

**TITLE 18. BOARD OF EQUALIZATION**

**Notice of Proposed Regulatory Action**

**The State Board of Equalization Proposes to Adopt Amendments to  
California Code of Regulations, Title 18,  
Section 1698, *Records*, and Section 4901, *Records***

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 7051, 8251, 9251, 30451, 32451, 40171, 41128, 43501, 45851, 46601, 50152, 55301, and 60601 proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation or Reg.) 1698, *Records*, and Regulation 4901, *Records*. The proposed amendments to both regulations define the term electronic cash register and provide that the term includes integrated point of sale (POS) systems. The proposed amendments add an example to both regulations explaining that if the taxpayer's POS system periodically overwrites stored data, the taxpayer should transfer and maintain a copy of all the data that would be overwritten or otherwise removed for the specified record retention period. The proposed amendments update the term "machine-sensible records" to "electronic records" throughout both of the regulations. The proposed amendments to both regulations clarify that storage-only imaging media includes "PDF files" and the amendments to Regulation 1698 clarify that storage-only imaging media includes "other media used in electronic imaging" to be consistent with the current provisions of Regulation 4901. The proposed amendments also replace the references to the Marine Invasive Species Fee, California Tire Fee, Natural Gas Surcharge, Covered Electronic Waste Recycling Fee, and Water Rights Fee with a reference to the Fee Collection Procedures Law (FCPL) (RTC § 55001 et seq.) in Regulation 4901, subdivision (a)(1), to cover all the taxes and fees currently enacted and administered under the FCPL.

**PUBLIC HEARING**

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on March 29-30, 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 March 29-30, 2016. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulations 1698 and 4901.

**AUTHORITY**

Regulation 1698: RTC section 7051

Regulation 4901: RTC sections 8251, 9251, 30451, 32451, 40171, 41128, 43501, 45851, 46601, 50152, 55301, and 60601

## REFERENCE

Regulation 1698: RTC sections 6455, 7053, 7054, and 7153.6

Regulation 4901: RTC sections 8301, 8302, 8303, 8304, 9253, 9254, 30453, 30454, 32551, 32453, 40172, 40173, 40174, 40175, 41056, 41073, 41129.30, 43502, 45852, 46602, 46603, 50153, 55302, 55363.5, 60604, 60605, and 60606

## INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

### Current Law

#### *Sales and Use Tax*

The Board administers California's sales and use taxes. The Board's Sales and Use Tax Department is responsible for administering the Board's sales and use tax programs, including performing audits to ensure that sales and use taxes are reported properly.

There are two statutes related to the retention and examination of records for sales and use tax purposes. RTC section 7053 provides that "[e]very seller, every retailer as defined in subdivision (b) of section 6015, and every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer shall keep such records, receipts, invoices, and other pertinent papers in such form as the [B]oard may require."

RTC section 7054 specifies that the Board, or any person authorized in writing by it, "may examine the books, papers, records, and equipment of any person selling tangible personal property and any person liable for the use tax." It further specifies that the Board "may investigate the character of the business of the person in order to verify the accuracy of any return made" or "if no return is made by the person, to ascertain and determine the amount required to be paid."

The Board adopted Regulation 1698 to implement, interpret, and make specific RTC sections 7053 and 7054 by specifying the types of records that must be maintained and made available for examination on request by the Board for sales and use tax purposes. The regulation currently allows records to be maintained and made available in hardcopy or electronic format. The regulation also generally requires all records to be preserved for a period of not less than four years, except for records for reporting periods beginning before January 1, 2003, that are subject to the extended ten year statute of limitations contained in RTC section 7073(d), which the regulation requires to be preserved for a period of not less than ten years. The Board made amendments that substantially updated

Regulation 1698 in 1997, and added the provisions regarding records for reporting periods beginning before January 1, 2003, in 2005. However, Regulation 1698 has not been substantially updated since 1997.

As relevant here, Regulation 1698 currently defines the terms “database management system,” “electronic data interchange” or “EDI Technology,” “hardcopy,” and “machine-sensible record.” It explains that machine-sensible records do not include hardcopy records “stored in or by a storage-only imaging system such as microfilm or microfiche.” It also provides the requirements for hardcopy records to be converted to “storage-only imaging media, such as microfilm and microfiche.”

