding that a wholesaler or distributor has violated any provision of the Act:

**(a)** A first offense of a violation of any of the following provisions will result in the issuance of a Warning Notice to the licensee or unlicensed person:

(1) Business and Professions Code section 22978.1 (distributor's or wholesaler's failure to retain purchase invoices).

(2) Business and Professions Code section 22978.4, subdivision (c) (distributor's or wholesaler's failure to comply with invoice requirements).

(3) Business and Professions Code section 22978.5, subdivision (b) (distributor's or wholesaler's failure to retain sales records).

(4) Business and Professions Code section 22980.1, subdivision (b), (c), (d), (e) (sales to or purchases from unlicensed person or person with suspended or revoked license) or (f) (sales of cigarettes or tobacco products to retailer or wholesaler revoked or suspended until debts are clear).

(5) Business and Professions Code section 22980.2, subdivision (a) (sales of cigarettes or tobacco products by unlicensed person or person with suspended or revoked license).

**(b)** A first offense of a violation of any of the following provisions will result in the issuance of a 20-day suspension:

(1) Business and Professions Code section 22977, subdivision (a)(5) (distributor's or wholesaler's false statement on application).

(2) Business and Professions Code section 22980, subdivision (b) (any person's refusal to allow inspection).

(3) Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subdivision. (b)).

**(c)** A second or subsequent offense for a violation of the provisions listed in subdivision (a) or (b) above shall result in both a 30-day suspension or revocation, and a fine. The fine shall be determined in accordance with Regulation 4607.

**(d)** A violation of Business and Profession Code section 22978.2 (possession of counterfeit stamped cigarettes by distributors, unstamped cigarettes by wholesalers or untaxed tobacco products) shall result in the following:

(1) Notwithstanding paragraphs (2) and (3) below, a Warning Notice for a first offense when the licensee or unlicensed person has been in business for less than one month and there has been no purchase of new cigarette or tobacco product inventory during the month.

(2) A 10-day suspension for a first offense for a seizure of less than 20 packages of cigarettes, or the equivalent amount of tobacco products based on wholesale cost.

(3) A 20-day suspension for a first offense for a seizure of 20 packages of cigarettes or more, or the equivalent amount of tobacco products based on wholesale cost.

(4) Both a 30-day suspension or revocation and a fine for a second or subsequent offense. The fine will be determined in accordance with section 4607.

\*\*\*

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

**(e)** In cases involving multiple violations, the violation punishable by the most severe penalty will be used for purposes of determining the penalty assessed.

**(f)** Notwithstanding subdivisions (b) through (e) above, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present, as set forth in Regulation 4606. If any suspension period is reduced, the redetermined period of suspension shall be 0 days, 5 days, 10 days, or 20 days. The existence of mitigating circumstances may also warrant reducing a revocation penalty to a 30-day suspension, unless revocation is mandated pursuant to Business and Professions Code section 22974.4, 22978.2, subdivision (a)(2) or subdivision (a)(4), 22978.6, or 22980.3, subdivision (a)(2) or subdivision (d).

\*\*\*

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

**Regulation 4605. Penalties for Licensed or Unlicensed Manufacturers and Importers**

The following penalties shall be assessed in addition to any other civil or criminal penalty provided by law upon a finding that a manufacturer or importer has violated any provision of the Act:

**(a)** A first offense of a violation of any of the following provisions will result in the issuance of a Warning Notice to the licensee or unlicensed person:

(1) Business and Professions Code section 22979.4 (importer's failure to retain purchase invoices on premises).

(2) Business and Professions Code section 22979, subdivision (b)(1) (participating manufacturer's false statement on certification to the Board).

(3) Business and Professions Code section 22979.5, subdivision (b) (manufacturer's or importer's failure to retain sales records on premises).

(4) Business and Professions Code section 22980.1, subdivision (a), (e) or (f) (purchases or sales from or to an unlicensed person or person with suspended or revoked license).

(5) Business and Professions Code section 22980.2, subdivision (a) (sales of cigarettes or tobacco products by unlicensed person or person with suspended or revoked license).

(6) Business and Professions Code section 22979.6, subdivision (c) (manufacturer's or importer's failure to comply with invoice requirements).

**(b)** A first offense of a violation of Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subdivision. (b)) shall result in a 20-day suspension.

**(c)** A second or subsequent offense for a violation of the provisions listed in subdivision (a) or (b) above shall result in both a 30-day suspension or revocation and a fine.

**(d)** In cases involving multiple violations, the violation punishable by the most severe penalty will be used for purposes of determining the penalty assessed.

**(e)** Notwithstanding subdivisions (b) through (d) above, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present, as set forth in Regulation 4606. If any suspension period is reduced, the redetermined period of suspension shall be 0 days, 5 days, 10 days, or 20 days. The existence of mitigating circumstances may also warrant reducing a revocation penalty to a 30-day suspension, unless revocation is mandated pursuant to Business and Professions Code section ~~22974.4, 22978.6, or~~ 22980.3, subdivision (a)(2) or subdivision (d).

\*\*\*

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

**Regulation 1685.5. Calculation of Estimated Use Tax – Use Tax Table.**

*Reference:* Section 6452.1, Revenue and Taxation Code.

(a) In General.

(1) Estimated Use Tax and Use Tax Table. The Board of Equalization (BOE) is required to annually calculate the estimated amount of use tax due according to a person's adjusted gross income (AGI) and make such amounts available to the Franchise Tax Board (FTB), by July 30 of each year, in the form of a use tax table for inclusion in the instructions to the FTB's returns.

(2) Who is Eligible to Use BOE Use Tax Tables.

(A) Consumers may elect to use the use tax tables included in the instructions to their FTB returns to report their estimated use tax liabilities for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand (\$1,000) on their FTB returns. However, eligible consumers may still calculate their actual use tax liabilities using the worksheets in the instructions to their FTB returns and report their actual use tax liabilities on their FTB returns. Consumers are not required to use the use tax tables included in the instructions to their FTB returns.

(B) The use tax table may not be used to estimate use tax liabilities for business purchases, including purchases made by businesses required to hold a seller's permit or to register with the BOE under the Sales and Use Tax Law and report their use tax liabilities directly to the BOE.

(3) Safe Harbor. If eligible consumers use the use tax tables included in the instructions to their FTB returns to estimate their use tax liabilities for qualified nonbusiness purchases and correctly report their estimated use tax liabilities for their qualified nonbusiness purchases in accordance with their AGI ranges, then the BOE may not assess the difference, if any, between the estimated use tax liabilities reported in accordance with the use tax tables and the consumers' actual use tax liabilities for qualified nonbusiness purchases.

(b) Definitions and Data Sources.

(1) AGI Ranges. The use tax table shall be separated into fifteen (15) AGI ranges as follows:

- (A) AGI less than \$10,000;
- (B) AGI of \$10,000 to \$19,999;
- (C) AGI of \$20,000 to \$29,999;
- (D) AGI of \$30,000 to \$39,999;
- (E) AGI of \$40,000 to \$49,999;
- (F) AGI of \$50,000 to \$59,999;
- (G) AGI of \$60,000 to \$69,999;

\*\*\*

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

- (H) AGI of \$70,000 to \$79,999;
- (I) AGI of \$80,000 to \$89,999;
- (J) AGI of \$90,000 to \$99,999;
- (K) AGI of \$100,000 to \$124,999;
- (L) AGI of \$125,000 to \$149,999;
- (M) AGI of \$150,000 to \$174,999;
- (N) AGI of \$175,000 to \$199,999;
- (O) AGI more than \$199,999

(2) Use Tax Liability Factor or Use Tax Table Percentage. For the 2011 calendar year the use tax liability factor or use tax table percentage shall be 0.070 percent (.0007). On June 1, 2012, ~~and each June 1 thereafter~~, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.37, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent. On June 1, 2013, and each June 1 thereafter, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.23, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent.

(3) Total Personal Income. Total personal income shall be determined by reference to the most current personal income data published by the United States Bureau of Economic Analysis.

(4) Total Spending at Electronic Shopping and Mail Order Houses. Total spending at electronic shopping and mail order houses shall be determined by reference to the most current electronic shopping and mail order house spending data published by the United States Census Bureau.

(5) Total Spending on Taxable Purchases. Total spending on taxable purchases shall be determined by:

(A) Determining the percentage, rounded to the nearest tenth of a percent, of total spending at electronic shopping and mail order houses that are not included in the following categories of items, by reference to the most current retail trade product lines statistics by kind of business data published by the United States Census Bureau:

- (i) Groceries and other foods for human consumption off premises, excluding bottled, canned, or packaged soft drinks;
- (ii) Prescriptions;
- (iii) Video Content Downloads;
- (iv) Audio Content Downloads;

\*\*\*

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

- (v) Prepackaged computer software, including software downloads; and
- (vi) All nonmerchandise receipts.

(B) Adding ten billion dollars (\$10,000,000,000) to the total spending at electronic shopping and mail order houses to account for spending that is not included in the spending data published by the United States Census Bureau; and

(C) Multiplying the sum calculated in (B) by the percentage of total spending at electronic shopping and mail order houses that are not included in the categories of items listed in (A) above so that the result does not include spending on nontaxable purchases, and then rounding the result to the nearest tenth of a percent.

(6) Percentage of Income Spent on Taxable Purchases. The percentage of income spent on taxable purchases during a calendar year shall be calculated by dividing the total spending on taxable purchases for that year by the total personal income for that year, multiplying the result by 100, and rounding the result to the nearest tenth of a percent.

(7) Average State, Local, and District Sales and Use Tax Rate. The average state, local, and district sales and use tax rate for a calendar year shall be the total of:

(A) The rates of the statewide sales and use taxes imposed under section 35 of article XIII of the California Constitution and the Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) in effect on January 1 of that year;

(B) The statewide rate of local tax imposed under the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. & Tax. Code, § 7200 et seq.) in effect on January 1 of that year; and

(C) The weighted average rate of the district taxes imposed under the Transactions and Use Tax Law (Rev. & Tax Code, § 7251 et seq.) in effect in the various jurisdictions throughout the state on January 1 of that year after taking into account the proportion of the total statewide taxable transactions (by dollar) reported for each jurisdiction during the fourth quarter of the calendar year that is two years prior to the calendar year for which the calculation is made. For example, the total reported taxable transactions (by dollar) for the fourth quarter of 2010 shall be used to determine the weighted average rate of the district tax rates in effect on January 1, 2012, to calculate the weighted average rate of district taxes for calendar year 2012.

(c) Calculation of the Estimated Use Tax Liability.

(1) The estimated use tax liability for the AGI range described in subdivision (b)(1)(A) shall be determined by multiplying \$5,000 by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(2) The estimated use tax liability for the AGI ranges described in subdivision (b)(1)(B) through (N) shall be determined by multiplying the midpoint of each AGI range by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

\*\*\*

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

(3) The estimated use tax liability for the AGI range described in subdivision (b)(1)(O) shall be determined by multiplying each range members actual AGI by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(d) Use Tax Table Format.

(1) The use tax table for calendar year 2011 shall provide as follows:

Adjusted Gross Income (AGI) Range	Use Tax Liability
Less Than \$20,000	\$7
\$20,000 to \$39,999	\$21
\$40,000 to \$59,999	\$35
\$60,000 to \$79,999	\$49
\$80,000 to \$99,999	\$63
\$100,000 to \$149,999	\$88
\$150,000 to \$199,999	\$123
More than \$199,999 -Multiply AGI by 0.070% (.0007)	

(2) The use tax tables for calendar year 2012 and subsequent years shall utilize the same format as follows:

Adjusted Gross Income (AGI) Range	Use Tax Liability
Less Than \$10,000	\$
\$10,000 to \$19,999	\$
\$20,000 to \$29,999	\$
\$30,000 to \$39,999	\$
\$40,000 to \$49,999	\$
\$50,000 to \$59,999	\$
\$60,000 to \$69,999	\$
\$70,000 to \$79,999	\$
\$80,000 to \$89,999	\$
\$90,000 to \$99,999	\$
\$100,000 to \$124,999	\$
\$125,000 to \$149,000	\$
\$150,000 to \$174,999	\$
\$175,000 to \$199,999	\$
More than \$199,999 -Multiply AGI by % (.000 )	

\*\*\*

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



**BOARD OF EQUALIZATION**

**BUSINESS TAXES COMMITTEE MEETING AGENDA**

HONORABLE BETTY YEE, COMMITTEE CHAIRWOMAN

450 N STREET, SACRAMENTO - ROOM 121

**JANUARY 15, 2013 – 10:00 A.M.**

---

1. Proposed Regulation 4801, *Transfers of Cigarettes and Tobacco Products between Retail Stores Owned by the Same Person*

Request approval and authorization to publish Regulation 4801 regarding transfers of cigarettes and tobacco products between retail stores.

2. Proposed amendments to Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*

Request approval and authorization to publish proposed amendments to account for the new registration requirements imposed on certain retailers.

3. Regulation 1502, *Computers, Programs, and Data Processing*, and Regulation 1507, *Technology Transfer Agreements*

Request Board authorization and direction to continue working with interested parties to clarify the application of tax to prewritten software recorded on tangible storage media.

**M e m o r a n d u m**

**To:** Honorable Jerome E. Horton, Chairman  
Honorable Michelle Steel, Vice Chair  
Honorable Betty T. Yee, First District  
Senator George Runner, Second District  
Honorable John Chiang, State Controller

**Date:** January 4, 2013

**From:** Jeffrey L. McGuire, Deputy Director  
Sales and Use Tax Department (MIC 43)

 Jeffrey L. McGuire, for

**Subject:** **Board Meeting, January 15, 2013**  
**Business Taxes Committee**  
**Request approval to publish amended Regulation 1685.5,**  
***Calculation of Estimated Use Tax – Use Tax Table***

We request your approval and authorization to publish proposed amendments to Sales and Use Tax Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table* (Exhibit 1). Staff's proposed amendments account for the new registration requirements imposed by Assembly Bill No. 155 (Stats. 2011, ch. 313) (AB 155).

### **I. Background**

Regulation 1685.5 implements, interprets, and makes specific Revenue and Taxation Code section 6452.1 by prescribing the methodology the Board uses to annually calculate the estimated amount of use tax due according to a person's adjusted gross income, and the format of the annual use tax table which the Board is required to make available to the Franchise Tax Board (FTB) by July 30 of each year for inclusion in the instructions to the FTB's income tax returns. Consumers may elect to use the use tax tables to report their estimated use tax liabilities, in accordance with their adjusted gross income, for one or more nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand (\$1,000) on their FTB returns.

As prescribed by Regulation 1685.5, the Board calculates a person's estimated use tax liability by applying a use tax liability factor to the specified Adjusted Gross Income (AGI) for the person's AGI range. Regulation 1685.5 further provides that the use tax liability factor for the calendar year shall be calculated by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.37, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent. This methodology is based upon the assumptions that California consumers spend an average percentage of their incomes on electronic and mail order purchases and that they also make an average percentage of their total purchases of tangible personal property for use in California from unregistered out-of-state retailers.

In the calculation of the use tax liability factor, the numeric value 0.37 (37 percent) represents the estimated percentage of California consumers' total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers. The 37 percent was estimated as described in the Board of Equalization Revenue Estimate, "Electronic Commerce and Mail Order Sales – Technical Documentation," December 6, 2010 (<http://www.boe.ca.gov/legdiv/pdf/e-commerce-11-10-technical.pdf>).

## **II. Reason for Amendment to Regulation 1685.5**

AB 155 expanded the use tax registration requirements so that they apply to some out-of-state retailers, including Internet retailers, that were previously not required to register with the Board to collect and remit use tax on their sales of tangible personal property to California customers. The provisions regarding the new registration requirements became operative September 15, 2012, and are anticipated to continue to be operative throughout 2013.

While Board staff is unable to precisely determine the extent to which the new registration requirements will reduce the percentage of taxable purchases that California consumers will make from unregistered out-of-state retailers during calendar year 2013, recent registration activities, including the registration of some retailers that make substantial sales to California consumers, indicate there will be an overall decrease in the percentage of purchases California consumers make from unregistered retailers during 2013. As a result, staff believes amendments to Regulation 1685.5 are necessary to ensure that consumers who elect to report their use tax liabilities incurred during the calendar year 2013, using the use tax tables included in the instructions to their 2013 FTB income tax returns, will be paying an estimated use tax amount that reflects the new use tax registration requirements imposed by AB 155 and recent registration activities. Staff understands that a person's actual use tax liability may be higher or lower than the amount estimated using the methodology incorporated into Regulation 1685.5, but staff continues to believe that the methodology produces reasonable estimates for each AGI range and staff believes that the recommended amendment to the regulation will help ensure that the Board's 2013 estimates are as accurate as possible.

## **III. Estimating a New Percentage of Purchases Made from Unregistered Sellers**

To determine an estimated percentage that would account for the new registration requirements imposed by AB 155, staff relied on a number of data sources including retailers' recent annual reports; 10-K reports on file with the United States (U.S.) Securities and Exchange Commission; "Estimated Quarterly U.S. Retail Sales (Not Adjusted): Total and E-Commerce," November 16, 2012, obtained from the U.S. Census Bureau; and two sets of data published by Vertical Web Media LLC: (1) *The Internet Retailer Top 500 Guide: Profiles and Statistics of America's 500 Largest Retail Web Sites Ranked by Annual Sales*, 2012 edition (hereafter *Top 500*) and (2) *Second 500 Guide: Profiles, Financial and Operating Statistics Plus Rankings of America's 501<sup>st</sup> to 1000<sup>th</sup> Largest E-retailers – The Future Leaders of E-commerce in the United States*, 2012 edition (hereafter *Second 500*).

*Adjusted Total 2011 U.S. Electronic Commerce Sales*

As a starting point, staff obtained electronic commerce sales reported by the U.S. Census Bureau for the four quarters of 2011 (the most recent year for which complete data is available). Staff adjusted the electronic commerce sales by: (1) adding \$10 billion to account for spending not included in the U.S. Census Bureau Data (See Regulation 1685.5 subdivision (b)(5)(B)); and (2) subtracting sales made outside of North America<sup>1</sup>. This methodology resulted in Adjusted Total 2011 U.S. Electronic Commerce Sales of \$182,403,322,210.

*Percentage of Top 1,000 Companies' Sales Made from Unregistered Companies*

The data published by Vertical Web Media LLC includes, among other things, rankings of the Top 1,000 companies based on their online revenues. In November 2012, staff reviewed the Top 1,000 retailers and the Board's administrative records to determine whether or not each of the retailers were registered to collect tax in California. Staff determined that approximately 14.4<sup>2</sup> percent of North American sales made by the *Top 500* companies are made by companies that are not registered with the Board, while 78.0 percent of sales of the *Second 500* companies are made by companies that are not registered with the Board.

The total sales reported by the *Top 500* companies (adjusted for sales made outside North America) account for approximately 86.9 percent of the Adjusted Total 2011 U.S. Electronic Commerce Sales (described above). The remaining difference of 13.1 percent is attributed to companies in the *Second 500* and all other companies not in the Top 1,000 companies. For the purpose of calculating a weighted average percentage of sales made by unregistered companies, staff assumed<sup>3</sup> that the percentage of sales made by unregistered companies included in the *Second 500* companies also represents the percentage of sales made by all unregistered companies not listed in the Top 1,000 companies.

*Calculation of Weighted Average Percentage of Sales Made by Unregistered Companies*

Using a weighted average (illustrated on page 4), staff determined a new estimated percentage of California consumers' total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers of approximately 23 percent.

---

<sup>1</sup> In order to make the adjustment, Research and Statistics Section staff assumed international sales reported in annual reports of the top 100 companies (of the *Top 500*) account for all significant sales made outside North America.

<sup>2</sup> Amazon.com is ranked #1 in the *Top 500* and their total North American sales account for approximately 14.6 percent of the Adjusted Total 2011 U.S. Electronic Commerce Sales. Based on a review of Amazon.com's first three quarterly reports for 2012, staff estimates that approximately 16 percent of total sales reported by Amazon.com were attributed to fees related to third party sellers and other non-retail activities. Staff assumed the revenues associated with these activities are attributed to sales made by companies with the same "unregistered percentage" as the *Second 500* companies.

<sup>3</sup> This assumption was necessary due to a lack of data regarding the companies that are not included in the Top 1,000 companies based on their online revenues.

Calculation of Weighted Average Percentage of Sales Made by Unregistered Companies		
Line Number		
<i>Percentages of Adjusted U.S. Total E-Commerce Sales:</i>		
<i>(Weights: Sum to 100 Percent of Sales)</i>		
1	Top 500 E-Commerce Companies	86.9%
2	All Other E-Commerce Sales	13.1%
<i>Percentages of E-Commerce Sales Made by Unregistered Companies:</i>		
<i>(Are not weights; Unregistered percentages only)</i>		
3	Top 500 E-Commerce Companies	14.4%
4	All Other E-Commerce Sales	78.0%
<b>Weighted Average: ((Line 1 (.869) x Line 3 (.144)) + (Line 2 (.131) x Line 4 (.78)) =</b>		<b>22.7%</b>

#### IV. Conclusion

As a result, staff recommends that the Board amend Regulation 1685.5, subdivision (b)(2), to change the estimated percentage of California consumers' total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers from 37 percent to 23 percent to account for the new use tax registration requirements imposed by AB 155 and recent registration activities. Staff will continue to monitor the implementation of AB 155 to determine whether further changes are needed to Regulation 1685.5 before the Board is required to prepare the 2014 use tax tables. In addition, staff intends to review the new 23 percent estimate for the 2013 use tax tables, as data becomes available regarding the actual sales and registration activities of the top 1000 companies based upon their online revenues following the implementation of AB 155, to see if the methodology set forth in this memorandum (or a similar methodology): (1) can be incorporated into Regulation 1685.5; and/or (2) be used on an annual basis to estimate the percentage of California consumers' total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers.

Approved:   
 Cynthia Bridges  
 Executive Director

JLM:rsw

Attachment

cc: Mr. Mike Gipson  
 Mr. Joel Angeles (MIC 77)  
 Mr. Alan LoFaso (MIC 71)  
 Mr. Sean Wallentine (MIC 78)  
 Ms. Marcy Jo Mandel  
 Ms. Cynthia Bridges (MIC 73)  
 Mr. Randy Ferris

**Regulation 1685.5. Calculation of Estimated Use Tax – Use Tax Table**

*Reference:* Section 6452.1, Revenue and Taxation Code.

(a) In General.

(1) Estimated Use Tax and Use Tax Table. The Board of Equalization (BOE) is required to annually calculate the estimated amount of use tax due according to a person's adjusted gross income (AGI) and make such amounts available to the Franchise Tax Board (FTB), by July 30 of each year, in the form of a use tax table for inclusion in the instructions to the FTB's returns.

(2) Who is Eligible to Use BOE Use Tax Tables.

(A) Consumers may elect to use the use tax tables included in the instructions to their FTB returns to report their estimated use tax liabilities for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand (\$1,000) on their FTB returns. However, eligible consumers may still calculate their actual use tax liabilities using the worksheets in the instructions to their FTB returns and report their actual use tax liabilities on their FTB returns. Consumers are not required to use the use tax tables included in the instructions to their FTB returns.

(B) The use tax table may not be used to estimate use tax liabilities for business purchases, including purchases made by businesses required to hold a seller's permit or to register with the BOE under the Sales and Use Tax Law and report their use tax liabilities directly to the BOE.

(3) Safe Harbor. If eligible consumers use the use tax tables included in the instructions to their FTB returns to estimate their use tax liabilities for qualified nonbusiness purchases and correctly report their estimated use tax liabilities for their qualified nonbusiness purchases in accordance with their AGI ranges, then the BOE may not assess the difference, if any, between the estimated use tax liabilities reported in accordance with the use tax tables and the consumers' actual use tax liabilities for qualified nonbusiness purchases.

(b) Definitions and Data Sources.

(1) AGI Ranges. The use tax table shall be separated into fifteen (15) AGI ranges as follows:

- (A) AGI less than \$10,000;
- (B) AGI of \$10,000 to \$19,999;
- (C) AGI of \$20,000 to \$29,999;
- (D) AGI of \$30,000 to \$39,999;
- (E) AGI of \$40,000 to \$49,999;
- (F) AGI of \$50,000 to \$59,999;

- (G) AGI of \$60,000 to \$69,999;
- (H) AGI of \$70,000 to \$79,999;
- (I) AGI of \$80,000 to \$89,999;
- (J) AGI of \$90,000 to \$99,999;
- (K) AGI of \$100,000 to \$124,999;
- (L) AGI of \$125,000 to \$149,999;
- (M) AGI of \$150,000 to \$174,999;
- (N) AGI of \$175,000 to \$199,999;
- (O) AGI more than \$199,999

(2) Use Tax Liability Factor or Use Tax Table Percentage. For the 2011 calendar year the use tax liability factor or use tax table percentage shall be 0.070 percent (.0007). On June 1, 2012, ~~and each June 1 thereafter~~, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.37, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent. On June 1, 2013, and each June 1 thereafter, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.23, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent.

