



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

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

FIONA MA, CPA  
Second District, San Francisco

JEROME E. HORTON  
Third District, Los Angeles County

DIANE L. HARKEY  
Fourth District, Orange County

BETTY T. YEE  
State Controller

CYNTHIA BRIDGES  
Executive Director

**December 4, 2015**

**To Interested Parties:**

**Notice of Proposed Regulatory Action**

**The State Board of Equalization Proposes to Adopt Amendments to  
California Code of Regulations, Title 18,  
Section 2460, *Administration*,  
Section 2461, *Exemptions, Deductions, Credits, and Specific Applications of  
Tax*,  
and  
Section 2462, *Refunds of Excess Charges Collected***

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) sections 42020 and 42103, proposes to adopt California Code of Regulations, title 18, sections (Regulations) 2460, *Administration*, 2461, *Exemptions, Deductions, Credits, and Specific Applications of Tax*, and 2462, *Refunds of Excess Charges Collected*. Proposed Regulations 2460, 2461, and 2462 implement, interpret, and make specific the Prepaid Mobile Telephony Services Surcharge Collection Act's and the Local Prepaid Mobile Telephony Services Collection Act's statutes regarding the application of the prepaid mobile telephony services surcharge and local charges to the purchase of prepaid mobile telephony services. The proposed regulations provide guidance to sellers that are required to collect the prepaid mobile telephony services surcharge and local charges from prepaid consumers and provide guidance to local agencies and jurisdictions with respect to local charges, as explained in more detail below.

**PUBLIC HEARING**

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on January 26-28, 2016. 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 10:00 a.m. or as soon thereafter as the matter may be heard on January 26, 27, or 28, 2016. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of proposed Regulations 2460, 2461, and 2462.

## **AUTHORITY**

Proposed Regulations 2460, 2461, and 2462: RTC sections 42020 and 42103

## **REFERENCE**

Proposed Regulation 2460: RTC sections 42004, 42010, 42014, 42020, 42021, 42022, 42101, 42101.5, 42102, 42102.5, and 42103.

Proposed Regulation 2461: RTC sections 42010, 42012, 42018, and 42020.

Proposed Regulation 2462: RTC sections 42010 and 42105.

## **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW PURSUANT TO GOVERNMENT CODE SECTION 11346.5, SUBDIVISION (a)(3)**

### Summary of Existing Laws and Regulations

Assembly Bill No. 1717 (AB 1717) (Stats. 2014, ch. 885) established the Prepaid Mobile Telephony Services Surcharge Collection Act (Prepaid MTS Act) and the Local Prepaid Mobile Telephony Services Collection Act (Local Act) (commencing with RTC sections 42001 and 42100, respectively). The bill also amended and added certain RTC sections with respect to the Emergency Telephone Users Surcharge Act (commencing with RTC section 41001), which imposes what has come to be commonly known as the “911 surcharge” because it funds the “911” emergency system utilizing the digits 9-1-1.

### Prepaid MTS Act

#### I. Surcharge Imposed by Prepaid MTS Act

##### *Mobile Telephony Service (MTS), Prepaid MTS, and Prepaid MTS Surcharge*

The term “‘mobile telephony service’ or ‘MTS’” means “commercially available interconnected mobile phone services that provide access to the public switched telephone network (PSTN) via mobile communication devices employing radiowave technology to transmit calls, including cellular radiotelephone, broadband Personal Communications Services (PCS), and digital Specialized Mobile Radio (SMR).” The term “mobile telephony services” does not include “mobile satellite telephone services or mobile data services used exclusively for the delivery of nonvoice information to a mobile device.” “Prepaid MTS” means “the right to utilize a mobile device for mobile telecommunications services or information services [(as defined in 47 U.S.C.

§ 1530)], including the download of digital products delivered electronically, content, and ancillary services, or both telecommunications services and information services, that must be purchased in advance of usage in predetermined units or dollars.” (Pub. Util. Code section 224.4; RTC section 42004.)

On and after January 1, 2016, a prepaid MTS surcharge is imposed on each “prepaid consumer” purchasing prepaid MTS. A “seller” is required to collect the surcharge. The surcharge is imposed as a percentage of the sales price from each retail transaction involving the purchase of prepaid MTS that occurs in this state. The prepaid MTS surcharge is in lieu of the surcharges and user fees imposed on amounts paid for prepaid MTS under the law in effect through December 31, 2015, and collected and paid to the California Public Utilities Commission (PUC), the Board, and local agencies or jurisdictions by providers and suppliers of telephone communication services. (RTC section 42010.)

#### *Definitions of Prepaid Consumer, Seller, and Direct Seller*

Pursuant to RTC section 42004, “prepaid consumer” means “a person who purchases prepaid [MTS] in a retail transaction,” and “seller” means “a person that sells prepaid [MTS] to a person in a retail transaction.” RTC section 42004 further provides that a “direct seller” means “a prepaid [MTS] provider or service supplier, as defined in [RTC section] 41007, that makes a sale of prepaid [MTS] directly to a prepaid consumer for any purpose other than for resale in the regular course of business.” A direct seller includes, but is not limited to, a telephone corporation, as defined in section 234 of the Public Utilities Code, a person that provides interconnected Voice over Internet Protocol (VoIP) service, as defined in section 285 of the Public Utilities Code, and a retailer that is a member of the same commonly controlled group or combined reporting group as a telephone corporation or provider of VoIP service under the Corporation Tax Law (commencing with RTC section 23001).

According to the above definitions, the term seller is inclusive of direct sellers. However, as further discussed in this paper, a seller who is further defined as a direct seller has different registration and reporting requirements than those sellers who do not meet the definition of a direct seller.

#### *Retail Sale Location / Transaction Location in this State*

Pursuant to RTC section 42004, “in this state” means “within the exterior limits of the State of California and includes all territory within those limits owned by or ceded to the United States of America.” Also, “retail transaction” means “the purchase of prepaid MTS, either alone or in combination with mobile data or other services, from a seller for any purpose other than resale in the regular course of business.”

Pursuant to RTC section 42014, a retail transaction *occurs* in this state for purposes of the prepaid MTS surcharge if the consumer makes the retail transaction in person at a business location in this state (point-of-sale transaction). If this is not applicable, a retail transaction *occurs* in this state if the consumer’s address is in this state (known-address transaction). For

this purpose, a known-address transaction occurs in this state under any one of the following circumstances:

- The retail sale involves the shipping of an item to be delivered to, or picked up by, the prepaid consumer at a location in this state.
- The prepaid consumer's address is known by the seller to be in this state. For this purpose, the consumer's address is considered to be known by the seller if the seller's records maintained in the ordinary course of business indicate that the prepaid consumer's address is in this state and the records are not made or kept in bad faith.
- The prepaid consumer provides an address during consummation of the retail transaction that is in this state, including an address provided with respect to the payment instrument if no other address is available and the address is not given in bad faith.
- The mobile telephone number is associated with a location in this state.

For purposes of determining local charges (discussed further below), a retail transaction occurs at only one location. When the retail transaction occurs in person at a business location in this state (point-of-sale transaction), it is presumed the consumption of, use of, or access to prepaid MTS occurs at the business location. If the retail transaction is not a point-of-sale transaction, it is presumed the consumption of, use of, or access to prepaid MTS occurs at the known address, and the known address location is determined by the circumstances bulleted above, in descending order.

#### *Determining the Prepaid MTS Surcharge Rate*

Pursuant to RTC section 42010, the Board is required to calculate the prepaid MTS surcharge rate annually by November 1 by adding the 911 surcharge rate (as determined and reported to the Board by the Office of Emergency Services under RTC section 41030) and the PUC reimbursement fee and telecommunications universal services surcharges (as determined by the PUC under Pub. Util. Code section 319, subs. (a) and (b)).

Pursuant to RTC section 42010, the Board is also required to post on its website, for each local jurisdiction, the combined total of the rates of the prepaid MTS surcharge (as calculated above) and the rate(s) of local charges. (See below for information regarding local charges.) The Board is also required to separately post on its website individual rates for each of the PUC surcharges included in the calculation of the prepaid MTS surcharge, the 911 surcharge rate, and each of the individual local charges applicable to prepaid MTS.

## II. Administration of Surcharge

### *Registration*

Pursuant to RTC sections 42020 and 42022, every person that sells prepaid MTS to a person in a retail transaction in this state is required to register with the Board. RTC section 42022 provides that the Board is required to establish a method for registration that uses "the existing registration

process for registering for a seller's permit" under the Sales and Use Tax Law (commencing with RTC section 6001). RTC section 42022 provides that "[e]very application for registration shall be upon a form prescribed by the [B]oard and shall set forth the name under which the applicant transacts or intends to transact business, the location of its place or places of business, and such other information as the Board may require." RTC section 42022 also provides that "applications for registration shall be authenticated in a form or pursuant to methods as may be prescribed by the [B]oard."

However, pursuant to RTC Section 42010, "direct sellers," as defined in RTC section 42004, must remit that portion of the prepaid MTS surcharge that consists of the emergency telephone users surcharge to the Board pursuant to the Emergency Telephone Users Surcharge Act. As such, direct sellers must register with the Board pursuant to RTC section 41040.

RTC section 41040 requires service suppliers, including direct sellers, to register "with the [B]oard upon a form prescribed by the [B]oard" and requires each registrant to "set forth the name under which it transacts or intends to transact business and such other information as the [B]oard may require." The Board previously adopted Regulation 2421, *Registration*, to incorporate and implement RTC section 41040. Regulation 2421 reiterates the statutory requirement and provides notice to service suppliers regarding their statutory registration requirements by reiterating that registration is required "with the Board upon a form prescribed by the Board."

#### *Payment and Collection*

Pursuant to RTC section 42010, every prepaid consumer of MTS in this state is liable for the prepaid MTS surcharge and any local charges until those amounts are paid to this state. However, a prepaid consumer's payment to a registered seller relieves the consumer from further liability. A seller is required to separately state the combined prepaid MTS surcharge and local charges on an invoice, receipt, or other similar document provided to the prepaid consumer, or otherwise disclose the combined prepaid MTS surcharge and local charges electronically to the prepaid consumer, at the time of the retail transaction. (RTC section 42010.) A prepaid MTS provider must also offer prepaid consumers the option to make payment for additional prepaid usage directly to the prepaid MTS provider at the provider's retail location or website. (RTC section 42010.)

The prepaid MTS surcharge that is required to be collected by a seller and any amount unreturned to the prepaid consumer that is not owed as part of the surcharge but was collected under the seller's representation that it was owed as part of the surcharge, constitute a seller's debt to the state. The local charge (discussed further below) shall also be collected by a seller and any amount unreturned to the prepaid consumer that is not owed as part of the local charge, but was collected under the seller's representation that it was owed as part of the local charge, constitutes a seller's debt jointly to the local jurisdiction imposing the local charge and the state, for purposes of collection on behalf of, and payment to, the local jurisdiction. (RTC section 42010.)

Furthermore, a prepaid MTS surcharge that has been collected and not yet remitted to the Board constitutes a seller's debt to the state. With respect to local charges collected and not yet remitted to the Board, such amounts shall constitute a seller's debt jointly to the local jurisdiction imposing the charge and the state, for purposes of collection on behalf of, and payment to, the local jurisdiction.

#### *Seller Reimbursement of 2%*

Pursuant to RTC section 42010, a seller that is not a direct seller is allowed to deduct and retain an amount equal to two percent of the amounts it collects from prepaid consumers for the prepaid MTS surcharge and local charges, on a pro rata basis, according to that portion of the revenues collected for the 911 surcharge, the PUC surcharges, and local charges.

#### *Reporting*

For seller's, other than direct seller's, the prepaid MTS surcharge, less the two percent retailer reimbursement amount, is due and payable to the Board quarterly on or before the last day of the next month following each calendar quarter, pursuant to RTC section 42021. However, the Board administers and collects the prepaid MTS surcharge under the Fee Collections Procedure Law (FCPL) (commencing with RTC section 55001), and the FCPL also specifies that the Board may require the payment of the amount due and the filing of returns for periods other than a quarterly reporting period. (RTC sections 42020, 55041.1.) In addition, a return must be filed with the Board using electronic media at the time of payment. (RTC section 42021.)

For direct sellers, the portion of the prepaid MTS surcharge that consists of the 911 surcharge is due and payable to the Board under the same reporting and payment periods as their 911 surcharge is due and payable under the Emergency Telephone Users Surcharge Act, on a return filed using electronic media, pursuant to RTC section 42010. A direct seller is also required to remit the portion of the prepaid MTS surcharge that consists of the PUC surcharges to the PUC and, if applicable, the portion that consists of the local charges to the local jurisdiction or agency imposing the local charge, and not to the Board. (RTC section 42010.)

#### *Electronic Funds Transfer*

The FCPL contains general requirements for making payments by electronic funds transfer (EFT). However, under RTC section 42020, a seller, other than a direct seller, that is required to, or elects to, remit payments by EFT for sales and use tax purposes must remit the prepaid MTS surcharge to the Board by EFT. The Board has previously adopted Regulation 1707, *Electronic Funds Transfers*, to further define the term EFT, prescribe the circumstances under which persons are required to remit payments by EFT, and provide procedures for persons to elect to remit payments by EFT, for sales and use tax purposes.

#### *Reliance on the Board's Website*

Pursuant to RTC section 42010, a seller may rely on the accuracy of the information posted on the Board's website when collecting and remitting all amounts of the prepaid MTS surcharge and local charges. A direct seller must utilize the rates posted on the Board's website when

determining what amounts to collect and remit to the PUC, Board, and each local jurisdiction or local agency.

Pursuant to RTC section 42014, a seller is discharged from any liability for additional prepaid MTS surcharge or local charges and is also relieved from refunding to the customer amounts collected and remitted to the Board if:

- A seller relies in good faith on Board-provided information to match either a point-of-sale transaction location, or the five digit postal ZIP Code of the prepaid consumer's known-address, to the applicable prepaid MTS surcharge and local charges amount;
- A seller collects that amount from the prepaid consumer; and
- A seller remits the amount to the Board in compliance with the Prepaid MTS Act.

The provisions above are applicable even if the ZIP code of the prepaid consumer's address in a known-address transaction corresponds to more than one local charge.

### III. Exemptions, Deductions, Credits, and Bundled Transactions

#### *Lifeline Exemption*

Pursuant to RTC section 42012, a prepaid consumer's purchase of prepaid MTS, either alone or in combination with mobile data or other services, is exempt from the prepaid MTS surcharge, if all of the following apply:

- The prepaid consumer is certified as eligible for the state or federal lifeline program.
- The seller is an authorized lifeline service provider, under the state or federal lifeline program.
- The exemption is only applied to the portion of the charge for prepaid MTS that the lifeline program specifies is exempt from the surcharges and fees comprising the prepaid MTS surcharge.

#### *Bad Debts*

Pursuant to RTC section 42010, a seller is relieved from the liability to collect the prepaid MTS surcharge that became due and payable, insofar as the base upon which the surcharge is imposed is represented by accounts found to be worthless and charged off for income tax purposes or, if the seller is not required to file income tax returns, charged off in accordance with generally accepted accounting principles. A seller that has previously paid the prepaid MTS surcharge on accounts found to be worthless and charged off for income tax purposes may, under rules and regulations prescribed by the Board, take a "bad debt" deduction on its return for the amount found worthless and charged off by the seller. If a seller subsequently collects any amounts for which a bad debt deduction was taken, the amount so collected is required to be reported and the prepaid MTS surcharge on such amount must be paid to the Board on the first return subsequently filed.

*Credit for Charges Paid to Other States*

Pursuant to RTC section 42010, a credit against, but not to exceed, the prepaid MTS surcharge and local charges is allowed where the prepaid consumer paid a 911 surcharge, state utility regulatory commission fees, state universal service charges, or local charges on the purchase to any other state, political subdivision thereof, or the District of Columbia. The credit shall be apportioned to the charges against which it is allowed in proportion to the amounts of those charges.

*Bundled Transactions*

Pursuant to RTC section 42018, the prepaid MTS surcharge and local charges apply to the entire price where prepaid MTS is sold in combination with mobile data services or any other services or products for a single non-itemized price in a “bundled transaction.” If prepaid MTS is sold with a cellular telephone for a single non-itemized price, the prepaid MTS surcharge applies to the entire charge; however, if the purchase price for the cellular telephone is disclosed to the consumer on a receipt, invoice, or other written or electronic documentation provided to the prepaid consumer, the charge for the cellular telephone is not subject to the prepaid MTS surcharge and local charges. Furthermore, the prepaid MTS surcharge and local charges do not apply to a transaction where a minimal amount of prepaid MTS amount is sold with a cellular telephone for a single, non-itemized bundled price. For this purpose, a minimal amount includes a service allotment denominated as 10 minutes or less, or \$5 or less.

