

Rulemaking File Index
Title 18. Public Revenue
Sales and Use Tax
Regulation 1616 *Federal Areas*

OAL Approval

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**State of California
Office of Administrative Law**

In re:
Board of Equalization

**NOTICE OF APPROVAL OF REGULATORY
ACTION**

Regulatory Action:

Government Code Section 11349.3

Title 18, California Code of Regulations

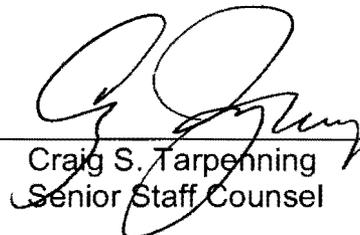
OAL File No. 2011-1202-01 S

Adopt sections:
Amend sections: 1616
Repeal sections:

The Board of Equalization proposed to adopt a new subdivision (d)(4)(G) in section 1616 of title 18 of the California Code of Regulations further prescribing the circumstances under which a sale of tangible personal property to, and the storage, use, or other consumption of tangible personal property by, the tribal government of an Indian tribe that is officially recognized by the United States is exempt from sales and use tax.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 2/10/2012.

Date: 1/11/2012



Craig S. Tarpinning
Senior Staff Counsel

For: DEBRA M. CORNEZ
Assistant Chief Counsel/
Acting Director

Original: Kristine Cazadd
Copy: Richard Bennion

RECEIVED
JAN 17 2012
Board Proceedings

OFFICE OF ADMINISTRATIVE LAW

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



DEBRA M. CORNEZ
Assistant Chief Counsel/Acting Director

MEMORANDUM

TO: Richard Bennion
FROM: OAL Front Desk
DATE: 1/13/2012
RE: Return of Approved Rulemaking Materials
OAL File No. 2011-1202-01S

OAL hereby returns this file your agency submitted for our review (OAL File No. 2011-1202-01S regarding Federal Areas).

If this is an approved file, it contains a copy of the regulation(s) stamped "ENDORSED APPROVED" by the Office of Administrative Law and "ENDORSED FILED" by the Secretary of State. The effective date of an approved file is specified on the Form 400 (see item B.5). (Please Note: The 30th Day after filing with the Secretary of State is calculated from the date the Form 400 was stamped "ENDORSED FILED" by the Secretary of State.)

DO NOT DISCARD OR DESTROY THIS FILE

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

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

Enclosures

STD. 400 (REV. 01-09)

NOTICE FILE NUMBER

Z-

REGULATORY ACTION NUMBER

2011-1202-01S

EMERGENCY NUMBER

For use by Office of Administrative Law (OAL) only

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

JAN 11 2012 1:15 PM

DEBRA BOWEN
Secretary of State

2011 DEC -2 AM 9:54
OFFICE OF
ADMINISTRATIVE LAW

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
State Board of Equalization

AGENCY FILE NUMBER (if any)

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

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

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Federal Areas	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
---	--

SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT
	AMEND 1616
	REPEAL
TITLE(S) 18	

3. TYPE OF FILING

<input checked="" type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §511346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input type="checkbox"/> Other (Specify) _____	

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

<input checked="" type="checkbox"/> Effective 30th day after filing with Secretary of State	<input type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____
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6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON

Richard E. Bennion

TELEPHONE NUMBER

(916) 445-2130

FAX NUMBER (Optional)

(916) 324-3984

E-MAIL ADDRESS (Optional)

rbennion@boe.ca.gov

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

SIGNATURE OF AGENCY HEAD OR DESIGNEE

Diane G. Olson

DATE

December 1, 2011

TYPED NAME AND TITLE OF SIGNATORY

Diane G. Olson, Chief, Board Proceedings Division

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

Office of Administrative Law

**Final Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1616**

Section 1616. Federal Areas.

(a) **In General.** Tax applies to the sale or use of tangible personal property upon federal areas to the same extent that it applies with respect to sale or use elsewhere within this state.

(b) **Alcoholic Beverages.** Manufacturers, wholesalers and rectifiers who deliver or cause to be delivered alcoholic beverages to persons on federal reservations shall pay the state retailer sales tax on the selling price of such alcoholic beverages so delivered, except when such deliveries are made to persons or organizations which are instrumentalities of the Federal Government or persons or organizations which purchase for resale.

Sales to officers' and non-commissioned officers' clubs and messes may be made without sales tax when the purchasing organizations have been authorized, under appropriate regulations and control instructions, duly prescribed and issued, to sell alcoholic beverages to authorized purchasers.*

(c) **Sales Through Vending Machines.** Sales through vending machines located on Army, Navy, or Air Force installations are taxable unless the sales are made by operators who lease the machines to exchanges of the Army, Air Force, Navy, or Marine Corps, or other instrumentalities of the United States, including Post Restaurants and Navy Civilian Cafeteria Associations, which acquire title to and sell the merchandise through the machines to authorized purchasers.

For the exemption to apply, the contracts between the operators and the United States instrumentalities and the conduct of the parties must make it clear that the instrumentalities acquire title to the merchandise and sell it through machines leased from the operators to authorized purchasers.

(d) **Indian Reservations.**

(1) **In General.** Except as provided in this regulation, tax applies to the sale or use of tangible personal property upon Indian reservations to the same extent that it applies with respect to sale or use elsewhere within this state.

(2) **Definitions.** For purposes of this regulation "Indian" means any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior.

Indian organizations are entitled to the same exemption as a Indians. "Indian organization" includes Indian tribes and tribal organizations and also includes partnerships all of whose members are Indians. The term includes corporations organized under tribal authority and wholly owned by Indians. The term excludes other corporations, including other corporations wholly owned by Indians.

“Reservation” includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian.

(3) Sales by On-Reservation Retailers.

(A) Sales by Indians.

1. Sales by Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by Indians to non-Indians and Indians who do not reside on a reservation. Sales tax does not apply to sales of tangible personal property by Indian retailers made to non-Indians and Indians who do not reside on a reservation when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on the reservation. Except as exempted below, Indian retailers are required to collect use tax from such purchasers and must register with the Board for that purpose.

Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation.

(B) Sales by non-Indians.

1. Sales by non-Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by retailers when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on a reservation. The sale is exempt whether the retailer is a federally licensed Indian trader or is not so licensed. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by non-Indians to non-Indians and Indians who do not reside on a reservation. Either sales tax or use tax applies to sales of tangible personal property by non-Indian retailers to non-Indians and Indians who do not reside on a reservation.

(C) Resale Certificates. Persons making sales for resale of tangible personal property to retailers conducting business on an Indian reservation should obtain

resale certificates from their purchasers. If the purchaser does not have a permit and all the purchaser's sales are exempt under paragraph (d)(3)(A) of this regulation, the purchaser should make an appropriate notation to that effect on the certificate in lieu of a seller's permit number (see Regulation 1668, "Resale Certificates").

(4) Sales by Off-Reservation Retailers.

(A) Sales Tax -In General. Sales tax does not apply to sales of tangible personal property made to Indians negotiated at places of business located outside Indian reservations if the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation. Generally ownership to property transfers upon delivery if delivery is made by facilities of the retailer and ownership transfers upon shipment if delivery is made by mail or carrier. Except as otherwise expressly provided herein, the sales tax applies if the property is delivered off the reservation or if the ownership to the property transfers to the purchaser off the reservation.

(B) Sales Tax -Permanent Improvements -In General. Sales tax does not apply to a sale to an Indian of tangible personal property (including a trailer coach) to be permanently attached by the purchaser upon the reservation to realty as an improvement if the property is delivered to the Indian on the reservation. A trailer coach will be regarded as having been permanently attached if it is not registered with the Department of Motor Vehicles. Sellers of property to be permanently attached to realty as an improvement should secure exemption certificates from their purchasers (see Regulation 1667, "Exemption Certificates").

(C) Sales Tax -Permanent Improvements -Construction Contractors.

1. Indian contractors. Sales tax does not apply to sales of materials to Indian contractors if the property is delivered to the contractor on a reservation. Sales tax does not apply to sales of fixtures furnished and installed by Indian contractors on Indian reservations. The term "materials" and "fixtures" as used in this paragraph and the following paragraph are as defined in Regulation 1521 "Construction Contractors."

2. Non-Indian contractors. Sales tax applies to sales of materials to non-Indian contractors notwithstanding the delivery of the materials on the reservation and the permanent attachment of the materials to realty. Sales tax does not apply to sales of fixtures furnished and installed by non-Indian contractors on Indian reservations.

(D) Use Tax -In General. Except as provided in paragraphs (d)(4)(E) and (d)(4)(F) of this regulation, use tax applies to the use in this state by an Indian purchaser of tangible personal property purchased from an off-reservation retailer for use in this state.

(E) Use Tax -Exemption. Use tax does not apply to the use of tangible personal property (including vehicles, vessels, and aircraft) purchased by an Indian from an off-reservation retailer and delivered to the purchaser on a reservation unless, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

(F) Leases. Neither sales nor use tax applies to leases otherwise taxable as continuing sales or continuing purchases as respects any period of time the leased property is situated on an Indian reservation when the lease is to an Indian who resides upon the reservation. In the absence of evidence to the contrary, it shall be assumed that the use of the property by the lessee occurs on the reservation if the lessor delivers the property to the lessee on the reservation. Tax applies to the use of leased vehicles registered with the Department of Motor Vehicles to the extent that the vehicles are used off the reservation.

(G) Property Used in Tribal Self-Governance. Sales and use tax does not apply to sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States if:

1. The tribal government's Indian tribe does not have a reservation or the principal place where the tribal government meets to conduct tribal business cannot be its Indian tribe's reservation because the reservation does not have a building in which the tribal government can meet or the reservation lacks one or more essential utility services, such as water, electricity, gas, sewage, or telephone, or mail service from the United States Postal Service;

2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and

3. The property is delivered to the tribal government and ownership of the property transfers to the tribal government at the principal place where the tribal government meets to conduct tribal business.

The purchase of tangible personal property is not exempt from use tax under this paragraph if the property is used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

* The following is a summary of the pertinent regulations which have been issued:

(a) General. Air force regulation 34-57, issued under date of February 9, 1968, army regulation 210-65, issued under date of May 4, 1966, and navy general order No. 15,

issued under date of May 5, 1965, authorize the sale and possession of alcoholic beverages at bases and installations subject to certain enumerated restrictions.

(b) Air Force. Air force regulation 34-57, paragraph 5, permits commissioned officers' and non-commissioned officers' open messes, subject to regulations established by commanders of major air commands to sell alcoholic beverages to authorized purchasers at bars and cocktail lounges, and provides that commanders will issue detailed control instructions. Paragraphs 8 and 9 require commanders of major air commands to issue regulations relative to package liquor sales and to procurement of alcoholic beverages, respectively.

(c) Army. Army regulation 210-65, paragraph 9, provides that major commanders are authorized to permit at installations or activities within their respective commands the dispensing of alcoholic beverages by the drink or bottle. Paragraph 11 of AR 210-65 provides that when authorized by major commanders as prescribed in paragraph 9, AR 210-65, officers' and non-commissioned officers' open messes may, subject to regulations prescribed by the commanding officer of the installation or activity concerned, dispense alcoholic beverages by the drink, and operate a package store.

(d) Navy. Navy general order No. 15 provides that commanding officers may permit, subject to detailed alcoholic beverage control instructions, the sale of packaged alcoholic beverages by officers' and noncommissioned officers' clubs and messes and the sale and consumption of alcoholic beverages by the drink in such clubs and messes.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6017, 6021, Revenue and Taxation Code, Public Law No. 817-76th Congress (Buck Act). Vending machines, sales generally, see Regulation 1574. Items dispensed for 10 ¢ or less, see Regulation 1574. Additional reference: Section 6352, Revenue and Taxation Code.

Galichet L, Straif K, on behalf of the WHO International Agency for Research on Cancer Monograph Working Group (2011). Carcinogenicity of chemicals in industrial and consumer products, food contaminants and flavourings, and water chlorination byproducts. *Lancet Oncology* 12(4):328-9.

[URL: <http://www.thelancet.com/journals/lanonc/article/PIIS1470-2045%2811%2970088-2/fulltext>].

IARC (2011). International Agency for Research on Cancer. Agents Classified by the *IARC Monographs*, Volumes 1-102. Available at

URL: <http://monographs.iarc.fr/ENG/Classification/ClassificationsAlphaOrder.pdf> [Accessed July 21, 2011].

SUMMARY OF REGULATORY ACTIONS

REGULATIONS FILED WITH SECRETARY OF STATE

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

File# 2011-1129-03
BOARD OF ACCOUNTANCY
Supervision and Disciplinary Guidelines

This rulemaking action repeals two sections from Title 16 in the California Code of Regulations (CCR) that became inoperative by their own terms. Additionally this rulemaking amends several sections in Title 16 of the CCR as well as two forms and an incorporated document. This rulemaking defines supervised experience and incorporates by reference two new forms used by applicants' supervisors to submit experience verification for licensure. This rulemaking also amends the Board of Accountancy's Disciplinary Guidelines which are incorporated by reference into the CCR.

Title 16
California Code of Regulations
AMEND: 12, 12.5, 98 REPEAL: 9, 11.5
Filed 01/10/2012
Effective 02/09/2012
Agency Contact: Matthew Stanley (916) 561-1792

File# 2011-1212-02
BOARD OF EDUCATION
Instructional Quality Commission

This non-substantive action amends numerous sections in Title 5 of the California Code of Regulations. These amendments are in response to AB 250 (CH 608, Statutes of 2011) that renamed the Curriculum Development and Supplemental Materials to the Instructional Quality Commission. The changes to the regulations are being made to make the name consistent with the statutes.