(3) Total Personal Income. Total personal income shall be determined by reference to the most current personal income data published by the United States Bureau of Economic Analysis.

(4) Total Spending at Electronic Shopping and Mail Order Houses. Total spending at electronic shopping and mail order houses shall be determined by reference to the most current electronic shopping and mail order house spending data published by the United States Census Bureau.

(5) Total Spending on Taxable Purchases. Total spending on taxable purchases shall be determined by:

(A) Determining the percentage, rounded to the nearest tenth of a percent, of total spending at electronic shopping and mail order houses that are not included in the following categories of items, by reference to the most current retail trade product lines statistics by kind of business data published by the United States Census Bureau:

- (i) Groceries and other foods for human consumption off premises, excluding bottled, canned, or packaged soft drinks;
- (ii) Prescriptions;
- (iii) Video Content Downloads;

- (iv) Audio Content Downloads;
- (v) Prepackaged computer software, including software downloads; and
- (vi) All nonmerchandise receipts.

(B) Adding ten billion dollars (\$10,000,000,000) to the total spending at electronic shopping and mail order houses to account for spending that is not included in the spending data published by the United States Census Bureau; and

(C) Multiplying the sum calculated in (B) by the percentage of total spending at electronic shopping and mail order houses that are not included in the categories of items listed in (A) above so that the result does not include spending on nontaxable purchases, and then rounding the result to the nearest tenth of a percent.

(6) Percentage of Income Spent on Taxable Purchases. The percentage of income spent on taxable purchases during a calendar year shall be calculated by dividing the total spending on taxable purchases for that year by the total personal income for that year, multiplying the result by 100, and rounding the result to the nearest tenth of a percent.

(7) Average State, Local, and District Sales and Use Tax Rate. The average state, local, and district sales and use tax rate for a calendar year shall be the total of:

(A) The rates of the statewide sales and use taxes imposed under section 35 of article XIII of the California Constitution and the Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) in effect on January 1 of that year;

(B) The statewide rate of local tax imposed under the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. & Tax. Code, § 7200 et seq.) in effect on January 1 of that year; and

(C) The weighted average rate of the district taxes imposed under the Transactions and Use Tax Law (Rev. & Tax Code, § 7251 et seq.) in effect in the various jurisdictions throughout the state on January 1 of that year after taking into account the proportion of the total statewide taxable transactions (by dollar) reported for each jurisdiction during the fourth quarter of the calendar year that is two years prior to the calendar year for which the calculation is made. For example, the total reported taxable transactions (by dollar) for the fourth quarter of 2010 shall be used to determine the weighted average rate of the district tax rates in effect on January 1, 2012, to calculate the weighted average rate of district taxes for calendar year 2012.

(c) Calculation of the Estimated Use Tax Liability.

(1) The estimated use tax liability for the AGI range described in subdivision (b)(1)(A) shall be determined by multiplying \$5,000 by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(2) The estimated use tax liability for the AGI ranges described in subdivision (b)(1)(B) through (N) shall be determined by multiplying the midpoint of each AGI range by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(3) The estimated use tax liability for the AGI range described in subdivision (b)(1)(O) shall be determined by multiplying each range members actual AGI by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(d) Use Tax Table Format.

(1) The use tax table for calendar year 2011 shall provide as follows:

Adjusted Gross Income (AGI) Range	Use Tax Liability
Less Than \$20,000	\$7
\$20,000 to \$39,999	\$21
\$40,000 to \$59,999	\$35
\$60,000 to \$79,999	\$49
\$80,000 to \$99,999	\$63
\$100,000 to \$149,999	\$88
\$150,000 to \$199,999	\$123
More than \$199,999 -Multiply AGI by 0.070% (.0007)	

(2) The use tax tables for calendar year 2012 and subsequent years shall utilize the same format as follows:

Adjusted Gross Income (AGI) Range	Use Tax Liability
Less Than \$10,000	\$
\$10,000 to \$19,999	\$
\$20,000 to \$29,999	\$
\$30,000 to \$39,999	\$
\$40,000 to \$49,999	\$
\$50,000 to \$59,999	\$
\$60,000 to \$69,999	\$
\$70,000 to \$79,999	\$
\$80,000 to \$89,999	\$
\$90,000 to \$99,999	\$
\$100,000 to \$124,999	\$
\$125,000 to \$149,000	\$
\$150,000 to \$174,999	\$
\$175,000 to \$199,999	\$
More than \$199,999 -Multiply AGI by __% (.000__)	

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

450 N STREET

SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT

JANUARY 15, 2013

BUSINESS TAXES COMMITTEE

REPORTED BY: Kathleen Skidgel

CSR NO. 9039.

Juli Price Jackson.

CSR NO. 5214

P R E S E N T

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

For the Committee:

Betty T. Yee  
Chair

Michelle Steel  
Member

Jerome E. Horton  
Member

George Runner  
Member

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

Joann Richmond  
Chief  
Board Proceedings Division

Board of Equalization  
Staff:

Susanne Buehler  
Chief, Tax Policy Division

Phil Bishop  
Business Taxes Specialist III  
Property and Special Taxes  
Division

Stephen Smith  
Tax Counsel IV  
Legal Department

Bradley Heller  
Tax Counsel IV  
Legal Department

---oOo---

INDEX OF SPEAKERS

1		
2	Speaker	Page
3	Dennis Loper	
	California Distributors Association	6
4		
	Steven K. Alari	
5	SEIU Local 1000	8
6	Gina Rodriquez	
	California Taxpayers Association	43, 50
7		
	Julian Decyk	
8	Paul Hastings	46
9	Mark Nebergall	
	Software Finance & Executive Council	48

---oOo---

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

450 N STREET  
SACRAMENTO, CALIFORNIA  
JANUARY 15, 2013

---oOo---

MR. HORTON: Okay. Ms. Richmond?

MS. RICHMOND: Our next item is the Business Taxes Committee. Ms. Yee is the Chair of that committee.

Ms. Yee.

MS. YEE: Thank you, Ms. Richmond.

Call the Business Taxes Committee to order. We have three items on the, uh, Business Taxes Committee agenda; we will take them up in order, and we do have speakers on each of the items.

The first item is, uh -- excuse me. The first item is proposed Regulation, uh, 4801 related to transfers of cigarettes and tobacco products between retail stores owned by the same person.

We have several speakers on this item. If I could have them come up and be seated. Mr. Steven Alari. And, uh, I think I saw Mr. Loper here. Come forward.

And, uh, while you're doing so, let me have staff introduce the issue.

Good afternoon.

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

We have three agenda items for your

1 consideration this afternoon. They include the Special  
2 Taxes Cigarette and Tobacco Products Licensing Act  
3 regulations; the use tax table; and technology transfer  
4 agreements. We will take each agenda item and their  
5 respective action time separately before moving to the  
6 next one.

7 For agenda item one, with me are Stephen Smith  
8 from our Legal Department and Phil Bishop from our  
9 Property and Special Taxes Department.

10 In action one we ask that the Board approve and  
11 authorize for publication either staff's recommendation  
12 to publish proposed Regulation 4801, transfers of  
13 cigarettes and tobacco products between retail stores  
14 owned by the same person. The regulation would provide  
15 for transfers of cigarettes and tobacco products between  
16 retail stores owned by the same legal entity that are  
17 supported by a transfer log or similar document and  
18 copies of invoices to be maintained at each location  
19 participating in the transfer.

20 Alternative one is embraced by retailers of  
21 cigarettes and tobacco products with multiple locations  
22 and formalizes the Board's current policies regarding  
23 documentation requirements for the transfer of  
24 cigarettes and tobacco products between retail stores  
25 owned by the same person.

26 Or, alternatively, direct staff to draft a  
27 proposed regulation that prohibits the transfer of  
28 cigarette and tobacco products between any retail

1 stores, regardless of the ownership, as recommended by  
2 some interested parties. Language was not submitted by  
3 the interested parties for this alternative.

4 As you noted, we have speakers for action one,  
5 and we are happy to answer any questions you may have.

6 MS. YEE: Thank you, Ms. Buehler.

7 Let's go to the speakers. You'll have two  
8 minutes each. If you'll introduce yourself for the  
9 record and, uh, proceed.

10 Mr. Loper.

11 ----oOo---

12 DENNIS LOPER

13 ----oOo---

14 MR. ALARI: You first.

15 MR. LOPER: Uh, Dennis Loper representing the  
16 California Distributors Association. I apologize that  
17 my daughter had to leave, so you get the worst half of  
18 the organization.

19 Uh, we -- you know, we oppose option one and  
20 support option two. We believe that -- that option one,  
21 although well-meaning, does not protect the Board or the  
22 taxpayers from giving easier ways for blending of  
23 product that isn't stamped -- meaning other tobacco  
24 products -- into the system.

25 Um, you know, arguably, you'll have logs; but  
26 logs are only as good as -- as the people filling them  
27 out, particularly when unless -- unless the  
28 investigators are onsite the day the product leaves one

1 site and goes to the other. Otherwise, um, you could  
2 conceivably have somebody that holds illegal product  
3 in -- in another area and every time that they -- they  
4 sell some of the product down, they just keep refilling  
5 it.

6 And, in most cases, when they blend product  
7 like that, they're also not reporting those sales which  
8 means that there's probably revenue loss on sales tax,  
9 too.

10 Um, when we wrote -- or when we supported AB  
11 71, we probably didn't do as good a job in this area as  
12 far as writing a strict enough portion. But I will  
13 remind you all that what we were -- what we've proposed  
14 as the proponents were to try to get as close to the  
15 good work that the ABC -- or Alcohol has done in this,  
16 where they have very strict rules of transfer of  
17 product. And in that case, a retailer does not have the  
18 right to move their product from one store to the next.  
19 They have to go through the -- the proper channels. The  
20 reason for that -- and -- and alcohol has a much lesser  
21 evasion rate than we have currently on tobacco. Uh, and  
22 they don't have stamps, so it doesn't always mean just  
23 indicia.

24 So, with that, we would support item two. We  
25 would never presume to send in language to the Board on  
26 how to write that regulation because we think that the  
27 staff should write regulations that easily -- that are  
28 easiest for them to -- to enforce than for us.

1           But -- but we believe that the spirit of option  
2 two is closer to what we think would be a better way of  
3 assuring that there's not evasion.

4           Thank you.

5           MS. YEE: Thank you, Mr. Loper.

6           Next, please.

7                                 ---oOo---

8                                 STEVEN K. ALARI

9                                 ---oOo---

10           MR. ALARI: Yes. Good afternoon. My name --  
11 Members of the Board, Madam Chair. My name is Steven  
12 Alari. I'm representing SEIU Local 1000 which  
13 represents the investigators and the, uh, inspectors who  
14 conduct the, uh, inspections.

15           I want to thank staff and the, uh -- and the  
16 Board for sending this back for further revision. I  
17 believe the revisions make it stronger, uh, the  
18 regulation stronger, and we have a letter which is  
19 included Exhibit 4 from our president, Yvonne Walker,  
20 removing our concerns regarding the proposed regulation.

21           Thank you.

22           MS. YEE: Thank you.

23           Let me ask staff, can you address Mr. Loper's  
24 concern with respect to how, uh -- what -- what are the  
25 safeguards against facilitating the transfer of  
26 unstamped products as we allow for this type of transfer  
27 between store locations?

28           MR. BISHOP: Well, the products in question

1 are typically unstamped tobacco products as opposed to  
2 cigarettes. And the safeguards we tried to put into the  
3 regulation deal with inventory control. And that log is  
4 in essence to assist in that aspect, the inventory  
5 control aspect.

6 So any product on the shelf should have an  
7 invoice supporting it. And if that invoice is not  
8 referenced to that particular license location, it would  
9 have to have been transferred and included on that log.

10 It provides the retailer the ability to move  
11 that product around if need -- if need be. And it also  
12 allows for ID, it gives them the ability to at least  
13 verify that that inventory on the shelf is supported by  
14 an invoice and/or the transfer log.

15 MS. YEE: Okay.

16 MR. BISHOP: And it has to be maintained at the  
17 site, and it needs to be made, um -- presented to the  
18 investigator or inspector at the time of the inspection.  
19 So something after the fact would not be accepted.

20 MS. YEE: Mm-hmm.

21 MR. BISHOP: And that product would be  
22 seized.

23 MS. YEE: Okay. And, Mr. Loper, would you  
24 agree that the problem or the potential problem does  
25 mainly affect unstamped tobacco products? I mean we  
26 have a --

27 MR. LOPER: Yeah, I would. But, interesting,  
28 yesterday I think that all of you saw a story in the

1 Sacramento Bee that -- that, um, said in a University of  
2 Michigan study that California's still highly -- have  
3 a -- have a cigarette evasion problem, too.

4 So that seems to me to speak to -- to -- to we  
5 need to take another look at -- at how our enforcement's  
6 going.

7 I mean, I'm particularly proud of Mr. Horton's  
8 bill and particularly proud that the bill has done as  
9 well as it has. But, clearly, there seems to be some  
10 more things happening. We're convinced that OTP, um,  
11 evasion is -- is higher now than it has ever been. And,  
12 um -- and, you know, we -- we appreciate that the staff,  
13 uh, thinks that this is the best method for them to  
14 allow transfers. We just think that the transfers  
15 themselves have inherent problems and allow for ways to  
16 get around it.

17 And, frankly, the staff doesn't know if a can  
18 of Skoal or a roll of Skoal is the same roll that's on  
19 the invoice. They only know the number of pieces of  
20 product that are sold. So there -- there -- you know,  
21 there isn't a way to say for sure that it is that roll.  
22 You can look at the date, but the date on the roll and  
23 the date of the invoice are not going to be the same  
24 thing because the date on the roll is the day that it  
25 was received by the distributor, not the day that it was  
26 sold.

27 So, there are a number of different things, a  
28 number of products that -- that don't even have dating.

1 So I would argue that as much as -- as, you know, this  
2 is -- I will have customers, my client's customers that  
3 will be unhappy with our position. But our position is  
4 not one that we're -- that we're -- you know, we're  
5 wavering on. We believe strongly that there will be  
6 evasion problems and it -- and it will encourage those  
7 people that are -- that are now skirting the law. It  
8 will make it easier and help them to skirt.

9 And -- and, you know, it's not the Safeways of  
10 the world we're worried about. It's the -- the street  
11 operators that concern us.

12 MS. YEE: Sure.

13 MR. LOPER: And it's not the -- the high-grade  
14 tobacconists that we're worried about. It's -- it's  
15 those street operations that -- that have a majority of  
16 the OTP sales in the state.

17 MS. YEE: Mm-hmm. Okay. Uh, thank you, Mr.  
18 Loper.

19 I think, um -- and I do want to hear from the  
20 other Members. We -- we definitely have an issue with  
21 respect to, um, OTP as we continue to have.

22 Uh, I would say that, uh, given the number of  
23 cases that we've seen before this Board where, uh, in  
24 practice, these transfers do occur fairly frequently,  
25 that, uh, this may not be the most, uh -- uh, failsafe,  
26 you know, method of -- of tracking these transfers. But  
27 we at least need to have something that, uh, allows us  
28 to understand what's going on when these transfers do

1 occur.

2           So -- but I would agree with you, more work  
3 needs to be done. We're going to continue to have  
4 evasion and, uh, I'm not sure if this adds to it or  
5 exacerbates it, or, uh -- it probably is a combination  
6 of both.

7           MR. LOPER: I -- I -- I would suggest, Ms. Yee,  
8 that a bright line saying that you can't do the transfer  
9 would have a better impact than one that allows for the  
10 transfer and allows for the -- the -- those that have  
11 been -- been pushing the envelope, gives them more  
12 latitude on how to push the envelope.

13           So I would argue that option two which is a  
14 bright line that says you can no longer do this would --  
15 would also be a stronger way of -- of -- of dealing with  
16 this program.

17           MS. YEE: Okay, thank you.

18           Members?

19           Senator Runner?

20           MR. RUNNER: Yeah, I mean, I think the  
21 challenge we have -- and this is in response to the  
22 issues that we've had before us, you know, with -- with  
23 and -- and ringing our hands over this concept of  
24 transfers, how do you keep track of, what are they  
25 supposed to keep track of, the fact that we ended up  
26 with people with -- without, um, good record, uh, or  
27 historical record as to what -- when -- what was  
28 transferred, certainly not tying it back to inventory or

1    trying it back to invoice, um, was -- was very  
2    problematic. And, you know, as a result of that, we  
3    asked for the interested parties to move forward and try  
4    to come up with -- with -- with -- with solution at that  
5    point.

6            And, you know, I hear the fact that maybe a  
7    bright line is the easiest issue. The problem I have  
8    with the issue of the bright line is it basically then  
9    puts then the -- the -- the, uh, retailer, who are all  
10   very different out there, in the issue of having to then  
11   potentially increase inventory. Because if you've got  
12   to go ahead and you can't split, that means you've got  
13   to go ahead and duplicate inventory.

14           And I think that's, in this day and age, and  
15   asking then inven -- you know, asking a businessman to  
16   increase inventory in order to compensate for the fact  
17   that you can't transfer to me is the hurdle that I have.

18           Um, you know, I think what we need to do is  
19   make sure that whatever we do have in place, and if it's  
20   tying the date back to the inventory, making sure that's  
21   the real record, that we stay as strict to that as we  
22   can and see if it works. If it doesn't work, then we  
23   need to come back and address it. If we see  
24   opportunities for more evasion, then we need to address  
25   it.

26           Um, my concern right now is we're more open to  
27   evasion the way our current system is than we -- than --  
28   than what we're trying to put into place. But, again,

1 I -- I -- in thinking through this, my concern is just  
2 the issue that it puts back on the small operator who's  
3 got to figure out how to move a little bit of inventory  
4 from one place to another, and all of a sudden the only  
5 way to do that with a bright line is through increased  
6 inventory, increased product on -- on the, uh -- on the  
7 shelf.

8 And so, I -- at this point that's why I feel  
9 like at least it's an issue to try and see what works.

10 MS. YEE: Thank you, Senator Runner.

11 Mr. Horton, please.

12 MR. HORTON: Thank you, Madam Chair.

13 Um, you know, as a legislator, we always have  
14 had concerns about legislating to the exception and not  
15 the rule.

16 Um, in this case, most of the audits that we  
17 conduct, uh, there is some indication -- what causes us  
18 to conduct those audits or those investigations, there's  
19 some indication of potential illegal activity. So  
20 wherein the times the Board of Equalization is actually  
21 in these facilities, there's a anticipation that  
22 something may have gone awry.

23 And so the -- the rule may very well be, uh,  
24 more the exception, if you know what I mean.

25 And so, it -- it -- you know, it -- I've gone  
26 backwards and forward on this, um, and took a look at  
27 the, uh, normal business practices. And in the normal  
28 business practice of a large retailer, they're going to

1 have extremely tight internal controls. Uh, and so that  
2 although the blending, you know, is -- is possible, but  
3 the tightening internal controls certainly minimizes  
4 that.

5 Uh, to that end, uh, when -- when a retailer  
6 purchases in bulk, typically, uh, the logic behind it is  
7 to be able to purchase a product at a lower price. It's  
8 not that the merchandise has to go to one location  
9 versus the other.

10 Uh, and so, I'm having somewhat of a quandary  
11 of understanding why there should be transfers,  
12 significant transfers anyway. Uh, and that if they're  
13 purchasing the product, they can direct the distributor  
14 to ship it to whichever location they want it shipped  
15 to. Uh, because the inventory challenges that they have  
16 at one location, theoretically, is going to exist at the  
17 other location. Unless, in fact, they're warehousing  
18 the merchandise; and given the life of this particular  
19 merchandise, that's not happening. I mean, the life of  
20 this merchandise is relatively short. And so, you want  
21 to get it from the distributor to the customer as soon  
22 as possible.

23 So, um -- I would -- I would add to the  
24 requirement that in purchasing, whenever you're  
25 purchasing in bulk, that the distributor has to ship it  
26 to the specific location and that any transfers between  
27 these should be incidental and nominal, and so that you  
28 don't see these major transfers, which is where -- which

1 lends itself to -- to, uh -- to the blending concern.

2 Um, and I don't know what that incidental  
3 number might be. I don't know if it's cartons. I don't  
4 know if it's cases. Uh, but I do know that, uh, the  
5 industry practice -- I mean, if you look at your major  
6 stores, they're shipping the merchandise directly to the  
7 store based on their sales volume. And a retailer in  
8 his -- his mode of business, mode of operation is going  
9 to make that assessment. This store will sell, on  
10 average, X amount, therefore I'm going to purchase on  
11 average, so forth.

12 So unless there is some, uh -- and I would go  
13 to the, uh -- to the industry. Unless there is some  
14 prohibition from the distributor actually shipping it to  
15 the -- the place of potential sale, then there shouldn't  
16 be a whole lot of transfers anyway. And if there are,  
17 they should be incidental.

18 MR. LOPER: If I -- if I may. Um, we can -- we  
19 can deliver to whatever location the -- the person --  
20 the retailer or the purchaser wants. Um, and if -- and  
21 if a retailer buys at Costco or they do their own  
22 delivery, they have the right also to -- to separate the  
23 invoices at the time of sale for each location.

24 Now, I would remind the Board that in the case  
25 of alcohol, there is not that right to transfer product.

26 MR. HORTON: It's prohibited.

27 MR. LOPER: And -- and -- and it's specifically  
28 prohibited. The error that -- that -- you know, and

1 maybe it's in need for legislation is, is that maybe it  
2 needs to be specifically prohibited in this case, too.  
3 Because in the -- if the retailer knows what their --  
4 what their store is doing, they shouldn't be  
5 over-ordering in one and not in another.

6           And on that occasion it will happen,  
7 Mr. Runner. But for the most part I would argue that  
8 most stores that are well-managed know the difference  
9 and they don't do it in alcohol. And it's -- and we're  
10 talking about these stores are basically all the same  
11 kind of stores. They -- they -- they manage their  
12 inventories in the same way. And there's a reason why  
13 they don't -- that -- that alcohol has -- has kept it  
14 this way. Um, and I -- I think that -- that it would be  
15 a stronger way to protect the -- the taxpayer.

16           Now, you know, I'm -- I'm interested in people  
17 that operate legally. And people that operate -- and it  
18 is too bad that we have to -- to regulate to protect  
19 those people. But in this case I think the regulation  
20 should be a bright line.

21           And, um, I'm -- I'm sorry, I can't be convinced  
22 that this regulation is going to -- is going to help  
23 and -- and that is the reason why we've opposed it.  
24 It's not because we're -- we're -- we want to make it  
25 harder on our customers. It's because we believe  
26 strongly that our members and our good customers will  
27 be -- will be eventually harmed.

28           MR. HORTON: Uh, Mr. Loper, I appreciate that.

1           Um, the question before you, um, the liquor  
2 industry, they too purchase in bulk for the purpose  
3 of -- of reducing cost. And they will ship that  
4 merchandise to a particular location.

5           MR. LOPER: They have -- they to have deliver  
6 by location.

7           MR. HORTON: By location.

8           MR. LOPER: By location.

9           MR. HORTON: And so --

10          MR. LOPER: Specific to the statute.

11          MR. HORTON: And so why not do that in this  
12 case? Um, require that the distributor delivers by  
13 location and so the merchandise -- to not take away the  
14 opportunity to purchase in bulk. So that they maintain  
15 the opportunity to purchase in bulk, but the distributor  
16 has to deliver it to, uh, the location and reduce the  
17 amount -- the level of which can be transferred by  
18 virtue of these log-in inventory controls to a nominal  
19 amount in the event that they -- there are some  
20 miscalculations, uh, let's say. I don't -- I'm not  
21 familiar enough with the industry to come up with an  
22 arbitrary number.

23          MR. LOPER: I -- I guess my answer would be --

24          MR. HORTON: But if you allow me to finish.

25          MR. LOPER: I'm sorry.

26          MR. HORTON: The incidental transfer, somewhere  
27 around, uh, you know, \$250, \$500, uh, I mean you're  
28 not -- but the -- the bulk transfers are handled by

1 the -- or the bulk distribution, if you will, is handled  
2 by the -- by the distributor and not by the -- the  
3 retailer. Because I too have some concerns, and I'm  
4 trying to have some flexibility here when you have  
5 incidental transfers that are -- that, in the normal  
6 course of business, couldn't be anticipated.

7 MR. LOPER: Um, if -- maybe. I mean I -- to  
8 help you with where I think you're going, I would say  
9 that the bright line basically answers the first  
10 question, because then we have to be -- then the product  
11 has to be specific to each location.

12 But, having said that, if -- if you're going to  
13 this issue of how do you accommodate those emergency  
14 situations, perhaps you'd put a limit on the number of  
15 times per calendar year a store can do those, and  
16 that -- and that they have to notify the Board at the  
17 time that they're making those transfers.