IV. Refunds

Pursuant to RTC section 42010, a seller that collects an amount in excess of the prepaid MTS surcharge and local charges owed may refund those amounts to the prepaid consumer. The seller may refund those amounts even though the surcharge amount was paid to the Board and no corresponding credit or refund has yet been secured. Under the FCPL, every person required to collect or pay the prepaid MTS surcharge or local charges that overpaid an amount to the Board, may file a claim for refund with the Board for such amount, unless otherwise specified. (RTC sections 55221, 55222; Cal. Code Regs., tit 18, § 5230.)

Local Act

I. Local Charges Imposed under Local Ordinances

*Legislative Intent*

The Local Act applies to local ordinances of local jurisdictions and local agencies that impose “local charges” on prepaid MTS. The terms “local jurisdiction” and “local agency” both mean “a city, county, or city and county, which includes a charter city, county, or city and county.” (RTC sections 42004, 42101.)

The Local Act recognizes that “[l]ocal charges on telecommunication services represent an important source of tax revenue for many cities and counties and are used to pay for” essential governmental services. The Local Act provides that “[i]t is a matter of statewide concern that the local charges for local prepaid [MTS] be collected in a uniform manner in order for the

collection to be fair and uniform on a statewide basis.” The Local Act also provides that it “is the intention of the Legislature that this part shall preempt the provisions pertaining to the tax or charge rate, base, and method of collection contained in all local ordinances, rules, or regulations concerning the imposition of a local charge upon the consumption of prepaid mobile telephony services, to the extent those provisions are inconsistent with the provisions of this part and Part 21 (commencing with Section 42000.) It is not the intent of the Legislature to otherwise preempt, limit, or affect the general authority of local jurisdictions to impose a utility user tax [(UUT)], local 911 charge, or any other local charges.” (RTC section 42100.)

*In General*

On and after January 1, 2016, a local charge imposed by a local agency on prepaid MTS is required to be collected by a seller from the prepaid consumer at the same time and in the same manner as the prepaid MTS surcharge is collected under the Prepaid MTS Act; provided that on or before September 1, 2015, the local agency enters into a contract with the Board to collect and administer the local charge, so that the Board can administer such local charge in a uniform manner with other local charges under the Local Act. (RTC sections 42101.5, 42103.)

In the event a local agency adopts a new local charge after September 1, 2015, the Local Act requires the local agency to enter into a contract with the Board, as provided above, on or before December 1, with collection of the local charge to commence April 1 of the next calendar year. Also, with respect to a local agency that contracts with the Board and thereafter increases its existing local charge, the Local Act requires the local agency to notify the Board in writing of the increase on or before December 1, with collection of the increased local charge to commence April 1 of the next calendar year. (RTC section 42101.5.)

In addition, in the event that a local agency reduces or eliminates its local charge, the Local Act requires the local agency to notify the Board in writing of the change (RTC section 42101.5). Also, when a local agency notifies the Board in writing that the rate of its local charge posted on the Board’s website is inaccurate, or that it no longer imposes a local charge, or that the rate of its local charge has decreased, then the Prepaid MTS Act requires that the Board promptly post the recalculated rate, and provides that the change becomes operative on the first day of the calendar quarter commencing more than 60 days from the date the local agency provided the written notification to the Board. (RTC section 42010.)

Notwithstanding any other law, on and after January 1, 2016, the Local Act also:

- Suspends the utility user tax on the consumption of prepaid MTS in the city or county at the rate specified in its ordinance and replaces it with specific tiered rates set forth in statute, based on the existing city or county rate (RTC section 42102); and
- Suspends a local charge applicable to prepaid MTS for communication services or local “911” emergency telephone access at a rate as specified in a local ordinance and replaces it with a rate as specified by statute. (RTC section 42102.5.)

Furthermore, on and after January 1, 2016, the Local Act shall be:

- The exclusive collection method for the local UUT, local 911 charges, and any other local charge imposed on consumers using prepaid MTS, and for defining the scope of the local tax or charge on prepaid MTS; and
- With respect to taxation of prepaid MTS, the complete substitute for the UUT rate set forth in the local ordinance at the specified tiered rate. (RTC section 42102.)

The Local Act also states that it “shall not preempt, limit, or affect the general authority of local jurisdictions to impose a utility user tax, local 911 charge, or any other local charges.” (RTC section 42102.)

#### *Contract*

The Local Act requires that, in its contract with the Board, the local agency must certify to the Board that its ordinance applies its local charge to prepaid MTS and that the local agency agrees to indemnify, and hold harmless, the Board, its officers, agents, and employees for any and all liability for damages that may result from collection pursuant to the contract. The Local Act also requires that the local agency must certify the amount of the “access to communications” or local 911 charge, or the applicable tiered rate for a UUT in its contract with the Board. (RTC section 42101.5.)

## II. Administration of Local Charges

### *In General*

Under the Local Act, the Board is required to perform all functions incident to the collection of a local charge after the local agency imposing the charge has entered into the required contract with the Board, except with respect to direct sellers. The Board must collect such local charges from sellers, other than direct sellers, in the same manner as it collects the prepaid MTS surcharge under the Prepaid MTS Act and the FCPL, subject to specified limitations. (RTC section 42103.)

### *Local Jurisdiction or Local Agency Responsibilities*

Under the Local Act, the local jurisdiction or local agency that has adopted an ordinance imposing a local charge is solely responsible for the following functions:

- Defending any claim regarding the validity of the ordinance in its application to prepaid MTS;
- Interpreting any provision of the ordinance, except to the extent specifically superseded by the Local Act;
- Responding to specified claims for refund by prepaid MTS consumers involving: (1) the presumed location of the retail transaction; (2) an exemption from the local charge under the local enactment; or (3) a challenge to the validity of a local tax ordinance, in whole or part;

- Reallocating local charges as a result of correcting errors relating to the location of the point of sale transaction of a seller, or the known address of a consumer, for up to two prior quarters from the date of knowledge of the error;
- Enforcing, including auditing, the collection and remittance of local charges by direct sellers pursuant to the ordinance; and
- Certifying that the ordinance applies the local charge to prepaid MTS and agreeing to indemnify and hold harmless the Board, its officers, agents, and employees for any and all liability for damages that may result from collection of the local charge. (RTC section 42105.)

The local jurisdiction or local agency is also required to certify to the Board the amount of the local 911 charge, as set out in RTC Section 42102.5, or the applicable tiered rate for a utility user tax, as set out in RTC Section 42102. (RTC section 42101.5.)

#### *Deposit of Local Revenues*

The Local Act provides that all local charges collected by the Board are to be deposited in the Local Charges for Prepaid Mobile Telephony Services Fund in the State Treasury and held in trust for the local taxing jurisdictions. Local charges consist of all taxes, charges, interest, penalties, and other amounts collected and paid to the Board, less payments for refunds and reimbursement to the Board for expenses to administer and collect the local charges. (RTC section 42103.)

The Local Act requires the Board to periodically transmit the funds to the local jurisdictions as promptly as feasible and at least once in each calendar quarter. The Board must also furnish a quarterly statement to the local jurisdictions indicating the amounts paid and costs withheld. Each local jurisdiction shall pay to the Board its pro rata share of the Board's cost of collection and administration, based on revenues collected. (RTC sections 42020, 42103.)

#### *Board's Duties*

The Local Act allows the Board to perform, or to contract with third parties to perform, the following duties of the Board:

- Allocate and transmit collected local charges in the Prepaid Mobile Telephony Services Fund to the appropriate local jurisdictions.
- Audit proper collection and remittance of the local charge.
- Respond to requests from sellers, consumers, boards, and others regarding issues pertaining to local charges that are within the scope of the Board's duties. (RTC section 42103.)

Also, the FCPL's current provisions prohibiting the Board from disclosing fee payers' confidential information, in RTC section 55381, apply to any third party performing the Board's functions under a third-party contract. And, contingent fee arrangements, as payment for services rendered, are prohibited in any third-party contract. (RTC section 42103.)

*Disclosing Information to Local Jurisdictions and Agencies*

The Local Act requires the Board to make available to a requesting local jurisdiction or local agency any information that is reasonably available to the Board regarding the proper collection and remittance of a local charge of that local jurisdiction or local agency by a seller, including a direct seller. Such information is subject to the confidentiality requirements of RTC sections 7284.6, 7284.7, and 19542. (RTC section 42103.)

Other Current Board Regulations

The Sales and Use Tax Law provides a retailer relief from liability to collect or pay taxes and a bad debt deduction for taxes previously paid on accounts found worthless and charged off by the retailer (RTC section 6203.5), which are similar to the Prepaid MTS Act's provisions providing a seller relief from liability to collect surcharges and local charges and a "bad debt" deduction for surcharges and local charges paid on accounts found worthless and charged off by the seller. Also, the Board has previously adopted Regulation 1642, *Bad Debts*, to prescribe the circumstances under which a retailer may be relieved from liability to collect or pay tax and be eligible to claim a bad debt deduction on its return for taxes previously paid on accounts found worthless and charged off by the retailer, for sales and use tax purposes.

In addition, the Sales and Use Tax Law provides that the terms "retail sale" and "sale at retail" mean "a sale for any purpose other than resale in the regular course of business in the form of tangible personal property" (RTC section 6007), and this definition is similar to the Prepaid MTS Act's definition of "retail transaction." Also, the Board has previously adopted Regulation 1668, *Sales for Resale*, to prescribe the circumstances under which tangible personal property is purchased for resale in the regular course of business, and prescribe the form of a resale certificate that may be used to document that a sale of tangible personal property is for resale in the regular course of business, for sales and use tax purposes.

Furthermore, the Board has previously adopted Regulation 4901, *Records*, to prescribe the records that taxpayers and feepayers must maintain and make available to the Board to substantiate that they have properly reported and paid a number of Board-administered taxes and fees, including records required to be maintained and made available regarding taxes and fee administered under the FCPL (RTC section 55302.). The Board has previously adopted Regulation 4902, *Relief from Liability*, to prescribe the circumstances under which a person is relieved from liability for a number of Board-administered taxes and fees, including taxes and fees administered under the FCPL (RTC section 55045), due to reasonable reliance on written advice from the Board. The Board has also previously adopted Regulation 4903, *Innocent Spouse or Registered Domestic Partner Relief from Liability*, to prescribe the circumstances under which a spouse or registered domestic partner may be relieved of liability for a number of Board-administered taxes and fees if it is inequitable to hold the person liable for such taxes or fees, including taxes and fees administered under the FCPL (RTC section 55045.1).

Effect, Objectives, and Benefits of the Proposed Adoption of Regulations 2460, 2461, and 2462

There are issues because there are currently no regulations that specifically implement, interpret, or make specific the Prepaid MTS Act's and Local Act's statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS and sellers need additional guidance to collect the prepaid MTS surcharge and local charges from prepaid consumers of prepaid MTS beginning on January 1, 2016, including guidance regarding reporting prepaid MTS surcharges and local charges, making payment by EFT, record keeping, relief from liability due to reasonable reliance on written advice from the Board, relief from liability and deductions for bad debts, and innocent spouse and registered domestic partner relief from liability. In addition, there are issues because there is currently no regulation that prescribes the circumstances under which prepaid MTS is purchased for resale in the regular course of business or prescribes the form of the resale certificate that may be used to document that the prepaid MTS surcharge and local charges are inapplicable because the purchase of prepaid MTS was for purposes of resale in the regular course of business.

*Business Taxes Committee Process*

Board staff determined that it was necessary to draft three proposed regulations, entitled "Administration," "Exemptions, Deductions, Credits, and Specific Applications of Tax," and "Refunds of Excess Charges Collected," to fully implement, interpret, and make specific the statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS, and specifically address the issues identified above. Therefore, Board staff prepared drafts of the regulations and an Initial Discussion Paper, which Board staff distributed to the interested parties on December 22, 2014, prior to holding its first meeting to discuss the draft regulations with interested parties on January 6, 2015.

Board staff did not receive comments from any interested parties prior to the January 6, 2015, interested parties meeting. During the meeting, interested parties appeared to be in agreement with staff's draft regulations. There was general discussion regarding a direct seller's reporting period for local charges and the process for claiming a lifeline exemption, among other items. Subsequent to the meeting, staff received written comments from interested parties: expressing support for the draft regulations; suggesting that the draft regulations clarify that direct sellers remit local charges to local jurisdictions on a monthly basis; suggesting that staff clarify the definition of prepaid MTS in the draft regulations by using the phrase "right to utilize and/or access," rather than "right to access," MTS or information services; and suggesting that staff clarify in the draft regulations that prepaid MTS may be sold to a consumer on a "tax-included basis," meaning a price that includes all applicable taxes and fees.

In response, staff agreed to revise the definition of prepaid MTS in the draft regulations so that it uses the phrase "right to utilize and/or access" and staff agreed to revise the definition of "receipt" in the draft regulations to clarify that prepaid MTS can be sold on a tax-included basis, so long as the receipt or other document provided to the consumer includes a separate statement of the amount which is for the combined prepaid MTS surcharge and local charges, as required

by RTC section 42010, subdivision (i). However, staff did not agree to prescribe the reporting basis for direct sellers to report local charges. Staff determined that per RTC section 42010, subdivision (f)(3), direct sellers are required to remit local charges directly to the local jurisdictions imposing the charges, and not to the Board. Staff also determined that the Board's functions with regard to the collection and administration of local charges are limited, and RTC section 42105, subdivision (a)(6), expressly provides that local jurisdictions are solely responsible for "the collection and remittance of local charges by direct sellers" pursuant to their own ordinances. Thus, staff concluded that the Board does not have authority to promulgate regulations specifying how direct sellers remit a charge imposed by a local ordinance to the local jurisdiction imposing that charge.

Staff subsequently incorporated the agreed to suggestions into a revised draft of the regulations, numbered the regulations as Regulations 2460, 2461, and 2462 for inclusion in a new chapter 5.7 to be added to division 2 of title 18 of the California Code of Regulations, prepared a second discussion paper regarding the draft regulations, which was distributed to the interested parties on February 20, 2015, and conducted a second meeting to discuss the draft regulations with the interested parties on March 4, 2015. During the second interested parties meeting, there was general approval of the revised draft regulations. Interested parties also expressed their appreciation of the Board's efforts to clarify the issues referred to above. After the second interested parties meeting, staff also received written comments expressing support and offering no further recommendations regarding revisions to the draft regulations.

Therefore, Board staff subsequently prepared Formal Issue Paper 15-009, which recommended that the Board propose to adopt staff's revised drafts of Regulations 2460, 2461, and 2462 to implement, interpret, and make specific the Prepaid MTS Act's and Local Act's statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS.

Specifically, the revised draft of Regulation 2460, *Administration*:

- Incorporates statutory terms from the Prepaid MTS Act and Local Act, and further defines the key statutory terms used in the prepaid MTS regulations.
- Clarifies that the term "direct seller" includes "a person that provides" the "Voice over Internet Protocol (VoIP) service" referred to in the statutory definition of direct seller, and clarifies that the reference to a "retailer, as defined by [RTC] Section 6203," in the statutory definition of direct seller, refers to a retailer "engaged in business in this state" as defined by RTC section 6203.
- Clarifies that the terms "prepaid mobile telephony services" and "prepaid MTS" mean the right to "utilize and/or access" mobile telecommunications services which are prepaid and "utilized by means of a mobile device," and not some other right, such as the right to utilize a mobile device to access the services.
- Clarifies the registration requirements for sellers and direct sellers.

- Reiterates and incorporates the statutory requirement in RTC section 42022 that every application for registration shall be made in a form prescribed by the Board, in a similar manner to the way that Regulation 2421 incorporates and implements RTC section 41040's similar registration requirement.
- Emphasizes that the prepaid MTS surcharge and local charges are imposed on the prepaid consumer, and that sellers are obligated to collect the prepaid MTS surcharge and local charges from prepaid consumers and separately state the combined prepaid MTS surcharge and local charges on their receipts.
- Clarifies that prepaid MTS may be sold to a prepaid consumer on a tax-included basis.
- Facilitates compliance by specifying that a seller is statutorily obligated to provide a "receipt" to a prepaid consumer and prescribing the elements that a document, including an electronic document, must contain to satisfy the receipt requirement, including a separate statement of the combined prepaid MTS surcharge and local charges even if the prepaid MTS is sold for a price that includes all applicable taxes and fees.
- Incorporates and clarifies the statutory provisions requiring sellers, including direct sellers, to report and pay the prepaid MTS surcharge and local charges they collect;
- Reiterates that direct sellers shall continue to remit the portion of the prepaid MTS surcharge that consists of the 911 surcharge to the Board pursuant to the Emergency Telephone Users Surcharge Act, and the portion of the prepaid MTS surcharge that consists of the PUC surcharges to the PUC, and reiterates that a direct seller shall remit local charges to the local jurisdiction or local agency imposing the charge.
- Specifies that returns are required to be filed online with the Board through the Board's website and the amounts required to be reported to the Board are generally required to be reported and paid on a quarterly basis, unless the Board specifically requires a seller to report and pay on another basis, which may be for quarterly periods other than calendar quarters and for periods other than quarterly periods.
- Clarifies that a deduction for statutory "seller reimbursement retention" must be taken in the corresponding period in which the sale of the prepaid MTS surcharge occurred, otherwise a claim for refund must be filed.
- Clarifies that sellers, other than direct sellers, are required to remit payment for the prepaid MTS surcharges and local charges they collect by EFT if they are required, or have elected, to remit their sales and use tax liabilities by EFT, and incorporates Regulation 1707's definition of the term EFT by reference.
- Clarifies that a seller shall maintain records and make such records available for examination in the manner set forth in Regulation 4901.
- Provides that the provisions for granting relief from liabilities due to reasonable reliance on written advice from the Board and the provisions for granting relief from

liabilities to spouses and registered domestic partners in Regulations 4902 and 4903 apply to liabilities for the prepaid MTS surcharge and local charges.