Title 5
California Code of Regulations
AMEND: 9510, 9510.5, 9511, 9512, 9513, 9514, 9515, 9516, 9517, 9517.1, 9519, 9520, 9521, 9524, 9525, 18533, 18600
Filed 01/10/2012
Agency Contact: Cynthia Olsen (916) 319-0584

File# 2011-1202-01
BOARD OF EQUALIZATION
Federal Areas

The Board of Equalization adopted a new subdivision (d)(4)(G) in section 1616 of title 18 of the California Code of Regulations further prescribing the circumstances under which a sale of tangible personal property to, and the storage, use, or other consumption of tangible personal property by, the tribal government of an Indian tribe that is officially recognized by the United States is exempt from sales and use tax.

Title 18
California Code of Regulations
AMEND: 1616
Filed 01/11/2012
Effective 02/10/2012
Agency Contact:
Richard E. Bennion (916) 445-2130

File# 2011-1130-01
BOARD OF EQUALIZATION
Regulations effected by temporary tax increase in Assembly Bill 3 (2009-2010 3rd Ex. Sess)

Board of Equalization (BOE) submitted this Section 100 action to amend Title 18 regulatory provisions that pertain to partial exemptions from sales and use tax provided by Revenue and Taxation Code (RTC) sections 6378, 6356.5, 6357.1, 6356.6, and 6358.5. Amendments to Title 18, California Code of Regulations, section 1532, Appendix A and Appendix B to section 1532, and sections 1533.1, 1534, and 1535 are nonsubstantive. Assembly Bill 3 (2009-2010 3rd Ex. Sess) added sections to the Revenue and Taxation Code to increase the statewide sales and use tax rate by one percent beginning on April 1, 2009 and ceasing either on July 1,

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 - Exhibit 4 Santa Ynes Band of Chumash Indians
 - Exhibit 5 Pechanga Indian Reservation
 - Exhibit 6 CTBA
 - Exhibit 7 Rincon Band of Luiseno Indians
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 - CA Regulatory Notice Register 2011, Volume No. 36-Z
8. [Notice to Interested Parties, September 9, 2011](#)

The following items are exhibited:

 - Notice of Hearing
 - Initial Statement of Reasons
 - Proposed Text of Regulation 1616
 - Regulation History
9. [Statement of Compliance](#)

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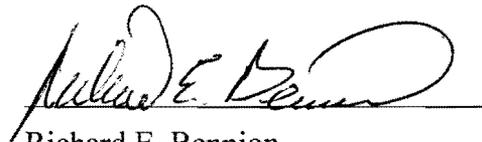
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VERIFICATION

I, Richard E. Bennion, Regulations Coordinator of the State Board of Equalization, state that the rulemaking file of which the contents as listed in the index is complete, and that the record was closed on December 1, 2011 and that the attached copy is complete.

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

December 1, 2011

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

Richard E. Bennion
Regulations Coordinator
State Board of Equalization

**Final Statement of Reasons for
Adoption of Proposed Amendments to California Code of Regulations,
Title 18, Section 1616, Federal Areas**

Update of Information in the Initial Statement of Reasons

The factual basis, specific purpose, and necessity for the proposed amendments adding new subdivision (d)(4)(G) to California Code of Regulations, title 18, section (Regulation) 1616, *Federal Areas*, are the same as provided in the Initial Statement of Reasons.

The State Board of Equalization (Board) did not rely on any data or any technical, theoretical, or empirical study, report, or similar document in proposing or adopting the amendments to Regulation 1616 that was not identified in the Initial Statement of Reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period.

The Board did not reject any reasonable alternatives to the proposed amendments to Regulation 1616 or any alternatives that would lessen the adverse economic impact on small businesses. No alternative amendments were presented to the Board for consideration.

The adoption of the proposed amendments to Regulation 1616 will recognize the holdings of United States Supreme Court opinions regarding the preemption of state taxation when it unlawfully infringes on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them and further clarify the types of transactions that are already exempt from sales and use tax under Revenue and Taxation Code (RTC) section 6352. Therefore, the Board has made an initial determination that the adoption of the proposed amendments to Regulation 1616 will not have a significant adverse economic impact on business, including small business.

The proposed regulation may affect small business.

The adoption of the proposed amendments to Regulation 1616 was not mandated by federal statutes or regulations and there is no federal regulation that is identical to Regulation 1616.

No Mandate on Local Agencies or School Districts

The Board has determined that the proposed amendments to Regulation 1616 do not impose a mandate on local agencies or school districts.

No Public Comments Received

The Board did not receive any written comments from interested parties regarding the proposed amendments to Regulation 1616. On November 15, 2011, the Board held a public hearing on the proposed amendments to Regulation 1616 and unanimously voted to adopt the proposed amendments without any changes. No interested parties asked to speak at the public hearing.

Alternatives Considered

On July 26, 2011, the Board considered whether to propose the amendments adding subdivision (d)(4)(G) to Regulations 1616 or, alternatively, whether to take no action at that time. The Board decided to propose the amendments adding subdivision (d)(4)(G) because:

- The Board determined that the nature of the state, federal, and tribal interests at stake dictate that federal law preempts the imposition of California's sales and use tax on the sale of tangible personal property to and the use of tangible personal property by the tribal governments of federally-recognized California Indian tribes, when such property is purchased for use in tribal self-governance, and the tribal governments have no reservation on which to conduct their governmental activities or the tribal governments have undeveloped reservations where it is impractical to conduct their governmental activities; and
- The Board determined that it is necessary to amend Regulation 1616 to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above.

By its motion, the Board determined that no alternative to the proposed amendments to Regulation 1616 would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation or would lessen the adverse economic impact on small businesses.

**Updated Informative Digest for
Adoption of Proposed Amendments to California Code of Regulations,
Title 18, Section 1616, Federal Areas**

On November 15, 2011, the State Board of Equalization (Board) held a public hearing on and unanimously voted to adopt the original text of the proposed amendments adding subdivision (d)(4)(G) to California Code of Regulations, title 18, section (Regulation) 1616, *Federal Areas*, described in the Notice of Proposed Regulatory Action. The Board did not receive any written comments from interested parties regarding the proposed amendments to Regulation 1616, no interested parties appeared at the public hearing on November 15, 2011, and there have not been any changes to the applicable laws or the effect of the adoption of the proposed amendments to Regulation 1616 described in the Informative Digest included in the Notice of Proposed Regulatory Action.

The Informative Digest included in the Notice of Proposed Regulatory Action provides:

“Current Regulation 1616

“RTC section 6352 exempts the sale and the storage, use, or other consumption of tangible personal property from sales and use tax when California is prohibited from taxing the sale or use of tangible personal property under federal law, including the United States Constitution.

“In 1831, Chief Justice Marshall recognized that Indian tribes, which are officially recognized by the government of the United States, are independent nations that retain inherent rights to self-government. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 16.) Justice Marshall also recognized that article 1, section 8, clause 3 of the United States Constitution reserves to the United States Government the exclusive authority to regulate commerce with the Indian tribes. (*Id.* at p. 18.)

“Subsequent United States Supreme Court opinions further explained that federally-recognized Indian tribes “retain ‘attributes of sovereignty over both their members and their territory’” (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142 [quoting from *United States v. Mazurie* (1975) 419 U.S. 544, 557]), “as a separate people, with the power of regulating their internal and social relations, and thus far [are] not brought under the laws” of the United States or the states in which the tribes reside. (*Bracker*, 448 U.S. at p. 142 [quoting from *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164, 173, which was quoting from *United States v. Kagama* (1886) 118 U.S. 375].)

“In 1978, subdivision (d) was added to Regulation 1616 to prescribe the circumstances underwhich the sale and use of tangible personal property on an Indian reservation¹ are

¹ In this context, the term “reservation” refers to all land that is considered “Indian country” as defined by 18 U.S.C. § 1151, which provides that “the term ‘Indian country’ . . . means (a) all land within the limits of

exempt from sales and use tax under RTC section 6352 because the tax is preempted by federal law. Subdivision (d) is based upon United States Supreme Court cases regarding the federal preemption of the states' authority to tax federally-recognized Indian tribes and their members, which have held that the application of state sales and use tax is preempted with regard to the sale and use of property on Indian reservations if the legal incidence of the tax falls on a tribe or tribal members. Regulation 1616, subdivision (d), is still consistent with United States Supreme Court opinions preempting California sales and use tax when the tax unlawfully infringes upon federally-recognized Indian tribes' sovereignty over their reservations. (See, e.g., *Wagon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 101-102.)

"Pursuant to the current provisions of Regulation 1616, subdivision (d)(4)(A) and (E), sales tax will not apply to the sale of tangible personal property to an Indian if the property is delivered to the Indian and ownership of the property transfers to the Indian on a reservation, and use tax will not apply to tangible personal property delivered to an Indian on a reservation unless the property is used off a reservation more than it is used on a reservation during the first 12 months following delivery. The federal preemption recognized by the current provisions of Regulation 1616, subdivision (d), allows the government of a federally-recognized Indian tribe to purchase tangible personal property for use in tribal self-governance without being subject to California sales and use tax if the property is delivered to the tribal government on its tribe's reservation and the property is used on the reservation more than it is used off reservation during the first 12 months following delivery. The current provisions of Regulation 1616, subdivision (d), do not address situations where California sales and use tax is preempted by federal law because the tax unlawfully infringes on federally-recognized Indian tribes' sovereignty over their members.

"Proposed Amendments to Regulation 1616

"United States Supreme Court opinions published after the initial adoption of Regulation 1616, subdivision (d), have established additional "principles with respect to the boundaries between state regulatory authority and tribal self-government" in the context of state taxation. (*Bracker, supra*, 448 U.S. at p. 141.) The United States Supreme Court has held that:

- Federal law preempts a state's authority to tax an activity undertaken on a "reservation or by tribal members" (*Id.* at p. 143) in circumstances where the tax unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them" (*Id.* at p. 142 [quoting from *Williams v. Lee* (1959) 358 U.S. 217, 220]);

any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

- State taxation of Indians is not generally preempted outside Indian reservations, however, state taxation of Indians outside of Indian reservations may nonetheless be preempted under appropriate circumstances (see, e.g., *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, in which Justice O'Connor contemplated whether state taxation may be preempted outside of a tribe's territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court; see also *Wagnon, supra*, 546 U.S. at p. 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149] indicating that there are some exceptions to the "general" rule that states are permitted to tax Indians when they reside outside of Indian reservations); and
- "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members" (*Bracker, supra*, 448 U.S. at p. 142), and state taxation is preempted when "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" indicate that, in a "specific context, the exercise of state authority would violate federal law" (*Id.* at p. 145) because it unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them." (*Id.* at p. 142.)

"Therefore, the Board reviewed the particular facts and circumstances applicable to the imposition of California's sales and use tax on the sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal governments of Indian tribes that are officially recognized by the United States, but cannot satisfy the current provisions of the exemptions prescribed by Regulation 1616, subdivision (d)(4)(A) and (E), because their tribes do not have reservations on which to take delivery of and use their property or their tribes have undeveloped reservations where it would be impractical to take delivery of and use their property.

"First, the Board found that there was a major shift in the United States' policies towards Indians that was implemented, at least in part, by the enactment of the Indian Reorganization Act (IRA) of 1934 (Pub.L. No. 73-383 (June 18, 1934) 48 Stat. 984), which represented formal federal recognition of a unique relationship between Indian tribes' sovereignty and land, and the federal government's duty to help restore Indian tribes' economic and governmental self-sufficiency, as sovereigns, through the acquisition of land. Specifically, section 5 of the IRA, which was subsequently codified (with minor amendments) as section 465 of title 25 of the United States Code, currently provides that:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

[¶] . . . [¶]

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Thus, the Department of the Interior “has had discretionary authority to take title to land, in the name of the United States, in trust for the benefit of Indian tribes” since 1934. (44 S.D. L. Rev. 681, 685.) And, when that discretion is exercised, the Secretary of the Interior accepts a fiduciary duty over the trust land and “the land is freed from federal and state taxes.” (*Id.* at p. 682.) In other words, a clear connection exists between tribal self-governance, the acquisition of trust land, and the preemption of state taxation.

“Second, the Board found that the Department of the Interior’s discretion to acquire land for the benefit of Indian tribes creates a tension between Indian tribes and nontribal governments: “Indian tribes need and are entitled to have lands taken into trust. Non-tribal governments are interested in keeping such lands on their tax rolls.” (44 S.D. L. Rev. 681, 682.) Moreover, inherent in this federal discretion is the principle that one of the functions of a landless Indian tribe’s government is to petition the Secretary of the Interior to acquire lands in trust for the tribe so that the tribe will have territorial boundaries in which to exercise its sovereignty. As a result, the Board determined that California’s taxation of sales to and purchases by federally-recognized Indian tribes of tangible personal property for use by their tribal governments in applying to the Secretary of the Interior for the acquisition of trust lands would unlawfully infringe upon their tribal sovereignty in certain contexts. A determination that is supported by the maxim that “the power to tax involves the power to destroy . . . [and] that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another.” (*McCulloch v. State of Maryland* (1819) 17 U.S. 316, 431.)