18 I mean, perhaps that would -- would strengthen  
19 the -- the spirit of what you're trying to do, um, and  
20 would get to Mr. Runner's issues, or perhaps Ms. Steel's  
21 issues. But -- but I -- if -- if -- if there's a need  
22 to figure out a way to do this because there's this --  
23 this -- of this issue, then I would argue perhaps you  
24 limit the number of times those transfers can be made,  
25 and perhaps you do that upon some sort of notice to the  
26 BO -- to the Board to either ID or to the excise unit at  
27 the time that the transfer's going to be made. So that  
28 the line becomes brighter. That people don't just

1 say -- just don't fill in logs and -- and, you know, do  
2 what they -- they want to do without having some  
3 controls, stronger than just the ID's logs that they've  
4 suggested.

5 MR. RUNNER: Madam Chair.

6 MR. HORTON: Uh, Members, I mean, we -- we --  
7 here's -- here's our challenge, in my mind, is that last  
8 year we audited some 10,000 different, uh, retailers,  
9 somewhere around there, I believe. Strike that.

10 I'm -- I'm referring to the annual report in  
11 2007, which is some time ago. Um, at that time we were  
12 somewhat at the peak of our activity, uh, and not as  
13 proficient as we are now.

14 MR. ALARI: 2004.

15 MR. HORTON: Our team is extremely more  
16 proficient. Uh, and we're not looking at that  
17 significant number of inspections anymore.

18 But then, of those inspections, a nominal  
19 amount actually yielded; I believe, the amount, if I  
20 remember correctly, was \$16 billion.

21 Since then, this program has generated  
22 hundreds -- a little over -- over hundreds of millions  
23 of dollars. I don't know the exact numbers, but I'll  
24 give you the credit anyway. Um, and so we're more  
25 focused than we've ever been before on our inspections.

26 And I, for one, think the criminal element in  
27 the State of California is on a rise; that the  
28 underground economy, the, uh -- the, uh, organized crime

1 is engaging in the distribution of counterfeit products  
2 at every level. And -- and we don't have enough force  
3 to -- to really deal with that issue.

4 But at the same time, I don't want to be  
5 punitive of a business that, uh, we may never audit, we  
6 may never suspect. But they're going to do what they  
7 can to adhere to the law, uh, and thereby when those  
8 incidental transactions do occur, we should be able  
9 to -- to -- to -- to -- to accommodate that.

10 But there should be some -- it just seems to be  
11 counterintuitive that a retailer has to inventory large  
12 amounts of cigarettes and then distribute them from  
13 their location, uh, when it's more convenient to have  
14 the distributor distribute -- distribute it based on  
15 your sales volume, per location, and then make those  
16 minor adjustments whenever we need to, so we allow for  
17 those minor adjustments.

18 Thank you, Madam Chair.

19 MS. YEE: Thank you, Mr. Horton.

20 Senator Runner, please.

21 MR. RUNNER: Yeah, yeah. I guess my -- my  
22 thought is that these are incidental. And so maybe, um,  
23 that we're not intending this to be mass transfers of  
24 lots of product back and forth.

25 So -- so I really don't have an issue in  
26 regards to creating some kind of cap or something that  
27 would -- that would limit it in some way. Because it  
28 seems to me that, again, my concern is just that all of

1 a sudden some product -- a little bit of product needs  
2 to be moved over there, then there's a process to do  
3 that. Certainly not trying to bring everything into a  
4 warehouse to be distributed then amongst two different  
5 stores or something like that. And if -- and if that's  
6 what this opens up, I certainly think that's  
7 problematic.

8 So, um -- but, again, I think the incidental  
9 movement is certainly something that in the normal  
10 course of business somebody would clearly get in the  
11 middle of and need to do.

12 Um, I -- I'm probably, again, uh, I'm not sure  
13 how much of this kind of a discussion happened in the  
14 interest parties meeting discussions, and so, you know,  
15 if these were part of the topics.

16 I'm not sure I -- I -- I'm concerned about the  
17 fact that somebody would be contacting the BOE every  
18 time there was a transfer. That sounds like it's, um, a  
19 bit of a -- a bit of a, uh, hassle for not only the,  
20 uh -- the, uh -- the retailer, but also then for -- for  
21 inventorying that and keeping track of that for the --  
22 for the BOE.

23 Um, but certainly I think there can be some  
24 limits on that. And it's certainly not my thought or  
25 intention that this be unlimited transfers and the  
26 ability then to -- it would -- it would be a perversion  
27 of -- I think what we were trying to do, if all of a  
28 sudden this became a way to, um, you know, bring

1 something into one place and then sort it out to four  
2 different places and, um -- as opposed to just saying,  
3 hey, I ran out of cartons of this or I ran out of, you  
4 know, tins of this and I need to put some over in that  
5 other store.

6 Um, that's what I -- at least those are the  
7 ones that have come before us. And so that's kind of  
8 what my thinking was because that was the nature of what  
9 was coming before us.

10 MS. YEE: Yeah.

11 MR. RUNNER: So --

12 MS. YEE: Let me -- let me, uh, just direct  
13 this question back to the staff then. Two -- two  
14 thoughts: One, in response to Senator Runner's comment  
15 just now. Um, I mean, I think what we were  
16 contemplating was really the situations that were before  
17 this Board with respect to, uh, really the more  
18 incidental (inaudible) and transfers.

19 MR. BISHOP: Correct, that's our current  
20 policy. The current policy was drafted after seeing a  
21 number of smaller retailers that had a couple of  
22 locations that were moving, you know, a couple hundred  
23 dollars worth of product at any given time --

24 MS. YEE: Mm-hmm.

25 MR. BISHOP: -- and not having, uh, transfer  
26 logs prepared in advance.

27 MS. YEE: Uh-huh.

28 MR. BISHOP: So being in situation of how do we

1 handle that. And so staff promulgated, well, put  
2 together the policy and then circulated that to all the  
3 retailers with multiple locations that are selling  
4 cigarettes or tobacco products, and it was approximately  
5 1700.

6 So, we felt that we needed a regulation so  
7 that, as these situations come before you, you have  
8 clear -- one, the retailer has clear guidelines on what  
9 they need to do, and the Board has a regulation that it  
10 can point to in support.

11 The Act, in my review of the Act, does not  
12 require that items be sold from the store in which they  
13 are delivered to. That is -- that is not -- ABC  
14 statutes are not replicated here in that situation.

15 So there is a -- regardless of what the Board  
16 decides, if we go with short -- allowing transfers, the  
17 Act provides for it. If we say it has to be sold from  
18 the location in which the store that it was delivered  
19 to, that would require a regulation because the Act is  
20 not -- it does not state that.

21 And I think if you want to limit the ability of  
22 a retailer, a legitimate retailer from moving product  
23 from one location to another, you need to be very clear  
24 within either the Act or within a regulation, because  
25 otherwise we're in the same quandary we're in today,  
26 that we're trying to get clarity on these transfers.

27 But some of the retailers that I've dealt with  
28 that are smaller, that have -- that are presum --

1 ostensibly legitimate, they purchase at one location.  
2 They're small, you know, one-person-owned location or  
3 business and they want to control that inventory. So  
4 they want to take delivery at the location that they're  
5 physically at and then they move it to their other  
6 store.

7 So that is occurring with, um --

8 MR. HORTON: Yeah.

9 MR. BISHOP: -- the gentleman that was at the  
10 interested parties meeting. And that -- his concern is  
11 this would put him out of business if we were to not  
12 allow for transfers. And -- and again, he buys in bulk  
13 and I believe if he was having it delivered to different  
14 locations, he may be able to get a discount in terms of  
15 the product discount in terms of the bulk, but is he  
16 going to get hit with delivery charge? And then if he's  
17 not physically at that location taking delivery, one of  
18 his employees is doing it. And so he would prefer that  
19 he is able to take control of that product himself.

20 Now --

21 MR. LOPER: If I remember right, that was a  
22 licensed distributor.

23 MR. BISHOP: He happens to be, yes.

24 MS. YEE: A licensed distributor?

25 MR. BISHOP: So he would have to invoice to  
26 himself then.

27 MS. YEE: Mm-hmm. Right, right.

28 Mr. Horton.

1 MR. HORTON: You know --

2 MR. BISHOP: And it's a thousand dollar monthly  
3 or annual fee.

4 MS. YEE: Right.

5 MR. HORTON: A small retailer doesn't have  
6 multiple locations that they have to distribute to.  
7 That, in and of itself, is counterintuitive, not  
8 definitive of a small local retailer. Uh, so that  
9 argument seems to, uh -- doesn't seem -- and I know  
10 you're just delivering the argument.

11 MR. BISHOP: Right.

12 MR. HORTON: But it just seems to be  
13 inconsistent.

14 And, uh -- and then there's a presumed distrust  
15 among his -- his other distributors. They don't -- they  
16 don't trust them for the same reason that we have  
17 challenges with blending. They, too, can be blending on  
18 him so that he -- if he's not controlling the industry,  
19 his -- one of his retail outlets could be moving illegal  
20 product in there and his product never getting sold but  
21 the illegal product's getting sold. And so he's got his  
22 own operation set up.

23 So he has the same concern. And that's  
24 indicative of the problem that we're trying to address.  
25 And -- and, uh, given the, uh -- you know, the evasion  
26 problem here and given the fact that we're focusing  
27 on -- we're far more focused than we've ever been before  
28 in our investigation that we're not auditing the average

1 Mom-and-Pop operation out there that, by all  
2 appearances, seem to be doing it right. Uh, we have  
3 more extensive investigation, uh, capacity now. And  
4 we're a little more focused.

5 So, that still does not seem to justify the  
6 transfer of anything more than what you've articulated,  
7 uh, \$200 incidental that may occur on a quarterly basis  
8 to make an adjustment for, uh, a miscalculation in  
9 sales, sales volume, something of that nature.

10 And so, a combination of a bright line test  
11 that allows for, uh -- that requires the distributor to  
12 ship directly to the -- to the point of sale, uh, or  
13 anticipated point of sale, with some minor incidental  
14 ability that it, too, has inventory control.

15 I'm not necessarily thinking that taxpayers  
16 ought to be reporting their transfer of inventory to the  
17 Board of Equalization. But there should be onsite  
18 inventory records, and they should keep the normal  
19 inventory records that the vendor that you described is  
20 probably keeping; uh, inventory control, quarterly  
21 inventory, independent inventory, you know, all of that,  
22 uh, should be maintained, not because the Board requires  
23 it, so -- but because it's normal business practice to  
24 control this volatile -- this particular industry that  
25 has these challenges.

26 MR. ALARI: One -- one -- one point.

27 MR. HORTON: Member Yee?

28 MR. ALARI: Ms. Yee, I'm sorry.

1 MS. YEE: Sure. Let me have Mr. Loper, Mr.  
2 Alari, respond briefly. And then, uh --

3 MR. LOPER: I -- I -- I guess I would point out  
4 and maybe Mr. Alari was going to point out, this  
5 regulation is not an incidental regulation. It  
6 doesn't -- it doesn't address this as an incidental  
7 action. It allows for actions on a daily basis --

8 MR. HORTON: Right.

9 MR. LOPER: -- as actually outlined by staff.

10 MS. YEE: Mr. Alari.

11 MR. ALARI: Yeah, Member Chair, to the point,  
12 uh, Mr. Horton -- Board Member Horton had said, we're  
13 having our annual meeting right now. And we just gave  
14 our report; for 2011-2012, our members have inspected  
15 approximately 10,400 in that period.

16 And, uh, one of the reasons that SEIU has -- is  
17 not opposing this regulation -- it's withdrawn -- is  
18 because in the additional language that was added in is  
19 that we are going to be asking for transfer documents  
20 commencing -- when we commence our inspections, and they  
21 cannot create them or give them to them afterwards.

22 We think that that will be helpful when we  
23 conduct these inspections. That additional language, we  
24 think it's very important.

25 MS. YEE: Okay.

26 MR. BISHOP: And I will add that blending can  
27 occur within a single location. Multiple locations --  
28 it's not necessary to have more than one location to

1 blend.

2           And what staff was trying to do, again, was to  
3 put in regulation form the current policy of the Board  
4 and the practice in the industry, albeit on a limited  
5 basis, but it does give the latitude to those retailers  
6 to transfer product of a -- of a type that is going to  
7 go bad after a period of time. So -- which is different  
8 than alcohol. Alcohol's not going to spoil, but the  
9 snuff or the cigars will eventually go bad if not  
10 properly humidified.

11           So, they're able to move that product, again  
12 legitimately, between locations where the sale may take  
13 place and so they can sell the product before it does go  
14 bad, before they have to return it to their distributor.

15           And this is -- we saw this as a business --  
16 retail -- retail business friendly proposal.

17           MR. SMITH: In staff's view, um, this  
18 regulation would not increase evasion because the  
19 transfer logs would have to be at the store at the time  
20 the inspector arrives.

21           After -- this would tighten current practice  
22 really, because currently some retailers attempt to  
23 provide transfer logs after the fact, and that becomes a  
24 contentious issue for us.

25           But I think this would clarify that all the  
26 records have to be in place at the time the inspector  
27 arrives.

28           MS. YEE: Okay. Very well.

1 Other comments, Members?

2 Hearing none, is there a motion?

3 MR. HORTON: Yeah, um, I would move that we  
4 limit the transfers to the \$200 a quarter, uh, and  
5 require the inventory, um -- all of the inventory  
6 controls, including the transfer log, um, and that there  
7 are no exceptions once the auditor's onsite. And  
8 anything in excess of that should be delivered by the  
9 distributor and not -- so we should have a bright line  
10 test that prohibits any excess transfers between stores,  
11 period.

12 But with that, Members, the concern is is that  
13 the law -- I mean, this is -- this is -- this is -- this  
14 is what books and records look like, whatever you write  
15 down on a blank sheet of paper. And so that can -- that  
16 can certainly be of a concern, uh, is of a concern for  
17 me and can -- tied in with the whole evasion thing.

18 And I -- I respectfully disagree, uh, with  
19 staff and would remind staff that when we were going  
20 through the process with AB 71, identified this as a  
21 huge problem. Staff didn't agree at that time either,  
22 but we've subsequently proven that it is just a major,  
23 major problem for the State of California. And we don't  
24 want to open any doors, uh, that we have to -- that may  
25 be of a challenge later on.

26 The other concern is that these -- these  
27 cigarettes are being sold to kids, and they're being  
28 sold illegally. Uh, the funding, excess funding is

1 being used for other criminal activities. I mean, this  
2 is a -- this is a huge problem.

3 When we were going through the process of  
4 debating the legislation, it was discovered that the  
5 revenue from this was being used to fund terrorist  
6 activity, uh, against the United States. And we were  
7 able to shut that down. The investigations that have  
8 yielded significant, uh, disclosure of unreported  
9 taxable sales, we found human trafficking existing, uh,  
10 as a result of perpetuating this illegal activity.

11 So, it's a -- it's a much larger concern than  
12 just a retailer being able to transfer. But I do want  
13 to accommodate them. And I think that nominal amount  
14 somehow -- whatever that number might be. I hate to  
15 speak on behalf of the small retailers out there, what  
16 their needs are.

17 But your own testimony, uh, staff's testimony  
18 was \$200. And based on your testimony, uh, pursuant to  
19 what you've heard from staff, I believe it was actually  
20 \$200 a quarter or something like that, but -- so that  
21 would be my motion. If you can -- that was a long  
22 motion.

23 MS. YEE: Okay. We have a motion by Mr. Horton  
24 to, uh, limit the application of, uh, the transfer to  
25 \$200 a quarter, keeping the inventory control  
26 requirements as proposed in place, and that the, uh --  
27 any amounts in excess of that would be, uh, subject to,  
28 uh, distribution to locations by distributor.

1 MR. HORTON: Yes.

2 MS. YEE: Okay. Is there a second?

3 I want to give it a courtesy second for  
4 discussion.

5 MR. RUNNER: Okay.

6 MS. YEE: I, um -- I feel like we need -- we  
7 need a measure in place now to deal with -- I'm sure  
8 there are going to be more cases that we're going to  
9 hear before we get something in place. So I do think  
10 there's some sense of urgency to this.

11 Um, and I think the staff has done, uh, good  
12 work in terms of outreach to the parties that would be  
13 affected. And, Mr. Chairman, on your proposal, um,  
14 would that change? I feel like I'd like to see it  
15 developed -- re -- reformulated and have it come back to  
16 the Board.

17 Um, there's a lot in that. I think the  
18 outreach that we would do around that is different from  
19 what the staff has already done. And, uh, I'd just like  
20 to kind of see it in whole again.

21 MR. HORTON: Yeah, I -- I -- I would agree with  
22 that, Madam Chair. I mean, if we send it back to staff,  
23 there's enough history here, uh, where we've had these  
24 problems. And to actually come up with numbers, as I  
25 indicated, I don't necessarily want to impose --

26 MS. YEE: Yeah.

27 MR. HORTON: -- an arbitrary number, uh, and  
28 just wanted to, uh, philosophically sort of delineate

1 the two efforts here.

2 MS. YEE: Okay. Um, I also think every time we  
3 speak about any change in this particular area of our,  
4 uh, administration of this particular tax area, that  
5 there are multiple objectives that we're trying to  
6 accomplish when we put these regulations in place. And  
7 some of which I don't think necessarily are on-point  
8 with respect to the -- the -- the focus at hand.

9 So, uh, I want to be mindful of that and not  
10 lose sight of kind of the origin of the concern with  
11 respect to what this regulation was trying to respond  
12 to.

13 So, uh, I would like to see this come back.  
14 But other, uh, thoughts, Members?

15 MS. STEEL: I --

16 MR. HORTON: Ms. Steel, then Mr. Runner.

17 MS. STEEL: I want staff to work on the numbers  
18 because 200 number -- \$200 is too arbitrary here for a  
19 quarter.

20 And I know Mr. Loper thinks that I'm very much  
21 sympathetic to small business owners. This one is, you  
22 know -- I'm talking about few dollars that they transfer  
23 and they get penalized and they have to close for ten  
24 days. When, you know, you're looking at those small  
25 stores, to ask them to close -- I mean, you know, make  
26 them to close it for ten days means that they have to  
27 close down for whole store.

28 So I really want staff to come back with the

1 numbers for the average, because I see a lot of small  
2 numbers, but \$200, I -- I really want to figure out  
3 that, you know, what number is the really better number  
4 here. Because I think Chairman Horton just came out  
5 from -- just 200 from, you know --

6 MR. HORTON: Out of the sky.

7 MS. STEEL: Yeah. Exactly. He just picked it.  
8 So I want something to --

9 MR. RUNNER: Limited research.

10 MS. STEEL: -- reasonable that -- that, you  
11 know, uh, not making small stores, they to have close  
12 down because of these penalties.

13 So, you know, I -- I just really want to see a  
14 little more flexible. I totally understand your point  
15 of view because everything has to be very strict, so  
16 most of the industries that they are doing honest  
17 businesses that they have to survive.

18 But at the same time, some of these small  
19 businesses, when they own couple of stores or they have  
20 their friends and they want to borrow just a little bit,  
21 it has to be little flexible here. But I don't like  
22 that 200 number. So let's, uh, you know, ask staff to  
23 come back that what's the best number to work with and  
24 then, you know, I want to see it.

25 MS. YEE: Okay.

26 MS. STEEL: Yeah.

27 MS. YEE: Senator Runner.

28 MR. RUNNER: Yeah, I -- I -- like I said, I

1 think we can find something that will work. I -- I just  
2 get concerned that we would be up here making up a  
3 number. We've had a, uh, interested parties in place.  
4 And, um --

5 MR. HORTON: "Ditto" will suffice.

6 MR. RUNNER: And -- and, uh -- and I think it's  
7 good to hear back from, uh, those groups to say what  
8 that would work with, with the impact. Because I'm not  
9 sure if there was ever a consideration during that  
10 interested parties about -- I mean, I think it was  
11 either of transferring or not transferring. I think --  
12 I don't know if they -- they ever got the discussion of  
13 limiting transfers, and that's a different kind of  
14 discussion. And I think before we do that, we need to  
15 let the process take care of it.

16 MS. YEE: Okay.

17 Mr. Horton, do you want to just, uh, change  
18 your motion to direct it to the staff?

19 MR. HORTON: I withdraw the motion and yield to  
20 your direction, Madam Chair.

21 MS. YEE: Okay. Um, why don't we have the  
22 staff then, uh, hearing the concerns that have been  
23 expressed today, we are looking at, uh, limiting the  
24 application of, uh -- well, limiting transfers and what  
25 that may look like.

26 Perhaps start with the proposal that was put on  
27 the table and, uh, certainly from an administration  
28 standpoint from the small business perspective impact,

1 uh, retailer impact, and, uh, also the distributor  
2 impact with respect to what we do with, uh, those, uh,  
3 amounts beyond any limitation we impose.

4 Okay. And, uh, I would like -- we did go  
5 through an interested parties process, uh, on this. I  
6 would like to be sure that all the interested parties  
7 are kept aware of the developments of our discussion  
8 here.

9 MS. BUEHLER: Certainly.

10 MS. YEE: And, uh, we'll work with you on that  
11 time frame for bringing this back.

12 MS. BUEHLER: Thank you.

13 MS. YEE: Okay. Without, objection, that will  
14 be the direction. Thank you.

15 MR. LOPER: Thank you.

16 MS. YEE: Thank you.

17 ----oOo----

18

19

20

21

22

23

24

25

26

27

28

1                                ---o0o---

2                MS. YEE: All right. Our next item, Members,  
3 is proposed amendments to Regulation 1685.5, a  
4 Calculation of the Estimated Use Tax, using the use tax  
5 table.

6                We have one speaker on this item, Miss Gina  
7 Rodriquez, if you'll come forward.

8                And we'll have the staff introduce the issue.

9                MS. BUEHLER: We actually have one more action  
10 item still under the --

11               MS. YEE: Oh, I'm sorry.

12               MS. BUEHLER: -- Cigarette and Tobacco.

13               MS. YEE: We do?

14               MS. BUEHLER: We do.

15               MS. YEE: Oh, was it the other amendments?

16               MS. BUEHLER: Yes.

17               MS. YEE: Okay. I'm sorry.

18               MS. BUEHLER: That's all right.

19               MS. YEE: Let me, uhmm, move back to item 1  
20 then.

21               So, we have given staff direction with respect  
22 to revising or further modifying Regulation 4801. It  
23 looks like we also have then the requirement of Board  
24 adoption to publish amendments to Regulations 4601 and  
25 4603, 4604 and 4605.

26               And this relates to -- to allowing any notice  
27 under the Cigarette and Tobacco Products Licensing Act  
28 to be served personally or by mail and to allow reduced

1 suspension period of five days, which is in addition to  
2 the already allowed zero, ten and twenty days with these  
3 respective regulations.

4 Okay.

5 MR. HORTON: Move adoption.

6 MS. YEE: Okay.

7 Moved by --

8 MS. MANDEL: I didn't even see that in the  
9 issues.

10 MR. BISHOP: It's in the agenda.

11 MS. YEE: Okay. Moved by Mr. Horton.

12 Is there a second?

13 MS. MANDEL: Oh, that's from before.

14 MS. YEE: Yes, uh-huh.

15 MR. RUNNER: Correct.

16 MS. MANDEL: Oh, okay, sorry.

17 MS. YEE: Okay, motion by Mr. Horton to adopt  
18 those amendments.

19 Second?

20 MS. STEEL: I second that but I wanted staff to  
21 come back, maybe year from now, that, you know, how many  
22 people are getting from zero to five days.

23 I'm very much concerned that small business  
24 owners, instead of getting zero now, there is between  
25 zero to ten. So, I want to see the numbers of five days  
26 to -- they supposed to get zero, but they get five  
27 days.

28 MS. YEE: Okay.

1 MS. STEEL: Thank you.

2 MS. YEE: You're welcome.

3 Motion by Mr. Horton, second by Ms. Steel, with  
4 a request by staff to provide an update after a year on  
5 the impact.

6 Without objection, Members?

7 MS. MANDEL: Yeah, I just had one that --

8 MS. YEE: Are you okay?

9 MS. MANDEL: -- yeah, I'm okay with this. I  
10 had one little note --

11 MS. YEE: Yes.

12 MS. MANDEL: -- on something else.

13 MS. YEE: Do you want to make --

14 MS. MANDEL: Oh, yeah. On -- just on the 4801,  
15 on the legal entity, if it goes forward like that I  
16 think you're going to have to pay -- I mean, I still got  
17 confused because I realized that you're using "legal  
18 entity" to also refer to a natural person and that  
19 that's taken care of by the example that you put.

20 So, I -- since, to me, "legal entity" just  
21 means an actual thing created under the Code somehow, I  
22 was confused and I was trying to think of other ways you  
23 would say -- say it, like, you know, when the licensee  
24 for the retail location, transferring in the licensee,  
25 receiving are the -- are identical.