- Incorporates and clarifies the statutory provisions providing relief from additional liabilities to sellers that rely in good faith on information provided by the Board to determine the prepaid MTS surcharge and local charges applicable to point-of-sale and known-address transactions.
- Specifies that a local agency or local jurisdiction must enter into a contract with the Board by September 1, 2015, in order to require sellers to collect existing local charges beginning on January 1, 2016.
- Specifies that December 1 is the annual contract due date and the following April 1 is the effective date for the collection of new local charges adopted after September 1, 2015.
- Consistently provides that December 1 is the annual contract due date and the following April 1 is the effective date for the collection of existing local charges when a local agency or jurisdiction does not meet the September 1, 2015, deadline, and thereafter first contracts with the Board to collect existing local charges after September 1, 2015.
- Explains the advance notice requirements for increases and decreases in the rates of local charges, corrections to inaccurately posted rates of local charges, and the expiration of local charges, and the effective dates for such changes.
- States how the Board shall annually calculate the prepaid MTS surcharge rate by November 1 of each year, beginning in 2015.
- Clarifies that the total combined prepaid MTS surcharge rate and rate(s) of local charges required to be collected beginning January 1, 2016, will be calculated by the Board by November 1, 2015, and posted on the Board's website by December 1, 2015.
- Clarifies that the current combined prepaid MTS rate and rate(s) of local charges will be recalculated and posted on the Board's website by March 1 of each year, beginning in 2016, for changes made after September 1, 2015, and that the recalculated rates will be effective the following April 1.

Specifically, the revised draft of Regulation 2461, *Exemptions, Deductions, Credits, and Specific Applications of Tax*:

- Prescribes the circumstances under which prepaid MTS is purchased for resale in the regular course of business and the form of a resale certificate that may be used to document that a sale of prepaid MTS is a sale for resale, sets forth a sample "California Resale Certificate – Prepaid Mobile Telephony Services" form that meets the regulation's requirements, and establishes an alternate process to document that a sale was not a retail transaction in the event a resale certificate is not timely obtained by the seller, using provisions that are consistent with Regulation 1668 (discussed above).

- Clarifies that a seller is relieved from the liability to collect the prepaid MTS surcharge insofar as the base upon which the surcharge is imposed is represented by accounts found to be worthless and charged off for income tax purposes or, if the seller is not required to file income tax returns or report its income on another person's return, charged off in accordance with generally accepted accounting principles.
- Clarifies when a seller may take a "bad debt" deduction for the prepaid MTS surcharge and local charges paid on accounts found worthless and charged off for income tax purposes, using provisions that are consistent with Regulation 1642 (discussed above), and clarifies how to calculate the amount of an allowable deduction.
- Clarifies the application of the prepaid MTS surcharge and local charges when an account that was previously found worthless and charged off for income tax purposes is subsequently collected, using provisions that are consistent with Regulation 1642.
- Specifies the types of records a seller needs to maintain to support a bad debt deduction or claim for refund based upon worthless accounts that were charged off for income tax purposes.
- Clarifies the amount subject to the prepaid MTS surcharge and local charges when prepaid MTS is sold in combination with mobile data services, other services, or products for a single non-itemized price in a bundled transaction.
- Clarifies how the lifeline exemption from the prepaid MTS surcharge and local charges applies to "lifeline transactions" in which prepaid MTS is purchased from a seller authorized to provide lifeline services under a state or federal lifeline program.
- Specifies the credit against the prepaid MTS surcharge and local charges for prepaid consumers that previously paid 911 surcharges, state utility regulatory commission fees, state universal service charges, or local charges on the purchase of prepaid MTS to any other state, political subdivision thereof, or the District of Columbia.

Specifically, the revised draft of Regulation 2462, *Refunds of Excess Charges Collected*:

- Clarifies the meaning of "excess charges."
- Clarifies that sellers may refund excess charges to prepaid consumers, but that excess charges collected, but not refunded to prepaid consumers, represent a debt owed to the state or jointly to a local jurisdiction imposing a local charge and the state.
- Clarifies that either a seller of prepaid MTS or a prepaid consumer may generally file a claim for refund, within the statute of limitations established by RTC sections 55222, 55222.1, and 55222.2 (in the FCPL).
- Specifies that certain claims for refund of local charges must be filed with a local agency or local jurisdiction, and not the Board.

- Cross references draft Regulation 2460's provisions providing relief from additional liabilities to sellers that rely in good faith on information provided by the Board to determine the prepaid MTS surcharge and local charges applicable to point-of-sale and known-address transactions.

Furthermore, Formal Issue Paper 15-009 informed the Board that Board staff and the interested parties had agreed to the provisions of the revised drafts of Proposed Regulations 2460, 2461, and 2462.

#### *Business Taxes Committee Meeting*

The Board considered Formal Issue Paper 15-009 during its Business Taxes Committee meeting on September 16, 2015. During the meeting, the Board heard public comments from Mr. Fran Mancia, Director of Government Relations for MUNI Services, which represents 60 local jurisdictions and agencies, and Mr. Mancia strongly supported, and urged the Board to vote to adopt, the recommended regulations. The Board also discussed the recommended regulations.

During the Business Taxes Committee meeting, the Board agreed with staff's recommendation to propose to adopt staff's revised drafts of Regulations 2460, 2461, and 2462. Therefore, the Board Members unanimously voted to propose the adoption of the regulations.

The Board determined that the adoption of the proposed regulations is reasonably necessary to have the effect and accomplish the objective of addressing the issues referred to above, by implementing, interpreting, and making specific the Prepaid MTS Act's and Local Act's statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS, and providing guidance to sellers that are required to collect the prepaid MTS surcharge and local charges from prepaid consumers, including guidance with respect to their registration and reporting requirements, the payment and collection of the prepaid MTS surcharge and local charges, record keeping, sales of prepaid MTS for resale, bad debts, bundled transactions, lifeline transactions, credits, relief from liability, excess charges, and claims for refund.

The Board further determined that the adoption of the proposed regulations is reasonably necessary to have the effect and accomplish the objective of providing guidance to local agencies and jurisdictions with respect to local charges, their notice requirements, contracting with the Board, the Board's posting and calculation of combined rates, and the Board's and local jurisdictions' and agencies' functions with regard to the administration of local charges.

The Board anticipates that the adoption of the proposed regulations will benefit the Board, Board staff, sellers and consumers of prepaid MTS, and local jurisdictions and agencies by:

- Clarifying the application of the prepaid MTS surcharge and local charges for sellers and consumers of prepaid MTS.

- Providing regulatory guidance to sellers, including direct sellers, of prepaid MTS regarding their registration, collection, reporting, and payment requirements under the Prepaid MTS Act and Local Act.
- Clarifying the Board's and local agencies' and local jurisdictions' duties with respect to the collection and administration of local charges, including clarifying that it is the responsibility of a local agency or local jurisdiction to contract with the Board to collect and administer its local charges, and provide adequate written notice to the Board when adding, increasing, or decreasing local charges, when local charges are expiring, or there is an error in the rate of local charges posted on the Board's website.
- Adding an alternative contract due date and effective date for the collection and administration of existing local charges when a local agency or jurisdiction first contracts with the Board to collect existing local charges after September 1, 2015.
- Prescribing the form of a resale certificate that may be used to document that a sale of prepaid MTS was for purposes of resale in the regular course of business.

The Board has performed an evaluation of whether proposed Regulations 2460, 2461, and 2462 are inconsistent or incompatible with existing state regulations and determined that the proposed regulations are not inconsistent or incompatible with existing state regulations. This is because proposed Regulations 2460, 2461, and 2462 are the only state regulations that specifically implement, interpret, and makes specific the statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS, and prescribe the form of the California resale certificate that the purchaser must furnish to document that the sale is for purposes of resale in the regular course of business. In addition, the Board has determined that there are no comparable federal regulations or statutes to proposed Regulations 2460, 2461, and 2462.

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

The Board has determined that the adoption of proposed Regulations 2460, 2461, and 2462 will not impose a mandate on local agencies or school districts, including a mandate that requires state reimbursement pursuant to title 2, division 4, part 7 (commencing with section 17500) of the Government Code.

#### **NO COST OR SAVINGS TO ANY STATE AGENCY, LOCAL AGENCY, OR SCHOOL DISTRICT**

The Board has determined that the adoption of proposed Regulations 2460, 2461, and 2462 will result in no direct or indirect cost or savings to any state agency and will result in no cost or savings in federal funding to the State of California. The Board has also determined that the adoption of proposed Regulations 2460, 2461, and 2462 will result in no direct or indirect cost to any local agency or school district that is required to be reimbursed under title 2, division 4, part

7 (commencing with section 17500) of the Government Code, and will result in no other non-discretionary cost or savings imposed on local agencies.

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

The Board has made an initial determination that adoption of proposed Regulations 2460, 2461, and 2462 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 Regulations 2460, 2461, and 2462 may affect small business.

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

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

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

The Board has determined that the proposed adoption of Regulations 2460, 2461, and 2462 is not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of proposed Regulations 2460, 2461, and 2462 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 proposed Regulations 2460, 2461, and 2462 will not affect the benefits of Regulations 2460, 2461, and 2462 to the health and welfare of California residents, worker safety, or the state's environment.

**NO SIGNIFICANT EFFECT ON HOUSING COSTS**

The adoption of proposed Regulations 2460, 2461, and 2462 will not have a significant effect on housing costs.

**STATEMENT 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 regulation should be directed to Andrew Kwee, by telephone at (916) 323-3096, by e-mail at [Andrew.Kwee@boe.ca.gov](mailto:Andrew.Kwee@boe.ca.gov), or by mail at State Board of Equalization, Attn: Andrew Kwee, 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. Mr. Bennion is the designated backup contact person to Mr. Kwee.

## **WRITTEN COMMENT PERIOD**

The written comment period ends at 9:30 a.m. on January 26, 2016, or as soon thereafter as the Board begins the public hearing regarding the adoption of proposed Regulations 2460, 2461, and 2462 during the January 26-28, 2016, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, or contentions contained in those written comments before the Board decides whether to adopt proposed Regulations 2460, 2461, and 2462. 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 a copy of the text of proposed Regulations 2460, 2461, and 2462 illustrating its express terms; however, the proposed regulations are not illustrated in underline or italics format because California Code of Regulations, title 1, section 8, subdivision (b) provides that "[u]nderline or italic is not required for the adoption of a new regulation or set of regulations if the final text otherwise clearly indicates that all of the final text submitted to OAL for filing is added to the California Code of Regulations." The Board has also prepared an initial statement

of reasons for the adoption of the proposed regulations, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed regulation is 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 regulation 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 proposed Regulations 2460, 2461, and 2462 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

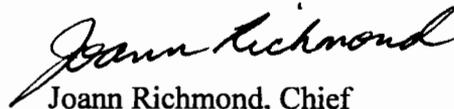
### **EFFECTIVE DATE**

The Board is proposing to adopt Regulations 2460, 2461, and 2462 to implement, interpret, and make specific the statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS, and provide guidance to sellers and purchasers of prepaid MTS with respect to statutory registration, reporting, payment, and collection requirements, which become effective January 1, 2016. Therefore, the Board has determined that there is good cause to request an early effective date for Regulations 2460, 2461, and 2462, in order to ensure that the regulations are effective as soon possible after the statutory requirements are effective, and the Board intends to request an early effective date for Regulations 2460, 2461, and 2462, pursuant to Government Code section 11343.4, subdivision (b)(3).

**AVAILABILITY OF FINAL STATEMENT OF REASONS**

If the Board adopts proposed Regulations 2460, 2461, and 2462, 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

**STATE BOARD OF EQUALIZATION**



BOARD APPROVED

At the January 26, 2016 Board Meeting

  
\_\_\_\_\_  
Joann Richmond, Chief  
Board Proceedings Division

**Initial Statement of Reasons for  
Proposed Adoption of California Code of Regulations, Title 18,  
Section 2460, Administration,  
Section 2461, Exemptions, Deductions, Credits, and Specific Applications of Tax,  
and Section 2462, Refunds of Excess Charges Collected**

SPECIFIC PURPOSES, PROBLEMS INTENDED TO BE ADDRESSED, NECESSITY,  
AND ANTICIPATED BENEFITS

Current Law

Assembly Bill No. 1717 (AB 1717) (Stats. 2014, ch. 885) established the Prepaid Mobile Telephony Services Surcharge Collection Act (Prepaid MTS Act) and the Local Prepaid Mobile Telephony Services Collection Act (Local Act) (commencing with Revenue and Taxation Code (RTC) sections 42001 and 42100, respectively). The bill also amended and added certain RTC sections with respect to the Emergency Telephone Users Surcharge Act (commencing with RTC section 41001), which imposes what has come to be commonly known as the “911 surcharge” because it funds the “911” emergency system utilizing the digits 9-1-1.

Prepaid MTS Act

I. Surcharge Imposed by Prepaid MTS Act

*Mobile Telephony Service (MTS), Prepaid MTS, and Prepaid MTS Surcharge*

The term “‘mobile telephony service’ or ‘MTS’” means “commercially available interconnected mobile phone services that provide access to the public switched telephone network (PSTN) via mobile communication devices employing radiowave technology to transmit calls, including cellular radiotelephone, broadband Personal Communications Services (PCS), and digital Specialized Mobile Radio (SMR).” The term “mobile telephony services” does not include “mobile satellite telephone services or mobile data services used exclusively for the delivery of nonvoice information to a mobile device.” “Prepaid MTS” means “the right to utilize a mobile device for mobile telecommunications services or information services [(as defined in 47 U.S.C. § 1530)], including the download of digital products delivered electronically, content, and ancillary services, or both telecommunications services and information services, that must be purchased in advance of usage in predetermined units or dollars.” (Pub. Util. Code section 224.4; RTC section 42004.)

On and after January 1, 2016, a prepaid MTS surcharge is imposed on each “prepaid consumer” purchasing prepaid MTS. A “seller” is required to collect the surcharge. The surcharge is imposed as a percentage of the sales price from each retail transaction involving the purchase of prepaid MTS that occurs in this state. The prepaid MTS

surcharge is in lieu of the surcharges and user fees imposed on amounts paid for prepaid MTS under the law in effect through December 31, 2015, and collected and paid to the California Public Utilities Commission (PUC), the State Board of Equalization (Board), and local agencies or jurisdictions by providers and suppliers of telephone communication services. (RTC section 42010.)

*Definitions of Prepaid Consumer, Seller, and Direct Seller*

Pursuant to RTC section 42004, “prepaid consumer” means “a person who purchases prepaid [MTS] in a retail transaction,” and “seller” means “a person that sells prepaid [MTS] to a person in a retail transaction.” RTC section 42004 further provides that a “direct seller” means “a prepaid [MTS] provider or service supplier<sup>1</sup> . . . that makes a sale of prepaid [MTS] directly to a prepaid consumer for any purpose other than for resale in the regular course of business.” A direct seller includes, but is not limited to, a telephone corporation,<sup>2</sup> a person that provides interconnected Voice over Internet Protocol (VoIP) service,<sup>3</sup> and a retailer that is a member of the same commonly controlled group or combined reporting group as a telephone corporation or provider of VoIP service under the Corporation Tax Law (commencing with RTC section 23001).

According to the above definitions, the term seller is inclusive of direct sellers. However, as further discussed in this paper, a seller who is further defined as a direct seller has different registration and reporting requirements than those sellers who do not meet the definition of a direct seller.

*Retail Sale Location / Transaction Location in this State*

Pursuant to RTC section 42004, “in this state” means “within the exterior limits of the State of California and includes all territory within those limits owned by or ceded to the United States of America.” Also, “retail transaction” means “the purchase of prepaid MTS, either alone or in combination with mobile data or other services, from a seller for any purpose other than resale in the regular course of business.”

Pursuant to RTC section 42014, a retail transaction *occurs* in this state for purposes of the prepaid MTS surcharge if the consumer makes the retail transaction in person at a business location in this state (point-of-sale transaction). If this is not applicable, a retail transaction *occurs* in this state if the consumer’s address is in this state (known-address transaction). For this purpose, a known-address transaction occurs in this state under any one of the following circumstances:

- The retail sale involves the shipping of an item to be delivered to, or picked up by,

---

<sup>1</sup> As defined in RTC section 41007, which provides that a “service supplier” means: (1) “a person supplying intrastate telephone communication services to a service user in this state pursuant to California intrastate tariffs and providing access to the ‘911’ emergency system by utilizing the digits 9-1-1”; (2) “a person supplying Voice over Internet Protocol (VoIP) service to a service user in this state and providing access to the ‘911’ emergency system by utilizing the digits 9-1-1”; and (3) “a person supplying intrastate telephone communication services for whom the [PUC], by rule or order, modifies or eliminates the requirement for that person to prepare and file California intrastate tariffs.”