“Third, the Board found that all three branches of the federal government have recognized Indian tribes’ interests in tribal sovereignty and the attributes of such sovereignty. The United States Supreme Court has long recognized that Indian tribes retain “attributes of sovereignty over both their members and their territory.” (*Bracker, supra*, 448 U.S. at p. 142.) Moreover, Congress, in 1995, declared that “(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; and (4) Indian tribes possess the inherent authority to establish their own form of government.” (25 U.S.C. § 3601.) Additionally, the United States Department of Justice conducts its Indian affairs under a June 1, 1995, policy memorandum, in which the Attorney General recognizes similar attributes of tribal sovereignty.

“Fourth, the Board reviewed the present status of California’s Indian tribes and found that the Bureau of Indian Affairs (BIA) provides the following information with respect to their unique status:

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of Guadalupe Hidalgo; the Senate's refusal to ratify the 18 treaties negotiated with California tribes during 1851-52; and the lawless nature of California's settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to "exterminate" the indigenous population.

Under pressure from the California Congressional delegation, the United States Senate not only refused to sign the 18 treaties that had been negotiated, but they also took extraordinary steps to place the treaties under seal. Between the un-ratified treaties and the Land Claims Act of 1851, most California Indians became homeless.

Major shifts in federal Indian policy at the national level during the late 19th century exacerbated the Indian problems in California. Passage of the General Allotment Act in 1887 opened part of the limited lands in California to non-Indian settlement. In 1905 the public was finally advised of the 18 un-ratified treaties. Citizens sympathetic to the economic and physical distress of California Indians encouraged Congress to pass legislation to acquire isolated parcels of land for homeless California Indians. Between 1906 and 1910 a series of appropriations were passed that provided funds to purchase small tracts of land in central and northern California for landless Indians of those areas. The land acquisitions resulted in what has been referred to as the Rancheria System in California.

In 1934, with the passage of the Indian Reorganization Act (IRA), the reconstituting of tribal governments included the BIA's supervision of elections among California tribes, including most of the Rancheria groups. Although many tribes accepted the provisions of the IRA, few California tribes benefited economically from the IRA because of the continuing inequities in funding of Federal Indian programs.

Beginning in 1944, forces within the BIA began to propose partial liquidation of the Rancheria system. Even the limited efforts to address the needs of California Indians at the turn of the century and again through passage of the IRA were halted by the federal government when it adopted the policy of termination. California became a primary target of this policy when Congress slated forty-one (41), California Rancherias for termination pursuant to the Rancheria Act of 1958.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 Rancherias that were terminated under the original

Rancheria Act. Additional tribes have since then been restored as a result of Acts of Congress.

This brief history only begins to explain why the Pacific Regional Office is unique. California tribes today continue to develop their tribal infrastructure as a result of not having the same opportunities that have been provided to other native groups throughout the Country. California has a large number of aboriginal native populations who are not currently recognized by the United States which presents [its] own list of problems.

“These unique BIA-recognized circumstances left a number of federally-recognized Indian tribes that are still located in California with no reservations on which to conduct their governmental activities, or undeveloped reservations, which lack adequate meeting facilities, essential utility services, or mail service, making it impractical for the tribes to conduct their governmental activities on their reservations. And, it is due to these unique BIA-recognized circumstances that both landless tribes and the tribes with undeveloped reservations are currently unable to exercise their rights to self-governance without interference from California’s sales and use tax.

“Therefore, during its July 26, 2011, Business Taxes Committee meeting, the Board determined that the nature of the state, federal, and tribal interests at stake dictate that federal law preempts the imposition of California’s sales and use tax on the sale of tangible personal property to and the use of tangible personal property by the tribal governments of federally-recognized California Indian tribes, when such property is purchased for use in tribal self-governance, and the tribal governments have no reservation on which to conduct their governmental activities or the tribal governments have undeveloped reservations where it is impractical to conduct their governmental activities, due to the unique BIA-recognized circumstances discussed above. This is because the taxation of these types of transactions involving off-reservation sales and use, and only these types of off-reservation transactions, would directly interfere with the tribes’ sovereignty and therefore unlawfully infringe on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them. The Board has not found any persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off reservation.

“The Board determined that it is necessary to amend Regulation 1616 to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The Board determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the sale and use of tangible personal property that is delivered to an officially-recognized Indian tribe at the principal place where the tribe’s government meets to conduct tribal business so that there is some way for retailers and the Board to verify exempt transactions. The Board understands that tribes may not own any real estate where their tribal governments can meet to conduct tribal business and they may occasionally meet at more than one place during a given period, and the Board has proposed to adopt a “principal place” test because the Board determined that such a test is sufficiently flexible to take into account the varying circumstances under which some tribal governments meet and therefore does not unlawfully infringe on the tribes’ rights to self-governance. The Board also determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the use of tangible personal property if the property is used in tribal self-governance more than it is used for purposes other than tribal self-governance within the first 12 months following delivery. This is because the Board is not preempted from imposing a use tax on property that is used off reservation more than it is used on a reservation within the first 12 months following delivery and that is also used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

“As a result, the Board proposes to amend Regulation 1616, to add a new subdivision (d)(4)(G), to implement, interpret, and make specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The objective of the proposed amendments is to clarify the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

“There are no comparable federal regulations or statutes to Regulation 1616.”



BOARD OF EQUALIZATION
BUSINESS TAXES COMMITTEE MEETING MINUTES
HONORABLE BETTY T. YEE, COMMITTEE CHAIR
450 N STREET, SACRAMENTO
MEETING DATE: JULY 26, 2011, TIME: 10:00 A.M.

ACTION ITEMS & STATUS REPORT ITEMS

Agenda Item No: 1

Title: Proposed amendments to Regulation 1616, *Federal Areas*, regarding Sales to Governments of Officially Recognized Indian Tribes

Issue/Topic:

Request approval and authorization to publish proposed amendments to Regulation 1616 to provide a limited exemption from tax for sales to and purchases by the tribal governments of officially recognized Indian tribes of tangible personal property for use in tribal self-governance under specified circumstances.

Committee Discussion:

Staff presented the proposed amendments to Regulation 1616. Interested parties addressed the Board thanking them for working with tribal governments to understand their concerns and address this important issue. Ms. Yee indicated the necessity to establish a tribal advisory council to facilitate working with tribal governments, and expressed her intent to bring back to the Board a recommendation to establish such council in the future.

Committee Action/Recommendation/Direction:

Upon motion by Mr. Horton, seconded by Ms. Mandel, the Committee unanimously approved and authorized for publication Alternative 1 – Staff Recommendation. There is no operative date, and implementation will take place 30 days after approval by the Office of Administrative Law. A copy of the proposed revisions to Regulation 1616 is attached.

Agenda Item No: 2**Title: Amending Regulation 1684, *Collection of Use Tax by Retailers*****Issue:**

Whether the Board should initiate an interested parties process to discuss amending Sales and Use Tax Regulation 1684, *Collection of Use Tax by Retailers*, to implement, interpret, and make specific the amendments made to Revenue and Taxation Code section 6203 by ABx1 28 (Stats. 2011, ch. 7), which changed the definition of “retailer engaged in business in this state.”

Committee Discussion:

Staff presented the issue explaining the need to initiate discussions with interested parties regarding the regulatory clarification and interpretation of the various provisions of the statute. Staff also provided general overview of the implementation for ABx1 28, and a possible timeline for the interested parties process. A speaker addressed the Board, noting the impact the legislation had on affiliate programs and expressed the need for expediting clarification with respect to distinguishing between advertising agreements and the affiliate agreements that would establish nexus for out-of-state retailers.

Staff answered Board members questions concerning the impact of the referendum on implementation, the interested parties process, and the effective date of the legislation. Mr. Runner expressed concern with moving forward with the interested parties process when there is uncertainty in regard to the referendum and the effective date of the legislation. Ms. Yee stated the Board has an obligation to enforce existing law until such time the law is suspended. Mr. Horton indicated it is best to be prepared and requested staff begin discussions with interested parties to understand the issues and to identify areas of the law that need clarification.

Staff was directed to request a formal opinion from the Attorney General with respect to the impact of the referendum on the effective date of the legislation.

Agenda Item No: 2 (Continued)

Committee Action:

Upon motion by Ms. Mandel, seconded by Mr. Horton, the Committee referred the matter to the interested parties process.

The vote was as follows:

MEMBER	Horton	Steel	Yee	Runner	Mandel
VOTE	Yes	No	Yes	No	Yes

/s/ Betty T. Yee

Honorable Betty T. Yee, Committee Chair

/s/ Kristine Cazadd

Kristine Cazadd, Interim Executive Director

BOARD APPROVED

at the July 27, 2011 Board Meeting

/s/ Diane Olson

Diane Olson, Chief
Board Proceedings Division

Proposed Amendments Regulation 1616, *Federal Areas*

Regulation 1616. FEDERAL AREAS.

Reference: Sections 6017, 6021, Revenue and Taxation Code.
Public Law No. 817-76th Congress (Buck Act).
Vending machine sales generally, see Regulation 1574
Items Dispensed for 10¢ or less, see Regulation 1574
Additional reference: Section 6352, Revenue and Taxation Code.

(a) IN GENERAL. Tax applies to the sale or use of tangible personal property upon Federal areas to the same extent that it applies with respect to sale or use elsewhere within this state.

(b) ALCOHOLIC BEVERAGES. Manufacturers, wholesalers and rectifiers who deliver or cause to be delivered alcoholic beverages to persons on Federal reservations, shall pay the state retailer sales tax on the selling price of such alcoholic beverages so delivered, except when such deliveries are made to persons or organizations which are instrumentalities of the Federal Government or persons or organizations which purchase for resale.

Sales to officers' and non-commissioned officers' clubs and messes may be made without sales tax when the purchasing organizations have been authorized, under appropriate regulations and control instructions, duly prescribed and issued, to sell alcoholic beverages to authorized purchasers.¹

(c) SALES THROUGH VENDING MACHINES. Sales through vending machines located on Army, Navy, or Air Force installations are taxable unless the sales are made by operators who lease the machines to exchanges of the Army, Air Force, Navy, or Marine Corps, or other instrumentalities of the United States, including Post Restaurants and Navy Civilian Cafeteria Associations, which acquire title to and sell the merchandise through the machines to authorized purchasers.

For the exemption to apply, the contracts between the operators and the United States instrumentalities and the conduct of the parties must make it clear that the instrumentalities acquire title to the merchandise and sell it through machines leased from the operators to authorized purchasers.

¹The following is a summary of the pertinent regulations which have been issued:

(a) GENERAL. Air Force Regulation 34-57, issued under date of February 9, 1968, Army Regulation 210-65, issued under date of May 4, 1966, and Navy General Order No. 15, issued under date of May 5, 1965, authorize the sale and possession of alcoholic beverages at bases and installations subject to certain enumerated restrictions.

(b) AIR FORCE. Air Force Regulation 34-57, Paragraph 5, permits commissioned officers' and noncommissioned officers' open messes, subject to regulations established by commanders of major air commands to sell alcoholic beverages to authorized purchasers at bars and cocktail lounges, and provides that commanders will issue detailed control instructions. Paragraph 8 and 9 require commanders of major air commands to issue regulations relative to package liquor sales and to procurement of alcoholic beverages, respectively.

(c) ARMY. Army Regulation 210-65, Paragraph 9, provides that major commanders are authorized to permit at installations or activities within their respective commands the dispensing of alcoholic beverages by the drink or bottle. Paragraph 11 of AR 210-65 provides that when authorized by major commanders as prescribed in Paragraph 9, AR 210-65, officers' and non-commissioned officers' open messes may, subject to regulations prescribed by the commanding officer of the installation or activity concerned, dispense alcoholic beverages by the drink, and operate a package store.

(d) NAVY. Navy General Order No. 15 provides that commanding officers may permit, subject to detailed alcoholic beverage control instructions, the sales of packaged alcoholic beverages by officers' and noncommissioned officers' clubs and messes and the sale and consumption of alcoholic beverages by the drink in such clubs and messes.

Proposed Amendments Regulation 1616, *Federal Areas*

(d) INDIAN RESERVATIONS.

(1) IN GENERAL. Except as provided in this regulation, tax applies to the sale or use of tangible personal property upon Indian reservations to the same extent that it applies with respect to sale or use elsewhere within this state.

(2) DEFINITIONS. For purposes of this regulation "Indian" means any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior. Indian organizations are entitled to the same exemption as are Indians. "Indian organization" includes Indian tribes and tribal organizations and also includes partnerships all of whose members are Indians. The term includes corporations organized under tribal authority and wholly owned by Indians. The term excludes other corporations, including other corporations wholly owned by Indians. "Reservation" includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian.

(3) SALES BY ON-RESERVATION RETAILERS.

(A) Sales by Indians.

1. Sales by Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by Indians to non-Indians and Indians who do not reside on a reservation. Sales tax does not apply to sales of tangible personal property by Indian retailers made to non-Indians and Indians who do not reside on a reservation when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on the reservation. Except as exempted below, Indian retailers are required to collect use tax from such purchasers and must register with the Board for that purpose.

Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation.

(B) Sales by non-Indians.

1. Sales by non-Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by retailers when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on a reservation. The sale is exempt whether the retailer is a federally licensed Indian trader or is not so licensed. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by non-Indians to non-Indians and Indians who do not reside on a reservation. Either sales tax or use tax applies to sales of tangible personal property by non-Indian retailers to non-Indians and Indians who do not reside on a reservation.