### *Special Taxes and Fees*

The Board also administers a number of special taxes and fees, in addition to the sales and use taxes. As relevant here, those special taxes and fees are administered under the Motor Vehicle Fuel Tax Law (RTC § 7301 et seq.), the Use Fuel Tax Law (RTC § 8601 et seq.), the Cigarette and Tobacco Products Tax Law (RTC § 30001 et seq.), the Alcoholic Beverage Tax Law (RTC § 32001 et seq.), the Energy Resources Surcharge Law (RTC § 40001 et seq.), the Emergency Telephone Users Surcharge Law (RTC § 41001 et seq.), the Hazardous Substances Tax Law (RTC § 43001 et seq.), the Integrated Waste Management Fee Law (RTC § 45001 et seq.), the Oil Spill Response, Prevention, and Administration Fees Law (RTC § 46001 et seq.), the Underground Storage Tank Maintenance Fee Law (RTC § 50101 et seq.), the FCPL, and the Diesel Fuel Tax Law (RTC § 60001 et seq.) (hereafter, collectively referred to as special tax and fee laws).

As relevant here, the Covered Electronic Waste Recycling Fee imposed by Public Resources Code (PRC) section 42464 is administered under the FCPL pursuant to PRC section 42464.2. The California Tire Fee imposed by PRC section 42885 is administered under the FPCL pursuant to PRC section 42882. The Lumber Products Assessment imposed by PRC section 4629.5 is administered under the FCPL pursuant to PRC section 4629.5. The Marine Invasive Species Fee imposed by PRC section 42885 is administered under the FCPL pursuant to RTC sections 44002 and 44003. The Natural Gas Surcharge imposed by Public Utilities Code (PUC) section 890 is administered under the FCPL pursuant to PUC section 893. The Prepaid Mobile Telephony Services Surcharge imposed by RTC section 42010 and Local Charges as defined in RTC section 42101 that are required to be collected by sellers other than direct sellers are administered under the FCPL pursuant to RTC sections 42020 and 42103. And, the Water Rights Fee imposed by Water Code sections 1525 and 13160.1 is administered under the FCPL pursuant to Water Code section 1552.

The Board’s Special Taxes and Fee Department is responsible for administering the Board’s special taxes and fees programs under the special tax and fee laws.

The Board adopted Regulation 4901 in 2003 to implement, interpret, and make specific the statutes related to the retention and examination of records under the special tax and fee laws, which are similar to RTC sections 7053 and 7054 (discussed above). (RTC §§

8301, 8302, 8303, 8304, 9253, 9254, 30453, 30454, 32551, 32453, 40172, 40173, 40174, 40175, 41056, 41073, 41129.30, 43502, 45852, 46602, 46603, 50153, 55302, 60604, 60605, and 60606.) As relevant here, Regulation 4901 contains a list of “Applicable Tax Laws” and prescribes the types of records that must be maintained and made available for examination on request by the Board to determine taxpayers’ and feepayers’ correct liabilities under the applicable tax laws. Regulation 4901 generally mirrors the provisions of Regulation 1698, except that it provides the requirements for hardcopy records to be converted to “storage-only imaging media, such as *microfilm, microfiche or other media used in electronic imaging.*” (Italics added.)

Regulation 4901 was amended in 2010 to clarify that it applies to the Water Rights Fee (enacted in 2003) and Cover Electronic Waste Recycling Fee (enacted in 2004). However, Regulation 4901 has not been substantially updated since it was adopted in 2003 and does not currently refer to the Lumber Products Assessment and the Prepaid Mobile Telephony Services Surcharge, which were enacted, or Local Charges, which the Board was first required to administer under the FCPL, after the regulation was last amended.

### *Electronic Cash Registers*

Cash registers have existed for many years. They offer business owners an organized place to ring up sales and store money from their sales transactions. Electronic cash registers have also been in use for some time and now include a wide range of devices, such as integrated POS systems.

POS systems are sophisticated computer systems that use commercially available operating systems to record each sale when it happens. In recent years, POS systems have become more popular than traditional cash registers with business owners because of their user-friendly interface, data tracking capabilities, and increased affordability. These systems are also popular because they can be integrated with third-party accounting software, online ordering, and credit and debit card processors.

The Legislature added RTC section 7153.6 to the Sales and Use Tax Law (RTC § 6001 et seq.) and RTC section 55363.5 to the FCPL, effective January 1, 2014. (Stats. 2013, ch. 532.) As relevant here, both statutes define the term “electronic cash register” to mean “a device that keeps a register or supporting documents through the means of an electronic device or computer system designed to record transaction data for the purpose of computing, compiling, or processing retail sales transaction data in whatever manner” and both statutes indicate that electronic cash registers include POS systems.

### Effect, Objectives, and Benefits of the Proposed Amendments

#### *Need to Update Regulation 1698*

As new technologies and business practices emerge, the Board must adapt to the new technologies and keep taxpayers informed with relevant guidance using the current

terminology in the industry. Board staff determined that there was an issue (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) because Regulation 1698 currently defines the outdated term “machines-sensible record” and generally uses the term to refer to information in an “electronic format,” which is now simply referred to as “electronic records.” Staff determined that there was an issue (or problem) with Regulation 1698 because it does not define the commonly used term electronic cash register or refer to POS systems. Staff also determined that there was an issue with Regulation 1698 because it did not provide guidance to business owners with POS systems that overwrite data after a period of time about how to maintain their data before it is overwritten.