<sup>2</sup> As defined in section 234 of the Public Utilities Code.

<sup>3</sup> As defined in section 285 of the Public Utilities Code.

the prepaid consumer at a location in this state.

- The prepaid consumer's address is known by the seller to be in this state. For this purpose, the consumer's address is considered to be known by the seller if the seller's records maintained in the ordinary course of business indicate that the prepaid consumer's address is in this state and the records are not made or kept in bad faith.
- The prepaid consumer provides an address during consummation of the retail transaction that is in this state, including an address provided with respect to the payment instrument if no other address is available and the address is not given in bad faith.
- The mobile telephone number is associated with a location in this state.

For purposes of determining local charges (discussed further below), a retail transaction occurs at only one location. When the retail transaction occurs in person at a business location in this state (point-of-sale transaction), it is presumed the consumption of, use of, or access to prepaid MTS occurs at the business location. If the retail transaction is not a point-of-sale transaction, it is presumed the consumption of, use of, or access to prepaid MTS occurs at the known address, and the known address location is determined by the circumstances bulleted above, in descending order.

#### *Determining the Prepaid MTS Surcharge Rate*

Pursuant to RTC section 42010, the Board is required to calculate the prepaid MTS surcharge rate annually by November 1 by adding the 911 surcharge rate (as determined and reported to the Board by the Office of Emergency Services under RTC section 41030) and the PUC reimbursement fee and telecommunications universal services surcharges (as determined by the PUC under Pub. Util. Code section 319, subs. (a) and (b)).

Pursuant to RTC section 42010, the Board is also required to post on its website, for each local jurisdiction, the combined total of the rates of the prepaid MTS surcharge (as calculated above) and the rate(s) of local charges. (See page 7 for information regarding local charges.) The Board is also required to separately post on its website individual rates for each of the PUC surcharges included in the calculation of the prepaid MTS surcharge, the 911 surcharge rate, and each of the individual local charges applicable to prepaid MTS.

## II. Administration of Surcharge

### *Registration*

Pursuant to RTC sections 42020 and 42022, every person that sells prepaid MTS to a person in a retail transaction in this state is required to register with the Board. RTC section 42022 provides that the Board is required to establish a method for registration that uses "the existing registration process for registering for a seller's permit" under the Sales and Use Tax Law (commencing with RTC section 6001). RTC section 42022 provides that "[e]very application for registration shall be upon a form prescribed by the [B]oard and shall set forth the name under which the applicant transacts or intends to

transact business, the location of its place or places of business, and such other information as the Board may require.” RTC section 42022 also provides that “applications for registration shall be authenticated in a form or pursuant to methods as may be prescribed by the [B]oard.”

However, pursuant to RTC Section 42010, “direct sellers,” as defined in RTC section 42004, must remit that portion of the prepaid MTS surcharge that consists of the emergency telephone users surcharge to the Board pursuant to the Emergency Telephone Users Surcharge Act. As such, direct sellers must register with the Board pursuant to RTC section 41040.

RTC section 41040 requires service suppliers, including direct sellers, to register “with the [B]oard upon a form prescribed by the [B]oard” and requires each registrant to “set forth the name under which it transacts or intends to transact business and such other information as the [B]oard may require.” The Board previously adopted California Code of Regulations, title 18, section (Regulation) 2421, *Registration*, to incorporate and implement RTC section 41040. Regulation 2421 reiterates the statutory requirement and provides notice to service suppliers regarding their statutory registration requirements by reiterating that registration is required “with the Board upon a form prescribed by the Board.”

#### *Payment and Collection*

Pursuant to RTC section 42010, every prepaid consumer of MTS in this state is liable for the prepaid MTS surcharge and any local charges until those amounts are paid to this state. However, a prepaid consumer’s payment to a registered seller relieves the consumer from further liability. A seller is required to separately state the combined prepaid MTS surcharge and local charges on an invoice, receipt, or other similar document provided to the prepaid consumer, or otherwise disclose the combined prepaid MTS surcharge and local charges electronically to the prepaid consumer, at the time of the retail transaction. (RTC section 42010.) A prepaid MTS provider must also offer prepaid consumers the option to make payment for additional prepaid usage directly to the prepaid MTS provider at the provider’s retail location or website. (RTC section 42010.)

The prepaid MTS surcharge that is required to be collected by a seller and any amount unreturned to the prepaid consumer that is not owed as part of the surcharge but was collected under the seller’s representation that it was owed as part of the surcharge, constitute a seller’s debt to the state. The local charge (discussed further below) shall also be collected by a seller and any amount unreturned to the prepaid consumer that is not owed as part of the local charge, but was collected under the seller’s representation that it was owed as part of the local charge, constitutes a seller’s debt jointly to the local jurisdiction imposing the local charge and the state, for purposes of collection on behalf of, and payment to, the local jurisdiction. (RTC section 42010.)

Furthermore, a prepaid MTS surcharge that has been collected and not yet remitted to the Board constitutes a seller’s debt to the state. With respect to local charges collected and not yet remitted to the Board, such amounts shall constitute a seller’s debt jointly to the

local jurisdiction imposing the charge and the state, for purposes of collection on behalf of, and payment to, the local jurisdiction.

#### *Seller Reimbursement of 2%*

Pursuant to RTC section 42010, a seller that is not a direct seller is allowed to deduct and retain an amount equal to two percent of the amounts it collects from prepaid consumers for the prepaid MTS surcharge and local charges, on a pro rata basis, according to that portion of the revenues collected for the 911 surcharge, the PUC surcharges, and local charges.

#### *Reporting*

For seller's, other than direct seller's, the prepaid MTS surcharge, less the two percent retailer reimbursement amount, is due and payable to the Board quarterly on or before the last day of the next month following each calendar quarter, pursuant to RTC section 42021. However, the Board administers and collects the prepaid MTS surcharge under the Fee Collections Procedure Law (FCPL) (commencing with RTC section 55001), and the FCPL also specifies that the Board may require the payment of the amount due and the filing of returns for periods other than a quarterly reporting period. (RTC sections 42020, 55041.1.) In addition, a return must be filed with the Board using electronic media at the time of payment. (RTC section 42021.)

For direct sellers, the portion of the prepaid MTS surcharge that consists of the 911 surcharge is due and payable to the Board under the same reporting and payment periods as their 911 surcharge is due and payable under the Emergency Telephone Users Surcharge Act, on a return filed using electronic media, pursuant to RTC section 42010. A direct seller is also required to remit the portion of the prepaid MTS surcharge that consists of the PUC surcharges to the PUC and, if applicable, the portion that consists of the local charges to the local jurisdiction or agency imposing the local charge, and not to the Board. (RTC section 42010.)

#### *Electronic Funds Transfer*

The FCPL contains general requirements for making payments by electronic funds transfer (EFT). However, under RTC section 42020, a seller, other than a direct seller, that is required to, or elects to, remit payments by EFT for sales and use tax purposes must remit the prepaid MTS surcharge to the Board by EFT. The Board has previously adopted Regulation 1707, *Electronic Funds Transfers*, to further define the term EFT, prescribe the circumstances under which persons are required to remit payments by EFT, and provide procedures for persons to elect to remit payments by EFT, for sales and use tax purposes.

#### *Reliance on the Board's Website*

Pursuant to RTC section 42010, a seller may rely on the accuracy of the information posted on the Board's website when collecting and remitting all amounts of the prepaid MTS surcharge and local charges. A direct seller must utilize the rates posted on the Board's website when determining what amounts to collect and remit to the PUC, Board, and each local jurisdiction or local agency.

Pursuant to RTC section 42014, a seller is discharged from any liability for additional prepaid MTS surcharge or local charges and is also relieved from refunding to the customer amounts collected and remitted to the Board if:

- A seller relies in good faith on Board-provided information to match either a point-of-sale transaction location, or the five digit postal ZIP Code of the prepaid consumer's known-address, to the applicable prepaid MTS surcharge and local charges amount;
- A seller collects that amount from the prepaid consumer; and
- A seller remits the amount to the Board in compliance with the Prepaid MTS Act.

The provisions above are applicable even if the ZIP code of the prepaid consumer's address in a known-address transaction corresponds to more than one local charge.

### III. Exemptions, Deductions, Credits, and Bundled Transactions

#### *Lifeline Exemption*

Pursuant to RTC section 42012, a prepaid consumer's purchase of prepaid MTS, either alone or in combination with mobile data or other services, is exempt from the prepaid MTS surcharge, if all of the following apply:

- The prepaid consumer is certified as eligible for the state or federal lifeline program.
- The seller is an authorized lifeline service provider, under the state or federal lifeline program.
- The exemption is only applied to the portion of the charge for prepaid MTS that the lifeline program specifies is exempt from the surcharges and fees comprising the prepaid MTS surcharge.

#### *Bad Debts*

Pursuant to RTC section 42010, a seller is relieved from the liability to collect the prepaid MTS surcharge that became due and payable, insofar as the base upon which the surcharge is imposed is represented by accounts found to be worthless and charged off for income tax purposes or, if the seller is not required to file income tax returns, charged off in accordance with generally accepted accounting principles. A seller that has previously paid the prepaid MTS surcharge on accounts found to be worthless and charged off for income tax purposes may, under rules and regulations prescribed by the Board, take a "bad debt" deduction on its return for the amount found worthless and charged off by the seller. If a seller subsequently collects any amounts for which a bad debt deduction was taken, the amount so collected is required to be reported and the prepaid MTS surcharge on such amount must be paid to the Board on the first return subsequently filed.

#### *Credit for Charges Paid to Other States*

Pursuant to RTC section 42010, a credit against, but not to exceed, the prepaid MTS surcharge and local charges is allowed where the prepaid consumer paid a 911 surcharge,

state utility regulatory commission fees, state universal service charges, or local charges on the purchase to any other state, political subdivision thereof, or the District of Columbia. The credit shall be apportioned to the charges against which it is allowed in proportion to the amounts of those charges.

#### *Bundled Transactions*

Pursuant to RTC section 42018, the prepaid MTS surcharge and local charges apply to the entire price where prepaid MTS is sold in combination with mobile data services or any other services or products for a single non-itemized price in a “bundled transaction.” If prepaid MTS is sold with a cellular telephone for a single non-itemized price, the prepaid MTS surcharge applies to the entire charge; however, if the purchase price for the cellular telephone is disclosed to the consumer on a receipt, invoice, or other written or electronic documentation provided to the prepaid consumer, the charge for the cellular telephone is not subject to the prepaid MTS surcharge and local charges. Furthermore, the prepaid MTS surcharge and local charges do not apply to a transaction where a minimal amount of prepaid MTS amount is sold with a cellular telephone for a single, non-itemized bundled price. For this purpose, a minimal amount includes a service allotment denominated as 10 minutes or less, or \$5 or less.

#### IV. Refunds

Pursuant to RTC section 42010, a seller that collects an amount in excess of the prepaid MTS surcharge and local charges owed may refund those amounts to the prepaid consumer. The seller may refund those amounts even though the surcharge amount was paid to the Board and no corresponding credit or refund has yet been secured. Under the FCPL, every person required to collect or pay the prepaid MTS surcharge or local charges that overpaid an amount to the Board, may file a claim for refund with the Board for such amount, unless otherwise specified. (RTC sections 55221, 55222; Cal. Code Regs., tit 18, § 5230.)

### Local Act

#### I. Local Charges Imposed under Local Ordinances

##### *Legislative Intent*

The Local Act applies to local ordinances of local jurisdictions and local agencies that impose “local charges” on prepaid MTS. The terms “local jurisdiction” and “local agency” both mean “a city, county, or city and county, which includes a charter city, county, or city and county.” (RTC sections 42004, 42101.)

The Local Act recognizes that “[l]ocal charges on telecommunication services represent an important source of tax revenue for many cities and counties and are used to pay for” essential governmental services. The Local Act provides that “[i]t is a matter of statewide concern that the local charges for local prepaid [MTS] be collected in a uniform manner in order for the collection to be fair and uniform on a statewide basis.” The Local Act also provides that it “is the intention of the Legislature that this part shall preempt the provisions pertaining to the tax or charge rate, base, and method of collection contained

in all local ordinances, rules, or regulations concerning the imposition of a local charge upon the consumption of prepaid mobile telephony services, to the extent those provisions are inconsistent with the provisions of this part and Part 21 (commencing with Section 42000.) It is not the intent of the Legislature to otherwise preempt, limit, or affect the general authority of local jurisdictions to impose a utility user tax [(UUT)], local 911 charge, or any other local charges.” (RTC section 42100.)

*In General*

On and after January 1, 2016, a local charge imposed by a local agency on prepaid MTS is required to be collected by a seller from the prepaid consumer at the same time and in the same manner as the prepaid MTS surcharge is collected under the Prepaid MTS Act; provided that on or before September 1, 2015, the local agency enters into a contract with the Board to collect and administer the local charge, so that the Board can administer such local charge in a uniform manner with other local charges under the Local Act. (RTC sections 42101.5, 42103.)

In the event a local agency adopts a new local charge after September 1, 2015, the Local Act requires the local agency to enter into a contract with the Board, as provided above, on or before December 1, with collection of the local charge to commence April 1 of the next calendar year. Also, with respect to a local agency that contracts with the Board and thereafter increases its existing local charge, the Local Act requires the local agency to notify the Board in writing of the increase on or before December 1, with collection of the increased local charge to commence April 1 of the next calendar year. (RTC section 42101.5.)

In addition, in the event that a local agency reduces or eliminates its local charge, the Local Act requires the local agency to notify the Board in writing of the change (RTC section 42101.5). Also, when a local agency notifies the Board in writing that the rate of its local charge posted on the Board’s website is inaccurate, or that it no longer imposes a local charge, or that the rate of its local charge has decreased, then the Prepaid MTS Act requires that the Board promptly post the recalculated rate, and provides that the change becomes operative on the first day of the calendar quarter commencing more than 60 days from the date the local agency provided the written notification to the Board. (RTC section 42010.)

Notwithstanding any other law, on and after January 1, 2016, the Local Act also:

- Suspends the utility user tax on the consumption of prepaid MTS in the city or county at the rate specified in its ordinance and replaces it with specific tiered rates set forth in statute, based on the existing city or county rate (RTC section 42102); and
- Suspends a local charge applicable to prepaid MTS for communication services or local “911” emergency telephone access at a rate as specified in a local ordinance and replaces it with a rate as specified by statute. (RTC section 42102.5.)

Furthermore, on and after January 1, 2016, the Local Act shall be:

- The exclusive collection method for the local UUT, local 911 charges, and any other local charge imposed on consumers using prepaid MTS, and for defining the scope of the local tax or charge on prepaid MTS; and
- With respect to taxation of prepaid MTS, the complete substitute for the UUT rate set forth in the local ordinance at the specified tiered rate. (RTC section 42102.)

The Local Act also states that it “shall not preempt, limit, or affect the general authority of local jurisdictions to impose a utility user tax, local 911 charge, or any other local charges.” (RTC section 42102.)

### *Contract*

The Local Act requires that, in its contract with the Board, the local agency must certify to the Board that its ordinance applies its local charge to prepaid MTS and that the local agency agrees to indemnify, and hold harmless, the Board, its officers, agents, and employees for any and all liability for damages that may result from collection pursuant to the contract. The Local Act also requires that the local agency must certify the amount of the “access to communications” or local 911 charge, or the applicable tiered rate for a UUT in its contract with the Board. (RTC section 42101.5.)

## II. Administration of Local Charges

### *In General*

Under the Local Act, the Board is required to perform all functions incident to the collection of a local charge after the local agency imposing the charge has entered into the required contract with the Board, except with respect to direct sellers. The Board must collect such local charges from sellers, other than direct sellers, in the same manner as it collects the prepaid MTS surcharge under the Prepaid MTS Act and the FCPL, subject to specified limitations. (RTC section 42103.)

### *Local Jurisdiction or Local Agency Responsibilities*

Under the Local Act, the local jurisdiction or local agency that has adopted an ordinance imposing a local charge is solely responsible for the following functions:

- Defending any claim regarding the validity of the ordinance in its application to prepaid MTS;
- Interpreting any provision of the ordinance, except to the extent specifically superseded by the Local Act;
- Responding to specified claims for refund by prepaid MTS consumers involving: (1) the presumed location of the retail transaction; (2) an exemption from the local charge under the local enactment; or (3) a challenge to the validity of a local tax ordinance, in whole or part;
- Reallocating local charges as a result of correcting errors relating to the location of the point of sale transaction of a seller, or the known address of a consumer, for up to two prior quarters from the date of knowledge of the error;

- Enforcing, including auditing, the collection and remittance of local charges by direct sellers pursuant to the ordinance; and
- Certifying that the ordinance applies the local charge to prepaid MTS and agreeing to indemnify and hold harmless the Board, its officers, agents, and employees for any and all liability for damages that may result from collection of the local charge. (RTC section 42105.)