(C) Resale Certificates. Persons making sales for resale of tangible personal property to retailers conducting business on an Indian reservation should obtain resale certificates from their purchasers. If the purchaser does not have a permit and all the purchaser's sales are exempt under paragraph (d)(3)(A) of this regulation, the purchaser should make an appropriate notation to that effect on the certificate in lieu of a seller's permit number (see Regulation 1668, "Resale Certificates").

(4) SALES BY OFF-RESERVATION RETAILERS.

(A) Sales Tax - In General. Sales tax does not apply to sales of tangible personal property made to Indians negotiated at places of business located outside Indian reservations if the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation. Generally ownership to property transfers upon delivery if delivery is made by facilities of the retailer and ownership transfers upon shipment if delivery is made by mail or carrier. Except as otherwise expressly provided herein, the sales tax applies if the property is delivered off the reservation or if the ownership to the property transfers to the purchaser off the reservation.

Proposed Amendments Regulation 1616, *Federal Areas*

(B) Sales Tax - Permanent Improvements - In General. Sales tax does not apply to a sale to an Indian of tangible personal property (including a trailer coach) to be permanently attached by the purchaser upon the reservation to realty as an improvement if the property is delivered to the Indian on the reservation. A trailer coach will be regarded as having been permanently attached if it is not registered with the Department of Motor Vehicles. Sellers of property to be permanently attached to realty as an improvement should secure exemption certificates from their purchasers (see Regulation 1667, "Exemption Certificates").

(C) Sales Tax - Permanent Improvements - Construction Contractors.

1. Indian contractors. Sales tax does not apply to sales of materials to Indian contractors if the property is delivered to the contractor on a reservation. Sales tax does not apply to sales of fixtures furnished and installed by Indian contractors on Indian reservations. The term "materials" and "fixtures" as used in this paragraph and the following paragraph are as defined in Regulation 1521 "Construction Contractors."

2. Non-Indian contractors. Sales tax applies to sales of materials to non-Indian contractors notwithstanding the delivery of the materials on the reservation and the permanent attachment of the materials to realty. Sales tax does not apply to sales of fixtures furnished and installed by non-Indian contractors on Indian reservations.

(D) Use Tax - In General. Except as provided in paragraphs (d)(4)(E) and (d)(4)(F) of this regulation, use tax applies to the use in this state by an Indian purchaser of tangible personal property purchased from an off-reservation retailer for use in this state.

(E) Use Tax - Exemption. Use tax does not apply to the use of tangible personal property (including vehicles, vessels, and aircraft) purchased by an Indian from an off-reservation retailer and delivered to the purchaser on a reservation unless, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

(F) Leases. Neither sales nor use tax applies to leases otherwise taxable as continuing sales or continuing purchases as respects any period of time the leased property is situated on an Indian reservation when the lease is to an Indian who resides upon the reservation. In the absence of evidence to the contrary, it shall be assumed that the use of the property by the lessee occurs on the reservation if the lessor delivers the property to the lessee on the reservation. Tax applies to the use of leased vehicles registered with the Department of Motor Vehicles to the extent that the vehicles are used off the reservation.

(G) Property Used in Tribal Self-Governance. Sales and use tax does not apply to sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States if:

1. The tribal government's Indian tribe does not have a reservation or the principal place where the tribal government meets to conduct tribal business cannot be its Indian tribe's reservation because the reservation does not have a building in which the tribal government can meet or the reservation lacks one or more essential utility services, such as water, electricity, gas, sewage, or telephone, or mail service from the United States Postal Service;

2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and

3. The property is delivered to the tribal government and ownership of the property transfers to the tribal government at the principal place where the tribal government meets to conduct tribal business.

The purchase of tangible personal property is not exempt from use tax under this paragraph if the property is used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.



BOARD OF EQUALIZATION

BUSINESS TAXES COMMITTEE MEETING AGENDA

HONORABLE BETTY YEE, COMMITTEE CHAIRWOMAN

450 N STREET, SACRAMENTO - ROOM 121

JULY 26, 2011 – 10:00 A.M.

1. Proposed amendments to Regulation 1616, *Federal Areas*, regarding Sales to Governments of Officially Recognized Indian Tribes

Staff request to approve and authorize publication of amendments to Regulation 1616 to provide a limited exemption from tax for sales to and purchases by the tribal governments of officially recognized Indian tribes of tangible personal property for use in tribal self-governance under specified circumstances.

2. Amending Regulation 1684, *Collection of Use Tax by Retailers*

Approval is sought to begin an interested parties process to discuss the need for rulemaking to implement, interpret, and make specific the provisions of ABx1 28 (Stats. 2011, Ch. 7). ABx1 28 amended Revenue and Taxation Code section 6203, which requires retailers that are engaged in business in California to collect use tax and remit it to the Board.

AGENDA — July 27, 2011 Business Taxes Committee Meeting
**Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Governments of Officially
Recognized Indian Tribes**

**Action 1 — Staff
Recommendation**

**Add paragraph (G) to
Subdivision (d)(4)**

(d) INDIAN RESERVATIONS.
(4) SALES BY OFF-RESERVATION RETAILERS.

(G) Property Used in Tribal Self-Governance. Sales and use tax does not apply to sales of tangible personal property to the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States if:

1. The tribal government’s Indian tribe does not have a reservation or the principal place where the tribal government meets to conduct tribal business cannot be its Indian tribe’s reservation because the reservation does not have a building in which the tribal government can meet or the reservation lacks one or more essential utility services, such as water, electricity, gas, sewage, or telephone, or mail service from the United States Postal Service;
2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and
3. The property is delivered to the tribal government and ownership of the property transfers to the tribal government at the principal place where the tribal government meets to conduct tribal business.

The purchase of tangible personal property is not exempt from use tax under this paragraph if the property is used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

Issue Paper Number 11-005

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



Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Governments of Officially Recognized Indian Tribes

I. Issue

Should Sales and Use Tax Regulation 1616, *Federal Areas*, be amended to clarify that a limited tax exemption exists for sales to and purchases by a tribal government of an officially recognized¹ Indian tribe under specific circumstances?

II. Alternative 1 - Staff Recommendation

Staff recommends the Board approve and authorize publication of proposed amendments to Regulation 1616, *Federal Areas*. This recommendation is generally supported by tribal leaders and interested parties that participated in the interested parties meeting process. Staff recommends amending subdivision (d) to clarify that a limited exemption from sales and use taxes exists for sales to, and purchases by, a tribal government of an officially recognized Indian tribe if:

- The tribal government does not have a reservation² on which to conduct tribal government business or the principal place where the tribal government meets to conduct tribal business cannot be on the tribe's reservation because the reservation lacks a building in which they can meet or the reservation lacks essential utility services, or lacks mail service from the United States Postal Service;
- The property is purchased for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and
- The property is delivered to the tribal government and ownership of the property transfers at the principal place where the tribal government meets to conduct tribal business.

Staff's proposed amendments are attached as Exhibit 2.

III. Alternative 2 - Other Alternative Considered

Do not amend Regulation 1616.

¹ For purposes of this issue paper, an Indian tribe is officially recognized if it is recognized by the federal government.

² In this context, the term "reservation" refers to all land that is considered "Indian country" as defined by 18 U.S.C. § 1151, which provides that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

IV. Background

Regulation 1616 was originally adopted in 1945 as a restatement of previous rulings. In 1978, subdivision (d) was added to the regulation to prescribe the application of sales and use tax to the sale and use of tangible personal property on Indian Reservations. In 2002, Regulation 1616, subdivision (d)(3)(A)2 was amended to provide that “Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation.”

More recently, Board staff has been working closely with tribal leaders and interested parties to revise publication 146, *Sales to American Indians and Sales on Indian Reservations*, to clarify the proper application of sales and use tax to specific transactions involving Indians. This has consisted of holding several meetings with tribal leaders and interested parties to seek input regarding necessary revisions to the publication. Additionally, tribal leaders and interested parties have submitted written comments regarding revisions to the publication they deem necessary. Board staff has incorporated many of the suggestions provided by tribal leaders and interested parties into the pending draft of the publication. However, some suggestions have not been incorporated since the suggestions are inconsistent with the current language of Regulation 1616.

One issue that has been repeatedly raised by tribal leaders and interested parties is the different tax consequences associated with the application of tax to sales of tangible personal property to Indians that are members of tribes that do not have reservations, as opposed to sales of tangible personal property to Indians that are members of Indian tribes that have reservations. Regulation 1616, subdivision (d) currently provides that sales tax does not apply to sales of tangible personal property made to Indians that reside on a reservation if the property is delivered to the Indian purchaser and ownership to the property transfers to the Indian purchaser on the reservation. However, sales tax applies if the property is delivered off the reservation or if the ownership to the property transfers to the purchaser off the reservation. Therefore, sales of tangible personal property to Indians who are members of tribes that do not have reservations are generally subject to sales tax since these Indians’ tribes do not have reservations where they can receive delivery of tangible personal property and transfer ownership of the property.

A second issue, which was raised at the March 9, 2011, meeting with tribal leaders on this topic, was the different tax consequences associated with the application of use tax to purchases of tangible personal property by tribal governments of officially recognized Indian tribes that have reservations and can practically exercise their rights to self-governance on their reservations and purchases by tribal governments of officially recognized Indian tribes that cannot practically exercise their rights to self-governance on their reservations because their reservations are remote and lack a building or essential utilities that make it impractical for the tribal governments to meet on their reservations and govern their tribes from their reservations. This is because Regulation 1616, subdivision (d), provides that sales tax does not apply to sales of tangible personal property to Indians if the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation. However, subdivision (d) also provides that use tax applies to property purchased by an Indian if the property is used in California more than it is used on a reservation within the first twelve months following delivery.

V. Discussion

Although state taxation of Indians is not generally preempted outside Indian reservations, the United States Supreme Court’s holdings suggest that state taxation of Indians outside of Indian reservations may be preempted under appropriate circumstances. For example, in *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, Justice O’Connor contemplated whether state taxation may be preempted outside of a tribe’s territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court. Also, more recent United States Supreme Court cases

continue to indicate that states are not “generally” preempted from taxing Indians when they reside outside of reservations, but that there are some exceptions to the general rule. (See, e.g., *Wagnon v. Prairie Band Potawatomi Nation* (2005) 546 U.S. 95, 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149].) Therefore, it appears that state taxation of Indians outside Indian reservations may be preempted by federal law in some circumstances that have not yet been prescribed by the United States Supreme Court.

Furthermore, the United State Supreme Court has said that “there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members.” (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142.) Instead, the Supreme Court has said that the boundaries between state regulatory authority and tribal self-government depend upon “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” in a specific context. (*Id.* at p. 145.) Therefore, Board staff has reviewed the particular facts and circumstances applicable to officially recognized California Indian tribes that do not have reservations (hereafter “landless tribes”) and their members to see whether the imposition of California’s sales tax interferes with their federally protected interests in any way that might require the tax to be preempted under federal law.

First, Board staff found that all three branches of the federal government have recognized Indian tribes’ interests in tribal sovereignty and the attributes of such sovereignty. The United States Supreme Court has long recognized that Indian tribes retain “attributes of sovereignty over both their members and their territory.” (*Bracker, supra*, 448 U.S. at p. 142.) Moreover, Congress, in 1995, declared that “(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; and (4) Indian tribes possess the inherent authority to establish their own form of government.” (25 U.S.C. § 3601.) Additionally, the United States Department of Justice (DOJ) conducts its Indian affairs under a June 1, 1995, policy memorandum regarding Indian Sovereignty (DOJ Memorandum),³ in which the Attorney General recognizes similar attributes of tribal sovereignty.

Second, Board staff found that the United States Supreme Court has specifically contemplated whether a tribe’s right to self-governance is strong enough to preempt state taxation outside of the tribe’s territorial jurisdiction, but the court has not yet resolved the issue in any definitive manner. (*White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. at p. 142.)

Third, Board staff found that there was a major shift in the United States’ policies towards Indians that was implemented, at least in part, by the enactment of the Indian Reorganization Act (IRA) of 1934 (Pub.L. No. 73-383 (June 18, 1934) 48 Stat. 984), which represented formal federal recognition of a unique relationship between Indian tribes’ sovereignty and land, and the federal government’s duty to help restore Indian tribes’ economic and governmental self-sufficiency, as sovereigns, through the acquisition of land. Specifically, section 5 of the IRA, which was subsequently codified (with minor amendments) as section 465 of title 25 of the United States Code, currently provides that:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

[¶] . . . [¶]

³ The June 1, 1995, memorandum is available on the DOJ’s Web site at <http://www.justice.gov/ag/readingroom/sovereignty.htm>.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Thus, Board staff noted that the Department of the Interior “has had discretionary authority to take title to land, in the name of the United States, in trust for the benefit of Indian tribes” since 1934. (44 S.D. L. Rev. 681, 685.) And, when that discretion is exercised, the Secretary of the Interior accepts a fiduciary duty over the trust land and “the land is freed from federal and state taxes.” (*Id.* at p. 682.) In other words, a clear connection exists between tribal self-governance, the acquisition of trust land, and the preemption of state taxation.