26 I thought, "Oh, well, for want of a -- for want  
27 of an initial on one of the licenses, you know, the guy  
28 would lose."

1 I was like, "Well, what about if it said the  
2 same?"

3 Well, but then we have the whole argument  
4 about, "I'm really the same."

5 So, I guess maybe that's where you wound up  
6 with legal entity, but I thought there was potential  
7 for -- still just potential for confusion when I  
8 realized that you were using it for -- last meeting I  
9 was focused on, you know, parents, subsidiary and that  
10 kind of thing and that's not what we were talking about.  
11 We were just talking about the exact same legal entity.

12 I hadn't focused that you were using it to also  
13 reference a natural person. So, that --

14 MR. SMITH: Yeah. Well, in the initial draft  
15 it included natural person.

16 MS. MANDEL: Yeah, I just --

17 MR. SMITH: And then in the second draft we  
18 added the parents of example to try to --

19 MS. MANDEL: -- right. Well, I meant that the  
20 phrase "legal entity" itself, that I'm the same legal  
21 entity.

22 MR. SMITH: -- yeah.

23 MS. MANDEL: I mean, I -- you know -- but maybe  
24 I'm sensitive to it because we get these letters from  
25 tax challenged that talk about legal entity.

26 I don't think of myself as a legal entity. So,  
27 that's why I found the language -- I don't know what.

28 MR. SMITH: We had some internal debate about

1 that.

2 Do you think "person" would be better than  
3 "legal entity"?

4 MS. MANDEL: Well, I mean, this is being put  
5 over so maybe we just, you know, talk about it later,  
6 but I -- I know you went through the -- "We don't want  
7 to use 'person' because that's too confusing."

8 But I -- I don't know if everyone in the world,  
9 you know, thinks "legal entity" can include a -- when  
10 they read it -- they'd have to go to the -- they'd go to  
11 the example, which is in the same paragraph that talks  
12 about natural person, but it just -- I guess I hadn't  
13 picked up on that you were using it to mean also a -- a  
14 natural person, since I was so focused last time on the  
15 related corporation-type issue.

16 MR. BISHOP: I think our discussion, in some  
17 sense, when we came up with "legal entity" and there was  
18 a discussion whether it should be "person."

19 The title of the regulation actually has  
20 "person" in it, saying "person." And, so, it alludes to  
21 the person and then it -- we further define that person  
22 as a "legal entity" the same and "Here's some examples  
23 of a type of legal entity" --

24 MS. MANDEL: All right.

25 MR. BISHOP: -- "which would be the same."

26 MS. MANDEL: Okay. You think you've walked it  
27 through? Okay.

28 MS. YEE: Well, take a -- take another look as

1 you're going back and looking at the other --

2 MR. BISHOP: Sure.

3 MS. MANDEL: That was the only note.

4 MS. YEE: -- actual areas for modification.

5 MS. MANDEL: Thank you.

6 MS. YEE: Okay. So, we have motion by  
7 Mr. Horton, second by Ms. Steel with respect to adoption  
8 of the amendments to 4601, 03, 04, 05 and with an update  
9 in a year on its -- on their impact.

10 And without objection those amendments are  
11 adopted and authorized for publication.

12 Thank you.

13 MR. BISHOP: Thank you.

14 MS. YEE: Okay, thank you.

15 Item No. 2, proposed amendments to  
16 Regulation 1685.5 with respect to the use tax table.

17 Ms. Buehler.

18 MS. BUEHLER: For agenda items 2 and 3, Bradley  
19 Heller from our Legal Department is joining me.

20 MS. YEE: Great. Good afternoon, Mr. Heller.

21 MR. HELLER: Good afternoon.

22 MS. BUEHLER: For agenda item 2 we request your  
23 approval and authorization to publish proposed  
24 amendments to Sales and Use Tax Regulation 1685.5,  
25 calculation of estimated use tax, use tax table.

26 Staff's proposed amendments account for the new  
27 registration requirements imposed by Assembly Bill 155  
28 and recent registration activities by changing the

1 estimated percentage of California consumers' total  
2 purchases -- purchases made from out-of-state retailers  
3 that are not registered with the Board to collect use  
4 tax from their customers from 37 percent to 23 percent.

5 The amendments would apply to the 2013 use tax  
6 table, which covers purchases made during the 2013  
7 calendar year.

8 Staff will continue to monitor the  
9 implementation of Assembly Bill 155, registration  
10 activities and other data sources to determine whether  
11 the methodology used to estimate the 23 percent can be  
12 incorporated into Regulation 1685.5 and used on an  
13 annual basis.

14 For the Board's general information, we note  
15 that based on data from the Franchise Tax Board,  
16 participation and the number of taxpayers reporting on  
17 the use tax line of their FTB returns nearly doubled  
18 2011 to 2012, with a revenue increase of \$9.8 million.

19 I believe we have a speaker for this item,  
20 after which we'd be happy to answer any questions you  
21 may have.

22 MS. YEE: Okay. Thank you, Ms. Buehler.

23 Good afternoon, Ms. Rodriquez, thank you for  
24 your patience.

25 ---o0o---

26 GINA RODRIQUEZ

27 ---o0o---

28 MS. Rodriquez: Thank you, Madam Chair and

1 Members and happy new year to all of you.

2 Gina Rodriquez with California Taxpayers  
3 Association. Cal-Tax did participate in the interested  
4 parties meetings and, as a result of staff conducting  
5 these meetings, we feel that taxpayers have been well  
6 served.

7 Staff was very receptive to Cal-Tax's concerns,  
8 specifically with the narrow AGI ranges that were  
9 initially proposed. Those AGI ranges have subsequently  
10 been widened.

11 Also our concern with -- with the lack of  
12 attention to AB 155 and, as Ms. Buehler just stated,  
13 AB 155 has been addressed.

14 They're doing a 14 percent reduction in looking  
15 at consumers' total purchases that are made from  
16 out-of-state online retailers.

17 So, for these reasons, we totally support  
18 staff's request to approve and authorize to publish the  
19 proposed regulation.

20 Thank you.

21 MS. YEE: Thank you very much. And thank you  
22 for your participation.

23 Comments, Members?

24 MR. HORTON: Move adoption.

25 MS. YEE: Okay. A motion by Mr. Horton. Is  
26 there a second?

27 MS. MANDEL: Second.

28 MS. MANDEL: Second by Ms. Mandel.

1 MS. YEE: Senator Runner, do you have a  
2 comment?

3 MR. RUNNER: No.

4 MS. YEE: Okay.

5 MS. STEEL: I have a little comment.

6 MS. YEE: Yes, Ms. Steel.

7 MS. STEEL: I think 23 percent is still too  
8 high, but it's better than 37 percent figure, so, I just  
9 go for it.

10 MS. YEE: Okay, noted.

11 Other comments?

12 Okay, motion by Mr. Horton, second by  
13 Ms. Mandel.

14 Objection?

15 Hearing none the request to approve and  
16 authorize publication of these amendments is adopted.

17 Thank you.

18 And our last item is Regulation 1502, and 1507.  
19 This relates to computers, programs and data processing  
20 and technology transfer agreements.

21 We have several speakers on this issue. Let me  
22 ask them to come forward, please?

23 Mr. Julian Decyk with Paul Hastings, Mr. Mark  
24 Nebergall with SOFTEC, Miss Rodriguez with Cal-Tax and,  
25 I believe, that is it.

26 Please come forward and we'll have Ms. Buehler  
27 and Mr. Heller introduce the issue.

28 MS. BUEHLER: In action 1, regarding whether to



1                    ---o0o---

2                    MR. DECYK: Thank you, Ms. Yee. My name's  
3 Julian Decyk. I am with Paul Hastings.

4                    I was co-lead counsel for the taxpayers in  
5 the -- in the Nortel cases. I'm co-author of the two  
6 Paul Hastings letters to which the formal issue paper  
7 here refers.

8                    I'd like to make two points briefly.

9                    First, the formal issue paper states that Paul  
10 Hastings recommended that Regulation 1507 be amended in  
11 a specific manner.

12                   In fact, Paul Hastings in these two letters  
13 made no specific recommendations to amend  
14 Regulation 1507, rather Paul Hastings was responding to  
15 factual errors and misstatements of applicable law  
16 presented in the initial and second discussion papers.

17                   As a result, the purpose of the letters was to  
18 base the discussion for potential amendments to  
19 Regulation 1507 on an accurate statement of the facts  
20 and law, thereby avoiding the potential for developing  
21 an invalid regulation.

22                   As we both know, there have been two invalid  
23 regulations relating to the technology transfer  
24 agreement statutes and we really don't need another.

25                   Moreover, because the statements in the letters  
26 were simply a description of the TTA statutes as  
27 authoritatively interpreted by the courts that  
28 considered them, you don't need a regulation to

1 implement them. They should just be implemented.

2 Second, the Board staff, in their discussion  
3 papers, have in many instances simply failed to  
4 substantially respond in any manner to the factual  
5 corrections and legal analyses presented to them.  
6 Instead in many instances the Board staff's papers  
7 simply repeat unchanged the statement that was refuted.  
8 And the Board staff's papers don't even acknowledge,  
9 much less respond to, the points made to them.

10 This approach leads to nothing constructive.  
11 Moreover, if Board Members read only the Board staff's  
12 position paper, this approach creates a potential -- a  
13 potentially misleading picture of the choices available  
14 to Board Members.

15 Thank you for your consideration.

16 MS. YEE: Thank you.

17 Next, please.

18 ---o0o---

19 MARK NEBERGALL

20 ---o0o---

21 MR. NEBERGALL: Yes, my name's Mark Nebergall.

22 Honorable Members of the Board, I'm the  
23 President of the Software Finance and Executive Council,  
24 which is a trade association that provides public  
25 policy, advocacy in the areas of tax, finance and  
26 accounting for the software industry.

27 I'm also here on behalf of a broadbased  
28 coalition of companies and trade associations that have

1 been participating in the interested parties process on  
2 this issue.

3           And I'm here to tell you today that we support  
4 the direction that the staff has recommended and to just  
5 briefly restate our understanding of the direction they  
6 are recommending that the -- that the issues be split  
7 into two baskets -- one basket having to do with the  
8 software stored on a tangible storage medium and the  
9 other basket for software that's stored on tangible  
10 personal property that is other than a tangible storage  
11 medium and that those issues be considered separately.  
12 We support that.

13           We also ask that you give the Board direction  
14 to consider the proposals that it has received that  
15 suggest that, at least with regard to software stored  
16 on -- or that is sold on tangible personal property  
17 other than a disk -- that a percentage split methodology  
18 approach be considered. We ask that you direct the  
19 staff to look more closely at those proposals and come  
20 up with a regulation that -- that allows companies  
21 and -- to sell products with a clear understanding of  
22 what their sales tax and use tax responsibilities are.

23           With that, I will conclude. And I'm prepared  
24 to answer any questions about the proposals, at least  
25 that SOFTEC and the Silicon Valley Leadership Group has  
26 submitted with regard to these issues.

27           MS. YEE: Thank you, Mr. Nebergall.

28           MR. NEBERGALL: You're welcome.

1 MS. YEE: Ms. Rodriguez.

2 ---o0o---

3 GINA RODRIQUEZ

4 ---o0o---

5 MS. RODRIQUEZ: Gina Rodriguez with the  
6 California Taxpayers Association, thank you very much.

7 First, if -- if there is a need for a  
8 regulation -- and we're not convinced there is, as  
9 Mr. Decyk stated -- we do want to continue working with  
10 staff on some -- some proposed language.

11 Cal-Tax did, in fact, offer some proposed  
12 language to staff not too long ago, sort of  
13 complementing SOFTEC's proposal.

14 There's the software industry and then there's  
15 everybody else that's interested. And, so, we want to  
16 make sure all interests are represented -- all  
17 industries are represented with respect to TTAs.

18 So, we did offer a safe harbor proposal. And  
19 we would love to continue working with staff on that  
20 language.

21 MS. YEE: Great. Thank you very much,  
22 Ms. Rodriguez.

23 Let me just make a couple comments here and I  
24 do support the staff recommendation as well. I think  
25 there has been some movement, albeit we're moving slow  
26 but deliberately on these issues, that it is -- these  
27 are difficult issues.

28 And I think from my perspective, I want to be

1 sure that what the Board does ultimately adopt is on  
2 solid legal foundation.

3 And I also want to be sure that -- and I have  
4 had many conversations with industry representatives  
5 that I think from both of our vantage point we want  
6 whatever is ultimately adopted to be clear with respect  
7 to implementing -- implementation, administration and  
8 certainly compliance in audit requirements as well.

9 This -- there are some pending audits that  
10 encompass some of these issues. And, so, I think  
11 clarity is of the utmost importance.

12 I will also say that I think one of the  
13 breakthroughs was with the submission of the  
14 SOFTEC-Silicon Valley Leadership proposal.

15 And I think Ms. Rodriguez's proposal also, I  
16 would say that at this point everything is still on the  
17 table, that we certainly want clarity.

18 And in order to get ease and compliance and  
19 certainly clear audit guidelines for the Board of  
20 Equalization, we're going to continue to work towards  
21 that goal.

22 So, Members, comments on this?

23 Mr. Horton.

24 MR. HORTON: Thank you, Madam Chair. I think  
25 I, Madam Chair, would like to have just a little more  
26 clarification on the discussion about the need for  
27 regulation or not.

28 MS. YEE: Uh-huh.

1 MR. HORTON: I'd like to hear from the  
2 Department as to their views and then possibly return to  
3 the witnesses that are here from the various groups.

4 MS. YEE: Okay, great question.

5 Mr. Heller.

6 MR. HELLER: Thank you, Ms. Yee.

7 Essentially right now we do already have two  
8 different regulations that we're -- that are already --  
9 already have been adopted, Regulation 1502, which  
10 addresses data processing programming and computer  
11 programs and the second regulation, 1507, that deals  
12 with technology transfer agreements.

13 So, essentially, staff was -- to the extent  
14 that we were going to further define what is a  
15 technology transfer agreement or a change or -- or  
16 include additional contracts in the -- within the  
17 definition, then staff was thinking that it might be the  
18 most appropriate to make those changes in the regulation  
19 that deals with technology transfer agreements.  
20 However, we're still open to looking at that further.

21 And then, in addition, with regard to the  
22 software itself, we do think we have a whole regulation  
23 that just deals with computer programs so that if  
24 there's any treatment of computer programs that's  
25 different than other types of tangible personal -- or I  
26 should say, other types of property, then -- then we  
27 were leaning towards making those amendments in  
28 Regulation 1502 as well.

1           But we're not necessarily arguing that it has  
2 to be done that way and we're open to further discussion  
3 as to the best method to do it.

4           MR. HORTON: Okay, that's helpful.

5           I mean I do believe there needs to be some  
6 clarification or some guidance, if you will, to -- to  
7 the industry as well as to the Audit Department, who  
8 will ultimately be reviewing these transactions.

9           And I think that's important whether that can  
10 be accomplished in the audit manual or some other means  
11 in and of itself is debatable.

12           The regulatory process, by having the  
13 clarification, the Board has historically codified that  
14 in the regulatory process by virtue of -- for the  
15 purpose, if you will, of giving direction to -- to -- to  
16 all who may be considering or may be dealing with the  
17 embedded software issue specifically.

18           And it seems to have a little more weight and a  
19 little more protection for the industry if, in fact, the  
20 ultimate language that is codified sort of represents  
21 the consensus of all of the interested parties to have  
22 it embedded in the regulation, as opposed to providing  
23 the Field Audit Manual adjustment directing the audit  
24 staff, which isn't something the staff -- I mean that  
25 the industry or the taxpayer generally has access to.

26           And, so, they're subject to clarification in  
27 the audit process, as opposed to a method in which we  
28 are communicating.

1           Even though we're not -- I mean I understand  
2 the concerns, but we're not necessarily changing the  
3 law. And the presumption is you are clarifying the  
4 law -- at least from my own personal perspective.

5           I don't want to -- so, Madam Chair, I too would  
6 be supportive of staff recommendation and -- as they  
7 have instructed staff to continue to work with the  
8 industry on the embedded software issue.

9           MS. YEE: Okay. I'll take that as a motion.  
10 Motion by Mr. Horton to adopt the staff recommendation.  
11 Is there a second?

12          MS. STEEL: Second.

13          MS. YEE: Second by Ms. Steel.

14          Without objection, motion carries.

15          Thank you very much.

16          MR. HELLER: Thank you.

17          MS. BUEHLER: In action 2, regarding whether to  
18 amend Regulation 1507, technology transfer agreements to  
19 clarify how the technology transfer under the statutes  
20 apply --

21          MR. HORTON: I think we --

22          MS. MANDEL: I understand the motion to  
23 cover --

24          MS. YEE: To cover both.

25          MS. BUEHLER: All three?

26          MS. YEE: Yes, uh-huh.

27          MS. BUEHLER: 'Cause there are three.

28          MS. MANDEL: There's three?

1 I've got to stop reading just the issue paper.

2 MS. BUEHLER: We're good. If you're good with  
3 all three, I'm good with all three.

4 MR. HORTON: All right, we are.

5 MR. HELLER: Ms. Yee, with your permission, if  
6 I could just make one quick clarification --

7 MS. YEE: Please, Mr. Heller.

8 MR. HELLER: -- it's not impacting the vote at  
9 all.

10 MS. YEE: Yes.

11 MR. HELLER: It was just -- I did want to point  
12 out, though, that staff, at least slightly, misconstrued  
13 Ernst & Young's comments as reflected in the discussion  
14 paper.

15 And to the extent that we are -- staff thought  
16 that the comments might apply to something like a --

17 MS. MANDEL: Coffee maker?

18 MR. HELLER: -- I think we used in there  
19 computer printer, like a normal consumer printer, and  
20 we've been informed that that was not the intent.

21 And we somehow misconstrued it and we're  
22 willing to talk with Ernst & Young further to figure out  
23 what kind of property they were referring to and see  
24 if -- and see how tax applies once we understand the  
25 transaction.

26 MS. YEE: Very well.

27 Thank you for that, Mr. Heller.

28 Okay. Thank you very much.

1 MR. HELLER: Thank you.

2 MS. BUEHLER: Thank you.

3 MS. YEE: That concludes the Business Taxes  
4 Committee for this meeting.

5 Thank you, Ms. Richmond.

6 ---o0o---

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

REPORTER'S CERTIFICATE.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

State of California )  
 ) ss  
County of Sacramento )

I, KATHLEEN SKIDGEL, Hearing Reporter for the California State Board of Equalization certify that on January 15, 2013 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 36 constitute a complete and accurate transcription of the shorthand writing.

Dated: February 20, 2013

*Kathleen Skidgel*



\_\_\_\_\_  
KATHLEEN SKIDGEL, CSR #9039  
Hearing Reporter

REPORTER'S CERTIFICATE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

State of California     )  
                                  )  ss  
County of Sacramento    )

I, JULI PRICE JACKSON, Hearing Reporter for the California State Board of Equalization certify that on JANUARY 15, 2013 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 37 through 56 constitute a complete and accurate transcription of the shorthand writing.

Dated: APRIL 8, 2013

\_\_\_\_\_  
JULI PRICE JACKSON  
Hearing Reporter

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

**Proposed Amendment of Sales and Use Tax Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table***

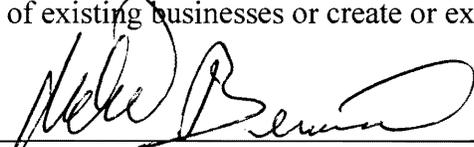
STATEMENT OF COST OR SAVINGS FOR NOTICE OF PUBLIC HEARING

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 March 15, 2013  
Richard Bennion, Regulations Coordinator

Approved by  Date 3/18/13  
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 6660 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. 12/2008)

**See SAM Section 6601 - 6616 for Instructions and Code Citations**

DEPARTMENT NAME State Board of Equalization	CONTACT PERSON Rick Bennion	TELEPHONE NUMBER 916-445-2130
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400 Calculation of Estimated Use Tax - Use Tax Table		NOTICE FILE NUMBER Z

**ECONOMIC IMPACT STATEMENT**

**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 businesses and/or employees
- b. Impacts small businesses
- c. Impacts jobs or occupations
- d. Impacts California competitiveness
- e. Imposes reporting requirements
- f. Imposes prescriptive instead of performance
- g. Impacts individuals
- h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) Please see the attached .

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. 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: \_\_\_\_\_

3. Enter the number of businesses that will be created: \_\_\_\_\_ eliminated: \_\_\_\_\_

Explain: \_\_\_\_\_

4. Indicate the geographic extent of impacts:  Statewide  Local or regional (List areas.): \_\_\_\_\_

5. Enter the number of jobs created: \_\_\_\_\_ or eliminated: \_\_\_\_\_ Describe the types of jobs or occupations impacted: \_\_\_\_\_

6. 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: \_\_\_\_\_

**B. 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: \_\_\_\_\_

**ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)**

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: \_\_\_\_\_ and the 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 that may result from this regulation and who will benefit: \_\_\_\_\_

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? \$ \_\_\_\_\_

---

---

**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: \_\_\_\_\_

2. 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.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.**

**ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)**

1. Will the estimated costs of this regulation to California business enterprises exceed \$10 million?  Yes  No (If No, skip the rest of this section.)

2. Briefly describe each equally as an effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: \_\_\_\_\_

Alternative 2: \_\_\_\_\_

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: \$ \_\_\_\_\_ Cost-effectiveness ratio: \$ \_\_\_\_\_

Alternative 1: \$ \_\_\_\_\_ Cost-effectiveness ratio: \$ \_\_\_\_\_

Alternative 2: \$ \_\_\_\_\_ Cost-effectiveness ratio: \$ \_\_\_\_\_

---

---

**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 of approximately \$ \_\_\_\_\_ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

a. is provided in \_\_\_\_\_, Budget Act of \_\_\_\_\_ or Chapter \_\_\_\_\_, Statutes of \_\_\_\_\_

b. will be requested in the \_\_\_\_\_ Governor's Budget for appropriation in Budget Act of \_\_\_\_\_  
(FISCAL YEAR)

2. Additional expenditures of approximately \$ \_\_\_\_\_ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

a. implements the Federal mandate contained in \_\_\_\_\_

b. implements the court mandate set forth by the \_\_\_\_\_  
court in the case of \_\_\_\_\_ vs. \_\_\_\_\_

c. implements a mandate of the people of this State expressed in their approval of Proposition No. \_\_\_\_\_ at the \_\_\_\_\_  
election; (DATE)

d. is issued only in response to a specific request from the \_\_\_\_\_  
\_\_\_\_\_, which is/are the only local entity(s) affected;

e. will be fully financed from the \_\_\_\_\_ authorized by Section  
(FEES, REVENUE, ETC.)  
\_\_\_\_\_ 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 such unit;

g. creates, eliminates, or changes the penalty for a new crime or infraction contained in \_\_\_\_\_

3. Savings of approximately \$ \_\_\_\_\_ annually.

4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

**ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 2-98)**

- 5. No fiscal impact exists because this regulation does not affect any local entity or program.
- 6. Other.

**B. 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 of approximately \$ \_\_\_\_\_ in the current State Fiscal Year. It is anticipated that State agencies will:
  - a. be able to absorb these additional costs within their existing budgets and resources.
  - b. request an increase in the currently authorized budget level for the \_\_\_\_\_ fiscal year.
- 2. Savings of approximately \$ \_\_\_\_\_ in the current State Fiscal Year.
- 3. No fiscal impact exists because this regulation does not affect any State agency or program.
- 4. Other.

**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 of approximately \$ \_\_\_\_\_ in the current State Fiscal Year.
- 2. Savings of approximately \$ \_\_\_\_\_ in the current State Fiscal Year.
- 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.
- 4. Other.

SIGNATURE	TITLE
	Regulations Coordinator
AGENCY SECRETARY <sup>1</sup>	DATE
 APPROVAL/CONCURRENCE	2/20/13
DEPARTMENT OF FINANCE <sup>2</sup>	DATE
PROGRAM BUDGET MANAGER  APPROVAL/CONCURRENCE	Exempt under SAM section 6660

1. The signature attests that the agency has completed the STD. 399 according to the instructions in SAM sections 6600-6680, 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.
2. Finance approval and signature is required when SAM sections 6600-6670 require completion of the Fiscal Impact Statement in the STD. 399.

**Attachment to Economic and Fiscal Impact**  
**Statement (STD. 399 (Rev. 12/2008)) for the Proposed Amendments to**  
**California Code of Regulations, Title 18, Section 1685.5,**  
***Calculation of Estimated Use Tax - Use Tax Table***

California Code of Regulations, title 18, section (Regulation) 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*, does not regulate business, the health and welfare of California residents, worker safety, or the state's environment. Regulation 1685.5 only prescribes the manner in which the State Board of Equalization (Board) "shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table," as required by Revenue and Taxation Code section 6452.1. In addition, Regulation 1685.5, subdivision (a)(2) provides that the Board's use tax tables "may not be used to estimate use tax liabilities for business purchases" and that consumers are not required to use the Board's use tax tables to estimate and report their use tax liabilities for nonbusiness purchases.