The local jurisdiction or local agency is also required to certify to the Board the amount of the local 911 charge, as set out in RTC Section 42102.5, or the applicable tiered rate for a utility user tax, as set out in RTC Section 42102. (RTC section 42101.5.)

#### *Deposit of Local Revenues*

The Local Act provides that all local charges collected by the Board are to be deposited in the Local Charges for Prepaid Mobile Telephony Services Fund in the State Treasury and held in trust for the local taxing jurisdictions. Local charges consist of all taxes, charges, interest, penalties, and other amounts collected and paid to the Board, less payments for refunds and reimbursement to the Board for expenses to administer and collect the local charges. (RTC section 42103.)

The Local Act requires the Board to periodically transmit the funds to the local jurisdictions as promptly as feasible and at least once in each calendar quarter. The Board must also furnish a quarterly statement to the local jurisdictions indicating the amounts paid and costs withheld. Each local jurisdiction shall pay to the Board its pro rata share of the Board's cost of collection and administration, based on revenues collected. (RTC sections 42020, 42103.)

#### *Board's Duties*

The Local Act allows the Board to perform, or to contract with third parties to perform, the following duties of the Board:

- Allocate and transmit collected local charges in the Prepaid Mobile Telephony Services Fund to the appropriate local jurisdictions.
- Audit proper collection and remittance of the local charge.
- Respond to requests from sellers, consumers, boards, and others regarding issues pertaining to local charges that are within the scope of the Board's duties. (RTC section 42103.)

Also, the FCPL's current provisions prohibiting the Board from disclosing fee payers' confidential information, in RTC section 55381, apply to any third party performing the Board's functions under a third-party contract. And, contingent fee arrangements, as payment for services rendered, are prohibited in any third-party contract. (RTC section 42103.)

#### *Disclosing Information to Local Jurisdictions and Agencies*

The Local Act requires the Board to make available to a requesting local jurisdiction or local agency any information that is reasonably available to the Board regarding the

proper collection and remittance of a local charge of that local jurisdiction or local agency by a seller, including a direct seller. Such information is subject to the confidentiality requirements of RTC sections 7284.6, 7284.7, and 19542. (RTC section 42103.)

### Other Current Board Regulations

The Sales and Use Tax Law provides a retailer relief from liability to collect or pay taxes and a bad debt deduction for taxes previously paid on accounts found worthless and charged off by the retailer (RTC section 6203.5), which are similar to the Prepaid MTS Act's provisions providing a seller relief from liability to collect surcharges and local charges and a "bad debt" deduction for surcharges and local charges paid on accounts found worthless and charged off by the seller. Also, the Board has previously adopted Regulation 1642, *Bad Debts*, to prescribe the circumstances under which a retailer may be relieved from liability to collect or pay tax and be eligible to claim a bad debt deduction on its return for taxes previously paid on accounts found worthless and charged off by the retailer, for sales and use tax purposes.

In addition, the Sales and Use Tax Law provides that the terms "retail sale" and "sale at retail" mean "a sale for any purpose other than resale in the regular course of business in the form of tangible personal property" (RTC section 6007), and this definition is similar to the Prepaid MTS Act's definition of "retail transaction." Also, the Board has previously adopted Regulation 1668, *Sales for Resale*, to prescribe the circumstances under which tangible personal property is purchased for resale in the regular course of business, and prescribe the form of a resale certificate that may be used to document that a sale of tangible personal property is for resale in the regular course of business, for sales and use tax purposes.

Furthermore, the Board has previously adopted Regulation 4901, *Records*, to prescribe the records that taxpayers and feepayers must maintain and make available to the Board to substantiate that they have properly reported and paid a number of Board-administered taxes and fees, including records required to be maintained and made available regarding taxes and fee administered under the FCPL (RTC section 55302.). The Board has previously adopted Regulation 4902, *Relief from Liability*, to prescribe the circumstances under which a person is relieved from liability for a number of Board-administered taxes and fees, including taxes and fees administered under the FCPL (RTC section 55045), due to reasonable reliance on written advice from the Board. The Board has also previously adopted Regulation 4903, *Innocent Spouse or Registered Domestic Partner Relief from Liability*, to prescribe the circumstances under which a spouse or registered domestic partner may be relieved of liability for a number of Board-administered taxes and fees if it is inequitable to hold the person liable for such taxes or fees, including taxes and fees administered under the FCPL (RTC section 55045.1).

### Proposed Regulations

There are issues (or "problems" within the meaning of Gov. Code section 11346.2, subdivision (b)(1)) because there are currently no regulations that specifically implement,

interpret, or make specific the Prepaid MTS Act's and Local Act's statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS and sellers need additional guidance to collect the prepaid MTS surcharge and local charges from prepaid consumers of prepaid MTS beginning on January 1, 2016, including guidance regarding reporting prepaid MTS surcharges and local charges, making payment by EFT, record keeping, relief from liability due to reasonable reliance on written advice from the Board, relief from liability and deductions for bad debts, and innocent spouse and registered domestic partner relief from liability. In addition, there are issues (or problems) because there is currently no regulation that prescribes the circumstances under which prepaid MTS is purchased for resale in the regular course of business or prescribes the form of the resale certificate that may be used to document that the prepaid MTS surcharge and local charges are inapplicable because the purchase of prepaid MTS was for purposes of resale in the regular course of business.

### *Business Taxes Committee Process*

Board staff determined that it was necessary to draft three proposed regulations, entitled "Administration," "Exemptions, Deductions, Credits, and Specific Applications of Tax," and "Refunds of Excess Charges Collected," to fully implement, interpret, and make specific the statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS, and specifically address the issues (or problems) identified above. Therefore, Board staff prepared drafts of the regulations and an Initial Discussion Paper, which Board staff distributed to the interested parties on December 22, 2014, prior to holding its first meeting to discuss the draft regulations with interested parties on January 6, 2015.

Board staff did not receive comments from any interested parties prior to the January 6, 2015, interested parties meeting. During the meeting, interested parties appeared to be in agreement with staff's draft regulations. There was general discussion regarding a direct seller's reporting period for local charges and the process for claiming a lifeline exemption, among other items. Subsequent to the meeting, staff received written comments from interested parties: expressing support for the draft regulations; suggesting that the draft regulations clarify that direct sellers remit local charges to local jurisdictions on a monthly basis; suggesting that staff clarify the definition of prepaid MTS in the draft regulations by using the phrase "right to utilize and/or access," rather than "right to access," MTS or information services; and suggesting that staff clarify in the draft regulations that prepaid MTS may be sold to a consumer on a "tax-included basis," meaning a price that includes all applicable taxes and fees.

In response, staff agreed to revise the definition of prepaid MTS in the draft regulations so that it uses the phrase "right to utilize and/or access" and staff agreed to revise the definition of "receipt" in the draft regulations to clarify that prepaid MTS can be sold on a tax-included basis, so long as the receipt or other document provided to the consumer includes a separate statement of the amount which is for the combined prepaid MTS surcharge and local charges, as required by RTC section 42010, subdivision (i). However, staff did not agree to prescribe the reporting basis for direct sellers to report

local charges. Staff determined that per RTC section 42010, subdivision (f)(3), direct sellers are required to remit local charges directly to the local jurisdictions imposing the charges, and not to the Board. Staff also determined that the Board's functions with regard to the collection and administration of local charges are limited, and RTC section 42105, subdivision (a)(6), expressly provides that local jurisdictions are solely responsible for "the collection and remittance of local charges by direct sellers" pursuant to their own ordinances. Thus, staff concluded that the Board does not have authority to promulgate regulations specifying how direct sellers remit a charge imposed by a local ordinance to the local jurisdiction imposing that charge.

Staff subsequently incorporated the agreed to suggestions into a revised draft of the regulations, numbered the regulations as Regulations 2460, 2461, and 2462 for inclusion in a new chapter 5.7 to be added to division 2 of title 18 of the California Code of Regulations, prepared a second discussion paper regarding the draft regulations, which was distributed to the interested parties on February 20, 2015, and conducted a second meeting to discuss the draft regulations with the interested parties on March 4, 2015. During the second interested parties meeting, there was general approval of the revised draft regulations. Interested parties also expressed their appreciation of the Board's efforts to clarify the issues (or problems) referred to above. After the second interested parties meeting, staff also received written comments expressing support and offering no further recommendations regarding revisions to the draft regulations.

Therefore, Board staff subsequently prepared Formal Issue Paper 15-009, which recommended that the Board propose to adopt staff's revised drafts of Regulations 2460, 2461, and 2462 to implement, interpret, and make specific the Prepaid MTS Act's and Local Act's statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS.

Specifically, the revised draft of Regulation 2460, *Administration*:

- Incorporates statutory terms from the Prepaid MTS Act and Local Act, and further defines the key statutory terms used in the prepaid MTS regulations.
- Clarifies that the term "direct seller" includes "a person that provides" the "Voice over Internet Protocol (VoIP) service" referred to in the statutory definition of direct seller, and clarifies that the reference to a "retailer, as defined by [RTC] Section 6203," in the statutory definition of direct seller, refers to a retailer "engaged in business in this state" as defined by RTC section 6203.
- Clarifies that the terms "prepaid mobile telephony services" and "prepaid MTS" mean the right to "utilize and/or access" mobile telecommunications services which are prepaid and "utilized by means of a mobile device," and not some other right, such as the right to utilize a mobile device to access the services.
- Clarifies the registration requirements for sellers and direct sellers.
- Reiterates and incorporates the statutory requirement in RTC section 42022 that every application for registration shall be made in a form prescribed by the Board, in a similar manner to the way that Regulation 2421 incorporates and implements RTC section 41040's similar registration requirement.

- Emphasizes that the prepaid MTS surcharge and local charges are imposed on the prepaid consumer, and that sellers are obligated to collect the prepaid MTS surcharge and local charges from prepaid consumers and separately state the combined prepaid MTS surcharge and local charges on their receipts.
- Clarifies that prepaid MTS may be sold to a prepaid consumer on a tax-included basis.
- Facilitates compliance by specifying that a seller is statutorily obligated to provide a “receipt” to a prepaid consumer and prescribing the elements that a document, including an electronic document, must contain to satisfy the receipt requirement, including a separate statement of the combined prepaid MTS surcharge and local charges even if the prepaid MTS is sold for a price that includes all applicable taxes and fees.
- Incorporates and clarifies the statutory provisions requiring sellers, including direct sellers, to report and pay the prepaid MTS surcharge and local charges they collect;
- Reiterates that direct sellers shall continue to remit the portion of the prepaid MTS surcharge that consists of the 911 surcharge to the Board pursuant to the Emergency Telephone Users Surcharge Act, and the portion of the prepaid MTS surcharge that consists of the PUC surcharges to the PUC, and reiterates that a direct seller shall remit local charges to the local jurisdiction or local agency imposing the charge.
- Specifies that returns are required to be filed online with the Board through the Board’s website and the amounts required to be reported to the Board are generally required to be reported and paid on a quarterly basis, unless the Board specifically requires a seller to report and pay on another basis, which may be for quarterly periods other than calendar quarters and for periods other than quarterly periods.
- Clarifies that a deduction for statutory “seller reimbursement retention” must be taken in the corresponding period in which the sale of the prepaid MTS surcharge occurred, otherwise a claim for refund must be filed.
- Clarifies that sellers, other than direct sellers, are required to remit payment for the prepaid MTS surcharges and local charges they collect by EFT if they are required, or have elected, to remit their sales and use tax liabilities by EFT, and incorporates Regulation 1707’s definition of the term EFT by reference.
- Clarifies that a seller shall maintain records and make such records available for examination in the manner set forth in Regulation 4901.
- Provides that the provisions for granting relief from liabilities due to reasonable reliance on written advice from the Board and the provisions for granting relief from liabilities to spouses and registered domestic partners in Regulations 4902 and 4903 apply to liabilities for the prepaid MTS surcharge and local charges.
- Incorporates and clarifies the statutory provisions providing relief from additional liabilities to sellers that rely in good faith on information provided by the Board to

determine the prepaid MTS surcharge and local charges applicable to point-of-sale and known-address transactions.

- Specifies that a local agency or local jurisdiction must enter into a contract with the Board by September 1, 2015, in order to require sellers to collect existing local charges beginning on January 1, 2016.
- Specifies that December 1 is the annual contract due date and the following April 1 is the effective date for the collection of new local charges adopted after September 1, 2015.
- Consistently provides that December 1 is the annual contract due date and the following April 1 is the effective date for the collection of existing local charges when a local agency or jurisdiction does not meet the September 1, 2015, deadline, and thereafter first contracts with the Board to collect existing local charges after September 1, 2015.
- Explains the advance notice requirements for increases and decreases in the rates of local charges, corrections to inaccurately posted rates of local charges, and the expiration of local charges, and the effective dates for such changes.
- States how the Board shall annually calculate the prepaid MTS surcharge rate by November 1 of each year, beginning in 2015.
- Clarifies that the total combined prepaid MTS surcharge rate and rate(s) of local charges required to be collected beginning January 1, 2016, will be calculated by the Board by November 1, 2015, and posted on the Board's website by December 1, 2015.
- Clarifies that the current combined prepaid MTS rate and rate(s) of local charges will be recalculated and posted on the Board's website by March 1 of each year, beginning in 2016, for changes made after September 1, 2015, and that the recalculated rates will be effective the following April 1.

Specifically, the revised draft of Regulation 2461, *Exemptions, Deductions, Credits, and Specific Applications of Tax*:

- Prescribes the circumstances under which prepaid MTS is purchased for resale in the regular course of business and the form of a resale certificate that may be used to document that a sale of prepaid MTS is a sale for resale, sets forth a sample "California Resale Certificate – Prepaid Mobile Telephony Services" form that meets the regulation's requirements, and establishes an alternate process to document that a sale was not a retail transaction in the event a resale certificate is not timely obtained by the seller, using provisions that are consistent with Regulation 1668 (discussed above).
- Clarifies that a seller is relieved from the liability to collect the prepaid MTS surcharge insofar as the base upon which the surcharge is imposed is represented by accounts found to be worthless and charged off for income tax purposes or, if the seller is not required to file income tax returns or report its income on another person's return, charged off in accordance with generally accepted accounting principles.

- Clarifies when a seller may take a “bad debt” deduction for the prepaid MTS surcharge and local charges paid on accounts found worthless and charged off for income tax purposes, using provisions that are consistent with Regulation 1642 (discussed above), and clarifies how to calculate the amount of an allowable deduction.
- Clarifies the application of the prepaid MTS surcharge and local charges when an account that was previously found worthless and charged off for income tax purposes is subsequently collected, using provisions that are consistent with Regulation 1642.
- Specifies the types of records a seller needs to maintain to support a bad debt deduction or claim for refund based upon worthless accounts that were charged off for income tax purposes.
- Clarifies the amount subject to the prepaid MTS surcharge and local charges when prepaid MTS is sold in combination with mobile data services, other services, or products for a single non-itemized price in a bundled transaction.
- Clarifies how the lifeline exemption from the prepaid MTS surcharge and local charges applies to “lifeline transactions” in which prepaid MTS is purchased from a seller authorized to provide lifeline services under a state or federal lifeline program.
- Specifies the credit against the prepaid MTS surcharge and local charges for prepaid consumers that previously paid 911 surcharges, state utility regulatory commission fees, state universal service charges, or local charges on the purchase of prepaid MTS to any other state, political subdivision thereof, or the District of Columbia.

Specifically, the revised draft of Regulation 2462, *Refunds of Excess Charges Collected*:

- Clarifies the meaning of “excess charges.”
- Clarifies that sellers may refund excess charges to prepaid consumers, but that excess charges collected, but not refunded to prepaid consumers, represent a debt owed to the state or jointly to a local jurisdiction imposing a local charge and the state.
- Clarifies that either a seller of prepaid MTS or a prepaid consumer may generally file a claim for refund, within the statute of limitations established by RTC sections 55222, 55222.1, and 55222.2 (in the FCPL).
- Specifies that certain claims for refund of local charges must be filed with a local agency or local jurisdiction, and not the Board.
- Cross references draft Regulation 2460’s provisions providing relief from additional liabilities to sellers that rely in good faith on information provided by the Board to determine the prepaid MTS surcharge and local charges applicable to point-of-sale and known-address transactions.

Furthermore, Formal Issue Paper 15-009 informed the Board that Board staff and the interested parties had agreed to the provisions of the revised drafts of Proposed Regulations 2460, 2461, and 2462.

### *Business Taxes Committee Meeting*

The Board considered Formal Issue Paper 15-009 during its Business Taxes Committee meeting on September 16, 2015. During the meeting, the Board heard public comments from Mr. Fran Mancina, Director of Government Relations for MUNI Services, which represents 60 local jurisdictions and agencies, and Mr. Mancina strongly supported, and urged the Board to vote to adopt, the recommended regulations. The Board also discussed the recommended regulations.