### *Interested Parties Process*

As a result, the Board’s Business Taxes Committee (BTC) staff prepared draft amendments to update Regulation 1698 and address the issues described above, and a discussion paper explaining the draft amendments. Both were provided to interested parties.

Staff’s draft amendments to Regulations 1698:

- Defined the term “electronic cash register” and explained that the term includes integrated POS systems.
- Replaced the term “machine-sensible record” with “electronic record” and explained that electronic records included records recorded and maintained by electronic cash registers.
- Changed the format of the example provided in subdivision (c)(2)(A).
- Added an example to subdivision (i) to further explain how business owners should maintain their data if they have POS systems that overwrite data after a period of time.

On June 17, 2015, BTC staff conducted an interested parties meeting to discuss the draft amendments. Following the meeting, staff received a submission, dated July 1, 2015, from Mr. Robert Jones of Collins, Mason & Company LLP. Mr. Jones proposed that each occurrence of “microfilm or microfiche” in the regulation be replaced with “microfilm, microfiche, or pdf.”

PDF or “portable document format” is a type of storage-only imaging format that is independent of software, hardware, or operating systems. Invented and developed by Adobe, PDF has become the most popular imaging format since 1994 when Adobe announced that it would provide its Adobe Reader software free online as an open file format. With increased availability and ease of use, PDF files have become the standard for document exchange, almost replacing microfilm or microfiche. Staff agreed with Mr. Jones that PDF is an acceptable record storage format, and as such agreed to add PDF to the regulation where it refers to microfilm and microfiche.

When preparing the second discussion paper and revising the draft amendments to Regulation 1698, BTC staff determined that Regulation 4901 generally mirrors Regulation 1698 (as discussed above). BTC staff also noticed that Regulation 4901 contains language in subdivision (h)(1) and (h)(2) that refers to “microfilm, microfiche or other media used in electronic imaging” (as discussed above). As such, staff revised its draft amendments to Regulation 1698, subdivisions (a)(4), (h)(1), and (h)(2) to replace each occurrence of “microfilm or microfiche” with “microfilm, microfiche, PDF files, or other media used in electronic imaging.”

In addition, BTC staff prepared drafted amendments to update Regulation 4901 that mirrored the amendments to Regulation 1698, discussed above, including adding “PDF files” to subdivisions (a)(5), (h)(1), and (h)(2) of Regulation 4901 to ensure consistency between Regulations 1698 and 4901. Also, to further update Regulation 4901, staff drafted amendments to remove the references to the Marine Invasive Species Fee, California Tire Fee, Natural Gas Surcharge, Covered Electronic Waste Recycling Fee, and Water Rights Fee from subdivision (a)(1)’s list of applicable tax laws and insert a reference to the FCPL to cover all the taxes and fees currently enacted and administered under the FCPL, as well as eliminate the need for further revisions to Regulation 4901 when new taxes and fees are enacted that are administered under the FCPL.

On August 11, 2015, BTC staff conducted a second interested parties meeting to discuss the draft amendments to Regulations 1698 and 4901. At the meeting, there was overall support for the proposed amendments. Also at the meeting, Mr. Marc Brandeis of Brandeis & Associates, LLC, requested that Excel worksheets and Access databases be included as acceptable forms of records in the regulations. Although staff did not receive a written submission for this request, staff did consider the suggestion. Staff determined that worksheets and database files are not necessarily source data and that they are often summaries or analyses of source data. Staff determined that worksheets and databases are already required to be maintained and made available to the Board under the provisions in subdivision (b)(1)(C) of both regulations, which refer to “schedules or working papers used in connection with the preparation of tax returns.” Additionally, staff determined that it would be unnecessarily restrictive to revise the regulation to refer to specific proprietary software products, such as Excel and Access. For these reasons, BTC staff did not agree to incorporate Mr. Brandeis’s suggestion into staff’s draft amendments.

*October 27, 2015, BTC Meeting*

Subsequently, staff prepared Formal Issue Paper 15-011 and distributed it to the Board Members for consideration at the Board’s October 27, 2015, BTC meeting. Formal Issue Paper 15-011 recommended that the Board propose to add a definition for “electronic cash register” to subdivision (a)(2) of Regulation 1698 and subdivision (a)(3) of Regulation 4901 to address the second issue (or problem) referred to above. The definitions in the regulations are in alphabetical order, therefore the issue paper recommended that the definition for “electronic cash register” be inserted alphabetically, and the remaining definitions be renumbered.