The proposed amendments to Regulation 1685.5 will improve the accuracy of the Board's calculations of the estimated amount of use tax due according to a person's adjusted gross income for calendar-year 2013 and subsequent years by accounting for the expanded use tax registration requirements imposed by Assembly Bill No. 155 (Stats. 2011, ch. 313) operative September 15, 2012, and a recent increase in the number of out-of-state retailers registered to collect California use tax, including the registration of some retailers that make substantial sales to California consumers. As such, the amendments merely reflect an increase in the percentage of use tax that will be collected by registered retailers and remitted to the Board and a decrease in the percentage of use tax that consumers will continue to be required to directly report and pay to the state, not a change in the total amount of use tax required to be paid by consumers.

Therefore, based upon the foregoing information and all of the information in the rulemaking file, the Board has determined that the adoption of the proposed amendments to Regulation 1685.5:

- 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, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California; and
- Will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

In addition, 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.

**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 <b>Z-2013-0220-01</b>	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
------------------	---------------------------------------------	--------------------------	------------------

For use by Office of Administrative Law (OAL) only

RECEIVED FOR FILING PUBLICATION DATE  FEB 20 '13      MAR 08 '13  Office of Administrative Law	NOTICE    REGULATIONS
------------------------------------------------------------------------------------------------------------	-----------------------------------

AGENCY WITH RULEMAKING AUTHORITY State Board of Equalization	AGENCY FILE NUMBER (if any)
-----------------------------------------------------------------	-----------------------------

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

1. SUBJECT OF NOTICE Calculation of Estimated Use Tax - Use Tax Table	TITLE(S) 18	FIRST SECTION AFFECTED 1685.5	2. REQUESTED PUBLICATION DATE March 8, 2013
3. NOTICE TYPE <input checked="" type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON Rick Bennion	TELEPHONE NUMBER (916) 445-2130	FAX NUMBER (Optional) (916) 324-3984
<b>OAL USE ONLY</b> <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)	
<b>SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)</b>	ADOPT
	AMEND
TITLE(S)	REPEAL

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"/> Resubmission of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmission 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.**

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

For use by Office of Administrative Law (OAL) only

**Notice of Proposed Regulatory Action**  
**The State Board of Equalization Proposes to Adopt**  
**Amendments to California Code of Regulations, Title 18,**  
**Section 1685.5, *Calculation of Estimated Use Tax - Use Tax Table***

NOTICE IS HEREBY GIVEN

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) 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*. Regulation 1685.5 prescribes the manner in which the Board “shall annually calculate the estimated amount of use tax due according to a person’s adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table,” as required by RTC section 6452.1. The proposed amendments update the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person’s adjusted gross income (AGI) for calendar year 2013 and subsequent years to account for the expanded use tax registration requirements imposed by Assembly Bill No. (AB) 155 (Stats. 2011, ch. 313) and recent registration activities.

PUBLIC HEARING

The Board will conduct a meeting in Room 207, 5901 Green Valley Circle, Culver City, California, on April 24-26, 2013. 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](http://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 April 24, 25, or 26, 2013. 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 1685.5.

AUTHORITY

RTC section 7051.

REFERENCE

RTC section 6452.1.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

Under RTC sections 6202 and 6453, consumers are primarily liable for reporting and paying use tax imposed on the storage, use, or other consumption of tangible personal property in this state. However, under RTC sections 6203, 6226, and 6453, specified retailers are required to register with the Board, collect use tax from their California customers, and report and pay the use tax to the state. Therefore, under Regulation 1685, *Payment of Tax by Purchasers*, consumers are required to report and pay their own use taxes to the state when they purchase tangible personal property for storage, use, or other consumption in this state from unregistered retailers that do not collect California use tax.

Prior to 2010, consumers could only report and pay their use taxes to the Board. However, RTC section 6452.1 was enacted in 2010 to make it more convenient for consumers to comply with their use tax obligations by permitting consumers to make an irrevocable election to report “qualified use tax” on an “acceptable [income] tax return” filed with the Franchise Tax Board (FTB). RTC section 6452.1, subdivision (d)(2), as enacted by Statutes 2010, chapter 721, defined the term “qualified use tax” to mean a taxpayer’s actual unpaid use tax liability after applying the state use taxes imposed under the Sales and Use Tax Law (RTC § 6001 et seq.) and article XIII of the California Constitution, and the local and district use taxes imposed in conformity with the Bradley-Burns Uniform Local Sales and Use Tax Law (RTC § 7200 et seq.) or in accordance with the Transactions and Use Tax Law (RTC § 7251 et seq.) to the taxpayer’s purchases of tangible personal property subject to use tax.

Senate Bill No. (SB) 86 (Stats. 2011, ch. 14) amended RTC section 6452.1 to make it more convenient for taxpayers to comply with their use tax obligations by giving taxpayers the option to report their “estimated use tax liabilities,” based upon their AGIs for income tax purposes, for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand dollars (\$1000), as determined from a use tax table, on their income tax returns, instead of calculating and reporting their actual unpaid use tax liabilities (as described above). In addition, RTC section 6452.1, subdivision (d)(2)(A)(i)(II), as amended by SB 86, requires the Board to “annually calculate the estimated amount of use tax due according to a person’s adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table” for inclusion in the instructions to the FTB’s returns and use by eligible taxpayers.

The Board adopted Regulation 1685.5 on July 26, 2011, to prescribe the specific use tax table that taxpayers could use to estimate their calendar-year 2011 use taxes based upon their AGIs, prescribe the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person’s AGI for calendar-year 2012 and subsequent years, and prescribe the format of the use tax tables the Board would be required to make available to the FTB for calendar-year 2012 and subsequent years. After discussing Regulation 1685.5 with interested parties, the Board adopted amendments to Regulation 1685.5 on March 20, 2012, to update the manner in which the Board annually calculates the estimated amount of use tax due according to a person’s AGI and makes such amounts available to the FTB in the form of a use tax table for

calendar-year 2012 and subsequent years. The Notice of Action for the 2012 amendments explained that:

The proposed [2012] amendments to Regulation 1685.5, subdivision (b)(2), will require that the Board multiply the percentage of income spent on taxable purchases during the preceding year by 0.37, which represents the estimated percentage of California consumers' total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers. AB 155 (Stats. 2011, ch. 313) expanded the use tax registration requirements so that they apply to some out-of-state retailers, including Internet retailers, that were previously not required to register with the Board to collect and remit use tax on their sales of tangible personal property to California customers. However, section 6 of AB 155 provides that the new registration requirements will not be operative until either September 15, 2012, or January 1, 2013, and the Board is currently unable to determine whether the new registration requirements will reduce the percentage of California consumers' total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers during 2012 or in subsequent years, and, if so, the extent of such reduction. Therefore, the Board is not proposing to amend Regulation 1685.5 to account for the new registration requirements imposed by AB 155 at this time. However, the Board is continuing to monitor the implementation of AB 155 and considering whether to propose sufficiently related changes to the original text of the proposed amendments to Regulation 1685.5 to account for the enactment of AB 155 or other events that may change the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during 2012 or subsequent years.

However, the Board did not make sufficiently related changes to the text of the 2012 amendments to Regulation 1685.5 to account for the enactment of AB 155 because the Board could not determine when AB 155's expanded use tax registration requirements would be operative and could not adequately estimate the effect of the expanded use tax registration requirements when the Board adopted the 2012 amendments. Instead, the Board continued to monitor the implementation of AB 155 and consider whether to propose amendments to Regulation 1685.5 to account for the enactment of AB 155 and the expanded use tax registration requirements effect on the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during calendar-year 2013 and subsequent years.

#### Effect, Objectives, and Benefits of the Proposed Amendments to Regulation 1685.5

The expanded registration requirements (discussed above) became operative on September 15, 2012, in accordance with section 6, subdivision (b)(2), of AB 155. The Board did see an increase in the number of out-of-state retailers registered to collect California use tax around that time, and Board staff was subsequently able to determine that those registration activities, including the registration of some retailers that make substantial sales to California consumers, indicate that there will be an overall decrease in the percentage of taxable purchases California consumers make from unregistered out-of-state retailers during calendar-year 2013, and in subsequent years. In addition, Board staff was able to:

- Calculate adjusted total 2011 United States electronic commerce sales;
- Determine that 86.9 percent of those sales were made by the top 500 Internet retailers and 13.1 percent of those sales were made by other Internet retailers;
- Estimate that 14.4 percent of the top 500 Internet retailers and 78 percent of the other Internet retailers were not registered with the Board to collect use tax after the operative date of AB 155; and
- Arrive at a weighted average percentage of sales made by unregistered Internet retailers of 22.7 percent  $((.869 \times .144) + (.131 \times .78))$ .

Therefore, staff prepared a memorandum dated January 4, 2013, which recommended that “the Board amend Regulation 1685.5, subdivision (b)(2), to change the estimated percentage of California consumers’ total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers from 37 percent to 23 percent to account for the new use tax registration requirements imposed by AB 155 and recent registration activities.” And, Board staff submitted the memorandum to the Board Members for their consideration at the Board’s January 15, 2013, Business Taxes Committee meeting.

During the January 15, 2013, meeting, Ms. Gina Rodriguez, Vice President of State Tax Policy for the California Taxpayers Association (CalTax), stated that CalTax supports the amendments to Regulation 1685.5 and the Board Members unanimously voted to propose their adoption. The Board determined that the amendments are reasonably necessary to account for the expanded registration requirements imposed by AB 155 operative September 15, 2012, and the recent registration activity discussed above.

The objective of the proposed amendments is to make the Board’s calculations of the estimated amount of use tax due according to a person’s AGI for calendar-year 2013 and subsequent years as accurate as possible by accounting for the expanded use tax registration requirements imposed by AB 155 and recent registration activities. The Board anticipates that the proposed amendments will promote fairness and generally encourage consumers to use the Board’s use tax tables by ensuring that eligible consumers’ estimated use tax liabilities are as accurate as possible.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1685.5 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 1685.5 is the only state regulation

prescribing the manner in which the Board “shall annually calculate the estimated amount of use tax due according to a person’s adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table,” as required by RTC section 6452.1. There is no federal use tax and there are no comparable federal regulations or statutes to Regulation 1685.5.

#### NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1685.5 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 1685.5 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

#### NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1685.5 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 1685.5 may affect small business.

#### NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

#### RESULTS OF THE ECONOMIC IMPACT ANALYSIS REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The Board has prepared the economic impact analysis 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 1685.5 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 1685.5 will not affect the health and welfare of California residents, worker safety, or the state's environment.

#### NO SIGNIFICANT EFFECT ON HOUSING COSTS

Adoption of the proposed amendments to Regulation 1685.5 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 Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at [Bradley.Heller@boe.ca.gov](mailto:Bradley.Heller@boe.ca.gov), or by mail at State Board of Equalization, Attn: Bradley M. Heller, 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](mailto: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 April 24, 2013, or as soon thereafter as the Board begins the public hearing regarding the proposed amendments to Regulation 1685.5 during the April 24-26, 2013, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1685.5. 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 1685.5 illustrating the express terms of the proposed amendments and an initial statement of reasons for the adoption of the proposed amendments, which includes the economic impact analysis 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](http://www.boe.ca.gov).

## SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1685.5 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 amendments, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting amendments will be mailed to those interested parties who commented on the original proposed amendments orally or in writing or who asked to be informed of such changes. The text of the resulting amendments will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting amendments that are received prior to adoption.

## AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1685.5, 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](http://www.boe.ca.gov).

**Text of Proposed Amendments to  
California Code of Regulations, Title 18, Section 1685.5**

**1685.5. Calculation of Estimated Use Tax - Use Tax Table.**

(a) In General.

(1) Estimated Use Tax and Use Tax Table. The Board of Equalization (BOE) is required to annually calculate the estimated amount of use tax due according to a person's adjusted gross income (AGI) and make such amounts available to the Franchise Tax Board (FTB), by July 30 of each year, in the form of a use tax table for inclusion in the instructions to the FTB's returns.

(2) Who is Eligible to Use BOE Use Tax Tables.

(A) Consumers may elect to use the use tax tables included in the instructions to their FTB returns to report their estimated use tax liabilities for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand (\$1,000) on their FTB returns. However, eligible consumers may still calculate their actual use tax liabilities using the worksheets in the instructions to their FTB returns and report their actual use tax liabilities on their FTB returns. Consumers are not required to use the use tax tables included in the instructions to their FTB returns.

(B) The use tax table may not be used to estimate use tax liabilities for business purchases, including purchases made by businesses required to hold a seller's permit or to register with the BOE under the Sales and Use Tax Law and report their use tax liabilities directly to the BOE.

(3) Safe Harbor. If eligible consumers use the use tax tables included in the instructions to their FTB returns to estimate their use tax liabilities for qualified nonbusiness purchases and correctly report their estimated use tax liabilities for their qualified nonbusiness purchases in accordance with their AGI ranges, then the BOE may not assess the difference, if any, between the estimated use tax liabilities reported in accordance with the use tax tables and the consumers' actual use tax liabilities for qualified nonbusiness purchases.

(b) Definitions and Data Sources.

(1) AGI Ranges. The use tax table shall be separated into fifteen (15) AGI ranges as follows:

(A) AGI less than \$10,000;

(B) AGI of \$10,000 to \$19,999;

(C) AGI of \$20,000 to \$29,999;

- (D) AGI of \$30,000 to \$39,999;
- (E) AGI of \$40,000 to \$49,999;
- (F) AGI of \$50,000 to \$59,999;
- (G) AGI of \$60,000 to \$69,999;
- (H) AGI of \$70,000 to \$79,999;
- (I) AGI of \$80,000 to \$89,999;
- (J) AGI of \$90,000 to \$99,999;
- (K) AGI of \$100,000 to \$124,999;
- (L) AGI of \$125,000 to \$149,999;
- (M) AGI of \$150,000 to \$174,999;
- (N) AGI of \$175,000 to \$199,999;
- (O) AGI more than \$199,999.

(2) Use Tax Liability Factor or Use Tax Table Percentage. For the 2011 calendar year the use tax liability factor or use tax table percentage shall be 0.070 percent (.0007). On June 1, 2012, ~~and each June 1 thereafter~~, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.37, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent. On June 1, 2013, and each June 1 thereafter, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.23, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent.

(3) Total Personal Income. Total personal income shall be determined by reference to the most current personal income data published by the United States Bureau of Economic Analysis.

(4) Total Spending at Electronic Shopping and Mail Order Houses. Total spending at electronic shopping and mail order houses shall be determined by reference to the most current electronic shopping and mail order house spending data published by the United States Census Bureau.

(5) Total Spending on Taxable Purchases. Total spending on taxable purchases shall be determined by:

(A) Determining the percentage, rounded to the nearest tenth of a percent, of total spending at electronic shopping and mail order houses that are not included in the following categories of items, by reference to the most current retail trade product lines statistics by kind of business data published by the United States Census Bureau:

- (i) Groceries and other foods for human consumption off premises, excluding bottled, canned, or packaged soft drinks;
- (ii) Prescriptions;
- (iii) Video content downloads;
- (iv) Audio content downloads;
- (v) Prepackaged computer software, including software downloads; and
- (vi) All nonmerchandise receipts.

(B) Adding ten billion dollars (\$10,000,000,000) to the total spending at electronic shopping and mail order houses to account for spending that is not included in the spending data published by the United States Census Bureau; and

(C) Multiplying the sum calculated in (B) by the percentage of total spending at electronic shopping and mail order houses that are not included in the categories of items listed in (A) above so that the result does not include spending on nontaxable purchases, and then rounding the result to the nearest tenth of a percent.

(6) Percentage of Income Spent on Taxable Purchases. The percentage of income spent on taxable purchases during a calendar year shall be calculated by dividing the total spending on taxable purchases for that year by the total personal income for that year, multiplying the result by 100, and rounding the result to the nearest tenth of a percent.

(7) Average State, Local, and District Sales and Use Tax Rate. The average state, local, and district sales and use tax rate for a calendar year shall be the total of:

(A) The rates of the statewide sales and use taxes imposed under section 35 of article XIII of the California Constitution and the Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) in effect on January 1 of that year;

(B) The statewide rate of local tax imposed under the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. & Tax. Code, § 7200 et seq.) in effect on January 1 of that year; and

(C) The weighted average rate of the district taxes imposed under the Transactions and Use Tax Law (Rev. & Tax Code, § 7251 et seq.) in effect in the various jurisdictions throughout the state on January 1 of that year after taking into account the proportion of the total statewide taxable transactions (by dollar) reported for each jurisdiction during the fourth quarter of the calendar year that is two years prior to the calendar year for which the calculation is made. For example, the total reported taxable transactions (by dollar) for the fourth quarter of 2010 shall be used to determine the weighted average rate of the district tax rates in effect on January 1, 2012, to calculate the weighted average rate of district taxes for calendar year 2012.

(c) Calculation of the Estimated Use Tax Liability.

(1) The estimated use tax liability for the AGI range described in subdivision (b)(1)(A) shall be determined by multiplying \$5,000 by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(2) The estimated use tax liability for the AGI ranges described in subdivision (b)(1)(B) through (N) shall be determined by multiplying the midpoint of each AGI range by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(3) The estimated use tax liability for the AGI range described in subdivision (b)(1)(O) shall be determined by multiplying each range member's actual AGI by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(d) Use Tax Table Format.

(1) The use tax table for calendar year 2011 shall provide as follows:

Adjusted Gross Income (AGI) Range	Use Tax Liability
Less Than \$20,000	\$7
\$20,000 to \$39,999	\$21
\$40,000 to \$59,999	\$35
\$60,000 to \$79,999	\$49
\$80,000 to \$99,999	\$63
\$100,000 to \$149,999	\$88
\$150,000 to \$199,999	\$123
More than \$199,999 -Multiply AGI by 0.070% (.0007)	

(2) The use tax tables for calendar year 2012 and subsequent years shall utilize the same format as follows:

Adjusted Gross Income (AGI)		Use Tax Liability
Range		
Less Than \$10,000		\$
\$10,000	to \$19,999	\$
\$20,000	to \$29,999	\$
\$30,000	to \$39,999	\$
\$40,000	to \$49,999	\$
\$50,000	to \$59,999	\$
\$60,000	to \$69,999	\$
\$70,000	to \$79,999	\$
\$80,000	to \$89,999	\$
\$90,000	to \$99,999	\$
\$100,000	to \$124,999	\$
\$125,000	to \$149,000	\$
\$150,000	to \$174,999	\$
\$175,000	to \$199,999	\$
More than \$199,999 -Multiply AGI by		% (.000 )

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6452.1, Revenue and Taxation Code.

## Bennion, Richard

---

**From:** State Board of Equalization - Announcement of Regulatory Change  
[Legal.Regulations@BOE.CA.GOV]  
**Sent:** Friday, March 08, 2013 11:50 AM  
**To:** BOE\_REGULATIONS@LISTSERV.STATE.CA.GOV  
**Subject:** State Board of Equalization - Announcement of Regulatory Change 1685.5

The State Board of Equalization proposes to amend Regulation 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*. A public hearing regarding the proposed amendments will be held in Room 207, 5901 Green Valley Circle, Culver City, at 9:30 a.m., or as soon thereafter as the matter may be heard on April 24 or 25, 2013.

The proposed amendments to Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*, update the manner in which the Board will calculate the estimated amount of use tax due according to a person's adjusted gross income for calendar year 2013 and subsequent years to account for the expanded use tax registration requirements imposed by Assembly Bill No. 155 (Stats. 2011, ch. 313) and recent registration activities.

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\\_1685\\_5\\_2013.htm](http://www.boe.ca.gov/regs/reg_1685_5_2013.htm)

Questions regarding the substance of the proposed amendments should be directed to Mr. Bradley Heller, Tax Counsel IV, at 450 N Street, MIC:82, Sacramento, CA 94279-0082, email [Bradley.Heller@boe.ca.gov](mailto:Bradley.Heller@boe.ca.gov), telephone (916) 323-3091, 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](mailto: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, as it was sent from an "announcement list."

Subscription Information: To unsubscribe from this list please visit the page: <http://www.boe.ca.gov/aprc/index.htm>

Privacy Policy Information: Your information is collected in accordance with our Privacy Policy  
<http://www.boe.ca.gov/info/privacyinfo.htm>

Technical Problems: If you cannot view the link included in the body of this message, please contact the Board's webmaster at [webmaster@boe.ca.gov](mailto:webmaster@boe.ca.gov)

ports, documentation and other materials related to the proposed action that is contained in the rulemaking file, is available for inspection and copying at 45 Fremont Street, 24th Floor, San Francisco, California 94105, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday.

#### AUTOMATIC MAILING

A copy of this notice, including the informative digest, which contains the general substance of the proposed regulations, will automatically be sent to all persons on CDI's mailing list.

#### WEBSITE POSTINGS

Documents concerning this proceeding are available on CDI's website. To access them, go to <http://www.insurance.ca.gov>. On the right side of the page, find the major heading "Quick Links". In this section, scroll down until you see the subheading "Legal Information". Click on the link. On the next page at the top of the page, there will be a link entitled "Proposed Regulations". Click on the link. When the "Search or Browse for Documents for Proposed Regulations" screen appears, you may choose to find the documents either by conducting a search or browsing for them by name.

To search, enter "2013-0001" (CDI's regulation file number for these regulations) in the search field. Alternatively, search using as your search term the California Insurance Code section number of a code section that the regulations implement (for instance, "1872.85") or search by keyword (for example "disability insurance assessment"). Then, click on the "Submit" button to display links to the various filing documents.

To browse, click on the "Browse All Regulations" button near the bottom of the screen. A list of the names of regulations for which documents are posed will appear. Find in the list the "Disability Insurance Assessment" link, and click it. Links to the documents associated with these regulations will then be displayed.

#### MODIFIED LANGUAGE

If the regulations adopted by CDI differ from those that have originally been made available but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Interested persons should request a copy of these regulations prior to adoption from the contact person listed above.

## TITLE 18. BOARD OF EQUALIZATION

### **The State Board of Equalization Proposes to Adopt Amendments to California Code of Regulations, Title 18, Section 1685.5, Calculation of Estimated Use Tax — Use Tax Table**

#### NOTICE IS HEREBY GIVEN

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) 1685.5, *Calculation of Estimated Use Tax — Use Tax Table*. Regulation 1685.5 prescribes the manner in which the Board "shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table," as required by RTC section 6452.1. The proposed amendments update the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income (AGI) for calendar year 2013 and subsequent years to account for the expanded use tax registration requirements imposed by Assembly Bill No. (AB) 155 (Stats. 2011, ch. 313) and recent registration activities.

#### PUBLIC HEARING

The Board will conduct a meeting in Room 207, 5901 Green Valley Circle, Culver City, California, on April 24-26, 2013. 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](http://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 April 24, 25, or 26, 2013. 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 1685.5.

#### AUTHORITY

RTC section 7051.

#### REFERENCE

RTC section 6452.1.

**INFORMATIVE DIGEST/POLICY STATEMENT  
OVERVIEW**

Current Law

Under RTC sections 6202 and 6453, consumers are primarily liable for reporting and paying use tax imposed on the storage, use, or other consumption of tangible personal property in this state. However, under RTC sections 6203, 6226, and 6453, specified retailers are required to register with the Board, collect use tax from their California customers, and report and pay the use tax to the state. Therefore, under Regulation 1685, *Payment of Tax by Purchasers*, consumers are required to report and pay their own use taxes to the state when they purchase tangible personal property for storage, use, or other consumption in this state from unregistered retailers that do not collect California use tax.

Prior to 2010, consumers could only report and pay their use taxes to the Board. However, RTC section 6452.1 was enacted in 2010 to make it more convenient for consumers to comply with their use tax obligations by permitting consumers to make an irrevocable election to report “qualified use tax” on an “acceptable [income] tax return” filed with the Franchise Tax Board (FTB). RTC section 6452.1, subdivision (d)(2), as enacted by Statutes 2010, chapter 721, defined the term “qualified use tax” to mean a taxpayer’s actual unpaid use tax liability after applying the state use taxes imposed under the Sales and Use Tax Law (RTC § 6001 et seq.) and article XIII of the California Constitution, and the local and district use taxes imposed in conformity with the Bradley–Burns Uniform Local Sales and Use Tax Law (RTC § 7200 et seq.) or in accordance with the Transactions and Use Tax Law (RTC § 7251 et seq.) to the taxpayer’s purchases of tangible personal property subject to use tax.