During the Business Taxes Committee meeting, the Board agreed with staff's recommendation to propose to adopt staff's revised drafts of Regulations 2460, 2461, and 2462. Therefore, the Board Members unanimously voted to propose the adoption of Regulations 2460, 2461, and 2462.<sup>4</sup>

The Board determined that the adoption of the proposed regulations is reasonably necessary for the specific purposes of addressing the issues (or problems) referred to above, by implementing, interpreting, and making specific the Prepaid MTS Act's and Local Act's statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS, and providing guidance to sellers that are required to collect the prepaid MTS surcharge and local charges from prepaid consumers, including guidance with respect to their registration and reporting requirements, the payment and collection of the prepaid MTS surcharge and local charges, record keeping, sales of prepaid MTS for resale, bad debts, bundled transactions, lifeline transactions, credits, relief from liability, excess charges, and claims for refund.

The Board further determined that the adoption of the proposed regulations is reasonably necessary for the specific purposes of providing guidance to local agencies and jurisdictions with respect to local charges, their notice requirements, contracting with the Board, the Board's posting and calculation of combined rates, and the Board's and local jurisdictions' and agencies' functions with regard to the administration of local charges.

The Board anticipates that the adoption of the proposed regulations will benefit the Board, Board staff, sellers and consumers of prepaid MTS, and local jurisdictions and agencies by:

- Clarifying the application of the prepaid MTS surcharge and local charges for sellers and consumers of prepaid MTS.

---

<sup>4</sup> The Board made minor, non-substantive changes to the text of proposed Regulations 2460, 2461, and 2462, which are not shown in the exhibits to Formal Issue Paper 15-009, to improve clarity.

- Providing regulatory guidance to sellers, including direct sellers, of prepaid MTS regarding their registration, collection, reporting, and payment requirements under the Prepaid MTS Act and Local Act.
- Clarifying the Board's and local agencies' and local jurisdictions' duties with respect to the collection and administration of local charges, including clarifying that it is the responsibility of a local agency or local jurisdiction to contract with the Board to collect and administer its local charges, and provide adequate written notice to the Board when adding, increasing, or decreasing local charges, when local charges are expiring, or there is an error in the rate of local charges posted on the Board's website.
- Adding an alternative contract due date and effective date for the collection and administration of existing local charges when a local agency or jurisdiction first contracts with the Board to collect existing local charges after September 1, 2015.
- Prescribing the form of a resale certificate that may be used to document that a sale of prepaid MTS was for purposes of resale in the regular course of business.

Furthermore, Regulations 2460, 2461, and 2462 duplicate provisions from the RTC sections that they implement, interpret, and make specific. For example, Regulation 2460 duplicates the definitions of a number of terms that are defined in RTC section 42004, such as the definitions of "Board," "local jurisdiction," and "local agency." Also, Regulation 2461 duplicates some provisions from Regulations 1642 and 1668 regarding bad debts and sales for resale. However, the Board has determined that the duplications are necessary to ensure that all three regulations clearly implement, interpret, and make specific the provisions of the Prepaid MTS Act and Local Act, and satisfy the clarity requirement of Government Code section 11349.1, subdivision (a)(3). The Board also determined that it is necessary for Regulation 2461 to duplicate some provisions from Regulations 1642 and 1668 to ensure that Regulation 2461 is generally consistent with Regulations 1642 and 1668 and satisfies the consistency requirement of Government Code section 11349.1, subdivision (a)(4).

The adoption of proposed Regulations 2460, 2461, and 2462 is not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to proposed Regulations 2460, 2461, and 2462.

#### DOCUMENTS RELIED UPON

The Board relied upon Formal Issue Paper 15-009, the exhibits to the issue paper, and the comments made during the Board's discussion of the issue paper during its September 16, 2015, Business Taxes Committee meeting in deciding to propose the adoption of Regulations 2460, 2461, and 2462, described above.

#### ALTERNATIVES CONSIDERED

The Board considered whether to propose to adopt Regulations 2460, 2461, and 2462 as recommended by staff in Formal Issue Paper 15-009 during its September 16, 2015, Business Taxes Committee meeting or, alternatively, whether to take no action at this time. The Board decided to begin the formal rulemaking process to adopt the proposed regulations at this time because the Board determined that the proposed regulations are reasonably necessary for the reasons set forth above.

During the Board's September 16, 2015, Business Taxes Committee meeting, the Board decided to propose to adopt Regulations 2460, 2461, and 2462 as recommended by staff because the Board determined that the adoption of the proposed regulations is reasonably necessary for all the reasons provided above. The Board did not reject any reasonable alternative to proposed Regulations 2460, 2461, and 2462 that would lessen any adverse impact the proposed action may have on small business or that would be less burdensome and equally effective in achieving the purposes of the proposed action. No reasonable alternative has been identified and brought to the Board's attention that would lessen any adverse impact the proposed action may have on small business, be more effective in carrying out the purposes for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

**INFORMATION REQUIRED BY GOVERNMENT CODE SECTION 11346.2, SUBDIVISION (b)(5) AND ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)(1)**

RTC sections 42002 and 42100 explain that in enacting AB 1717 and establishing the Prepaid MTS Act and Local Act, the Legislature intended to change current law by providing a standardized method for the collection of communications taxes, fees, and surcharges from end-use consumers of prepaid MTS that is efficient and competitively neutral, and providing uniform procedures for the collection and equitable distribution of local charges imposed by cities and counties. The prepaid MTS surcharge is imposed on and after January 1, 2016, and is in lieu of the surcharges and fees imposed under the law in effect through December 31, 2015. (RTC section 42010.)

RTC section 42100 further specifies that it is the intention of the Legislature that the Local Act shall preempt the provisions pertaining to the tax or charge rate, base, and method of collection contained in all local ordinances, rules, or regulations concerning the imposition of a local charge upon the consumption of prepaid MTS to the extent those provisions are inconsistent with the provisions of the Prepaid MTS Act and Local Act. Also, RTC sections 42102 and 42102.5 set forth tiered rates for local charges that apply on and after January 1, 2016, which are generally lower than the rates set forth in local ordinances.

Furthermore, RTC section 42002 recognizes that prepaid MTS is frequently sold by a third-party retailer (or seller) that is not a prepaid MTS provider. RTC section 42100 recognizes that the collection and remittance of prepaid MTS surcharges and local

charges by such a seller involves administrative costs and responsibilities that are unique to prepaid MTS, and therefore justify unique reimbursement measures. So, as a result, RTC section 42010 provides that a seller that is not a direct seller shall be permitted to deduct and retain an amount equal to 2 percent of the prepaid MTS surcharge and local charges collected; however, current law does not allow for any third party seller or retailer reimbursement. The Prepaid MTS Act also defines the measure upon which the prepaid MTS surcharge is collected on a purchase of prepaid MTS to include charges for “mobile data and other services” (ancillary services). However, the PUC surcharges and fees, and the 911 surcharge, generally do not apply to charges for such ancillary services. Further, according to the PUC, prepaid MTS providers and services suppliers may not have actually remitted local utility user taxes to all local jurisdictions in this state under the law in effect prior to the Local Act. Thus, the Board estimated that AB 1717 could result in a net state and local revenue gain of \$40,958,000, which is mainly comprised of \$35,968,000 in additional local charge revenue that will be collected pursuant to the Local Act. Therefore, the Board anticipates that the provisions of AB 1717 establishing the Prepaid MTS Act and Local Act will have some economic impact on business, prepaid consumers, and state and local revenue.

The Board is proposing to adopt Regulations 2460, 2461, and 2462 to fully implement, interpret, and make specific the Prepaid MTS Act’s and Local Act’s statutes regarding the application of the prepaid MTS surcharge and local charges to the purchase of prepaid MTS. The proposed regulations provide guidance to sellers and purchasers of prepaid MTS with respect to the statutory registration, collection, payment, and reporting requirements, the statutorily applicable exemptions and credits, and the statutory claim for refund procedures. The proposed regulations also provide guidance to local agencies and jurisdictions with respect to the application of the Local Act to local charges, including the Local Act’s notice requirements, contracting requirements, and the Local Act’s provisions requiring the Board to collect and administer certain local charges. In addition, the Board intends to make the sample “California Resale Certificate – Prepaid Mobile Telephony Services” form set forth in Appendix A to proposed Regulation 2461 available to the public on the Board’s website at no charge.

The Board anticipates that the adoption of the proposed regulations will benefit the Board, Board staff, sellers and consumers of prepaid MTS, and local jurisdictions and agencies by:

- Clarifying the application of the prepaid MTS surcharge and local charges for sellers and consumers of prepaid MTS.
- Providing regulatory guidance to sellers, including direct sellers, of prepaid MTS regarding their registration, collection, reporting, and payment requirements under the Prepaid MTS Act and Local Act.
- Clarifying the Board’s and local agencies’ and local jurisdictions’ duties with respect to the collection and administration of local charges, including clarifying that it is the responsibility of a local agency or local jurisdiction to contract with the Board to collect and administer its local charges, and provide

adequate written notice to the Board when adding, increasing, or decreasing local charges, when local charges are expiring, or there is an error in the rate of local charges posted on the Board's website.

- Adding an alternative contract due date and effective date for the collection and administration of existing local charges when a local agency or jurisdiction contracts with the Board to collect existing local charges after September 1, 2015.
- Prescribing the form of a resale certificate that may be used to document that a sale of prepaid MTS was for purposes of resale in the regular course of business.

All of the provisions in proposed Regulations 2460, 2461, and 2462 are fully consistent with current law, including the provisions of AB 1717 establishing the Prepaid MTS Act and Local Act, and there is nothing in proposed Regulations 2460, 2461, and 2462 that would significantly change how individuals and businesses would generally behave in response to the provisions of AB 1717 in the absence of the proposed regulatory action. Therefore, the Board estimates that the proposed regulations will not have a measurable economic impact on individuals and business that is in addition to whatever economic impact the provisions of AB 1717 will have on individuals and businesses. And, the Board has determined that the proposed adoption of Regulations 2460, 2461, and 2462 is not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed regulations will not have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period.

In addition, the Board has determined that proposed Regulations 2460, 2461, and 2462 do not impose any costs on any persons, including businesses, which are not already imposed by the provisions of AB 1717 establishing the Prepaid MTS Act and Local Act, and the Board has determined that there is nothing in proposed Regulations 2460, 2461, and 2462 that would impact revenue. Therefore, based on these facts and all of the information in the rulemaking file, the Board has determined that the adoption of proposed Regulations 2460, 2461, and 2462 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor affect the expansion of businesses currently doing business in the State of California.

Furthermore, although a portion of the prepaid MTS surcharge funds the "911" emergency system, proposed Regulations 2460, 2461, and 2462 will not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of proposed Regulations 2460, 2461, and 2462 will not affect the benefits of the regulations to the health and welfare of California residents, worker safety, or the state's environment.

The forgoing information also provides the factual basis for the Board's initial determination that the adoption of proposed Regulations 2460, 2461, and 2462 will not have a significant adverse economic impact on business.

The adoption of proposed Regulations 2460, 2461, and 2462 may affect small businesses.

**Proposed Text of**  
**California Code of Regulations, Title 18, Section 2460,**  
*Administration*

(A new regulation to be added to the California Code of Regulations)

2460. Administration.

(a) Definitions. For purposes of this chapter (Prepaid Mobile Telephony Services Regulations, commencing with Regulation 2460), the following terms shall have the following meanings:

(1) “Board” means the State Board of Equalization.

(2) “Direct seller” means a prepaid MTS provider or service supplier, as defined in Revenue and Taxation Code section 41007, that makes a sale of prepaid MTS directly to a prepaid consumer for any purpose other than for resale in the regular course of business.

A direct seller includes, but is not limited, to any of the following:

(A) A telephone corporation, as defined by section 234 of the Public Utilities Code.

(B) A person that provides “interconnected Voice over Internet Protocol (VoIP) service,” as that term is defined in section 285 of the Public Utilities Code.

(C) A “retailer engaged in business in this state,” as defined by Revenue and Taxation Code section 6203, that is a member of the same commonly controlled group, as defined in Revenue and Taxation Code section 25105, or that is a member of the same combined reporting group, as defined in paragraph (3) of subdivision (b) of section 25106.5 of title 18 of the California Code of Regulations, as an entity described in subparagraph (A) or (B).

(3) “Emergency telephone users surcharge” means surcharges authorized pursuant to the Emergency Telephone Users Surcharge Act (commencing with Revenue and Taxation Code section 41001) to be collected from prepaid consumers of mobile telephony services.

(4) “In this state” means within the exterior limits of the State of California and includes all territory within those limits owned by or ceded to the United States of America.

(5) “Local charge” or “local charges” means the utility user taxes as described in Revenue and Taxation Code section 42102, and charges for access to communication services or to local “911” emergency telephone systems, as described in Revenue and Taxation Code section 42102.5, the collection of which are subject to the provisions of the Local Prepaid Mobile Telephony Services Collection Act (commencing with Revenue and Taxation Code section 42100).

(6) “Local jurisdiction” or “local agency” means a city, county, or city and county, which includes a charter city, county, or city and county.

(7) “Mobile data service” has the same meaning as defined in section 224.4 of the Public Utilities Code.

(8) “Mobile telephony service” or “MTS” has the same meaning as defined in section 224.4 of the Public Utilities Code.

(9) “Ordinance” refers to an ordinance of a local jurisdiction or local agency imposing a local charge, including any local enactment relating to the filing of a claim for refund or other claim arising under the ordinance.

(10) “Person” includes any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, assignee for the benefit of creditors, trustee, trustee in bankruptcy, syndicate, the United States, this state, any city, county, city and county, municipality, district, or other political subdivision of the state, or any other group or combination acting as a unit.

(11) “Prepaid consumer” means a person who purchases prepaid MTS in a retail transaction.

(12) “Prepaid mobile telephony services” or “prepaid MTS” means the right to utilize and/or access mobile telecommunications services or information services, including the download of digital products delivered electronically, content, and ancillary services, or both telecommunications services and information services, that must be purchased in advance of usage in predetermined units or dollars and are utilized by means of a mobile device.

For these purposes, “telecommunications service” and “information service” have the same meanings as defined in section 153 of title 47 of the United States Code.

(13) “Prepaid MTS provider” means a telephone corporation, as defined in section 234 of the Public Utilities Code, that provides prepaid MTS.

(14) “Prepaid MTS surcharge” means the surcharge imposed under the Prepaid Mobile Telephony Services Surcharge Collection Act (commencing with Revenue and Taxation Code section 42001) that consists of the emergency telephone users surcharge and the Public Utilities Commission surcharges, as calculated pursuant to subdivision (b) of Revenue and Taxation Code section 42010, that is required to be collected by a seller from a prepaid consumer.

(15) “Public Utilities Commission” or “Commission” means the Public Utilities Commission created by section 1 of article XII of the California Constitution.

(16) “Public Utilities Commission surcharges” means surcharges authorized by the Public Utilities Commission to be billed and collected from end-use consumers of wireless communications services, and of which the Commission provides the Board with notice pursuant to section 319 of the Public Utilities Code, including:

(A) The California High-Cost Fund-A Administrative Committee Fund program surcharge (Section 275.6 of the Public Utilities Code).

(B) The California High-Cost Fund-B Administrative Committee Fund program surcharge (Section 739.3 of the Public Utilities Code).

(C) The Deaf and Disabled Telecommunications Program Administrative Committee Fund surcharge (Section 2881 of the Public Utilities Code).

(D) The California Teleconnect Fund Administrative Committee Fund program surcharge (Section 280 of the Public Utilities Code).

(E) The California Advanced Services Fund program surcharge (Section 281 of the Public Utilities Code).

(F) The Moore Universal Telephone Service Act (Article 8 (commencing with section 871) of chapter 4 of part 1 of division 1 of the Public Utilities Code).

(G) Public Utilities Commission reimbursement fees imposed pursuant to chapter 2.5 (commencing with section 401) of part 1 of division 1 of the Public Utilities Code.

(17) “Retail transaction” means the purchase of prepaid MTS, either alone or in combination with mobile data or other services, from a seller for any purpose other than resale in the regular course of business. For these purposes, a “purchase” means any transfer of title or possession, exchange, or barter, conditional or otherwise of prepaid MTS for a consideration, including such a transfer of a mobile telephone service communication device (commonly termed a cell phone) when purchased with prepaid MTS for a single, nonitemized price, and for other than a minimal amount of prepaid MTS.

(18) “Sale” means any transfer of title, possession, exchange, or barter, conditional or otherwise of prepaid MTS for a consideration, including such a transfer of a mobile telephone service communication device (commonly termed a cell phone) when sold with prepaid MTS for a single, nonitemized price, and for other than a minimal amount of prepaid MTS.

(19) “Seller” means a person that sells prepaid MTS to a person in a retail transaction.