In addition, Board staff noted that the Department of the Interior’s discretion to acquire land for the benefit of Indian tribes creates a tension between Indian tribes and nontribal governments: “Indian tribes need and are entitled to have lands taken into trust. Non-tribal governments are interested in keeping such lands on their tax rolls.” (44 S.D. L. Rev. 681, 682.) Moreover, inherent in this federal discretion is the principle that one of the functions of a landless Indian tribe’s government is to petition the Secretary of the Interior to acquire lands in trust for the tribe so that the tribe will have territorial boundaries in which to exercise its sovereignty. As a result, Board staff found that California’s taxation of sales to, and purchases by, landless federally recognized Indian tribes of tangible personal property for use by their tribal governments in applying to the Secretary of the Interior for the acquisition of trust lands could be viewed as interfering with their tribal sovereignty. And, the interference with their tribal sovereignty might support the conclusion that the imposition of sales or use tax on such transactions would be preempted by federal law.

Fourth, Board staff reviewed the present status of California’s landless Indian tribes and found that the Bureau of Indian Affairs (BIA) provides the following information with respect to their status:

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of Guadalupe Hidalgo; the Senate’s refusal to ratify the 18 treaties negotiated with California tribes during 1851-52; and the lawless nature of California’s settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to “exterminate” the indigenous population.

Under pressure from the California Congressional delegation, the United States Senate not only refused to sign the 18 treaties that had been negotiated, but they also took extraordinary steps to place the treaties under seal. Between the un-ratified treaties and the Land Claims Act of 1851, most California Indians became homeless.

Major shifts in federal Indian policy at the national level during the late 19th century exacerbated the Indian problems in California. Passage of the General Allotment Act in 1887 opened part of the limited lands in California to non-Indian settlement. In 1905 the public was finally advised of the 18 un-ratified treaties. Citizens sympathetic to the economic and physical distress of California Indians encouraged Congress to pass legislation to acquire isolated parcels of land for homeless California Indians. Between 1906 and 1910 a series of appropriations were passed that provided funds to purchase small tracts of land in central and northern California for landless Indians of those areas. The land acquisitions resulted in what has been referred to as the Rancheria System in California.

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In 1934, with the passage of the Indian Reorganization Act (IRA), the reconstituting of tribal governments included the BIA's supervision of elections among California tribes, including most of the Rancheria groups. Although many tribes accepted the provisions of the IRA, few California tribes benefited economically from the IRA because of the continuing inequities in funding of Federal Indian programs.

Beginning in 1944, forces within the BIA began to propose partial liquidation of the Rancheria system. Even the limited efforts to address the needs of California Indians at the turn of the century and again through passage of the IRA were halted by the federal government when it adopted the policy of termination. California became a primary target of this policy when Congress slated forty-one (41), California Rancherias for termination pursuant to the Rancheria Act of 1958.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 Rancherias that were terminated under the original Rancheria Act. Additional tribes have since then been restored as a result of Acts of Congress.

This brief history only begins to explain why the Pacific Regional Office is unique. California tribes today continue to develop their tribal infrastructure as a result of not having the same opportunities that have been provided to other native groups throughout the Country. California has a large number of aboriginal native populations who are not currently recognized by the United States which presents [its] own list of problems.⁴

Therefore, Board staff concluded that these unique circumstances, recognized by the BIA, indicated that the federal courts could decide that federal law must preempt California's taxation of landless Indian tribes in a manner that may not be applicable in other states where these unique circumstances are not present in order to prohibit California from directly interfering with the self-governance of federally recognized landless Indian tribes in California.

Board staff is also aware that the federal government does hold land in trust for some officially recognized Indian tribes, which is not suitable for their tribal governments to meet and exercise their rights to self-governance due to the lack of adequate meeting facilities, essential utility services, or mail service on the tribes' lands. As a result, the governments of these tribes are currently unable to exercise their rights to self-governance without interference from California's sales and use tax in the same manner as landless tribes. Therefore, Board staff concluded that the federal courts could decide that California's taxation of tribes with trust land that is not suitable for conducting tribal government business must also be preempted when it interferes with those tribes' rights to self-governance, similar to the preemption of California's taxation of federally recognized landless tribes.

However, Board staff believes that federal preemption of California's taxation of officially recognized Indian tribes outside of a reservation would be limited to preempting the taxation of tangible personal property that is sold to or purchased by tribal governments for use in tribal self-governance, including, but not limited to, the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land. This is because the taxation of these types of transactions, and only these types of transactions, might directly interfere with a tribe's sovereignty. In other words, other than the potential limited exemption for tribes discussed above, staff has found no persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off-reservation.

Furthermore, Board staff believes that an exemption recognizing such preemption would need to be limited to taxes imposed on property delivered to an officially recognized Indian tribe at the principal

⁴ Text available at <http://www.bia.gov/WhoWeAre/RegionalOffices/Pacific/WeAre/index.htm>.

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place where the tribe's government meets to conduct tribal business so that there is some way for retailers and the State Board of Equalization to verify exempt transactions. Board staff also believes that a "principal place" test is sufficiently flexible because we recognize that federally recognized tribes may not own any real estate where their tribal governments can meet to conduct tribal business, and they may occasionally meet at more than one place during a given period.

Proposed amendments to subdivision (d) of Regulation 1616 that would codify such an exemption recognizing limited federal preemption are illustrated in Exhibit 2.

Officially Recognized Indian Tribes

Comments received from Agua Caliente Band of Cahuilla Indians (Exhibit 3), Santa Ynez Band of Chumash Indians (Exhibit 4), Pechanga Indian Reservation (Exhibit 5), and the California Tribal Business Alliance (Exhibit 6) objected to extending the proposed exemption to Indian tribes recognized by the state, but not recognized by the United States. Comments received from the California Valley Miwok Tribe (Exhibit 9) expressed support for including an exemption for all recognized tribes. Previously proposed amendments had provided that the exemption would apply to sales to and purchases by tribal governments of Indian tribes that are recognized by either the United States or the State of California. However, based upon the comments received, the proposed amendments have been clarified to limit the exemption recognizing federal preemption to purchases by tribal governments of Indian tribes that are recognized by the United States. The provisions that would have provided an exemption for purchases by tribal governments of state recognized Indian tribes were removed.

Indian Organizations

Comments received from the Rincon Band of Luiseno Indians (Exhibit 7) requested that the proposed amendments also cover sales to, and the storage, use, or other consumption of tangible personal property by, an Indian organization, as that term is currently defined in Regulation 1616, subdivision (d)(2). Staff believes the proposed amendments to Regulation 1616 would provide a limited exemption for sales to, and the storage, use, or other consumption of tangible personal property by, an Indian organization because subdivision (d)(2) expressly provides that "Indian organizations are entitled to the same exemption as are Indians." Following the successful adoption of the proposed amendments to Regulation 1616, clarification regarding this issue will be incorporated into Publication 146.

12-Month Test Period

Comments received from the Rincon Band of Luiseno Indians (Exhibit 7) requested that the 12-month test period provisions be removed from the proposed amendments to Regulation 1616 because the Rincon Band of Luiseno Indians does not believe that there is a statutory basis for the test period. Even though this request is outside the scope of the regulatory amendments approved for this Business Taxes Committee topic, staff considered the suggestion and concluded that there is authority for the 12-month test and that it is necessary to incorporate a 12-month test into the proposed amendments for the proper administration of the Sales and Use Tax Law. Revenue and Taxation Code section 6202 provides that any person purchasing tangible personal property from a retailer for use in this state is liable for payment of the use tax, unless an exemption or exclusion applies, and the proposed amendments only provide an exemption for property that is purchased for use in tribal self-governance. Therefore, when property is purchased for nonexempt use in California and for exempt use in tribal self-governance, a test period is necessary to determine whether the property qualifies for an exemption because the property is used primarily for exempt purposes rather than nonexempt purposes. Furthermore, Revenue and Taxation Code section 6248 specifically provides for a 12-month test period in determining whether a vehicle, vessel, or aircraft is purchased for use in this state and there are 12-month test period provisions contained elsewhere in the existing text of subdivision (d) of Regulation 1616. Therefore, staff continues

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to believe it is reasonable to include a 12-month test period in the proposed amendments to Regulation 1616.

Reservation Based Value

Comments received from Big Sandy Rancheria (Exhibit 8) requested that Regulation 1616 include additional amendments to address “value added” activity for on-reservation sales by Indians. The comments included a cite to *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202 (superseded by statute in *New York v. Shinnecock Indian Nation* (2007) 523 F. Supp. 2d 185), as authority for the additional amendments.

The comments acknowledge that Regulation 1616 does provide that “Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation” and indicate that Big Sandy Rancheria believes this language should extend to other products in which there is “value added” on the reservation. Although meals, food or beverage sold by an Indian retailer may have value added on the reservation, the basis for the limited exemption from the obligation to collect use tax provided for sales of meals, food or beverage is not the “value added” on the reservation.

The Board has previously adopted amendments to Regulation 1616 that would have recognized an exemption for “value added” or “reservation based value.” However, the amendments were rejected by the Office of Administrative Law (OAL) due to necessity, clarity and consistency concerns. As OAL has rejected these amendments previously, and they are beyond the scope of the proposed amendments currently under consideration, staff is not including provisions addressing reservation based value in the current proposed amendments to Regulation 1616.

VI. Alternative 1 - Staff Recommendation

Staff recommends the Board approve and authorize publication of the proposed amendments to subdivision (d) of Regulation 1616, as illustrated in Exhibit 2.

A. Description of Alternative 1

Alternative 1 clarifies that a limited exemption from sales and use tax exists for sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by tribal governments of federally recognized Indian tribes if:

- The tribal government does not have a reservation on which to conduct tribal government business, or the principal place where the tribal government meets to conduct tribal business cannot be on the tribe’s reservation because the reservation lacks a building in which they can meet or the reservation lacks essential utility services, or lacks mail service from the United States Postal Service;
- The property is purchased for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and
- The property is delivered to the tribal government and ownership of the property transfers at the principal place where the tribal government meets to conduct tribal business.

B. Pros of Alternative 1

The proposed amendments will recognize federal preemption of California’s sales and use taxes in narrow, specific circumstances where their application would directly interfere with a tribal government of a federally recognized Indian tribe’s exercise of its tribe’s right to self-governance.

C. Cons of Alternative 1

Retailers of tangible personal property would be required to verify that the address where property is delivered qualifies as the principal place where the tribal-government purchaser meets to conduct tribal business in order to substantiate the exemption.

D. Statutory or Regulatory Change for Alternative 1

No statutory change is required. However, staff's recommendation does require adoption of amendments to Regulation 1616.

E. Operational Impact of Alternative 1

Staff will incorporate the provisions of the amendments into publication 146, *Sales to American Indians and Sales in Indian Country*, if they are successfully adopted. Additionally, staff will work with the Bureau of Indian Affairs and tribal leaders to maintain, on the Board's website, an accurate listing of each address outside of Indian country that qualifies as a principal place where the tribal government of a federally recognized Indian tribe meets to conduct business.

F. Administrative Impact of Alternative 1

1. Cost Impact

The workload associated with publishing the regulation and outreach efforts are considered routine. Any corresponding costs would be absorbed within the Board's existing budget.

2. Revenue Impact

None. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact of Alternative 1

The overall impact of the proposed amendments to taxpayers and consumers is minimal.

H. Critical Time Frames of Alternative 1

Implementation will begin 30 days following approval of the amended regulation by OAL.

VII. Other Alternatives

A. Description of Alternative

Do not revise Regulation 1616.

B. Pros of Alternative

The Board would avoid the workload involved with processing and publicizing the revised regulation.

C. Cons of Alternative

The Board would continue to impose sales tax on all off-reservation sales of tangible personal property to tribal governments and impose use tax on all tangible personal property purchased by a tribal government for storage, use, or other consumption outside of a reservation. Also, not revising the regulation may result in confusion regarding the application of tax to sales of tangible personal property to tribal governments of federally recognized Indian tribes.

D. Statutory or Regulatory Change for Alternative

None.

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E. Operational Impact of Alternative

None.

F. Administrative Impact of Alternative

1. Cost Impact

None.

2. Revenue Impact

None. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact of Alternative

Minimal.

H. Critical Time Frames of Alternative

None.

Preparer/Reviewer Information

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

Current as of: July 11, 2011

REVENUE ESTIMATE

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Governments of Officially Recognized Indian Tribes

Alternative 1 - Staff Recommendation

Staff recommends the Board approve and authorize publication of proposed amendments to Regulation 1616, *Federal Areas*. This recommendation is generally supported by tribal leaders and interested parties that participated in the interested parties meeting process. Staff recommends amending subdivision (d) to clarify that a limited exemption from sales and use taxes exists for sales to, and purchases by, a tribal government of an officially recognized Indian tribe if:

- The tribal government does not have a reservation¹ on which to conduct tribal government business or the principal place where the tribal government meets to conduct tribal business cannot be on the tribe's reservation because the reservation lacks a building in which they can meet or the reservation lacks essential utility services, or lacks mail service from the United States Postal Service;
- The property is purchased for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and
- The property is delivered to the tribal government and ownership of the property transfers at the principal place where the tribal government meets to conduct tribal business.

Alternative 2 - Other Alternative Considered

Do not amend Regulation 1616.

Background, Methodology, and Assumptions

¹ In this context, the term "reservation" refers to all land that is considered "Indian country" as defined by 18 U.S.C. § 1151, which provides that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

Alternative 1 – Staff Recommendation

We would expect the revenue impacts of this amendment to Regulation 1616 to be negligible. Many tribes have lands, and the ones that do not have lands tend to be relatively small. Furthermore, under current law tribes without lands can cooperate with tribes that do have lands and take possession in Indian country of goods they purchase exempt of sales and use taxes. Since the regulation only makes it more convenient for tribes to make such tax exempt purchases, we would expect little revenue impact.