Senate Bill No. (SB) 86 (Stats. 2011, ch. 14) amended RTC section 6452.1 to make it more convenient for taxpayers to comply with their use tax obligations by giving taxpayers the option to report their “estimated use tax liabilities,” based upon their AGIs for income tax purposes, for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand dollars (\$1000), as determined from a use tax table, on their income tax returns, instead of calculating and reporting their actual unpaid use tax liabilities (as described above). In addition, RTC section 6452.1, subdivision (d)(2)(A)(i)(II), as amended by SB 86, requires the Board to “annually calculate the estimated amount of use tax due according to a person’s adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the

form of a use tax table” for inclusion in the instructions to the FTB’s returns and use by eligible taxpayers.

The Board adopted Regulation 1685.5 on July 26, 2011, to prescribe the specific use tax table that taxpayers could use to estimate their calendar–year 2011 use taxes based upon their AGIs, prescribe the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person’s AGI for calendar–year 2012 and subsequent years, and prescribe the format of the use tax tables the Board would be required to make available to the FTB for calendar–year 2012 and subsequent years. After discussing Regulation 1685.5 with interested parties, the Board adopted amendments to Regulation 1685.5 on March 20, 2012, to update the manner in which the Board annually calculates the estimated amount of use tax due according to a person’s AGI and makes such amounts available to the FTB in the form of a use tax table for calendar–year 2012 and subsequent years. The Notice of Action for the 2012 amendments explained that:

The proposed [2012] amendments to Regulation 1685.5, subdivision (b)(2), will require that the Board multiply the percentage of income spent on taxable purchases during the preceding year by 0.37, which represents the estimated percentage of California consumers’ total purchases of tangible personal property for use in California from all out–of–state retailers that are made from out–of–state retailers that are not registered with the Board to collect use tax from their customers. AB 155 (Stats. 2011, ch. 313) expanded the use tax registration requirements so that they apply to some out–of–state retailers, including Internet retailers, that were previously not required to register with the Board to collect and remit use tax on their sales of tangible personal property to California customers. However, section 6 of AB 155 provides that the new registration requirements will not be operative until either September 15, 2012, or January 1, 2013, and the Board is currently unable to determine whether the new registration requirements will reduce the percentage of California consumers’ total purchases of tangible personal property for use in California from all out–of–state retailers that are made from out–of–state retailers that are not registered with the Board to collect use tax from their customers during 2012 or in subsequent years, and, if so, the extent of such reduction. Therefore, the Board is not proposing to amend Regulation 1685.5 to account for the new registration requirements imposed by AB 155 at this time. However, the Board is continuing to monitor the implementation of AB 155 and

considering whether to propose sufficiently related changes to the original text of the proposed amendments to Regulation 1685.5 to account for the enactment of AB 155 or other events that may change the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during 2012 or subsequent years.

However, the Board did not make sufficiently related changes to the text of the 2012 amendments to Regulation 1685.5 to account for the enactment of AB 155 because the Board could not determine when AB 155's expanded use tax registration requirements would be operative and could not adequately estimate the effect of the expanded use tax registration requirements when the Board adopted the 2012 amendments. Instead, the Board continued to monitor the implementation of AB 155 and consider whether to propose amendments to Regulation 1685.5 to account for the enactment of AB 155 and the expanded use tax registration requirements' effect on the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during calendar-year 2013 and subsequent years.

Effect, Objectives, and Benefits of the Proposed Amendments to Regulation 1685.5

The expanded registration requirements (discussed above) became operative on September 15, 2012, in accordance with section 6, subdivision (b)(2), of AB 155. The Board did see an increase in the number of out-of-state retailers registered to collect California use tax around that time, and Board staff was subsequently able to determine that those registration activities, including the registration of some retailers that make substantial sales to California consumers, indicate that there will be an overall decrease in the percentage of taxable purchases California consumers make from unregistered out-of-state retailers during calendar-year 2013, and in subsequent years. In addition, Board staff was able to:

- Calculate adjusted total 2011 United States electronic commerce sales;
- Determine that 86.9 percent of those sales were made by the top 500 Internet retailers and 13.1 percent of those sales were made by other Internet retailers;
- Estimate that 14.4 percent of the top 500 Internet retailers and 78 percent of the other Internet retailers were not registered with the Board to collect use tax after the operative date of AB 155; and
- Arrive at a weighted average percentage of sales made by unregistered Internet retailers of 22.7 percent  $((.869 \times .144) + (.131 \times .78))$ .

Therefore, staff prepared a memorandum dated January 4, 2013, which recommended that "the Board amend Regulation 1685.5, subdivision (b)(2), to change the estimated percentage of California consumers' total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers from 37 percent to 23 percent to account for the new use tax registration requirements imposed by AB 155 and recent registration activities." And, Board staff submitted the memorandum to the Board Members for their consideration at the Board's January 15, 2013, Business Taxes Committee meeting.

During the January 15, 2013, meeting, Ms. Gina Rodriguez, Vice President of State Tax Policy for the California Taxpayers Association (CalTax), stated that CalTax supports the amendments to Regulation 1685.5 and the Board Members unanimously voted to propose their adoption. The Board determined that the amendments are reasonably necessary to account for the expanded registration requirements imposed by AB 155 operative September 15, 2012, and the recent registration activity discussed above.

The objective of the proposed amendments is to make the Board's calculations of the estimated amount of use tax due according to a person's AGI for calendar-year 2013 and subsequent years as accurate as possible by accounting for the expanded use tax registration requirements imposed by AB 155 and recent registration activities. The Board anticipates that the proposed amendments will promote fairness and generally encourage consumers to use the Board's use tax tables by ensuring that eligible consumers' estimated use tax liabilities are as accurate as possible.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1685.5 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 1685.5 is the only state regulation prescribing the manner in which the Board "shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table," as required by RTC section 6452.1. There is no federal use tax and there are no comparable federal regulations or statutes to Regulation 1685.5.

**NO MANDATE ON LOCAL AGENCIES  
AND SCHOOL DISTRICTS**

The Board has determined that the adoption of the proposed amendments to Regulation 1685.5 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 1685.5 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

**NO SIGNIFICANT STATEWIDE ADVERSE  
ECONOMIC IMPACT DIRECTLY  
AFFECTING BUSINESS**

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1685.5 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 1685.5 may affect small business.

**NO COST IMPACTS TO PRIVATE  
PERSONS OR BUSINESSES**

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

**RESULTS OF THE ECONOMIC IMPACT  
ANALYSIS REQUIRED BY GOVERNMENT  
CODE SECTION 11346.3, SUBDIVISION (b)**

The Board has prepared the economic impact analysis 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 1685.5 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 1685.5 will not affect the health and welfare of California residents, worker safety, or the state's environment.

**NO SIGNIFICANT EFFECT  
ON HOUSING COSTS**

Adoption of the proposed amendments to Regulation 1685.5 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 Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at [Bradley.Heller@boe.ca.gov](mailto:Bradley.Heller@boe.ca.gov), or by mail at State Board of Equalization, Attn: Bradley M. Heller, 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](mailto: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 April 24, 2013, or as soon thereafter as the Board begins the public hearing regarding the proposed amendments to Regulation 1685.5 during the April 24-26, 2013, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1685.5. The

Board will only consider written comments received by that time.

**GENERAL PUBLIC INTEREST**

**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 1685.5 illustrating the express terms of the proposed amendments and an initial statement of reasons for the adoption of the proposed amendments, which includes the economic impact analysis required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rule-making file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

**SUBSTANTIALLY RELATED CHANGES  
PURSUANT TO GOVERNMENT CODE  
SECTION 11346.8**

The Board may adopt the proposed amendments to Regulation 1685.5 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 amendments, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting amendments will be mailed to those interested parties who commented on the original proposed amendments orally or in writing or who asked to be informed of such changes. The text of the resulting amendments will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting amendments that are received prior to adoption.

**AVAILABILITY OF FINAL  
STATEMENT OF REASONS**

If the Board adopts the proposed amendments to Regulation 1685.5, 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](http://www.boe.ca.gov).

**DEPARTMENT OF HEALTH CARE  
SERVICES**

**THE DEPARTMENT OF HEALTH CARE  
SERVICES QUALITY ASSURANCE FEE  
ON SKILLED NURSING FACILITIES FOR  
THE 2012-13 RATE YEAR**

This notice provides information concerning the Quality Assurance Fee (QAF) assessed for all non-exempt Freestanding Skilled Nursing Facilities Level B (FS/NFB), Freestanding Adult Subacute Nursing Facilities Level B (FSSA/NF-B) and Freestanding Pediatric Subacute Facilities Level B (PSA/NF-B) for rate year August 1, 2012 to July 31, 2013, approved by the Centers for Medicare & Medicaid Services on February 5, 2013. *California Health and Safety Code*, Sections 1324.20 through 1324.30, authorizes the Department of Health Care Services (DHCS) to collect a QAF from all non-exempt FS/NF-Bs, FSSA/NF-Bs and PSA/NF-Bs. The purpose of this fee is to enhance federal financial participation in the Medi-Cal program, provide additional reimbursement to, and support quality improvement efforts in, licensed NF-Bs providing services for the Medi-Cal program.

**QAF IMPOSED FOR THE 2012-13 RATE YEAR**

DHCS will collect the following QAF on a monthly basis:

FS/NF-Bs, FSSA/NF-Bs and PSA/NF-Bs with total annual resident days equal to or greater than 100,000: \$15.61 per resident day.

FS/NF-Bs, FSSA/NF-Bs and PSA/NF-Bs with total annual resident days less than 100,000: \$14.88, per resident day.

DHCS will send quarterly notices to each non-exempt NF-B and three monthly payment forms. Payments are due on or before the last day of the month following the month for which the fee is imposed.

**PUBLIC REVIEW AND COMMENTS**

A copy of the California Health and Safety Code sections 1324.20 through 1324.30 may be requested from, and any comments may be sent to:



STATE OF CALIFORNIA

**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

**March 8, 2013**

**To Interested Parties:**

**Notice of Proposed Regulatory Action  
by the  
State Board of Equalization**

**Proposed to Amend Regulation 1685.5, *Calculation of Estimated Use Tax - Use Tax Table***

**NOTICE IS HEREBY GIVEN**

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) 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*. Regulation 1685.5 prescribes the manner in which the Board “shall annually calculate the estimated amount of use tax due according to a person’s adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table,” as required by RTC section 6452.1. The proposed amendments update the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person’s adjusted gross income (AGI) for calendar year 2013 and subsequent years to account for the expanded use tax registration requirements imposed by Assembly Bill No. (AB) 155 (Stats. 2011, ch. 313) and recent registration activities.

**PUBLIC HEARING**

The Board will conduct a meeting in Room 207, 5901 Green Valley Circle, Culver City, California, on April 24-26, 2013. 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](http://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 April 24, 25, or 26, 2013. 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 1685.5.

### **AUTHORITY**

RTC section 7051.

### **REFERENCE**

RTC section 6452.1.

### **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

#### Current Law

Under RTC sections 6202 and 6453, consumers are primarily liable for reporting and paying use tax imposed on the storage, use, or other consumption of tangible personal property in this state. However, under RTC sections 6203, 6226, and 6453, specified retailers are required to register with the Board, collect use tax from their California customers, and report and pay the use tax to the state. Therefore, under Regulation 1685, *Payment of Tax by Purchasers*, consumers are required to report and pay their own use taxes to the state when they purchase tangible personal property for storage, use, or other consumption in this state from unregistered retailers that do not collect California use tax.

Prior to 2010, consumers could only report and pay their use taxes to the Board. However, RTC section 6452.1 was enacted in 2010 to make it more convenient for consumers to comply with their use tax obligations by permitting consumers to make an irrevocable election to report “qualified use tax” on an “acceptable [income] tax return” filed with the Franchise Tax Board (FTB). RTC section 6452.1, subdivision (d)(2), as enacted by Statutes 2010, chapter 721, defined the term “qualified use tax” to mean a taxpayer’s actual unpaid use tax liability after applying the state use taxes imposed under the Sales and Use Tax Law (RTC § 6001 et seq.) and article XIII of the California Constitution, and the local and district use taxes imposed in conformity with the Bradley-Burns Uniform Local Sales and Use Tax Law (RTC § 7200 et seq.) or in accordance with the Transactions and Use Tax Law (RTC § 7251 et seq.) to the taxpayer’s purchases of tangible personal property subject to use tax.

Senate Bill No. (SB) 86 (Stats. 2011, ch. 14) amended RTC section 6452.1 to make it more convenient for taxpayers to comply with their use tax obligations by giving taxpayers the option to report their “estimated use tax liabilities,” based upon their AGIs for income tax purposes, for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand dollars (\$1000), as determined from a use tax table, on their income tax returns, instead of calculating and reporting their actual unpaid use tax liabilities (as described above). In addition, RTC section 6452.1, subdivision (d)(2)(A)(i)(II), as amended by SB 86, requires the Board to “annually calculate the estimated amount of use tax

due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table" for inclusion in the instructions to the FTB's returns and use by eligible taxpayers.

The Board adopted Regulation 1685.5 on July 26, 2011, to prescribe the specific use tax table that taxpayers could use to estimate their calendar-year 2011 use taxes based upon their AGIs, prescribe the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person's AGI for calendar-year 2012 and subsequent years, and prescribe the format of the use tax tables the Board would be required to make available to the FTB for calendar-year 2012 and subsequent years. After discussing Regulation 1685.5 with interested parties, the Board adopted amendments to Regulation 1685.5 on March 20, 2012, to update the manner in which the Board annually calculates the estimated amount of use tax due according to a person's AGI and makes such amounts available to the FTB in the form of a use tax table for calendar-year 2012 and subsequent years. The Notice of Action for the 2012 amendments explained that:

The proposed [2012] amendments to Regulation 1685.5, subdivision (b)(2), will require that the Board multiply the percentage of income spent on taxable purchases during the preceding year by 0.37, which represents the estimated percentage of California consumers' total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers. AB 155 (Stats. 2011, ch. 313) expanded the use tax registration requirements so that they apply to some out-of-state retailers, including Internet retailers, that were previously not required to register with the Board to collect and remit use tax on their sales of tangible personal property to California customers. However, section 6 of AB 155 provides that the new registration requirements will not be operative until either September 15, 2012, or January 1, 2013, and the Board is currently unable to determine whether the new registration requirements will reduce the percentage of California consumers' total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers during 2012 or in subsequent years, and, if so, the extent of such reduction. Therefore, the Board is not proposing to amend Regulation 1685.5 to account for the new registration requirements imposed by AB 155 at this time. However, the Board is continuing to monitor the implementation of AB 155 and considering whether to propose sufficiently related changes to the original text of the proposed amendments to Regulation 1685.5 to account for the enactment of AB 155 or other events that may change the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during 2012 or subsequent years.

However, the Board did not make sufficiently related changes to the text of the 2012 amendments to Regulation 1685.5 to account for the enactment of AB 155 because the Board

could not determine when AB 155's expanded use tax registration requirements would be operative and could not adequately estimate the effect of the expanded use tax registration requirements when the Board adopted the 2012 amendments. Instead, the Board continued to monitor the implementation of AB 155 and consider whether to propose amendments to Regulation 1685.5 to account for the enactment of AB 155 and the expanded use tax registration requirements effect on the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during calendar-year 2013 and subsequent years.

#### Effect, Objectives, and Benefits of the Proposed Amendments to Regulation 1685.5

The expanded registration requirements (discussed above) became operative on September 15, 2012, in accordance with section 6, subdivision (b)(2), of AB 155. The Board did see an increase in the number of out-of-state retailers registered to collect California use tax around that time, and Board staff was subsequently able to determine that those registration activities, including the registration of some retailers that make substantial sales to California consumers, indicate that there will be an overall decrease in the percentage of taxable purchases California consumers make from unregistered out-of-state retailers during calendar-year 2013, and in subsequent years. In addition, Board staff was able to:

- Calculate adjusted total 2011 United States electronic commerce sales;
- Determine that 86.9 percent of those sales were made by the top 500 Internet retailers and 13.1 percent of those sales were made by other Internet retailers;
- Estimate that 14.4 percent of the top 500 Internet retailers and 78 percent of the other Internet retailers were not registered with the Board to collect use tax after the operative date of AB 155; and
- Arrive at a weighted average percentage of sales made by unregistered Internet retailers of 22.7 percent  $((.869 \times .144) + (.131 \times .78))$ .

Therefore, staff prepared a memorandum dated January 4, 2013, which recommended that "the Board amend Regulation 1685.5, subdivision (b)(2), to change the estimated percentage of California consumers' total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers from 37 percent to 23 percent to account for the new use tax registration requirements imposed by AB 155 and recent registration activities." And, Board staff submitted the memorandum to the Board Members for their consideration at the Board's January 15, 2013, Business Taxes Committee meeting.

During the January 15, 2013, meeting, Ms. Gina Rodriguez, Vice President of State Tax Policy for the California Taxpayers Association (CalTax), stated that CalTax supports the amendments to Regulation 1685.5 and the Board Members unanimously voted to propose their adoption. The Board determined that the amendments are reasonably necessary to account for the expanded registration requirements imposed by AB 155 operative September 15, 2012, and the recent registration activity discussed above.

The objective of the proposed amendments is to make the Board's calculations of the estimated amount of use tax due according to a person's AGI for calendar-year 2013 and subsequent years as accurate as possible by accounting for the expanded use tax registration requirements imposed by AB 155 and recent registration activities. The Board anticipates that the proposed amendments will promote fairness and generally encourage consumers to use the Board's use tax tables by ensuring that eligible consumers' estimated use tax liabilities are as accurate as possible.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1685.5 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 1685.5 is the only state regulation prescribing the manner in which the Board "shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table," as required by RTC section 6452.1. There is no federal use tax and there are no comparable federal regulations or statutes to Regulation 1685.5.

#### **NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS**

The Board has determined that the adoption of the proposed amendments to Regulation 1685.5 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 1685.5 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

#### **NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1685.5 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 1685.5 may affect small business.

### **NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES**

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

### **RESULTS OF THE ECONOMIC IMPACT ANALYSIS REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)**

The Board has prepared the economic impact analysis 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 1685.5 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 1685.5 will not affect the health and welfare of California residents, worker safety, or the state's environment.

### **NO SIGNIFICANT EFFECT ON HOUSING COSTS**

Adoption of the proposed amendments to Regulation 1685.5 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 Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at [Bradley.Heller@boe.ca.gov](mailto:Bradley.Heller@boe.ca.gov), or by mail at State Board of Equalization, Attn: Bradley M. Heller, 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](mailto: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 April 24, 2013, or as soon thereafter as the Board begins the public hearing regarding the proposed amendments to Regulation 1685.5 during the April 24-26, 2013, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1685.5. 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 1685.5 illustrating the express terms of the proposed amendments and an initial statement of reasons for the adoption of the proposed amendments, which includes the economic impact analysis 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](http://www.boe.ca.gov).

### **SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8**

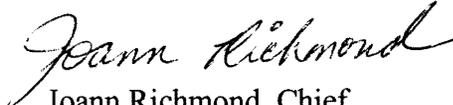
The Board may adopt the proposed amendments to Regulation 1685.5 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed amendments, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting amendments will be mailed to those interested parties who commented on the original proposed amendments orally or in writing or who asked to be informed of such changes. The text of the resulting amendments will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting amendments that are received prior to adoption.

March 8, 2013

**AVAILABILITY OF FINAL STATEMENT OF REASONS**

If the Board adopts the proposed amendments to Regulation 1685.5, 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](http://www.boe.ca.gov).

Sincerely,

  
Joann Richmond, Chief  
Board Proceedings Division

JR:reb

**Initial Statement of Reasons**  
**Adoption of Proposed Amendments to**  
**California Code of Regulations, Title 18, Section 1685.5,**  
***Calculation of Estimated Use Tax - Use Tax Table***

SPECIFIC PURPOSE AND NECESSITY

Current Law

Under Revenue and Taxation Code (RTC) sections 6202 and 6453, consumers are primarily liable for reporting and paying use tax imposed on the storage, use, or other consumption of tangible personal property in this state. However, under RTC sections 6203, 6226, and 6453, specified retailers are required to register with the State Board of Equalization (Board), collect use tax from their California customers, and report and pay the use tax to the state. Therefore, under California Code of Regulations, title 18, section (Regulation) 1685, *Payment of Tax by Purchasers*, consumers are required to report and pay their own use taxes to the state when they purchase tangible personal property for storage, use, or other consumption in this state from unregistered retailers that do not collect California use tax.

Prior to 2010, consumers could only report and pay their use taxes to the Board. However, RTC section 6452.1 was enacted in 2010 to make it more convenient for consumers to comply with their use tax obligations by permitting consumers to make an irrevocable election to report “qualified use tax” on an “acceptable [income] tax return” filed with the Franchise Tax Board (FTB). RTC section 6452.1, subdivision (d)(2), as enacted by Statutes 2010, chapter 721, defined the term “qualified use tax” to mean a taxpayer’s actual unpaid use tax liability after applying the state use taxes imposed under the Sales and Use Tax Law (RTC § 6001 et seq.) and article XIII of the California Constitution, and the local and district use taxes imposed in conformity with the Bradley-Burns Uniform Local Sales and Use Tax Law (RTC § 7200 et seq.) or in accordance with the Transactions and Use Tax Law (RTC § 7251 et seq.) to the taxpayer’s purchases of tangible personal property subject to use tax.

Senate Bill No. (SB) 86 (Stats. 2011, ch. 14) amended RTC section 6452.1 to make it more convenient for taxpayers to comply with their use tax obligations by giving taxpayers the option to report their “estimated use tax liabilities,” based upon their adjusted gross incomes (AGIs) for income tax purposes, for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand dollars (\$1000), as determined from a use tax table, on their income tax returns, instead of calculating and reporting their actual unpaid use tax liabilities (as described above). In addition, RTC section 6452.1, subdivision (d)(2)(A)(i)(II), as amended by SB 86, requires the Board to “annually calculate the estimated amount of use tax due according to a person’s adjusted gross income and by

July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table” for inclusion in the instructions to the FTB’s returns and use by eligible taxpayers.

The Board adopted Regulation 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*, on July 26, 2011, to prescribe the specific use tax table that taxpayers could use to estimate their calendar-year 2011 use taxes based upon their AGIs, prescribe the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person’s AGI for calendar-year 2012 and subsequent years, and prescribe the format of the use tax tables the Board would be required to make available to the FTB for calendar-year 2012 and subsequent years. After discussing Regulation 1685.5 with interested parties, the Board adopted amendments to Regulation 1685.5 on March 20, 2012, to update the manner in which the Board annually calculates the estimated amount of use tax due according to a person’s AGI and makes such amounts available to the FTB in the form of a use tax table for calendar year 2012 and subsequent years.

The Notice of Action for the 2012 amendments explained that:

The proposed [2012] amendments to Regulation 1685.5, subdivision (b)(2), will require that the Board multiply the percentage of income spent on taxable purchases during the preceding year by 0.37, which represents the estimated percentage of California consumers’ total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers. AB 155 (Stats. 2011, ch. 313) expanded the use tax registration requirements so that they apply to some out-of-state retailers, including Internet retailers, that were previously not required to register with the Board to collect and remit use tax on their sales of tangible personal property to California customers. However, section 6 of AB 155 provides that the new registration requirements will not be operative until either September 15, 2012, or January 1, 2013, and the Board is currently unable to determine whether the new registration requirements will reduce the percentage of California consumers’ total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers during 2012 or in subsequent years, and, if so, the extent of such reduction. Therefore, the Board is not proposing to amend Regulation 1685.5 to account for the new registration requirements imposed by AB 155 at this time. However, the Board is continuing to monitor the implementation of AB 155 and considering whether to propose sufficiently related changes to the original text of the proposed amendments to Regulation 1685.5 to account for the enactment of AB 155 or other events that may change the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during 2012 or subsequent years.

However, the Board did not make sufficiently related changes to the text of the 2012 amendments to Regulation 1685.5 to account for the enactment of AB 155 because the Board could not determine when AB 155's expanded use tax registration requirements would be operative and could not adequately estimate the effect of the expanded use tax registration requirements when the Board adopted the 2012 amendments. Instead, the Board continued to monitor the implementation of AB 155 and consider whether to propose amendments to Regulation 1685.5 to account for the enactment of AB 155 and the expanded use tax registration requirements effect on the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during calendar-year 2013 and subsequent years.

### Specific Purpose, Necessity, and Benefits of the Proposed Amendments

The expanded registration requirements (discussed above) became operative on September 15, 2012, in accordance with section 6, subdivision (b)(2), of AB 155. The Board did see an increase in the number of out-of-state retailers registered to collect California use tax around that time, and Board staff was subsequently able to determine that those registration activities, including the registration of some retailers that make substantial sales to California consumers, indicate that there will be an overall decrease in the percentage of taxable purchases California consumers make from unregistered out-of-state retailers during calendar-year 2013, and in subsequent years. In addition, Board staff was able to:

- Calculate adjusted total 2011 United States electronic commerce sales;
- Determine that 86.9 percent of those sales were made by the top 500 Internet retailers and 13.1 percent of those sales were made by other Internet retailers;
- Estimate that 14.4 percent of the top 500 Internet retailers and 78 percent of the other Internet retailers were not registered with the Board to collect use tax after the operative date of AB 155; and
- Arrive at a weighted average percentage of sales made by unregistered Internet retailers of 22.7 percent  $((.869 \times .144) + (.131 \times .78))$ .