(b) Registration. Every person that sells prepaid MTS to a person in a retail transaction is required to register with the Board pursuant to Revenue and Taxation Code section 42022. Direct sellers are required to be registered with the Board under the Emergency Telephone Users Surcharge Act (commencing with Revenue and Taxation Code section 41001). Direct sellers are not required to register as a seller of prepaid MTS. A seller, other than a direct seller, shall register for a Prepaid MTS Account.

Every application for registration shall be made in a form prescribed by the Board and shall set forth the name under which the applicant transacts or intends to transact business, the location of

his or her place or places of business, and such other information as the Board may require. An application for registration shall be authenticated in a form or pursuant to methods as may be prescribed by the Board.

(c) Payment of Prepaid MTS Surcharge and Local Charges by Purchasers. Every consumer of prepaid MTS in this state is liable for the prepaid MTS surcharge and any local charges until those amounts are paid to the Board, unless a receipt, as provided by subdivision (d), is obtained from a registered seller.

(d) Receipts. Each seller required to collect the prepaid MTS surcharge and local charges from a prepaid consumer must give a receipt to each prepaid consumer at the time of the retail transaction with a separate statement of the combined prepaid MTS surcharge and local charges, even if the prepaid MTS is sold for a price that includes all applicable taxes and fees. For purposes of this subdivision, prepaid MTS are sold on a tax-included basis if the seller discloses to the consumer in the receipt that the price of the prepaid MTS includes applicable taxes and fees.

For the purposes of this regulation, a receipt need not be in any particular form and may consist of an invoice, receipt, or other similar document provided to the prepaid consumer, or otherwise disclosed electronically to the prepaid consumer, but must show the following:

(1) The name and place of business of the seller.

(2) The date on which the service was sold.

(3) A combined amount of the prepaid MTS surcharge and local charges collected from the prepaid consumer. If the prepaid MTS were not sold to the prepaid consumer on a tax-included basis, the receipt must also separately state the sales price subject to the prepaid MTS surcharge and local charges.

(e) Payment and Returns.

(1) Payment. Except as otherwise provided in subdivision (e)(4) and (e)(6), the prepaid MTS surcharge and local charges are due and payable to the Board quarterly on or before the last day of the next month following each calendar quarter.

(2) Returns. Notwithstanding Revenue and Taxation Code section 55040, and except as otherwise provided in subdivision (e)(6), every person liable for the prepaid MTS surcharge and local charges must file a return online with the Board through the Board's website quarterly, on or before the last day of the next month following each calendar quarter.

(3) Reporting Periods. Notwithstanding subdivisions (e)(1) or (e)(2), the Board may require returns and payment of the prepaid MTS surcharge and local charges required to be reported to the Board pursuant to the Prepaid Mobile Telephony Services Surcharge Collection Act, for quarterly periods other than calendar quarters, or for reporting periods other than quarterly periods.

(4) Seller Reimbursement Retention. A seller, that is not a direct seller, may deduct and retain a reimbursement amount equal to two percent of the amounts it collects from prepaid consumers for the prepaid MTS surcharge and local charges, on a pro rata basis, according to that portion of the revenues collected for each of the following:

- (A) The emergency telephone users surcharge.
- (B) The Public Utilities Commission surcharges.
- (C) The local charges.

Such reimbursement is to be taken on the return for the corresponding reporting period in which the sale of the prepaid MTS occurs. If a seller claims only some or none of the reimbursement amount during the corresponding reporting period in which the sale occurred, the seller is not allowed to claim a credit for the remaining unclaimed reimbursement on a subsequent return. Rather, the seller must file a claim for refund.

(5) Electronic Funds Transfer. Notwithstanding Revenue and Taxation Code section 55050, any person required, or that elects, to remit its sales and use tax liabilities due by electronic funds transfer (pursuant to Revenue and Taxation Code section 6479.3), other than a direct seller, must also remit the prepaid MTS surcharge and local charges by electronic funds transfer.

For purposes of this section, “electronic funds transfer” shall have the same meaning as defined in California Code of Regulations, title 18, section 1707, *Electronic Funds Transfer*.

(6) Direct Sellers. A direct seller shall remit the prepaid MTS surcharge and local charges as follows:

- (A) That portion of the prepaid MTS surcharge that consists of the Public Utilities Commission surcharges shall be remitted to the Public Utilities Commission, and not to the Board, for those retail transactions with a prepaid consumer in the state, along with any reports required by the Public Utilities Commission.
- (B) That portion of the prepaid MTS surcharge that consists of the emergency telephone users surcharge shall be remitted to the Board pursuant to the Emergency Telephone Users Surcharge Act (commencing with Revenue and Taxation Code section 41001) with a return filed online with the Board through the Board’s website for those retail transactions with a prepaid consumer in the state.
- (C) Local charges, if applicable, shall be remitted to the local jurisdiction or local agency imposing the local charge, and not to the Board. Remittance of the local charges shall be separately identified from any other local taxes or other charges that are remitted to the local jurisdiction or local entity imposing the local tax or other charge.

For direct sellers, the portion of the prepaid MTS surcharge that consists of the emergency telephone users surcharge is due and payable to the Board, as provided by California Code of Regulations, title 18, section 2422, *Returns, Reporting and Payment*.

(f) Records. A seller of prepaid MTS shall maintain and make available for examination on request by the Board or its authorized representatives, records in the manner set forth in California Code of Regulations, title 18, section 4901, *Records*.

(g) Relief from Liability. In addition to the provisions set forth in California Code of Regulations, title 18, section 4902, *Relief from Liability*, a seller may be relieved of the liability for the prepaid MTS surcharge and local charges as set forth in subdivision (g)(1) and (g)(2):

(1) Point-of-Sale Transaction. A seller is not liable for any additional prepaid MTS surcharges or local charges, and is not required to refund any amounts collected from the prepaid consumer when all of the following apply:

(A) A seller relies in good faith on the information provided by the Board to match the location of the point-of-sale transaction to the applicable prepaid MTS surcharge and local charges, and

(B) A seller collects such amounts from the prepaid consumer and remits such amounts to the Board.

(2) Known-Address Transaction. A seller is not liable for any additional prepaid MTS surcharges or local charges, and is not required to refund any amounts collected from the prepaid consumer when all of the following apply:

(A) A seller relies in good faith with due diligence on credible information to match the five-digit postal zip code of the prepaid consumer's address to the applicable prepaid MTS surcharge and local charges, and

(B) A seller collects such amounts from the prepaid consumer and remits such amounts to the Board.

The provisions of subdivision (g)(2) apply even if the five-digit postal zip code of the prepaid consumer's address corresponds to more than one local charge.

(h) Innocent Spouse Relief. A spouse or registered domestic partner requesting relief from liability for any prepaid MTS surcharge or local charge, interest, and penalties shall be relieved from such liability where all the requirements set forth in California Code of Regulations, title 18, section 4903, *Innocent Spouse or Registered Domestic Partner Relief from Liability*, are met.

(i) Local Charges

(1) Ordinances in effect as of September 1, 2015. On and after January 1, 2016, a local charge imposed by a local agency on prepaid mobile telephony services shall be collected

from the prepaid consumer by a seller at the same time and in the same manner as the prepaid MTS surcharge is collected under the Prepaid Mobile Telephony Services Surcharge Collection Act (commencing with Revenue and Taxation Code section 42001) provided that, on or before September 1, 2015, the local agency enters into a contract with the Board pursuant to Revenue and Taxation Code section 42101.5.

In the event a local agency or local jurisdiction does not enter into a contract with the Board by September 1, 2015, the local agency may enter into a contract with the Board, pursuant to Revenue and Taxation Code section 42101.5, on or before December 1, with collection of the local charge to commence April 1 of the next calendar year. Thereafter, all subsequently enacted local charges, increases to local charges, or other changes thereto, shall become operative pursuant to paragraphs (2), (3), (4) and (5) of this subdivision.

(2) New Local Charges. When a local agency or local jurisdiction adopts a new local charge, after September 1, 2015, the local agency shall enter into a contract with the Board, pursuant to Revenue and Taxation Code section 42101.5, on or before December 1, with collection of the local charge to commence April 1 of the next calendar year.

(3) Increases in Local Charges. When a local agency or local jurisdiction increases an existing local charge, after September 1, 2015, the local agency shall provide the Board written notice of the increase, on or before December 1, with collection of the local charge to commence April 1 of the next calendar year.

(4) Advance Written Notification. When a local charge is about to expire or decrease in rate, the local agency or local jurisdiction imposing the local charge shall notify the Board in writing of the upcoming change, not less than 110 days prior to the date the local charge is scheduled to expire or decrease. The change shall become operative on the first day of the calendar quarter commencing after the specified date of expiration or decrease in rate.

If advance written notice is provided less than 110 days prior to the specified date of expiration or decrease in rate, the change shall become operative on the first day of the calendar quarter commencing more than 60 days after the specified date of expiration or decrease.

(5) Inaccurate Rate Posted on Board's Website. When a local agency or local jurisdiction notifies the Board in writing that the rate posted on the Board's website (posted rate) for a local charge imposed by that local agency or local jurisdiction is inaccurate, including scenarios where the local charge was reduced or eliminated and the local agency or jurisdiction failed to provide advance written notice pursuant to subdivision (i)(4), the recalculated rate applicable to the local agency or local jurisdiction shall become operative on the first day of the calendar quarter commencing more than 60 days from the date the Board receives the local agency's or local jurisdiction's written notification that the posted rate is inaccurate. The local agency or local jurisdiction shall promptly notify the Board in writing of any such discrepancies with the posted rate that are known or discovered by the local agency or local jurisdiction.

(j) Posting and Calculation of Combined Rates

(1) Calculation of Prepaid MTS Surcharge Rate. The prepaid MTS surcharge rate shall be annually calculated by the Board by no later than November 1 of each year commencing November 1, 2015, by adding the following:

(A) The surcharge rate reported pursuant to subdivision (d) of Revenue and Taxation Code section 41030; and

(B) The Public Utilities Commission's reimbursement fee and telecommunications universal service surcharges, established by the Public Utilities Commission pursuant to subdivisions (a) and (b) of Section 319 of the Public Utilities Code.

The prepaid MTS surcharge rate calculated pursuant to this subdivision shall be the prepaid MTS surcharge rate, exclusive of any applicable local charges, that applies to all retail transactions during the calendar year beginning January 1 following the calculation.

(2) Calculation of Combined Rate. The combined total of the prepaid MTS surcharge rate calculated pursuant to subdivision (j)(1), and the rate(s) of local charges imposed as of September 1, 2015, that are required to be collected by a seller from a prepaid consumer on and after January 1, 2016, shall be posted on the Board's website by December 1, 2015. The posted combined rate shall be the rate that applies to all retail transactions during the calendar year beginning January 1, 2016, unless there is a later change in the combined rate.

(3) New Local Charges and Increases to Existing Local Charges. After September 1, 2015, the Board shall post on its website, for each local jurisdiction, the combined total of the rates of the prepaid MTS surcharge and the rate(s) of local charges, as calculated pursuant to Revenue and Taxation Code sections 42102 and 42102.5, that each local jurisdiction has adopted and provided written notice to the Board of, on or before December 1 of each year, as provided in subdivision (i). The Board shall post the combined total of the rates of the prepaid MTS surcharge and rate(s) of local charges on its website by March 1, of each year. The posted combined total of the rates of the prepaid MTS surcharge and rate(s) of local charges shall be the rate that applies to all retail transactions during the calendar year beginning April 1 following the posting, unless there is a later change in the combined rate.

Note: Authority cited: Sections 42020 and 42103, Revenue and Taxation Code. Reference: Sections 42004, 42010, 42014, 42020, 42021, 42022, 42101, 42101.5, 42102, 42102.5 and 42103, Revenue and Taxation Code.

**Proposed Text of**  
**California Code of Regulations, Title 18, Section 2461,**  
***Exemptions, Deductions, Credits, and Specific Applications of Tax***  
(A new regulation to be added to the California Code of Regulations)

2461. Exemptions, Deductions, Credits, and Specific Applications of Tax.

(a) In General. This regulation explains the specific applications of the prepaid MTS surcharge and local charges to, and applicable exemptions, deductions, and credits for the following types of transactions:

- (1) Sales for resale.
- (2) Bad debts.
- (3) Bundled transactions.
- (4) Lifeline transactions.
- (5) Transactions in which a surcharge or local charge was paid to another state.

(b) Sales for Resale.

The burden of proving that a sale of prepaid MTS is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the prepaid MTS are purchased for resale. If timely taken in proper form as set forth in subdivision (b)(1)(A) and in good faith from a person who is engaged in the business of selling prepaid MTS and who holds a Prepaid MTS Account as required by Regulation 2460, *Administration*, the certificate relieves the seller from the duty of collecting the prepaid MTS surcharge and local charges. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the prepaid MTS, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the prepaid MTS to the purchaser. A resale certificate remains in effect until revoked in writing.

(1) Form of Certificate.

(A) Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a resale certificate with respect to the sale of the prepaid MTS described in the document if it contains all of the following essential elements:

1. The signature of the purchaser, purchaser's employee or authorized representative of the purchaser.
2. The name and address of the purchaser.
3. The number of the Prepaid MTS Account held by the purchaser. If the purchaser is not required to hold a Prepaid MTS Account because the purchaser makes no sales

of prepaid MTS in this state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a Prepaid MTS Account in lieu of a Prepaid MTS Account number.

4. A statement that the prepaid MTS described in the document is purchased for resale. The document must contain the phrase “for resale.” The use of phrases such as “nontaxable,” “not subject to surcharge,” “exempt,” or similar terminology is not acceptable.

5. Date of execution of document. (An otherwise valid resale certificate will not be considered invalid solely on the grounds that it is undated.)

(B) A document containing the essential elements described in subdivision (b)(1)(A) is the minimum form which will be regarded as a resale certificate. However, in order to preclude potential controversy, the seller should timely obtain from the purchaser a certificate substantially in the form shown in Appendix A of this regulation.

(C) Blanket Resale Certificate. If a purchaser issues a general (blanket) resale certificate which provides a general description of the items to be purchased, and subsequently issues a purchase order which indicates that the transaction covered by the purchase order is subject to the prepaid MTS surcharge or local charges, the resale certificate does not apply with respect to that transaction. However, the purchaser will bear the burden of establishing either that the purchase order was sent to and received by the seller within the seller’s billing cycle or prior to delivery of the prepaid MTS to the purchaser (whichever is the later), or that the prepaid MTS surcharge or local charges were paid to the seller. The purchaser may avoid this burden by using the procedures described in subdivision (b)(1)(D) below.

(D) Qualified Resale Certificate. If a purchaser wishes to designate on each purchase order whether the prepaid MTS being purchased are for resale, the seller should obtain a qualified resale certificate, i.e., one that states “see purchase order” in the space provided for a description of the property to be purchased. Each purchase order must then specify whether or not the prepaid MTS covered by the order is purchased for resale. The use of the phrases “for resale,” “resale = yes,” “not subject to surcharge,” “surcharge = no,” or similar terminology on a purchase order, indicating that the prepaid MTS surcharge or local charges should not be added to the sales invoice will be regarded as designating that the prepaid MTS described is purchased for resale provided the combination of the purchase order and the qualified resale certificate contains all the essential elements provided in subdivision (b)(1)(A). However, a purchase order where the applicable amount of the prepaid MTS surcharge or local charges is shown as \$0 or is left blank will not be accepted as designating that the prepaid MTS is purchased for resale, unless the purchase order also includes the phrase “for resale” or other terminology described above to specify that the prepaid MTS is purchased for resale. If each purchase order does not so specify, or is not issued timely within the meaning of subdivision (b), it will be presumed that the prepaid MTS covered by that purchase order was not purchased for resale and that sale or purchase is subject to the prepaid mobile telephony services

surcharge or local charges. If the purchase order includes both prepaid MTS to be resold and prepaid MTS to be used, the purchase order must specify which prepaid MTS are purchased for resale and which prepaid MTS are purchased for use.

The seller shall retain copies of the purchase orders along with the qualified resale certificates in order to support the sales for resale.

(E) If the seller does not timely obtain a resale certificate, the fact that the purchaser deletes the prepaid MTS surcharge or local charges from the seller's billing, provides a Prepaid MTS Account number to the seller, or informs the seller that the transaction is "not subject to the surcharge" does not relieve the seller from the liability for the prepaid MTS surcharge or local charges nor from the burden of proving the sale was for resale.

## (2) Good Faith.

In absence of evidence to the contrary, a seller will be presumed to have taken a resale certificate in good faith if the resale certificate contains the essential elements as described in subdivision (b)(1)(A) and otherwise appears to be valid on its face. If the purchaser insists that the purchaser is buying for resale prepaid MTS of a kind not normally resold in the purchaser's business, the seller should require a resale certificate containing a statement that the specific prepaid MTS is being purchased for resale in the regular course of business.

## (3) Improper Use of Certificate.

Any person, including any officer or employee of a corporation, who gives a resale certificate for prepaid MTS which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable for the amount of prepaid MTS surcharge or local charges that would be due if he or she had not given such resale certificate.