Alternative 2 - Other Alternative – do not revise Regulation 1616

There is nothing in the Alternative 2 that would impact sales and use tax revenue.

Revenue Summary

Alternative 1 – staff recommendation has a negligible revenue impact.

Alternative 2 – alternative 2 does not have a revenue impact.

Preparation

Mr. Joe Fitz, Research and Statistics Section, Legislative and Research Division, prepared this revenue estimate. Mr. Robert Ingenito, Chief, Research and Statistics Section, Legislative and Research Division and Ms. Susanne Buehler, Chief Tax Policy Division, Sales and Use Tax Department, reviewed this revenue estimate.

Current as of July 11, 2011.

Regulation 1616. FEDERAL AREAS.

Reference: Sections 6017, 6021, Revenue and Taxation Code.
Public Law No. 817-76th Congress (Buck Act).
Vending machine sales generally, see Regulation 1574
Items Dispensed for 10¢ or less, see Regulation 1574
Additional reference: Section 6352, Revenue and Taxation Code.

(a) IN GENERAL. Tax applies to the sale or use of tangible personal property upon Federal areas to the same extent that it applies with respect to sale or use elsewhere within this state.

(b) ALCOHOLIC BEVERAGES. Manufacturers, wholesalers and rectifiers who deliver or cause to be delivered alcoholic beverages to persons on Federal reservations, shall pay the state retailer sales tax on the selling price of such alcoholic beverages so delivered, except when such deliveries are made to persons or organizations which are instrumentalities of the Federal Government or persons or organizations which purchase for resale.

Sales to officers' and non-commissioned officers' clubs and messes may be made without sales tax when the purchasing organizations have been authorized, under appropriate regulations and control instructions, duly prescribed and issued, to sell alcoholic beverages to authorized purchasers.¹

(c) SALES THROUGH VENDING MACHINES. Sales through vending machines located on Army, Navy, or Air Force installations are taxable unless the sales are made by operators who lease the machines to exchanges of the Army, Air Force, Navy, or Marine Corps, or other instrumentalities of the United States, including Post Restaurants and Navy Civilian Cafeteria Associations, which acquire title to and sell the merchandise through the machines to authorized purchasers.

For the exemption to apply, the contracts between the operators and the United States instrumentalities and the conduct of the parties must make it clear that the instrumentalities acquire title to the merchandise and sell it through machines leased from the operators to authorized purchasers.

¹The following is a summary of the pertinent regulations which have been issued:

(a) GENERAL. Air Force Regulation 34-57, issued under date of February 9, 1968, Army Regulation 210-65, issued under date of May 4, 1966, and Navy General Order No. 15, issued under date of May 5, 1965, authorize the sale and possession of alcoholic beverages at bases and installations subject to certain enumerated restrictions.

(b) AIR FORCE. Air Force Regulation 34-57, Paragraph 5, permits commissioned officers' and noncommissioned officers' open messes, subject to regulations established by commanders of major air commands to sell alcoholic beverages to authorized purchasers at bars and cocktail lounges, and provides that commanders will issue detailed control instructions. Paragraph 8 and 9 require commanders of major air commands to issue regulations relative to package liquor sales and to procurement of alcoholic beverages, respectively.

(c) ARMY. Army Regulation 210-65, Paragraph 9, provides that major commanders are authorized to permit at installations or activities within their respective commands the dispensing of alcoholic beverages by the drink or bottle. Paragraph 11 of AR 210-65 provides that when authorized by major commanders as prescribed in Paragraph 9, AR 210-65, officers' and non-commissioned officers' open messes may, subject to regulations prescribed by the commanding officer of the installation or activity concerned, dispense alcoholic beverages by the drink, and operate a package store.

(d) NAVY. Navy General Order No. 15 provides that commanding officers may permit, subject to detailed alcoholic beverage control instructions, the sales of packaged alcoholic beverages by officers' and noncommissioned officers' clubs and messes and the sale and consumption of alcoholic beverages by the drink in such clubs and messes.

(d) INDIAN RESERVATIONS.

(1) IN GENERAL. Except as provided in this regulation, tax applies to the sale or use of tangible personal property upon Indian reservations to the same extent that it applies with respect to sale or use elsewhere within this state.

(2) DEFINITIONS. For purposes of this regulation "Indian" means any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior. Indian organizations are entitled to the same exemption as are Indians. "Indian organization" includes Indian tribes and tribal organizations and also includes partnerships all of whose members are Indians. The term includes corporations organized under tribal authority and wholly owned by Indians. The term excludes other corporations, including other corporations wholly owned by Indians. "Reservation" includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian.

(3) SALES BY ON-RESERVATION RETAILERS.

(A) Sales by Indians.

1. Sales by Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by Indians to non-Indians and Indians who do not reside on a reservation. Sales tax does not apply to sales of tangible personal property by Indian retailers made to non-Indians and Indians who do not reside on a reservation when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on the reservation. Except as exempted below, Indian retailers are required to collect use tax from such purchasers and must register with the Board for that purpose.

Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation.

(B) Sales by non-Indians.

1. Sales by non-Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by retailers when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on a reservation. The sale is exempt whether the retailer is a federally licensed Indian trader or is not so licensed. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by non-Indians to non-Indians and Indians who do not reside on a reservation. Either sales tax or use tax applies to sales of tangible personal property by non-Indian retailers to non-Indians and Indians who do not reside on a reservation.

(C) Resale Certificates. Persons making sales for resale of tangible personal property to retailers conducting business on an Indian reservation should obtain resale certificates from their purchasers. If the purchaser does not have a permit and all the purchaser's sales are exempt under paragraph (d)(3)(A) of this regulation, the purchaser should make an appropriate notation to that effect on the certificate in lieu of a seller's permit number (see Regulation 1668, "Resale Certificates").

(4) SALES BY OFF-RESERVATION RETAILERS.

(A) Sales Tax - In General. Sales tax does not apply to sales of tangible personal property made to Indians negotiated at places of business located outside Indian reservations if the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation. Generally ownership to property transfers upon delivery if delivery is made by facilities of the retailer and ownership transfers upon shipment if delivery is made by mail or carrier. Except as otherwise expressly provided herein, the sales tax applies if the property is delivered off the reservation or if the ownership to the property transfers to the purchaser off the reservation.

(B) Sales Tax - Permanent Improvements - In General. Sales tax does not apply to a sale to an Indian of tangible personal property (including a trailer coach) to be permanently attached by the purchaser upon the reservation to realty as an improvement if the property is delivered to the Indian on the reservation. A trailer coach will be regarded as having been permanently attached if it is not registered with the Department of Motor Vehicles. Sellers of property to be permanently attached to realty as an improvement should secure exemption certificates from their purchasers (see Regulation 1667, "Exemption Certificates").

(C) Sales Tax - Permanent Improvements - Construction Contractors.

1. Indian contractors. Sales tax does not apply to sales of materials to Indian contractors if the property is delivered to the contractor on a reservation. Sales tax does not apply to sales of fixtures furnished and installed by Indian contractors on Indian reservations. The term "materials" and "fixtures" as used in this paragraph and the following paragraph are as defined in Regulation 1521 "Construction Contractors."

2. Non-Indian contractors. Sales tax applies to sales of materials to non-Indian contractors notwithstanding the delivery of the materials on the reservation and the permanent attachment of the materials to realty. Sales tax does not apply to sales of fixtures furnished and installed by non-Indian contractors on Indian reservations.

(D) Use Tax - In General. Except as provided in paragraphs (d)(4)(E) and (d)(4)(F) of this regulation, use tax applies to the use in this state by an Indian purchaser of tangible personal property purchased from an off-reservation retailer for use in this state.

(E) Use Tax - Exemption. Use tax does not apply to the use of tangible personal property (including vehicles, vessels, and aircraft) purchased by an Indian from an off-reservation retailer and delivered to the purchaser on a reservation unless, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

(F) Leases. Neither sales nor use tax applies to leases otherwise taxable as continuing sales or continuing purchases as respects any period of time the leased property is situated on an Indian reservation when the lease is to an Indian who resides upon the reservation. In the absence of evidence to the contrary, it shall be assumed that the use of the property by the lessee occurs on the reservation if the lessor delivers the property to the lessee on the reservation. Tax applies to the use of leased vehicles registered with the Department of Motor Vehicles to the extent that the vehicles are used off the reservation.

(G) Property Used in Tribal Self-Governance. Sales and use tax does not apply to sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States if:

1. The tribal government's Indian tribe does not have a reservation or the principal place where the tribal government meets to conduct tribal business cannot be its Indian tribe's reservation because the reservation does not have a building in which the tribal government can meet or the reservation lacks one or more essential utility services, such as water, electricity, gas, sewage, or telephone, or mail service from the United States Postal Service;

2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and

3. The property is delivered to the tribal government and ownership of the property transfers to the tribal government at the principal place where the tribal government meets to conduct tribal business.

The purchase of tangible personal property is not exempt from use tax under this paragraph if the property is used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.



AGUA CALIENTE BAND OF CAHUILLA INDIANS
TRIBAL COUNCIL

RICHARD M. MILANOVICH CHAIRMAN • JEFF L. GRUBBE VICE CHAIRMAN
KAREN A. WELMAS SECRETARY/TREASURER • VINCENT GONZALES III MEMBER • ANTHONY J. ANDREAS III MEMBER

March 23, 2011

Susanne Buehler
Chief, Tax Policy Division
Sales and Use Tax Department
State Board of Equalization
PO Box 942879
Sacramento, CA 94279-0092

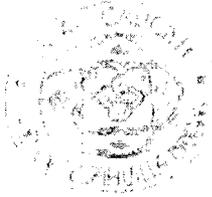
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MAR 29 2011
TAX POLICY DIVISION

RE: Regulation 1616, *Federal Areas*

Dear Ms. Buehler,

The Agua Caliente Band of Cahuilla Indians ("Tribe") appreciates the Board of Equalization's ("BOE") continued outreach to tribal governments in crafting changes to regulations that impact Indian tribes and their members. Currently, the BOE proposes to amend Regulation 1616, creating a limited sales and use tax exemption for specified sales to and purchases by officially recognized landless Indian tribes. Although the proposed changes are well intended, as discussed below, the premise upon which the change is based is flawed and the BOE should decline to adopt the draft language.

The proposed changes to Regulation 1616 would exempt officially recognized landless tribes from payment of sales and use tax on certain items delivered to the tribe's principal place of conducting tribal business. The draft language defines eligible landless tribes as those officially recognized by either the federal or state government. However, California has no "state recognized" tribes. Instead, there exist two non-binding, California Assembly Joint Resolutions passed in support of two tribes seeking federal recognition. These Resolutions are not connected to any codified process for unrecognized tribes to establish formal government to government relationships with the State and, within the context of taxation, are meaningless.



Page 2 of 2

RE: Regulation 1616, Federal Areas

As recognized in the Initial Discussion Paper, tax exemptions for tribes are rooted in their existence as formally recognized, sovereign governments. Because California has no codified process for unrecognized tribes to seek formal recognition, it is impermissible for the BOE to grant tax exemptions to any unrecognized tribe. Accordingly, the Agua Caliente Band of Cahuilla Indians urges the BOE to not adopt the proposed changes to Regulation 1616.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard M. Milanovich".

Richard M. Milanovich
Chairman, Tribal Council
**AGUA CALIENTE BAND OF
CAHUILLA INDIANS**

TC-11451-03-11



**AGUA CALIENTE BAND OF CAHUILLA INDIANS
TRIBAL COUNCIL**

**RICHARD M. MILANOVICH CHAIRMAN • JEFF L. GRUBBE VICE CHAIRMAN
VINCENT GONZALES III SECRETARY/TAMAJURR • ANTHONY J. ANDREAS III MEMBER • SAVANA R. SAUBEL MEMBER**

June 2, 2011

Susanne Buehler
Chief, Tax Policy Division
Sales and Use Tax Department
State Board of Equalization
PO Box 942879
Sacramento, CA 94279-0092

RE: Regulation 1816, *Federal Areas*

Dear Ms. Buehler,

As a follow up to our March 23, 2011, letter, the Agua Caliente Band of Cahuilla Indians ("Tribe") reemphasizes its position that the California State Board of Equalization ("BOE") should decline to adopt the proposed amendment to Regulation 1816, creating a limited sales and use tax exemption for sales to landless "state recognized" tribes. As noted in the Tribe's earlier letter, California has no "state recognized" tribes. In fact, the closest to state recognition the BOE can cite are two non-binding, California Assembly Joint Resolutions passed in support of two tribes seeking federal recognition. Under this framework, only two unrecognized tribes stand to benefit from the proposed regulation change, which as discussed in earlier correspondence, is impermissible in the context of the law, regarding Indian tribes and taxation. Further, the history of California's native population makes it impossible for the BOE to develop and enforce a bright line test of what additional tribes might benefit from the proposed tax exemption.

The Initial Discussion Paper captures the history of tribes in California, but fails to include the very important fact that in addition to those tribes terminated under the California Rancheria Act or other federal legislation, there are entities, asserting tribal



**RE: Regulation 1816, Federal Areas
Page No. 2**

status, that were never federally recognized. In fact, a review of the *45 or so currently unrecognized California tribes shows that only 6 of these were terminated under the California Rancheria Act. Accordingly, the BOE, in the absence of state law, establishing a recognition process, cannot rely on the termination era statutes in determining what tribes should benefit from the proposed change. To further compound the problem, those tribes that were not previously federally recognized are self-identifying, which would require BOE staff to craft regulations to determine which groups could legitimately take advantage of the tax exemption.