Therefore, staff prepared a memorandum dated January 4, 2013, which recommended that "the Board amend Regulation 1685.5, subdivision (b)(2), to change the estimated percentage of California consumers' total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers from 37 percent to 23 percent to account for the new use tax registration requirements imposed by AB 155 and recent registration activities." And, Board staff submitted the memorandum to the Board Members for their consideration at the Board's January 15, 2013, Business Taxes Committee meeting.

During the January 15, 2013, meeting, Ms. Gina Rodriguez, Vice President of State Tax Policy for the California Taxpayers Association (CalTax), stated that CalTax supports the amendments to Regulation 1685.5 and the Board Members unanimously voted to propose their adoption. The Board determined that the amendments are reasonably necessary to address the problem of ensuring that the Board's future calculations of the estimated

amount of use tax due according to a person's AGI account for the expanded registration requirements imposed by AB 155 operative September 15, 2012, and the recent registration activity discussed above. The Board anticipates that the proposed amendments will promote fairness and generally encourage consumers to use the Board's use tax tables by ensuring that eligible consumers' estimated use tax liabilities are as accurate as possible.

The proposed amendments to Regulation 1685.5 were not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to Regulation 1685.5.

#### DOCUMENTS RELIED UPON

The Board relied upon the January 4, 2013, memorandum referred to above, the exhibit to the memorandum, which illustrated the proposed amendments to Regulation 1685.5, and the comments made during the Board's discussion of the memorandum during its January 15, 2013, Business Taxes Committee meeting in deciding to propose the amendments to Regulation 1685.5 described above.

#### ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1685.5 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 at this time because the Board determined that the amendments are reasonably necessary for the reasons set forth above.

The Board did not reject any reasonable alternative to the proposed amendments to Regulation 1685.5 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)(6) AND ECONOMIC IMPACT ANALYSIS REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

Regulation 1685.5 only prescribes the manner in which the Board "shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table," as required by RTC section 6452.1. In

addition, Regulation 1685.5, subdivision (a)(2) provides that the Board's use tax tables "may not be used to estimate use tax liabilities for business purchases" and that consumers are not required to use the Board's use tax tables to estimate and report their use tax liabilities for nonbusiness purchases.

The proposed amendments to Regulation 1685.5 will improve the accuracy of the Board's calculations of the estimated amount of use tax due according to a person's AGI for calendar-year 2013 and subsequent years by accounting for the expanded use tax registration requirements imposed by AB 155 operative September 15, 2012, and a recent increase in the number of out-of-state retailers registered to collect California use tax, including the registration of some retailers that make substantial sales to California consumers. As such, the amendments merely reflect an increase in the percentage of use tax that will be collected by registered retailers and remitted to the Board and a decrease in the percentage of use tax that consumers will continue to be required to directly report and pay to the state, not a change in the total amount of use tax required to be paid by consumers.

Furthermore, Regulation 1685.5 does not regulate business, the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has determined that the adoption of the proposed amendments to Regulation 1685.5 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. The Board has also determined that the adoption of the proposed amendments to Regulation 1685.5 will not affect 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 1685.5 will not have a significant adverse economic impact on business.

The proposed amendments may affect small business.

**Text of Proposed Amendments to  
California Code of Regulations, Title 18, Section 1685.5**

**1685.5. Calculation of Estimated Use Tax - Use Tax Table.**

(a) In General.

(1) Estimated Use Tax and Use Tax Table. The Board of Equalization (BOE) is required to annually calculate the estimated amount of use tax due according to a person's adjusted gross income (AGI) and make such amounts available to the Franchise Tax Board (FTB), by July 30 of each year, in the form of a use tax table for inclusion in the instructions to the FTB's returns.

(2) Who is Eligible to Use BOE Use Tax Tables.

(A) Consumers may elect to use the use tax tables included in the instructions to their FTB returns to report their estimated use tax liabilities for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand (\$1,000) on their FTB returns. However, eligible consumers may still calculate their actual use tax liabilities using the worksheets in the instructions to their FTB returns and report their actual use tax liabilities on their FTB returns. Consumers are not required to use the use tax tables included in the instructions to their FTB returns.

(B) The use tax table may not be used to estimate use tax liabilities for business purchases, including purchases made by businesses required to hold a seller's permit or to register with the BOE under the Sales and Use Tax Law and report their use tax liabilities directly to the BOE.

(3) Safe Harbor. If eligible consumers use the use tax tables included in the instructions to their FTB returns to estimate their use tax liabilities for qualified nonbusiness purchases and correctly report their estimated use tax liabilities for their qualified nonbusiness purchases in accordance with their AGI ranges, then the BOE may not assess the difference, if any, between the estimated use tax liabilities reported in accordance with the use tax tables and the consumers' actual use tax liabilities for qualified nonbusiness purchases.

(b) Definitions and Data Sources.

(1) AGI Ranges. The use tax table shall be separated into fifteen (15) AGI ranges as follows:

(A) AGI less than \$10,000;

(B) AGI of \$10,000 to \$19,999;

(C) AGI of \$20,000 to \$29,999;

- (D) AGI of \$30,000 to \$39,999;
- (E) AGI of \$40,000 to \$49,999;
- (F) AGI of \$50,000 to \$59,999;
- (G) AGI of \$60,000 to \$69,999;
- (H) AGI of \$70,000 to \$79,999;
- (I) AGI of \$80,000 to \$89,999;
- (J) AGI of \$90,000 to \$99,999;
- (K) AGI of \$100,000 to \$124,999;
- (L) AGI of \$125,000 to \$149,999;
- (M) AGI of \$150,000 to \$174,999;
- (N) AGI of \$175,000 to \$199,999;
- (O) AGI more than \$199,999.

(2) Use Tax Liability Factor or Use Tax Table Percentage. For the 2011 calendar year the use tax liability factor or use tax table percentage shall be 0.070 percent (.0007). On June 1, 2012, ~~and each June 1 thereafter~~, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.37, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent. On June 1, 2013, and each June 1 thereafter, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.23, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent.

(3) Total Personal Income. Total personal income shall be determined by reference to the most current personal income data published by the United States Bureau of Economic Analysis.

(4) Total Spending at Electronic Shopping and Mail Order Houses. Total spending at electronic shopping and mail order houses shall be determined by reference to the most current electronic shopping and mail order house spending data published by the United States Census Bureau.

(5) Total Spending on Taxable Purchases. Total spending on taxable purchases shall be determined by:

(A) Determining the percentage, rounded to the nearest tenth of a percent, of total spending at electronic shopping and mail order houses that are not included in the following categories of items, by reference to the most current retail trade product lines statistics by kind of business data published by the United States Census Bureau:

(i) Groceries and other foods for human consumption off premises, excluding bottled, canned, or packaged soft drinks;

(ii) Prescriptions;

(iii) Video content downloads;

(iv) Audio content downloads;

(v) Prepackaged computer software, including software downloads; and

(vi) All nonmerchandise receipts.

(B) Adding ten billion dollars (\$10,000,000,000) to the total spending at electronic shopping and mail order houses to account for spending that is not included in the spending data published by the United States Census Bureau; and

(C) Multiplying the sum calculated in (B) by the percentage of total spending at electronic shopping and mail order houses that are not included in the categories of items listed in (A) above so that the result does not include spending on nontaxable purchases, and then rounding the result to the nearest tenth of a percent.

(6) Percentage of Income Spent on Taxable Purchases. The percentage of income spent on taxable purchases during a calendar year shall be calculated by dividing the total spending on taxable purchases for that year by the total personal income for that year, multiplying the result by 100, and rounding the result to the nearest tenth of a percent.

(7) Average State, Local, and District Sales and Use Tax Rate. The average state, local, and district sales and use tax rate for a calendar year shall be the total of:

(A) The rates of the statewide sales and use taxes imposed under section 35 of article XIII of the California Constitution and the Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) in effect on January 1 of that year;

(B) The statewide rate of local tax imposed under the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. & Tax. Code, § 7200 et seq.) in effect on January 1 of that year; and

(C) The weighted average rate of the district taxes imposed under the Transactions and Use Tax Law (Rev. & Tax Code, § 7251 et seq.) in effect in the various jurisdictions throughout the state on January 1 of that year after taking into account the proportion of the total statewide taxable transactions (by dollar) reported for each jurisdiction during the fourth quarter of the calendar year that is two years prior to the calendar year for which the calculation is made. For example, the total reported taxable transactions (by dollar) for the fourth quarter of 2010 shall be used to determine the weighted average rate of the district tax rates in effect on January 1, 2012, to calculate the weighted average rate of district taxes for calendar year 2012.

(c) Calculation of the Estimated Use Tax Liability.

(1) The estimated use tax liability for the AGI range described in subdivision (b)(1)(A) shall be determined by multiplying \$5,000 by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(2) The estimated use tax liability for the AGI ranges described in subdivision (b)(1)(B) through (N) shall be determined by multiplying the midpoint of each AGI range by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(3) The estimated use tax liability for the AGI range described in subdivision (b)(1)(O) shall be determined by multiplying each range member's actual AGI by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(d) Use Tax Table Format.

(1) The use tax table for calendar year 2011 shall provide as follows:

Adjusted Gross Income (AGI) Range	Use Tax Liability
Less Than \$20,000	\$7
\$20,000 to \$39,999	\$21
\$40,000 to \$59,999	\$35
\$60,000 to \$79,999	\$49
\$80,000 to \$99,999	\$63
\$100,000 to \$149,999	\$88
\$150,000 to \$199,999	\$123
More than \$199,999 -Multiply AGI by 0.070% (.0007)	

(2) The use tax tables for calendar year 2012 and subsequent years shall utilize the same format as follows:

Adjusted Gross Income (AGI)		Use Tax Liability
Range		
Less Than \$10,000		\$
\$10,000	to \$19,999	\$
\$20,000	to \$29,999	\$
\$30,000	to \$39,999	\$
\$40,000	to \$49,999	\$
\$50,000	to \$59,999	\$
\$60,000	to \$69,999	\$
\$70,000	to \$79,999	\$
\$80,000	to \$89,999	\$
\$90,000	to \$99,999	\$
\$100,000	to \$124,999	\$
\$125,000	to \$149,000	\$
\$150,000	to \$174,999	\$
\$175,000	to \$199,999	\$
More than \$199,999 -Multiply AGI by		%( .000 )

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6452.1, Revenue and Taxation Code.

## Regulation History

**Type of Regulation:** Sales and Use Tax

Regulation: 1685.5

Title: 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*

**Preparation:** Bradley Heller

**Legal Contact:** Bradley Heller

The proposed amendments to Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*, update the manner in which the Board will calculate the estimated amount of use tax due according to a person's adjusted gross income for calendar year 2013 and subsequent years to account for the expanded use tax registration requirements imposed by Assembly Bill No. 155 (Stats. 2011, ch. 313) and recent registration activities.

### History of Proposed Regulation:

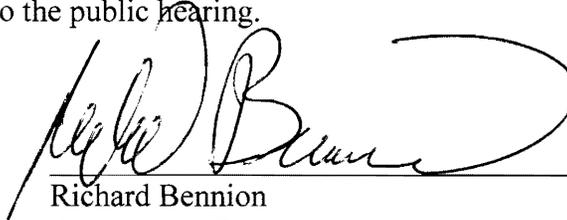
April 24-26, 2013	Public Hearing
March 8, 2013	OAL publication date; 45-day public comment period begins; Interested Parties mailing
February 20, 2013	Notice to OAL
January 15, 2013	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor:	NA
Support:	NA
Oppose:	NA

## Statement of Compliance

The State Board of Equalization, in process of adopting Special Taxes Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*, did comply with the provision of Government Code section 11346.4(a)(1) through (4). A notice to interested parties was mailed on March 8, 2013, 47 days prior to the public hearing.

March 14, 2013

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

Richard Bennion  
Regulations Coordinator  
State Board of Equalization

## **Bennion, Richard**

---

**From:** Ann Hauer [ann@citysourcesf.com]  
**Sent:** Friday, March 08, 2013 12:09 PM  
**To:** Heller, Bradley (Legal)  
**Subject:** Adjusted Use Tax

What a ridiculous idea!

**Ann Hauer**  
**Controller**

**ANVIL BUILDERS INC**

US: 1475 Donner Ave., 2nd Floor | San Francisco, California 94124

GUAM: 590 S. Marine Dr., ITC Bldg, Ste. 701 | Tamuning, Guam 96913

o. 415.285.5000 | c. 415.336-5871 | f. 415.285.5005

[ann@anvilbuilders.com](mailto:ann@anvilbuilders.com) | [www.anvilbuilders.com](http://www.anvilbuilders.com)



We have moved! Please update your contact info (address):

US: 1475 Donner Ave, 2nd Floor | San Francisco, California 94124

## Bennion, Richard

---

**From:** Heller, Bradley (Legal)  
**Sent:** Monday, March 11, 2013 4:33 PM  
**To:** 'Tsuneaki Tanaka'  
**Cc:** Bennion, Richard  
**Subject:** RE: Questioning

Dear Tsuneaki Tanaka,

Regulation 1685.5 is available at <http://www.boe.ca.gov/lawguides/business/current/btlg/vol1/sutr/1685-5.html>. The amendments modify the way the State Board of Equalization (BOE) annually calculates the estimated amount of use tax due according to a person's adjusted gross income and makes such amounts available to the Franchise Tax Board (FTB), by July 30 of each year, in the form of a use tax table for inclusion in the instructions to the FTB's returns. The regulation explains that eligible consumers may elect to use the BOE's use tax tables to estimate their use tax liabilities for specified nonbusiness purchases, instead of calculating their actual use tax liabilities, but that no one is required to use the BOE's use tax tables to estimate their use tax liabilities.

The proposed amendments to Regulation 1685.5 will not impose any new California sales or use taxes or repeal any existing tax exemptions or exclusions. Information regarding the application of California sales and use tax to exports is available in:

- Publication 101, Sales Delivered Outside California: <http://www.boe.ca.gov/sutax/pub101/index.html>
- Publication 104, Sales to Residents of Other Countries: <http://www.boe.ca.gov/formspubs/pub104/index.html>

You may also find Publication 103, Sales for Resale, helpful if you are purchasing tangible personal property for resale. The publication is available at <http://www.boe.ca.gov/formspubs/pub103/index.html>.

Please let me know if you have any other comments or questions regarding the proposed amendments to Regulation 1685.5.

Bradley M. Heller, Tax Counsel IV  
Board of Equalization Legal Department  
Tax and Fee Programs Division  
916-323-3091

---

**From:** Tsuneaki Tanaka [<mailto:tctanaka@earthlink.net>]  
**Sent:** Monday, March 11, 2013 3:59 PM  
**To:** Heller, Bradley (Legal)  
**Subject:** Questioning

Dear Mr. Bradley Heller,

I have been belonging to the export business of pet goods since 2003.  
I purchase goods from wholesalers and retailers in California  
and in other states and export 100% of them to Japan.  
I wonder, under the new amendment to Regulation 1685.5,  
if I will be under the obligation of paying Sales and Use Tax.

even for export business.  
I appreciate your answer to this question.

Thank you and best regards,

Tsuneaki Tanaka  
Takahashi-Bussho  
A/C No.100585455  
28229 Lobrook Dr.,  
Rancho Palos Verdes, CA 90275  
Tel: 310-377-6121  
[tctanaka@earthlink.net](mailto:tctanaka@earthlink.net)

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION  
5901 GREEN VALLEY CIRCLE  
CULVER CITY, CALIFORNIA

REPORTER'S TRANSCRIPT

APRIL 24, 2013

ITEM F2

PROPOSED AMENDMENTS TO REGULATION 1685.5,  
CALCULATION OF ESTIMATED USE TAX - USE TAX TABLE

REPORTED BY: Kathleen Skidgel

CSR NO. 9039

P R E S E N T

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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:

Lawrence Mendel  
Legal Department

---oOo---

1 5901 GREEN VALLEY CIRCLE  
2 CULVER CITY, CALIFORNIA  
3 APRIL 24, 2013

4 ---oOo---

5 MR. HORTON: Ms. Richmond, our next item.

6 MS. RICHMOND: Our next item is F2,  
7 Proposed Amendments to Regulation 1685.5,  
8 Calculation of Estimated Use Tax - Use Tax Table.

9 MR. HORTON: Good afternoon, and welcome  
10 back again.

11 Please commence your presentation,  
12 commence -- starting with your introduction for the  
13 record.

14 MR. MENDEL: Good afternoon, Mr. Chairman,  
15 Members. I'm Lawrence Mendel, Legal Department,  
16 representing staff.

17 Staff requests that the Board adopt the  
18 proposed amendments to Regulation 1685.5. The  
19 proposed amendments update the manner in which the  
20 Board annually calculates the es -- the estimated  
21 amount of use tax due according to a person's  
22 adjusted gross income for the calendar year 2013 and  
23 subsequent years.

24 The amendments account for the expanded use  
25 tax registration requirements imposed by Assembly  
26 Bill 155 and subsequent registration activities.  
27 The amendments result in a reduction of the factor  
28 from .37 to .23.

1 Staff would like to make three additional  
2 points regarding the use of this table:

3 First, use of the table is optional. A  
4 person may always choose to report based on his or  
5 her actual purchases subject to use tax.

6 Second, those who choose to use the table  
7 are not necessarily paying more tax than they  
8 otherwise are required to pay. They may choose to  
9 use the table because they don't have actual  
10 receipts or they find it to be more efficient and  
11 convenient way to report tax liability.

12 And third, and finally, the use tax table  
13 provides the benefit of a safe harbor. That is, if  
14 a person correctly uses the table to report his or  
15 her use tax liability, they cannot be assessed any  
16 additional liability.

17 Accordingly, we request adoption of the  
18 proposed amendments. Thank you.

19 MR. HORTON: Thank you.

20 Discussion?

21 Member Steel.

22 MS. STEEL: Um, I still don't believe that  
23 the higher income is buying more merchandise outside  
24 of California. But at least this one, this table is  
25 going to be -- and then, you know, I don't think  
26 this table is really necessary. But, um, the table  
27 itself is going from 37 percent to 23 percent. It's  
28 going down, so I'm going to support it.

1 MR. HORTON: Further discussion, Members?  
2 Member Runner.

3 MR. RUNNER: Yeah, just a real quick  
4 comment, um -- and I'm wondering if maybe I guess  
5 this is to the Board.

6 I -- I -- yeah, I think the Board is -- or  
7 the -- the table is taking in consideration some of,  
8 uh, changes with inner -- with out-of-state -- or  
9 actually in-state now, um, Internet sales that are  
10 going on, particularly with Amazon. So I'm glad  
11 that -- that -- that re-numbers and the calculations  
12 seem to be identifying that -- that kind of change,  
13 so that's good.

14 Um, what I'm wondering, um, you know, I'm  
15 sure you're all watching back in Washington there  
16 seems to be a lot of new energy attached to the  
17 discussions going on with Internet sales tax across  
18 states now. Uh, a bill just, I think, was moved out  
19 of the Senate yesterday or the day before --  
20 yesterday, I guess it was.

21 Uhm, and, uh, you know, so -- and I -- and  
22 I know there are parts and pieces of that  
23 legislation that are required by the states in order  
24 to take full function if that bill does pass.

25 I wonder if it might be time, now that we  
26 actually have a bill that's passed out of the U.S.  
27 Senate, to get an update next month as to what that  
28 piece of legislation would require and mean for the

1 State of California. Um, because it is -- it will  
2 be significant, obviously, for us. It's -- and I  
3 think it is probably, as far as my opinion, has  
4 always been the best solution for this particular  
5 issue. And I think now that we've got a piece of  
6 legislation that's actually moved out of -- out of  
7 the Senate, we're starting to see a framework of  
8 something that could very well be what it is that  
9 we're going to see here in the future in this issue.

10 So, just throw that in as a comment.

11 MR. HORTON: Thank you.

12 Further discussion, Members?

13 Thank --

14 Is there a motion?

15 MS. STEEL: So move.

16 MR. HORTON: Moved by Member Steel.

17 MS. YEE: Second.

18 MR. HORTON: Second by Member Yee.

19 Without objection, Members, uh, to adopt  
20 staff recommendations? Without objection, Members,  
21 such will be the order.

22 Thank you very much.

23 MR. MENDEL: Thank you.

24 ---oOo---

25

26

27

28

REPORTER'S CERTIFICATE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

State of California )  
 ) ss  
County of Sacramento )

I, KATHLEEN SKIDGEL, Hearing Reporter for the California State Board of Equalization certify that on April 24, 2013 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 6 constitute a complete and accurate transcription of the shorthand writing.

Dated: May 2, 2013

*Kathleen Skidgel*



\_\_\_\_\_  
KATHLEEN SKIDGEL, CSR #9039  
Hearing Reporter

**2013 MINUTES OF THE STATE BOARD OF EQUALIZATION****Wednesday, April 24, 2013****PUBLIC HEARINGS****F1 Property Taxes – State Assesseees’ Presentations on the Valuation of State-Assessed Properties**

Ken Thompson, Chief, State-Assessed Properties Division, Property and Special Taxes Department, made introductory remarks regarding presentations on the valuation of state-assessed properties.

Speaker: Peter W. Michaels, Law Offices of Peter Michaels, representing State Assessed Gas/Electric, Intercounty Pipeline, Telephone and Railroad Companies

**F2 Proposed Amendments to Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table***

Lawrence Mendel, Tax Counsel III, Appeals Division, Legal Department, made introductory remarks regarding staff’s request for adoption of proposed amendments to Regulation 1685.5 to account for the new registration requirements imposed by Assembly Bill No. 155 (Stats. 2011, ch. 313) and recent registration activities (Exhibit 4.5).

Speakers were invited to address the Board, but there were none.

Action: Upon 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 adopted the proposed amendments to Regulation 1685.5 as recommended by staff.

Mr. Runner requested an update for the next meeting on what the federal bill on Internet sales that recently moved out of the Senate would require of the State of California if it becomes enacted.

**[G1] LEGAL APPEALS MATTERS, CONSENT**

The Board deferred consideration of the following matters: *G1.4 Karen D. Hulse, 458251 (EH)*; and, *G1.7 Jose Agustin Fernandez, 549411, 553265 (AR)*.

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

**G1.1 Jill Ellen Malone, 518599 (DF)**

4-1-09 to 6-30-09, \$35,613.00 Claim for Refund

Action: Deny the Claim for Refund as recommended by the Appeals Division.



STATE OF CALIFORNIA

**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

**March 8, 2013**

**To Interested Parties:**

**Notice of Proposed Regulatory Action  
by the  
State Board of Equalization**

**Proposed to Amend Regulation 1685.5, *Calculation of Estimated Use Tax - Use Tax Table***

**NOTICE IS HEREBY GIVEN**

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) 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*. Regulation 1685.5 prescribes the manner in which the Board “shall annually calculate the estimated amount of use tax due according to a person’s adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table,” as required by RTC section 6452.1. The proposed amendments update the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person’s adjusted gross income (AGI) for calendar year 2013 and subsequent years to account for the expanded use tax registration requirements imposed by Assembly Bill No. (AB) 155 (Stats. 2011, ch. 313) and recent registration activities.

**PUBLIC HEARING**

The Board will conduct a meeting in Room 207, 5901 Green Valley Circle, Culver City, California, on April 24-26, 2013. 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](http://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 April 24, 25, or 26, 2013. 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 1685.5.

### **AUTHORITY**

RTC section 7051.

### **REFERENCE**

RTC section 6452.1.

### **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

#### Current Law

Under RTC sections 6202 and 6453, consumers are primarily liable for reporting and paying use tax imposed on the storage, use, or other consumption of tangible personal property in this state. However, under RTC sections 6203, 6226, and 6453, specified retailers are required to register with the Board, collect use tax from their California customers, and report and pay the use tax to the state. Therefore, under Regulation 1685, *Payment of Tax by Purchasers*, consumers are required to report and pay their own use taxes to the state when they purchase tangible personal property for storage, use, or other consumption in this state from unregistered retailers that do not collect California use tax.

Prior to 2010, consumers could only report and pay their use taxes to the Board. However, RTC section 6452.1 was enacted in 2010 to make it more convenient for consumers to comply with their use tax obligations by permitting consumers to make an irrevocable election to report “qualified use tax” on an “acceptable [income] tax return” filed with the Franchise Tax Board (FTB). RTC section 6452.1, subdivision (d)(2), as enacted by Statutes 2010, chapter 721, defined the term “qualified use tax” to mean a taxpayer’s actual unpaid use tax liability after applying the state use taxes imposed under the Sales and Use Tax Law (RTC § 6001 et seq.) and article XIII of the California Constitution, and the local and district use taxes imposed in conformity with the Bradley-Burns Uniform Local Sales and Use Tax Law (RTC § 7200 et seq.) or in accordance with the Transactions and Use Tax Law (RTC § 7251 et seq.) to the taxpayer’s purchases of tangible personal property subject to use tax.