## (4) Other Evidence to Rebut Presumption of Imposition of the Prepaid MTS Surcharge or Local Charges.

A sale for resale is not subject to the prepaid MTS surcharge or local charges. A person who purchases prepaid MTS for resale and who subsequently uses the prepaid MTS owes the prepaid MTS surcharge or local charges on that use. A resale certificate which is not timely taken is not retroactive and will not relieve the seller of the liability for the prepaid MTS surcharge or local charges. Consequently, if the seller does not timely obtain a resale certificate containing the essential elements as described in subdivision (b)(1)(A), the seller will be relieved of liability for the prepaid MTS surcharge or local charges only where the seller shows that the prepaid MTS:

(A) Were in fact resold by the purchaser and was not used by the purchaser for any purpose other than retention, demonstration, or display while holding them for sale in the regular course of business, or

(B) Are being held for resale by the purchaser and has not been used by the purchaser for any purpose other than retention, demonstration, or display while holding them for sale in the regular course of business, or

(C) Were consumed by the purchaser and the prepaid MTS surcharge or local charges were reported directly to the Board by the purchaser on the purchaser's return, or

(D) Were consumed by the purchaser and the prepaid MTS surcharge or local charges were paid to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.

(5) Use of XYZ Letters.

A seller who does not timely obtain a resale certificate may use any verifiable method of establishing that it should be relieved of liability for the prepaid MTS surcharge or local charges under subdivision (b)(4). One method that the Board authorizes to assist a seller in satisfying its burden that the sale was for resale or that the prepaid MTS surcharge was paid, is the use of "XYZ letters." XYZ letters are letters in a form approved by the Board which are sent to some or all of the seller's purchasers inquiring as to the purchaser's disposition of the prepaid MTS purchased from the seller. An XYZ letter will include certain information and request responses to certain questions, set forth below. The XYZ letter may also be further customized by agreement between the Board's staff and the seller to reflect the seller's particular circumstances.

(A) An XYZ letter may include the following information: seller's name and Prepaid MTS Account number, date of invoice(s), invoice number(s), purchase order number(s), amount of purchase(s), and a description of the prepaid MTS purchased or other identifying information. A copy of the actual invoice(s) may be attached to the XYZ letter. The XYZ letter will request the purchaser to complete the statement and include the purchaser's name, seller's Prepaid MTS Account number and nature of the purchaser's business. The statement shall be signed by the purchaser, purchaser's employee or authorized representative, and include the printed name of person signing the certificate, title, date, telephone number and city.

(B) An XYZ letter will request that the purchaser, purchaser's employee or authorized representative check one of the boxes provided inquiring as to whether the prepaid MTS in question were:

1. Purchased for resale and resold, without any use other than retention, demonstration, or display while being held for sale in the regular course of business;
2. Purchased for resale and presently in resale inventory, without having been used for any purpose other than retention, demonstration, or display while being held for sale in the regular course of business;
3. Purchased for resale but consumed or used; or

4. Purchased for use.

5. When the purchaser answers either (3) or (4) affirmatively (box checked), the XYZ letter will inquire further whether:

A. The prepaid MTS surcharge or local charges were paid directly to the Board on the purchaser's return, and if so, in what amount;

B. The prepaid MTS surcharge or local charges were added to the billing of the seller and remitted to the seller, and if so, in what amount;

C. The prepaid MTS surcharge or local charges were paid directly to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.

D. The purchaser confirms that the purchase is subject to the prepaid MTS surcharge or local charges.

(C) A response to an XYZ letter is not equivalent to a timely and valid resale certificate. A purchaser responding affirmatively to questions reflected in subparagraphs 1, 2, or 3 of subdivision (b)(5)(B) will be regarded as confirming the seller's belief that a sale was for resale for purposes of subdivision (b)(6). However, the Board is not required to relieve a seller from liability for the collection of the prepaid MTS surcharge or local charges based on a response to an XYZ letter. The Board may, in its discretion, verify the information provided in the response to the XYZ letter, including making additional contact with the purchaser or other persons to determine whether the purchase was for resale or for use or whether the prepaid MTS surcharge or local charges were paid by the purchaser. When the Board accepts the purchaser's response to an XYZ letter as a valid response, the Board shall relieve the seller of liability for collection of the prepaid MTS surcharge or local charges.

(D) When there is no response to an XYZ letter, the Board staff should consider whether it is appropriate to use an alternative method to ascertain whether the seller should be relieved of the prepaid MTS surcharge or local charges under subdivision (b)(4) with respect to the questioned or unsupported transaction(s).

#### (6) Purchaser's Liability for the Prepaid MTS Surcharge or Local Charges.

A purchaser who issues a resale certificate containing the essential elements as described in subdivision (b)(1)(A) and that otherwise appears valid on its face, or who otherwise purchases prepaid MTS that is accepted by the Board as purchased for resale pursuant to subdivision (b)(5) and who thereafter makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business is liable for the prepaid MTS surcharge or local charges on the purchase price of the prepaid MTS. The prepaid MTS surcharge or local charges are due at the time the prepaid MTS is

first stored or used and must be reported and paid by the purchaser with the purchaser's return for the period in which the prepaid MTS is first so stored or used.

(c) Bad Debts.

A seller of prepaid MTS is relieved from liability to collect the prepaid MTS surcharge insofar as the measure of the surcharge is represented by accounts found worthless and charged off for income tax purposes (which include circumstances where the seller's income is reported on a related person's income tax return and the bad debt is charged off on that return) or, if the seller is not required to file income tax returns and the seller's income is not reported on another person's return, charged off in accordance with generally accepted accounting principles. A seller may claim a bad debt deduction provided that the prepaid MTS surcharge was actually paid to the state.

This deduction should be taken on the return filed for the period in which the amount was found worthless and charged off for income tax purposes or, if the seller is not required to file income tax returns, charged off in accordance with generally accepted accounting principles.

Failure to take the deduction on the proper return will not in itself prevent the allowance of a refund measured by an amount for which a seller could have taken a timely deduction provided a claim for refund is filed with the Board within the limitation periods specified in sections 55222, 55222.1, and 55222.2 of the Revenue and Taxation Code.

(1) Amount Subject to Deduction.

(A) Receipts Subject to the Prepaid MTS Surcharge. If the amount of an account found to be worthless and charged off is comprised in part of receipts not subject to the prepaid MTS surcharge such as sales for resale or sales subject to a Lifeline exemption and in part of receipts subject to the prepaid MTS surcharge, a bad debt deduction may be claimed only with respect to the unpaid amount upon which the prepaid MTS surcharge has been paid. The allowable amount of deduction shall be adjusted for amounts claimed as retailer reimbursement. It shall be presumed that retailer reimbursement was claimed on all previously reported amounts subject to the prepaid MTS surcharge. In determining that amount, all payments and credits to the account may be applied: (1) ratably against the various elements comprising the amount the purchaser contracted to pay (pro rata method); (2) may be applied as provided in the contract of sale (contract method); or (3) may be applied by another method which reasonably determines the amount subject to the prepaid MTS surcharge (alternative method). When claiming a bad debt deduction or refund using an alternative method, the seller must include a clear explanation of that method. After having applied payments and credits using one method and claiming a deduction or refund based on such method, a seller shall not thereafter reapply the payments or credits using another method with respect to such losses previously claimed.

(B) Expenses of Collection. No deduction is allowable for expenses incurred by the seller in attempting to enforce collection of any account receivable, or for that portion of

a debt recovered that is retained by or paid to a third party as compensation for services rendered in collecting the account.

(2) **Worthless Account Subsequently Collected.** If any account found worthless and charged off is thereafter collected by the seller, in whole or in part, the amount subject to the prepaid MTS surcharge so collected shall be included in the first return filed after such collection and tax shall be paid on such amount with the return. The same percentage of the account which the seller claimed as an allowable bad debt deduction or refund shall be used to determine the percentage of the recovery subject to the prepaid MTS surcharge. The percentage subject to the prepaid MTS surcharge of any amounts received from a third party for the sale of an account after the seller has found them to be worthless and has claimed a bad debt deduction or refund are regarded as amounts subsequently collected for purposes of this provision, and the seller must include such amounts in the first return filed after receipt of such amounts and pay the prepaid MTS surcharge thereon.

(3) **Records.** In support of deductions or claims for refund for bad debts, sellers must maintain adequate and complete records showing:

(A) Date of original sale.

(B) Name and address of purchaser.

(C) Amount purchaser contracted to pay.

(D) Amount on which seller paid the prepaid MTS surcharge.

(E) The jurisdiction(s) where the local charges, when applicable, were allocated.

(F) All payments or other credits applied to the account of the purchaser.

(G) Evidence that the uncollectible portion of gross receipts on which the prepaid MTS surcharge was paid actually has been legally charged off as a bad debt for income tax purposes (whether or not the income tax return has yet been filed) or, if the seller is not required to file income tax returns and the seller's income is not reported on another person's return, charged off in accordance with generally accepted accounting principles.

(H) The percentage subject to the prepaid MTS surcharge of the amount charged off as a bad debt properly allocable to the amount on which the seller reported and paid the prepaid MTS surcharge.

(d) **Bundled Transactions.**

(1) The prepaid MTS surcharge and local charges apply to the entire selling price when there is a sale of prepaid MTS in combination with mobile data services or any other services or products for a single price.

(2) The prepaid MTS surcharge and local charges apply to the entire selling price when there is a sale of prepaid MTS in combination with a mobile telephone communication device for a single nonitemized price, except as provided in subparagraphs (A) or (B).

(A) The purchase price of the mobile telephone communication device in the bundled transaction is disclosed to the customer on a receipt, invoice, or other documentation provided to the customer. In such an instance, the prepaid MTS surcharge and local charges shall only apply to the remaining charge after excluding the selling price of the mobile telephone communication device; or

(B) The amount of the prepaid MTS sold with the mobile telephone communication device is a minimal amount. In such an instance, the prepaid MTS surcharge and local charges do not apply to the entire selling price.

For the purposes of this subdivision, the amount of prepaid MTS will be deemed as minimal if the service allotment is for 10 minutes or less or is five dollars or less.

(e) Lifeline Transactions.

A lifeline transaction is a transaction in which a person purchases prepaid MTS from a seller authorized to provide lifeline service under the state or federal lifeline programs. The state lifeline program means the program furnishing lifeline voice communication service pursuant to the Moore Universal Telephone Service Act. The purchase in a retail transaction in this state of prepaid MTS, either alone or in combination with mobile data or other services, by a consumer is exempt from the prepaid MTS surcharge if all of the following apply:

- (1) The prepaid consumer is certified as eligible for the state or federal lifeline programs. The seller must retain sufficient documentation supporting amounts claimed as subject to the lifeline program.
- (2) The seller is authorized to provide lifeline service under the state or federal lifeline programs. If the seller is not an authorized provider of lifeline service, the exemption does not apply.
- (3) The exemption is applied only to the amount paid for the portion of the prepaid MTS that the lifeline program specifies is exempt from the prepaid MTS surcharge.

(f) Transactions in Which a Surcharge or Local Charge was Paid to Another State.

A credit shall be allowed against, but shall not exceed, the prepaid MTS surcharge and local charges imposed on any prepaid consumer of prepaid MTS to the extent that the prepaid consumer has paid emergency telephone users charges, state utility regulatory commission fees, state universal service charges, or local charges on the purchase to any other state, political subdivision thereof, or the District of Columbia. The credit shall be apportioned to the charges against which it is allowed in proportion to the amounts of those charges.

Note: Authority cited: Sections 42020 and 42103, Revenue and Taxation Code. Reference: Sections 42010, 42012, 42018 and 42020, Revenue and Taxation Code.

**APPENDIX A**

**California Resale Certificate - Prepaid Mobile Telephony Services**

The burden of proving that a sale of prepaid MTS is not a retail transaction is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the prepaid MTS are purchased for resale. If timely taken in proper form and in good faith from a person who is engaged in the business of selling prepaid MTS and who holds a Prepaid MTS Account as required by Regulation 2460, *Administration*, this certificate relieves the seller from the duty of collecting the prepaid MTS surcharge and local charges. If the purchaser is not required to hold a Prepaid MTS Account because the purchaser makes no sales of prepaid MTS in this State, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a Prepaid MTS Account in lieu of a Prepaid MTS Account number.

**I HEREBY CERTIFY:**

1. I hold a valid California Prepaid MTS Account number: \_\_\_\_\_.
2. This certificate is for the purchase from \_\_\_\_\_ of the property described below.  
[Vendor's name]
3. I will resell the item(s) described in paragraph 4, which I am purchasing for resale in the regular course of my business operations, and I will do so prior to making any storage, use, or other consumption of the item(s) other than retention, demonstration, and display while holding the item(s) for sale in the regular course of my business. I understand that if I use the item(s) purchased under this certificate in any manner other than as just described, ***I will owe the prepaid MTS surcharge and local charges***, based on the sales price of the prepaid MTS, or as otherwise provided by law.

I further understand that if any tangible personal property is involved, the transaction might also be subject to sales or use tax in this state, and this certificate does not relieve me of any obligations imposed pursuant to California's Sales and Use Tax Law.

4. Description of property to be purchased:

\_\_\_\_\_

\_\_\_\_\_

Name of Purchaser	
Signature of Purchaser, Purchaser's Employee or Authorized Representative	
Printed Name of Person Signing	Title
Address of Purchaser	
Telephone Number	Date

**Proposed Text of  
California Code of Regulations, Title 18, Section 2462,  
Refunds of Excess Charges Collected**

(A new regulation to be added to the California Code of Regulations)

2462. Refunds of Excess Charges Collected.

(a) Excess Charges Collected. Except as otherwise provided in subdivision (c), when an amount represented by a seller to a prepaid consumer of prepaid MTS as constituting charges for the prepaid MTS surcharge or local charges is in excess of the prepaid MTS surcharge or local charges imposed, or is otherwise erroneously or illegally charged or computed under the representation that it was owed as part of the prepaid MTS surcharge or local charges when it is not owed as part of the prepaid MTS surcharge or local charges and is actually paid by the consumer to the seller, the amount so paid constitutes excess charges collected. The seller may refund the excess charges collected to the prepaid consumer who paid the amount to the seller even if the seller has not yet secured a credit or refund from the Board. Any excess charges collected and not refunded to the customer constitute a debt owed to the State, or jointly to the local jurisdiction imposing the local charges and to the State, for purposes of collection on behalf of, and payment to, the local jurisdiction.

(b) Claim for Refund. Except as otherwise provided in subdivision (c), every person required to pay the prepaid MTS surcharge or local charges, including the seller, may file a claim for refund with the Board for any amount that has been erroneously or illegally collected or computed and paid to the Board. In order to be timely, the claim for refund must be filed with the Board within the limitation periods specified in sections 55222, 55222.1, and 55222.2 of the Revenue and Taxation Code.

(c) Filing a Claim for Refund with the Local Jurisdiction or Local Agency. A prepaid consumer must file a claim for refund for the local charges with the local jurisdiction or local agency imposing the local charges, and not the Board, in the following circumstances:

(1) When a prepaid consumer chooses to rebut the presumed location of a retail transaction, as provided in subdivision (b) of section 42014 of the Revenue and Taxation Code, the prepaid consumer shall file a claim and declaration under penalty of perjury on a form established by the city or county clerk of the local jurisdiction or local agency indicating the actual location of the retail sale. The claim shall be processed in accordance with the provisions of the local enactment that allows the claim to be filed.

(2) A prepaid consumer that is exempt from the local charges under the local enactment may file a claim for a refund with the local jurisdiction or local agency in accordance with the refund provisions of the local enactment that allows the claim to be filed.

(3) In connection with any actions or claims relating to or arising from the invalidity of a local tax ordinance, in whole or in part.

(d) Relief from Liability. A seller is not liable for any additional prepaid MTS surcharges or local charges, and is not required to refund any amounts collected from the prepaid consumer

under the conditions set forth in subdivision (g)(1) and (g)(2) of Regulation 2460,  
*Administration.*

Note: Authority cited: Sections 42020 and 42103, Revenue and Taxation Code. Reference:  
Sections 42010 and 42105, Revenue and Taxation Code.

## Regulation History

**Types of Regulations:** Prepaid Mobile Telephony Services

**Regulations:** 2460, 2461, 2462

**Title:** 2460, *Administration*

2461, *Exemptions, Deductions, Credits, and Specific Applications of Tax,*

2462, *Refunds of Excess Charges Collected*

**Preparation:** Andrew Kwee

**Legal Contact:** Andrew Kwee

The State Board of Equalization proposes to adopt new regulations to implement, interpret, and make specific the Prepaid Mobile Telephony Services Surcharge Collection Act's and the Local Prepaid Mobile Telephony Services Collection Act's statutes regarding the application of the prepaid mobile telephony services (MTS) surcharge and local charges to the purchase of prepaid MTS.

### History of Proposed Regulations:

January 26-28, 2016	Public Hearing
December 4, 2015	OAL publication date; 45-day public comment period begins; Interested Parties mailing
November 23, 2015	Notice to OAL
September 16, 2015	Business Taxes Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA

Support: NA

Oppose: NA