Because there is no codified process in California for unrecognized tribes to gain state recognition, your regulatory body should decline to in essence, create new law. Further, the history and status of the numerous unrecognized tribes in California creates a new burden on BOE staff to determine what tribes should benefit from the proposed tax exemption. Accordingly, the Agua Caliente Band of Cahuilla Indians again urges the BOE to not adopt the proposed changes to Regulation 1816.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard M. Milanovich".

Richard M. Milanovich
Chairman, Tribal Council
**AGUA CALIENTE BAND OF
CAHUILLA INDIANS**

RMM: IF
TC-11465-06-11

* Although the Bureau of Indian Affairs does not maintain a list of unrecognized tribes, Humboldt State University, among other academic institutions, endeavors to document such entities. The Humboldt State list is available to the public at <http://sos.nativeweb.org/caunrectribes.html>.



**AGUA CALIENTE BAND OF CAHUILLA INDIANS
TRIBAL COUNCIL**

RICHARD M. MILANOVICH CHAIRMAN • JEFF L. GRUBBE VICE CHAIRMAN
VINCENT GONZALES III SECRETARY/TREASURER • ANTHONY J. ANDREAS III MEMBER • SAVANA R. SAUBEL MEMBER

June 28, 2011

Brad Miller
SUTD Regulations & Legislation Specialist
Business Taxes Committee
State Board of Equalization
P. O. Box 942879
Sacramento, CA 94279-0092

RE: Regulation 1616, *Federal Areas*

Dear Mr. Miller,

On June 22, 2011, you followed up with me, regarding the Agua Caliente Band of Cahuilla Indians' written comments opposing the proposed amendments to Regulation 1616. Specifically, you inquired as to whether the Tribe would continue in its opposition to the proposed change if the language were revised to limit the sales tax exemption to landless, federally recognized tribal governments.

Because the Tribe's opposition to the proposed change is rooted in the fact that there is no codified process for unrecognized tribes to seek formal State recognition, the proposal to limit the exemption to federally recognized tribes does indeed address our concerns. Consequently, if the language were so revised, the Tribe would have no opposition to amending Regulation 1616.

The Tribe appreciates the Board of Equalization's sincere willingness to work with tribal governments on these changes and the Tribe looks forward to seeing the revised proposed changes to Regulation 1616.

Sincerely,

Richard M. Milanovich
Chairman, Tribal Council
AGUA CALIENTE BAND OF
CAHUILLA INDIANS

RMM:lf
TC-44466-06-11

TAX POLICY DIVISION

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Santa Ynez Band of Chumash Indians

P.O. Box 517 • Santa Ynez, CA 93460
805-688-7997 • Fax 805-686-9578
www.santaynezchumash.org

BUSINESS COMMITTEE
Vincent Armenta, Chairman
Richard Gomez, Vice Chairman
Kenneth Kahn, Secretary/Treasurer
David D. Dominguez, Committee Member
Gary Pace, Committee Member

June 3, 2011

Board of Equalization
Tax Policy Division (MIC 92)
P O Box 942879
Sacramento, CA 94279-0092
Attention: Mr. Bradley Miller:

RE: Regulation 1616 proposed amendments

Dear Mr. Miller:

The Santa Ynez Band of Chumash Indians must respectfully disagree with your position that there are "State Recognized" Tribes in the State of California. We are aware of no State statute providing for State recognition but we do appreciate the efforts of the State of California to provide services for various tribal organizations in addition to federally recognized Tribal governments.

Sincerely,

Vincent P. Armenta
Tribal Chairman



PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

Post Office Box 1477 • Temecula, CA 92593
Telephone (951) 770-6000 Fax (951) 695-1778

Tribal Chairman:
Mark Macarro

Council Members:
Mark Calac
Corrine Garbani
Andrew Masiel, Sr.
Russell "Butch" Murphy
Kenneth Perez
Benjamin "Ben" Vasquez

Tribal Treasurer:
Christina McMenamin

Tribal Secretary:
Louise Burke

June 1, 2011

Susanne Buehler
Chief, Tax Policy Division
State of California Board of Equalization
450 N Street
Sacramento, CA 94279-0092

RE: Amendments to Regulation 1616, *Federal Areas*

Dear Ms. Buehler,

I write on behalf of the Pechanga Band of Luiseño Indians, a federally recognized tribal government, in response to the Board of Equalization's Second Discussion Paper regarding proposed amendments to Regulation 1616, *Federal Areas*.

We appreciate the Board's efforts to address some of the matters that impact tribal governments. However, we oppose the definition of "officially recognized" tribal governments in the language of subdivision (d) of Regulation 1616.

We strongly disagree with the notion of State recognized tribes receiving benefits and treatment similar to that of federally recognized tribes. These benefits should only be extended to federally recognized tribes.

The recognition and establishment of a federally recognized tribe should remain within the exclusive jurisdiction of the United States government. With no defined process in place to determine who is and who is not a legitimate tribe and identify its duly elected leadership, the State is ill-equipped to oversee such matters.

Accordingly, we urge the Board of Equalization to not adopt the proposed changes to Regulation 1616 as it relates to "officially" recognized tribes.

Respectfully submitted,

Mark Macarro
Tribal Chairman



CALIFORNIA TRIBAL
BUSINESS ALLIANCE

May 27, 2011

Ms. Susanne Buehler, Chief
Tax Policy Division
Sales and Use Tax Department
State Board of Equalization
P.O. Box 942879
Sacramento, California 94279-0044

RE: Board of Equalization Proposal to Amend Regulation 1616, *Federal Areas*, Second Discussion Paper – Sales To Governments of Officially Recognized Indian Tribes (“Amendment”)

Dear Ms. Buehler:

Thank you for your dedication and ongoing effort to advance the exercise of tribal sovereignty and self-governance for Indian tribes in California by proposing the above-referenced Amendment to create a limited exemption for tangible personal property that is sold to or purchased by officially recognized Indian tribes without a reservation on which to conduct tribal government business. The California Tribal Business Alliance (CTBA) has reviewed the proposed Amendment and respectfully requests that it be revised to exclusively apply to “federally-recognized” Indian tribes.

The United States Department of Interior annually publishes a document entitled, *Indian Entities Recognized and Eligible to Receive Services From the United State Bureau of Indian Affairs*. Federal recognition establishes the federal-trust relationship between Indian tribes and the United States which is institutionalized in both the government-to-government relationship between an Indian tribe and the United States, and federal common law under the doctrine of sovereign immunity which recognizes the sovereign status of Indian tribes as lawfully vested with police powers, including powers to tax and regulate conduct within their jurisdiction free from state interference.¹ Federal recognition of Indian tribes, whether by congressional act, treaties, executive orders or acknowledgement (25 CFR 83), also entitle Indian tribes to participate in federal programs and services due to their political status as Indians.²

¹ See, Section 3.02[3], Felix Cohen – Handbook of Federal Indian Law (2005) (“Cohen”)

² Cohen, Section 3.02[9], pp. 169.



1530 J Street, Suite 400
Sacramento, CA 95814
Tel: 916 346 4205
Fax: 916.346.4283

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TAX POLICY DIVISION

BOE Second Discussion Paper Reg. 1616
May 27, 2011
Page 2

State recognized Indian tribes have no legal relationship with the federal government and do not have any status under the United States Constitution as distinct political and legal entities. State recognized Indian tribes also lack policy powers and the authority to tax and regulate their affairs or conduct on Indian lands. For these reasons, state recognized tribes are not entitled to receive services under the vast majority of federal programs for Indians and should not be included as eligible tribal governments under the proposed Amendment.

Therefore, CTBA requests the following revisions to the proposed Amendment:

(G) Property Used in Tribal Self-Governance. Sales and use tax does not apply to sales of tangible personal property to and purchases of tangible personal property by the tribal government of an Indian tribe that is officially recognized by either the United States or the State of California if:

1. The Indian tribe does not have a reservation or the principal place where the tribal government meets to conduct tribal business cannot be its Indian tribe's reservation because the reservation does not have a building in which the tribal government can meet or the reservation lacks one or more essential utility services, such as water, electricity, gas, sewage, or telephone, or mail services from the United States Postal Service;
2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and,
3. The property is delivered to the tribal government and ownership of the property transfers to the tribal government at the principal place where the tribal government meets to conduct tribal business.

The purchase of tangible property is not exempt from use tax under this paragraph if the property is used for purposes other than tribal self-governance more than it is used for tribal self-governmental purposes within the first 12 months following delivery.

Respectfully,



ROBERT H. SMITH
Chairman

Rincon Band of Luiseño Indians

PO Box 68 • Valley Center • CA 92082 • (760) 749-1051 • Fax: (760) 749-8901



Mr. Jeffrey L. McGuire
Deputy Director
Sales and Use Tax Department
State Board of Equalization
P O Box 942879
Sacramento, CA 94279-0044
Fax 916-322-0187

March 31, 2011

Comments of Rincon Band of Luiseno Indians Regarding Board of Equalization Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Landless Tribes¹

Dear Mr. McGuire,

The Rincon Band of Luiseno Indians submits these comments in response to the Board of Equalization (the "BOE") letter, dated February 3, 2011, circulating the Initial Discussion Paper – Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Landless Tribes (the "Amendments") and consultation meeting with tribal leaders on March 9, 2011.

The Amendments are intended to provide a limited exemption for tangible personal property that is sold to or purchased by landless Indian tribes for use by their

¹The Rincon Band continues to have a number of disagreements with the State regarding taxation policy and interpretation of cases regarding the incidence and applicability of state taxes. In submitting these comments and participating in this process, the comments of the Rincon Band of Luiseno Indians should neither be construed to bind the Band to any position that concedes state authority to any tax in any context nor should they be considered a complete inventory of all issues and concerns regarding BOE's position on taxation on Indian lands. Further, the comments shall not in any way be interpreted as acquiescence to or agreement with the revised Draft, nor in any way be interpreted as a waiver of the Tribe to contest any position the State may take regarding applicability of state or local taxes to Indian lands, Indian enterprises, or goods and services provided on Indian lands.

Rincon Band of Luiseno Indians

BOE Initial Discussion Paper Reg 1616
March 23, 2011
Bo Mazzetti
Tribal Chairman

Stephanie Spencer
Vice Chairwoman

Charlie Kolb
Council Member

Steve Stallings
Council Member

Kenneth Kolb
Council Member

tribal governments in the governance of tribal members or for the acquisition of trust land. The BOE staff believes taxation of these types of transactions might interfere with tribal sovereignty and further believes that the exemption would need to be limited to taxes imposed on property delivered to an officially recognized landless Indian tribe at a principal place where the landless tribe's government meets to conduct tribal business so that there is some way for retailers and the State Board of Equalization to verify exempt transactions by landless tribes. The BOE staff has formulated a "principal place" test that recognizes that landless tribes may not own any real estate where their tribal government can meet to conduct tribal business, and that may occasionally meet at more than one place during a given period.

The proposed Amendments to Regulation 1616(d) provides a limited exemption from sales and use tax for sales to and purchases by officially recognized landless Indian tribes of tangible personal property for use by their tribal governments in the governance of tribal members or for the acquisition of trust land. The proposed language of the Amendment provides,

(G) Officially Recognized Landless Indian Tribes. Sales tax does not apply to sales of tangible personal property to a landless Indian tribe that is officially recognized by either the United States or the State of California when the property is purchased for use by the tribal government in the governance of tribal members or for the acquisition of trust land, and the property is delivered to the tribe and ownership of the property transfers to the tribe at the principal place where the landless tribe's government meets to conduct tribal business. Use tax does not apply to the use of tangible personal property purchased by a landless Indian tribe from a retailer and delivered to the tribe at the principal place where the landless tribe's government meets to conduct tribal business unless, within the first 12 months following delivery, the property is used for purposes other than the landless tribe's governance of its tribal members or acquisition of trust land more than it is used for the landless tribe's governance of its tribal members or acquisition of trust land.

In general, the Band commends the Board for addressing this issue, however, we believe the proposed Amendment is unnecessarily narrow as to the limitation on uses of tax exempt purchases and class of purchasers. First, the Band does not believe a sufficient purpose, need or legal basis exists for the BOE to impose limitations on the use of exempt purchases by tribal governments, landless or not. What is the rationale for restricting exempt purchases to uses for the governance of tribal members or for the acquisition of trust land? Does the BOE analysis change if the property purchased by a landless tribal government is for recreational, business or commercial uses? Furthermore, what types of property or circumstances are covered by tribal government purchases for the acquisition of trust land and who gets to decide whether a nexus exists between the purchase and the acquisition of trust land?

Second, the Band also believes the proposed Amendment should include an Indian Organization, as that term is defined in Regulation 1616(d)(2), of officially recognized tribes provided that the same delivery and title transfer requirements are satisfied in accordance with the proposed Amendment.

Finally, the BOE staff has acknowledged, in connection with draft Publication 146 -- Sales to American Indians and Sales in Indian Country ("Publication 146"), that the 12-month use limitation lacks a statutory basis and was an exercise of Board discretion to impose a time limit on purchases. The Band understood that the Board agreed to add the 12-month test to the list of Board issues for regulatory amendments. Therefore, the continued application of the 12-month use limitation in the proposed Amendment should be deleted.