Senate Bill No. (SB) 86 (Stats. 2011, ch. 14) amended RTC section 6452.1 to make it more convenient for taxpayers to comply with their use tax obligations by giving taxpayers the option to report their “estimated use tax liabilities,” based upon their AGIs for income tax purposes, for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand dollars (\$1000), as determined from a use tax table, on their income tax returns, instead of calculating and reporting their actual unpaid use tax liabilities (as described above). In addition, RTC section 6452.1, subdivision (d)(2)(A)(i)(II), as amended by SB 86, requires the Board to “annually calculate the estimated amount of use tax

due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table" for inclusion in the instructions to the FTB's returns and use by eligible taxpayers.

The Board adopted Regulation 1685.5 on July 26, 2011, to prescribe the specific use tax table that taxpayers could use to estimate their calendar-year 2011 use taxes based upon their AGIs, prescribe the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person's AGI for calendar-year 2012 and subsequent years, and prescribe the format of the use tax tables the Board would be required to make available to the FTB for calendar-year 2012 and subsequent years. After discussing Regulation 1685.5 with interested parties, the Board adopted amendments to Regulation 1685.5 on March 20, 2012, to update the manner in which the Board annually calculates the estimated amount of use tax due according to a person's AGI and makes such amounts available to the FTB in the form of a use tax table for calendar-year 2012 and subsequent years. The Notice of Action for the 2012 amendments explained that:

The proposed [2012] amendments to Regulation 1685.5, subdivision (b)(2), will require that the Board multiply the percentage of income spent on taxable purchases during the preceding year by 0.37, which represents the estimated percentage of California consumers' total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers. AB 155 (Stats. 2011, ch. 313) expanded the use tax registration requirements so that they apply to some out-of-state retailers, including Internet retailers, that were previously not required to register with the Board to collect and remit use tax on their sales of tangible personal property to California customers. However, section 6 of AB 155 provides that the new registration requirements will not be operative until either September 15, 2012, or January 1, 2013, and the Board is currently unable to determine whether the new registration requirements will reduce the percentage of California consumers' total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers during 2012 or in subsequent years, and, if so, the extent of such reduction. Therefore, the Board is not proposing to amend Regulation 1685.5 to account for the new registration requirements imposed by AB 155 at this time. However, the Board is continuing to monitor the implementation of AB 155 and considering whether to propose sufficiently related changes to the original text of the proposed amendments to Regulation 1685.5 to account for the enactment of AB 155 or other events that may change the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during 2012 or subsequent years.

However, the Board did not make sufficiently related changes to the text of the 2012 amendments to Regulation 1685.5 to account for the enactment of AB 155 because the Board

could not determine when AB 155's expanded use tax registration requirements would be operative and could not adequately estimate the effect of the expanded use tax registration requirements when the Board adopted the 2012 amendments. Instead, the Board continued to monitor the implementation of AB 155 and consider whether to propose amendments to Regulation 1685.5 to account for the enactment of AB 155 and the expanded use tax registration requirements effect on the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during calendar-year 2013 and subsequent years.

#### Effect, Objectives, and Benefits of the Proposed Amendments to Regulation 1685.5

The expanded registration requirements (discussed above) became operative on September 15, 2012, in accordance with section 6, subdivision (b)(2), of AB 155. The Board did see an increase in the number of out-of-state retailers registered to collect California use tax around that time, and Board staff was subsequently able to determine that those registration activities, including the registration of some retailers that make substantial sales to California consumers, indicate that there will be an overall decrease in the percentage of taxable purchases California consumers make from unregistered out-of-state retailers during calendar-year 2013, and in subsequent years. In addition, Board staff was able to:

- Calculate adjusted total 2011 United States electronic commerce sales;
- Determine that 86.9 percent of those sales were made by the top 500 Internet retailers and 13.1 percent of those sales were made by other Internet retailers;
- Estimate that 14.4 percent of the top 500 Internet retailers and 78 percent of the other Internet retailers were not registered with the Board to collect use tax after the operative date of AB 155; and
- Arrive at a weighted average percentage of sales made by unregistered Internet retailers of 22.7 percent  $((.869 \times .144) + (.131 \times .78))$ .

Therefore, staff prepared a memorandum dated January 4, 2013, which recommended that "the Board amend Regulation 1685.5, subdivision (b)(2), to change the estimated percentage of California consumers' total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers from 37 percent to 23 percent to account for the new use tax registration requirements imposed by AB 155 and recent registration activities." And, Board staff submitted the memorandum to the Board Members for their consideration at the Board's January 15, 2013, Business Taxes Committee meeting.

During the January 15, 2013, meeting, Ms. Gina Rodriguez, Vice President of State Tax Policy for the California Taxpayers Association (CalTax), stated that CalTax supports the amendments to Regulation 1685.5 and the Board Members unanimously voted to propose their adoption. The Board determined that the amendments are reasonably necessary to account for the expanded registration requirements imposed by AB 155 operative September 15, 2012, and the recent registration activity discussed above.

The objective of the proposed amendments is to make the Board's calculations of the estimated amount of use tax due according to a person's AGI for calendar-year 2013 and subsequent years as accurate as possible by accounting for the expanded use tax registration requirements imposed by AB 155 and recent registration activities. The Board anticipates that the proposed amendments will promote fairness and generally encourage consumers to use the Board's use tax tables by ensuring that eligible consumers' estimated use tax liabilities are as accurate as possible.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1685.5 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 1685.5 is the only state regulation prescribing the manner in which the Board "shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table," as required by RTC section 6452.1. There is no federal use tax and there are no comparable federal regulations or statutes to Regulation 1685.5.

#### **NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS**

The Board has determined that the adoption of the proposed amendments to Regulation 1685.5 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 1685.5 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

#### **NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1685.5 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 1685.5 may affect small business.

**NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES**

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

**RESULTS OF THE ECONOMIC IMPACT ANALYSIS REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)**

The Board has prepared the economic impact analysis 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 1685.5 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 1685.5 will not affect the health and welfare of California residents, worker safety, or the state's environment.

**NO SIGNIFICANT EFFECT ON HOUSING COSTS**

Adoption of the proposed amendments to Regulation 1685.5 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 Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at [Bradley.Heller@boe.ca.gov](mailto:Bradley.Heller@boe.ca.gov), or by mail at State Board of Equalization, Attn: Bradley M. Heller, 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](mailto: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 April 24, 2013, or as soon thereafter as the Board begins the public hearing regarding the proposed amendments to Regulation 1685.5 during the April 24-26, 2013, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1685.5. 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 1685.5 illustrating the express terms of the proposed amendments and an initial statement of reasons for the adoption of the proposed amendments, which includes the economic impact analysis 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](http://www.boe.ca.gov).

### **SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8**

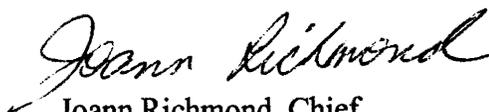
The Board may adopt the proposed amendments to Regulation 1685.5 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed amendments, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting amendments will be mailed to those interested parties who commented on the original proposed amendments orally or in writing or who asked to be informed of such changes. The text of the resulting amendments will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting amendments that are received prior to adoption.

March 8, 2013

**AVAILABILITY OF FINAL STATEMENT OF REASONS**

If the Board adopts the proposed amendments to Regulation 1685.5, 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](http://www.boe.ca.gov).

Sincerely,

A handwritten signature in black ink that reads "Joann Richmond". The signature is written in a cursive style with a long, sweeping underline.

Joann Richmond, Chief  
Board Proceedings Division

JR:reb

**Initial Statement of Reasons**  
**Adoption of Proposed Amendments to**  
**California Code of Regulations, Title 18, Section 1685.5,**  
***Calculation of Estimated Use Tax - Use Tax Table***

SPECIFIC PURPOSE AND NECESSITY

Current Law

Under Revenue and Taxation Code (RTC) sections 6202 and 6453, consumers are primarily liable for reporting and paying use tax imposed on the storage, use, or other consumption of tangible personal property in this state. However, under RTC sections 6203, 6226, and 6453, specified retailers are required to register with the State Board of Equalization (Board), collect use tax from their California customers, and report and pay the use tax to the state. Therefore, under California Code of Regulations, title 18, section (Regulation) 1685, *Payment of Tax by Purchasers*, consumers are required to report and pay their own use taxes to the state when they purchase tangible personal property for storage, use, or other consumption in this state from unregistered retailers that do not collect California use tax.

Prior to 2010, consumers could only report and pay their use taxes to the Board. However, RTC section 6452.1 was enacted in 2010 to make it more convenient for consumers to comply with their use tax obligations by permitting consumers to make an irrevocable election to report “qualified use tax” on an “acceptable [income] tax return” filed with the Franchise Tax Board (FTB). RTC section 6452.1, subdivision (d)(2), as enacted by Statutes 2010, chapter 721, defined the term “qualified use tax” to mean a taxpayer’s actual unpaid use tax liability after applying the state use taxes imposed under the Sales and Use Tax Law (RTC § 6001 et seq.) and article XIII of the California Constitution, and the local and district use taxes imposed in conformity with the Bradley-Burns Uniform Local Sales and Use Tax Law (RTC § 7200 et seq.) or in accordance with the Transactions and Use Tax Law (RTC § 7251 et seq.) to the taxpayer’s purchases of tangible personal property subject to use tax.

Senate Bill No. (SB) 86 (Stats. 2011, ch. 14) amended RTC section 6452.1 to make it more convenient for taxpayers to comply with their use tax obligations by giving taxpayers the option to report their “estimated use tax liabilities,” based upon their adjusted gross incomes (AGIs) for income tax purposes, for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand dollars (\$1000), as determined from a use tax table, on their income tax returns, instead of calculating and reporting their actual unpaid use tax liabilities (as described above). In addition, RTC section 6452.1, subdivision (d)(2)(A)(i)(II), as amended by SB 86, requires the Board to “annually calculate the estimated amount of use tax due according to a person’s adjusted gross income and by

July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table” for inclusion in the instructions to the FTB’s returns and use by eligible taxpayers.

The Board adopted Regulation 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*, on July 26, 2011, to prescribe the specific use tax table that taxpayers could use to estimate their calendar-year 2011 use taxes based upon their AGIs, prescribe the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person’s AGI for calendar-year 2012 and subsequent years, and prescribe the format of the use tax tables the Board would be required to make available to the FTB for calendar-year 2012 and subsequent years. After discussing Regulation 1685.5 with interested parties, the Board adopted amendments to Regulation 1685.5 on March 20, 2012, to update the manner in which the Board annually calculates the estimated amount of use tax due according to a person’s AGI and makes such amounts available to the FTB in the form of a use tax table for calendar year 2012 and subsequent years.

The Notice of Action for the 2012 amendments explained that:

The proposed [2012] amendments to Regulation 1685.5, subdivision (b)(2), will require that the Board multiply the percentage of income spent on taxable purchases during the preceding year by 0.37, which represents the estimated percentage of California consumers’ total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers. AB 155 (Stats. 2011, ch. 313) expanded the use tax registration requirements so that they apply to some out-of-state retailers, including Internet retailers, that were previously not required to register with the Board to collect and remit use tax on their sales of tangible personal property to California customers. However, section 6 of AB 155 provides that the new registration requirements will not be operative until either September 15, 2012, or January 1, 2013, and the Board is currently unable to determine whether the new registration requirements will reduce the percentage of California consumers’ total purchases of tangible personal property for use in California from all out-of-state retailers that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers during 2012 or in subsequent years, and, if so, the extent of such reduction. Therefore, the Board is not proposing to amend Regulation 1685.5 to account for the new registration requirements imposed by AB 155 at this time. However, the Board is continuing to monitor the implementation of AB 155 and considering whether to propose sufficiently related changes to the original text of the proposed amendments to Regulation 1685.5 to account for the enactment of AB 155 or other events that may change the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during 2012 or subsequent years.

However, the Board did not make sufficiently related changes to the text of the 2012 amendments to Regulation 1685.5 to account for the enactment of AB 155 because the Board could not determine when AB 155's expanded use tax registration requirements would be operative and could not adequately estimate the effect of the expanded use tax registration requirements when the Board adopted the 2012 amendments. Instead, the Board continued to monitor the implementation of AB 155 and consider whether to propose amendments to Regulation 1685.5 to account for the enactment of AB 155 and the expanded use tax registration requirements effect on the percentage of taxable purchases that California consumers make from unregistered out-of-state retailers during calendar-year 2013 and subsequent years.

### Specific Purpose, Necessity, and Benefits of the Proposed Amendments

The expanded registration requirements (discussed above) became operative on September 15, 2012, in accordance with section 6, subdivision (b)(2), of AB 155. The Board did see an increase in the number of out-of-state retailers registered to collect California use tax around that time, and Board staff was subsequently able to determine that those registration activities, including the registration of some retailers that make substantial sales to California consumers, indicate that there will be an overall decrease in the percentage of taxable purchases California consumers make from unregistered out-of-state retailers during calendar-year 2013, and in subsequent years. In addition, Board staff was able to:

- Calculate adjusted total 2011 United States electronic commerce sales;
- Determine that 86.9 percent of those sales were made by the top 500 Internet retailers and 13.1 percent of those sales were made by other Internet retailers;
- Estimate that 14.4 percent of the top 500 Internet retailers and 78 percent of the other Internet retailers were not registered with the Board to collect use tax after the operative date of AB 155; and
- Arrive at a weighted average percentage of sales made by unregistered Internet retailers of 22.7 percent  $((.869 \times .144) + (.131 \times .78))$ .

Therefore, staff prepared a memorandum dated January 4, 2013, which recommended that "the Board amend Regulation 1685.5, subdivision (b)(2), to change the estimated percentage of California consumers' total purchases of tangible personal property for use in California that are made from out-of-state retailers that are not registered with the Board to collect use tax from their customers from 37 percent to 23 percent to account for the new use tax registration requirements imposed by AB 155 and recent registration activities." And, Board staff submitted the memorandum to the Board Members for their consideration at the Board's January 15, 2013, Business Taxes Committee meeting.

During the January 15, 2013, meeting, Ms. Gina Rodriguez, Vice President of State Tax Policy for the California Taxpayers Association (CalTax), stated that CalTax supports the amendments to Regulation 1685.5 and the Board Members unanimously voted to propose their adoption. The Board determined that the amendments are reasonably necessary to address the problem of ensuring that the Board's future calculations of the estimated

amount of use tax due according to a person's AGI account for the expanded registration requirements imposed by AB 155 operative September 15, 2012, and the recent registration activity discussed above. The Board anticipates that the proposed amendments will promote fairness and generally encourage consumers to use the Board's use tax tables by ensuring that eligible consumers' estimated use tax liabilities are as accurate as possible.

The proposed amendments to Regulation 1685.5 were not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to Regulation 1685.5.

#### DOCUMENTS RELIED UPON

The Board relied upon the January 4, 2013, memorandum referred to above, the exhibit to the memorandum, which illustrated the proposed amendments to Regulation 1685.5, and the comments made during the Board's discussion of the memorandum during its January 15, 2013, Business Taxes Committee meeting in deciding to propose the amendments to Regulation 1685.5 described above.

#### ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1685.5 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 at this time because the Board determined that the amendments are reasonably necessary for the reasons set forth above.

The Board did not reject any reasonable alternative to the proposed amendments to Regulation 1685.5 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)(6) AND ECONOMIC IMPACT ANALYSIS REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

Regulation 1685.5 only prescribes the manner in which the Board "shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table," as required by RTC section 6452.1. In

addition, Regulation 1685.5, subdivision (a)(2) provides that the Board's use tax tables "may not be used to estimate use tax liabilities for business purchases" and that consumers are not required to use the Board's use tax tables to estimate and report their use tax liabilities for nonbusiness purchases.

The proposed amendments to Regulation 1685.5 will improve the accuracy of the Board's calculations of the estimated amount of use tax due according to a person's AGI for calendar-year 2013 and subsequent years by accounting for the expanded use tax registration requirements imposed by AB 155 operative September 15, 2012, and a recent increase in the number of out-of-state retailers registered to collect California use tax, including the registration of some retailers that make substantial sales to California consumers. As such, the amendments merely reflect an increase in the percentage of use tax that will be collected by registered retailers and remitted to the Board and a decrease in the percentage of use tax that consumers will continue to be required to directly report and pay to the state, not a change in the total amount of use tax required to be paid by consumers.

Furthermore, Regulation 1685.5 does not regulate business, the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has determined that the adoption of the proposed amendments to Regulation 1685.5 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. The Board has also determined that the adoption of the proposed amendments to Regulation 1685.5 will not affect 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 1685.5 will not have a significant adverse economic impact on business.

The proposed amendments may affect small business.

**Text of Proposed Amendments to  
California Code of Regulations, Title 18, Section 1685.5**

**1685.5. Calculation of Estimated Use Tax - Use Tax Table.**

(a) In General.

(1) Estimated Use Tax and Use Tax Table. The Board of Equalization (BOE) is required to annually calculate the estimated amount of use tax due according to a person's adjusted gross income (AGI) and make such amounts available to the Franchise Tax Board (FTB), by July 30 of each year, in the form of a use tax table for inclusion in the instructions to the FTB's returns.

(2) Who is Eligible to Use BOE Use Tax Tables.

(A) Consumers may elect to use the use tax tables included in the instructions to their FTB returns to report their estimated use tax liabilities for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand (\$1,000) on their FTB returns. However, eligible consumers may still calculate their actual use tax liabilities using the worksheets in the instructions to their FTB returns and report their actual use tax liabilities on their FTB returns. Consumers are not required to use the use tax tables included in the instructions to their FTB returns.

(B) The use tax table may not be used to estimate use tax liabilities for business purchases, including purchases made by businesses required to hold a seller's permit or to register with the BOE under the Sales and Use Tax Law and report their use tax liabilities directly to the BOE.

(3) Safe Harbor. If eligible consumers use the use tax tables included in the instructions to their FTB returns to estimate their use tax liabilities for qualified nonbusiness purchases and correctly report their estimated use tax liabilities for their qualified nonbusiness purchases in accordance with their AGI ranges, then the BOE may not assess the difference, if any, between the estimated use tax liabilities reported in accordance with the use tax tables and the consumers' actual use tax liabilities for qualified nonbusiness purchases.

(b) Definitions and Data Sources.

(1) AGI Ranges. The use tax table shall be separated into fifteen (15) AGI ranges as follows:

(A) AGI less than \$10,000;

(B) AGI of \$10,000 to \$19,999;

(C) AGI of \$20,000 to \$29,999;

- (D) AGI of \$30,000 to \$39,999;
- (E) AGI of \$40,000 to \$49,999;
- (F) AGI of \$50,000 to \$59,999;
- (G) AGI of \$60,000 to \$69,999;
- (H) AGI of \$70,000 to \$79,999;
- (I) AGI of \$80,000 to \$89,999;
- (J) AGI of \$90,000 to \$99,999;
- (K) AGI of \$100,000 to \$124,999;
- (L) AGI of \$125,000 to \$149,999;
- (M) AGI of \$150,000 to \$174,999;
- (N) AGI of \$175,000 to \$199,999;
- (O) AGI more than \$199,999.

(2) Use Tax Liability Factor or Use Tax Table Percentage. For the 2011 calendar year the use tax liability factor or use tax table percentage shall be 0.070 percent (.0007). On June 1, 2012, ~~and each June 1 thereafter~~, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.37, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent. On June 1, 2013, and each June 1 thereafter, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on taxable purchases for the preceding calendar year by 0.23, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent.

(3) Total Personal Income. Total personal income shall be determined by reference to the most current personal income data published by the United States Bureau of Economic Analysis.

(4) Total Spending at Electronic Shopping and Mail Order Houses. Total spending at electronic shopping and mail order houses shall be determined by reference to the most current electronic shopping and mail order house spending data published by the United States Census Bureau.

(5) Total Spending on Taxable Purchases. Total spending on taxable purchases shall be determined by:

(A) Determining the percentage, rounded to the nearest tenth of a percent, of total spending at electronic shopping and mail order houses that are not included in the following categories of items, by reference to the most current retail trade product lines statistics by kind of business data published by the United States Census Bureau:

(i) Groceries and other foods for human consumption off premises, excluding bottled, canned, or packaged soft drinks;

(ii) Prescriptions;

(iii) Video content downloads;

(iv) Audio content downloads;

(v) Prepackaged computer software, including software downloads; and

(vi) All nonmerchandise receipts.

(B) Adding ten billion dollars (\$10,000,000,000) to the total spending at electronic shopping and mail order houses to account for spending that is not included in the spending data published by the United States Census Bureau; and

(C) Multiplying the sum calculated in (B) by the percentage of total spending at electronic shopping and mail order houses that are not included in the categories of items listed in (A) above so that the result does not include spending on nontaxable purchases, and then rounding the result to the nearest tenth of a percent.

(6) Percentage of Income Spent on Taxable Purchases. The percentage of income spent on taxable purchases during a calendar year shall be calculated by dividing the total spending on taxable purchases for that year by the total personal income for that year, multiplying the result by 100, and rounding the result to the nearest tenth of a percent.

(7) Average State, Local, and District Sales and Use Tax Rate. The average state, local, and district sales and use tax rate for a calendar year shall be the total of:

(A) The rates of the statewide sales and use taxes imposed under section 35 of article XIII of the California Constitution and the Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) in effect on January 1 of that year;

(B) The statewide rate of local tax imposed under the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. & Tax. Code, § 7200 et seq.) in effect on January 1 of that year; and

(C) The weighted average rate of the district taxes imposed under the Transactions and Use Tax Law (Rev. & Tax Code, § 7251 et seq.) in effect in the various jurisdictions throughout the state on January 1 of that year after taking into account the proportion of the total statewide taxable transactions (by dollar) reported for each jurisdiction during the fourth quarter of the calendar year that is two years prior to the calendar year for which the calculation is made. For example, the total reported taxable transactions (by dollar) for the fourth quarter of 2010 shall be used to determine the weighted average rate of the district tax rates in effect on January 1, 2012, to calculate the weighted average rate of district taxes for calendar year 2012.

(c) Calculation of the Estimated Use Tax Liability.

(1) The estimated use tax liability for the AGI range described in subdivision (b)(1)(A) shall be determined by multiplying \$5,000 by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(2) The estimated use tax liability for the AGI ranges described in subdivision (b)(1)(B) through (N) shall be determined by multiplying the midpoint of each AGI range by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(3) The estimated use tax liability for the AGI range described in subdivision (b)(1)(O) shall be determined by multiplying each range member's actual AGI by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(d) Use Tax Table Format.

(1) The use tax table for calendar year 2011 shall provide as follows:

Adjusted Gross Income (AGI) Range	Use Tax Liability
Less Than \$20,000	\$7
\$20,000 to \$39,999	\$21
\$40,000 to \$59,999	\$35
\$60,000 to \$79,999	\$49
\$80,000 to \$99,999	\$63
\$100,000 to \$149,999	\$88
\$150,000 to \$199,999	\$123
More than \$199,999 -Multiply AGI by 0.070% (.0007)	

(2) The use tax tables for calendar year 2012 and subsequent years shall utilize the same format as follows:

Adjusted Gross Income (AGI)		Use Tax Liability
Range		
Less Than \$10,000		\$
\$10,000	to \$19,999	\$
\$20,000	to \$29,999	\$
\$30,000	to \$39,999	\$
\$40,000	to \$49,999	\$
\$50,000	to \$59,999	\$
\$60,000	to \$69,999	\$
\$70,000	to \$79,999	\$
\$80,000	to \$89,999	\$
\$90,000	to \$99,999	\$
\$100,000	to \$124,999	\$
\$125,000	to \$149,000	\$
\$150,000	to \$174,999	\$
\$175,000	to \$199,999	\$
More than \$199,999 -Multiply AGI by		% (.000 )

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6452.1, Revenue and Taxation Code.

## Regulation History

**Type of Regulation:** Sales and Use Tax

Regulation: 1685.5

Title: 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*

**Preparation:** Bradley Heller

**Legal Contact:** Bradley Heller

The proposed amendments to Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*, update the manner in which the Board will calculate the estimated amount of use tax due according to a person's adjusted gross income for calendar year 2013 and subsequent years to account for the expanded use tax registration requirements imposed by Assembly Bill No. 155 (Stats. 2011, ch. 313) and recent registration activities.

### History of Proposed Regulation:

April 24-26, 2013	Public Hearing
March 8, 2013	OAL publication date; 45-day public comment period begins; Interested Parties mailing
February 20, 2013	Notice to OAL
January 15, 2013	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA  
Support: NA  
Oppose: NA