Subdivision (i) of both regulations explains that records must be kept for a period of not less than four years. The formal issue paper recommended that the Board propose to add an example to this subdivision to address the third issue (or problem) referred to above by explaining that if the taxpayer's POS system periodically overwrites stored data, the taxpayer should transfer and maintain a copy of all the data that would be overwritten or otherwise removed for the specified period.

The formal issue paper recommended that the Board propose to update the term "machine-sensible records" to "electronic records" throughout the regulations to address the first issue (or problem) referred to above. "Machine-sensible records" is an outdated term, and "electronic records" is a current and readily understood term. Board staff also recommended that the Board propose to change the formatting of the regulations in subdivision (c)(2)(A) where they provide examples of what retained records should contain when a taxpayer uses electronic data interchange processes and technology. The recommended amendments reformatted the examples as numbered lists for easier reading and consistent formatting with other subdivisions in the regulations.

Additionally, the formal issue paper recommended that the Board revise Regulation 4901 to remove the references to the Marine Invasive Species Fee, California Tire Fee, Natural Gas Surcharge, Covered Electronic Waste Recycling Fee, and Water Rights Fee from the list of applicable tax laws under subdivision (a)(1) and insert a reference to the FCPL to cover all the taxes and fees currently enacted and administered under the FCPL, as well as eliminate the need for further revisions to Regulation 4901 when new taxes and fees are enacted that are administered under the FCPL. The recommended amendments to subdivision (a)(1) were also arranged in alphabetical order.

Furthermore, the formal issue paper recommended that the Board propose to amend Regulation 1698, subdivisions (a)(4), (h)(1), and (h)(2) to replace each occurrence of "microfilm or microfiche" with "microfilm, microfiche, PDF files, or other media used in electronic imaging" and propose to amend Regulation 4901 to add "PDF files" to subdivisions (a)(5), (h)(1), and (h)(2), to address Mr. Jones's submission, which was included as Exhibit 4 to the formal issue paper.

At the conclusion of the Board's discussion of Formal Issue Paper 15-011 during the October 27, 2015, BTC meeting, the Board Members unanimously voted to propose the amendments to Regulations 1698 and 4901 recommended in the formal issue paper. The Board determined that the proposed amendments are reasonably necessary to have the effect and accomplish the objectives of clarifying and updating the regulations to address the issues (or problems) referred to above and respond to Mr. Jones's submission.

The Board anticipates that the proposed amendments to Regulations 1698 and 4901 will benefit business owners that use electronic cash registers, including POS systems, and maintain records in electronic format by providing updated guidance about the electronic records they must maintain and make available to the Board. The Board also anticipates that the amendments to Regulation 4901, subdivision (a)(1), will benefit the Board by

eliminating the need for further revisions to Regulation 4901 when new taxes and fees are enacted that are administered under the FCPL.

The Board has performed an evaluation of whether the proposed amendments to Regulations 1698 and 4901 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulations 1698 and 4901 are the only regulations that specify the types of records that must be maintained and made available for examination on request by the Board under the Sales and Use Tax Law and special tax and fee laws, and the Board is making consistent amendments to both regulations. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulations 1698 and 4901 or the proposed amendments to Regulations 1698 and 4901.

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

The Board has determined that the adoption of the proposed amendments to Regulations 1698 and 4901 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

#### NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulations 1698 and 4901 will result in no direct or indirect cost or savings to any state agency and will result in no cost or savings in federal funding to the State of California. The Board has also determined that the adoption of the proposed amendments to Regulations 1698 and 4901 result in no direct or indirect cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, and will result in no other non-discretionary cost or savings imposed on local agencies.

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

The Board has made an initial determination that the adoption of the proposed amendments to Regulations 1698 and 4901 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulations 1698 and 4901 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 adoption of the proposed amendments to Regulations 1698 and 4901 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulations 1698 and 4901 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulations 1698 and 4901 will not affect the benefits of Regulations 1698 and 4901 to the health and welfare of California residents, worker safety, or the state's environment.

#### NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulations 1698 and 4901 will not have a significant effect on housing costs.

#### DETERMINATION REGARDING ALTERNATIVES

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

#### CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Pamela Mash, Tax Counsel, by telephone at (916) 323-3248, by e-mail at [Pamela.Mash@boe.ca.gov](mailto:Pamela.Mash@boe.ca.gov), or by mail at State Board of Equalization, Attn: Pamela Mash, 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 Ms. Mash.

#### WRITTEN COMMENT PERIOD

The written comment period ends at 10:00 a.m. on March 29, 2016, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1698 and 4901 during the March 29-30, 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, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulations 1698 and 4901. 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 underscored and strikeout versions of the text of Regulations 1698 and 4901 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulations 1698 and 4901, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

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

The Board may adopt the proposed amendments to Regulations 1698 and 4901 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

#### AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulations 1698 and 4901, 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).