Our suggested revisions to the proposed Amendment are:

(G) Officially Recognized Landless Indian Tribes. Sales tax does not apply to sales of tangible personal property to a landless Indian tribe, or its Indian organization, that is officially recognized by either the United States or the State of California when the property is purchased for use by the tribal government in the governance of tribal members or for the acquisition of trust land, and the property is delivered to the tribe and ownership of the property transfers to the tribe at the principal place where the landless tribe's government meets to conduct tribal business. Use tax does not apply to the use of tangible personal property purchased by a landless Indian tribe from a retailer and delivered to the tribe at the principal place where the landless tribe's government meets to conduct tribal business unless, within the first 12 months following delivery, the property is used for purposes other than the landless tribe's governance of its tribal members or acquisition of trust land more than it is used for the landless tribe's governance of its tribal members or acquisition of trust land.

Respectfully Submitted,



Bo Mazzetti, Chairman
Rincon Band of Luiseno Indians



March 9, 2011

Elizabeth D. Kipp
Chairperson

Ms. Susanne Buehler
Division Chief
State Board of Equalization
P O. Box 942879
Sacramento, CA 94279-0092

Arrow Sample
Vice Chair

Lisa Garcia
Secretary

Dear Division Chief Buehler,

Donny Baty
Treasurer

The Big Sandy Rancheria appreciates your request for input from tribal governments in California regarding proposed amendments to California Tax Regulation 1616. Federal Areas set forth in your February 23, 2011 letter. Big Sandy Rancheria supports the amendment allowing landless tribes to enjoy the benefits of the unique state tax status of federally recognized Indian tribes and Indian lands. This status is important in fulfilling the sovereign rights enjoyed by Indian tribes

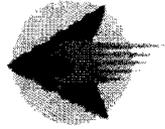
Amy A. Hutchins
Member-At-Large

In this regard, California has, at least in part, all ready recognized that where a tribe provides goods and services to non-members on their reservation and those goods and services are created by the tribe on their reservation, the State is without the power to tax those goods and services. California Tax Reg. 1616(d)(3)(A)(2). The value added by the tribes on their reservation displaces whatever taxing jurisdiction the State might have enjoyed over those non members. However, as currently written, this exemption from State taxation only applies to meals, foods and beverages. Federal law recognizes no such limitation on this exemption. The State lacks jurisdiction to tax any goods and services that arise out of value added by the Tribe on the Tribe's reservation. So while these regulations are most definitely a step in the right direction, they still do not fully take into account the limits of State jurisdiction to tax reservation transactions involving non-Indians. Big Sandy Rancheria will provide a more detailed analysis of this issue to the Board of Equalization before the comment period closes on March 31, 2011. Thank you.

Sincerely,

Elizabeth Kipp
Chairperson, Big Sandy Rancheria

Exhibit 8



BIG SANDY RANCHERIA

March 29, 2011

Elizabeth D. Kipp
Chairperson

State Board of Equalization
Attn: Susanne Buehler
450 N. Street
P.O. Box 948279
Sacramento, California 94279-0092

Arrow Sample
Vice Chair

Lisa D. Garcia
Secretary

Re: Comments on the Board of Equalizations amendments to
regulation 1616

Johnny Baty
Insurer

Dear Ms. Buehler:

Amy Hutchins
Member-At-Large

Please accept this submission as comments made in response your February 23, 2011 invitation for comments on the Board of Equalization's ("BOE") proposed amendments to BOE Regulation 1616, Federal Areas. While Big Sandy Rancheria ("Big Sandy") applauds and welcomes the BOE's recognition that landless Indians are nonetheless sovereign, the current scope of Regulation 1616 does not accurately reflect the full limits of state jurisdiction over Indian lands and activity thereon. State jurisdiction over activities and goods that derive their value from Indian lands is extremely limited. These limits encompass much more than meals; they encompass any product or activity that derives its values from activity of Indians on Indian land. Big Sandy requests that Regulation 1616 be amended to accurately set forth the full limits of state jurisdiction over activity and products that derive their value from Indian activity conducted on Indian land.

BOE Regulation 1616(d)(3)(A)(2) provides, in part, that sales made from Indians to non-Indians are generally subject to California's use tax and the Indian retailers on the reservation are responsible for collecting this tax. Regulation 1616 exempts from this taxation "meals, food or beverages" sold by Indian retailers to non-Indians. However, an exemption limited only to "meals, food or beverages" does not accurately reflect the scope of federal law on limits of state jurisdiction to regulate reservation Indians in regard to their dealings with non-Indians on their reservation. Federal law provides a much broader exemption and it is not dependent upon the type of goods or

services provided. Instead, it is related to whether the goods or services are created by value added by the Indians on their reservation.

One of the most significant United State Supreme Court cases on this issue originated in California. In *California v. Cabazon Band Of Mission Indians*, 480 U.S. 202 (1987), the State of California was attempting to regulate under state law a bingo game being operated by the Indian tribe on its reservation in which non-Indians were playing. California claimed that it retained the inherent authority to regulate the interaction of tribes with non-Indians, even on the reservation.¹ The state argued that the tribe was doing nothing more than marketing an exemption from state law and that under prior U.S. Supreme Court precedent, it could regulate such activity. The *Cabazon* court quickly differentiated the case before it from the prior cases relied on by the state.² The tribe in *Cabazon* had not merely put a product manufactured somewhere on a shelf for re-sale. They had put in considerable time, effort and resources to create a well run business offering services to non-Indians. The Court found that the “[tribes] are generating value on the reservation through activities in which they have a substantial interest.” *Cabazon*, 480 U.S. at 220. This “value added” on the reservation by the tribes ejected the state from jurisdiction to regulate such activity, even where it involved non-Indians. *Id* at 216 and 220; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (holding that tribally owned and managed hunting and fishing resort on reservation was beyond state regulation). These cases stand for the proposition of federal law that where tribes create value on the reservation in a good or service offered to non-Indians on the reservation, state governments are prevented from regulating the relationship between the tribe and non-Indians in regard to that good or service.

The exemption contained in Regulation 1616(d)(3)(A)(2) simply does not accurately reflect controlling federal law on this issue. Limiting this exemption to merely food and beverages is in no way supported by federal law. This exemption is dependent upon whether the tribe has added value to the goods or activity on their reservation. The United States Department of Justice has recognized that were a tribe to manufacture cigarettes on its reservation, this activity would constitute “value added” on the reservation and the state would be without the power to regulate that activity, even where it involved non-Indians. See Letter from Mark C. Van Norman,

¹ California also claimed that Congress had given the state the power to regulate such activity through Public Law 280. This claim was utterly rejected by the Court. *Cabazon*, 480 U.S. at 207-08.

² *Moe v. Confederated Salish and Kootenai Tribe of the Flathead Reservation*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribe of the Colville Indian Reservation*, 447 U.S. 134 (1980) were the cases that the state incorrectly applied in the *Cabazon* case.

Deputy Director, United States Dept. of Justice, to Barry S. Orlow (October 8, 1997) attached hereto as **Attachment 1**. Thus, it is clear that any "value added" activity falls under the rule announced in *Cabazon*.

The current Regulation 1616 simply does not accurately reflect the scope of federal exemptions on state regulation of "value added" reservation activity. As California has now amended Regulation 1616 to properly recognize the sovereignty of landless Indians, it should take this opportunity to properly recognize the scope of the "value added" exemption in this amendment process. Please contact me to discuss, or if you would like more information or analysis on this issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "Elizabeth Callahan". The signature is written in black ink and is positioned to the right of the word "Sincerely,".



U. S. Department of Justice

Office of Tribal Justice

Washington, D.C. 20530

OCT 8 1997

Barry S. Orlow, Esq.
Office of Chief Counsel
U.S. Treasury Department
Bureau of Alcohol, Tobacco & Firearms
650 Massachusetts Ave., N.W.
Washington, DC 20226

Dear Mr. Orlow:

You have asked for our views concerning the application of state taxes to cigarette sales by the Omaha Indian Tribe, where the Tribe manufactures the cigarettes and sells them to both Indian and non-Indian consumers at retail outlets on its reservation.

In the special area of state taxation, the Supreme Court has a per se rule that absent congressional authorization, states may not tax Indian tribes or tribal members within tribal territory. County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 258 (1992). The Supreme Court has explained the rationale for this rule:

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. As a corollary to this authority, and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.

Montana v. Blackfeet Indian Tribe, 471 U.S. 759, 764 (1985). Thus, states may not tax cigarette sales to tribal members within tribal territory. Moe v. Salish & Kootenai, 425 U.S. 463 (1974).

On the other hand, the Supreme Court has held that Indian tribes may not "market an exemption" from state taxation to non-Indians. Thus, non-Indians who purchase prepackaged cigarettes from tribal retailers are ordinarily subject to non-discriminatory state cigarette taxes. Washington v. Colville, 447 U.S. 134, 155 (1980). The Court explained:

It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have significant interests.

Id. The Supreme Court has affirmed this rule in a number of cases.

Barry Orlow, Esq.
Bureau of Alcohol, Tobacco & Firearms
Page 2

In contrast, based on the federal policies promoting tribal self-determination and economic self-sufficiency, where Indian tribes generate value on their reservations, the goods or services provided to non-Indians are generally exempt from state regulation or taxation. For example, in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), the Supreme Court held that the State could not regulate non-Indian hunters patronizing a tribal hunting and fishing enterprise within tribal territory. The Court explained:

The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. This case is thus far removed from those situations, such as on-reservation sales outlets which market to non-members goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is de minimis. The tribal enterprise in this case clearly involves "value generated on the reservations by activities involving the Tribe."

462 U.S. at 340. Accordingly, the State could not assess state license fees on the non-Indian hunters.

Similarly, in California v. Cabazon Band of Indians, 480 U.S. 202 (1987), the Supreme Court held that California had no authority to regulate Indian gaming because state regulation would interfere with tribal self-government. The Court explained:

[T]he Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. . . .

[T]he Cabazon and Morongo Bands are generating value on reservation through activities in which they have a substantial interest.

480 U.S. at 219-220. Thus, because Indian gaming is a tribal activity that generates reservation value it was not subject to state law.

Applying these precedents to the situation of the Omaha Indian Tribe, where the Tribe manufactures cigarettes for resale to Indian and non-Indian consumers at retail outlets on its reservation, it

Barry Orlow, Esq.
Bureau of Alcohol, Tobacco & Firearms
Page 3

is fairly clear that the State may not tax or regulate the Tribe's cigarette business within tribal territory.

The Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341 et seq., imposes record keeping requirements, on persons engaged in shipping, distribution or sale of cigarettes in excess of 50,000 per transaction. The Act also prohibits knowing transportation, possession, receipt, sale, or purchase of contraband cigarettes. The Act defines contraband cigarettes by reference to payment of "applicable" state taxes. 18 U.S.C. § 2341(2).

The Act has been held to apply to cigarette transactions by Indian transporters and retailers, where cigarettes are otherwise subject to state taxation. United States v. Baker, 63 F.3d 1478 (9th Cir. 1995). In passing the Act, however, the Conference Committee was clear that it did not intend to change the existing case law to extend state taxation authority in tribal territory. H.R. Conf. Rep. 95-1778, 95th Cong., 2nd Sess (1978); 1978 WL 8548 (Leg. Hist.). The Conference Committee Report explains:

Some concern was expressed in the course of the conference that the definition of "contraband cigarettes" inadvertently extinguished rights of certain Indians and Indian tribes under current law to engage in the commercial sale of cigarettes within Indian country free of state taxation. The phrase "applicable state cigarette taxes" makes it clear that this legislation is not intended to affect transportation or sale by Indians or Indian tribes acting in accordance with legally established rights. The Conferees do not intend that this bill address the current exemption from state taxation of cigarette sales on Indian reservations and nothing in this bill is intended to affect this or any other immunity from state tax held by any Indian or Indian tribe.

1978 WL 8548 at 8. Clearly, the Act does not affect the right of the Omaha Indian Tribe to sell cigarettes which it manufactures on-reservation to non-Indians at retail outlets on-reservation. Thus, because sales of such cigarettes are based on reservation generated value they would not be subject to state taxation.¹

¹ In contrast, were the Tribe to sell its cigarettes outside the reservation, then absent a contrary treaty provision, the Act would apply because state taxation of the cigarettes would not be preempted in regard to transactions outside of the reservation. See Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 463-464 (1995).

Barry Orlow, Esq.
Bureau of Alcohol, Tobacco & Firearms
Page 4

As you know, we have consulted with the Associate Solicitor for Indian Affairs in the Department of the Interior, and he is in agreement with our conclusion. If you have any further questions, we would be happy to discuss them with you.

Sincerely,



Mark C. Van Norman
Deputy Director

CALIFORNIA VALLEY MIWOK TRIBE

10601 N. Escondido Pl, Stockton, California 95212 Bus: (209) 931-4567 Fax: (209) 931-4333
<http://www.californiavalleymiwoktribe-nsn.gov>



Transmitted via Facsimile to (916) 322-4530

March 29, 2011

Susanne Buehler
Board of Equalization
450 N Street
Sacramento, California 94279

Re: Comments Regarding the Recommended Amendments to Regulation 1616

Dear Ms. Buehler:

On behalf of the California Valley Miwok Tribe ("Tribe"), I would first like to extend my thanks to the Board of Equalization ("Board") for shining light on the current disparity present in sales and use taxes applicable to federally and state recognized Indian tribes. The Tribe supports amending the existing regulation to expressly include landless tribes as eligible for sales and use tax exemptions. All recognized tribes should be treated equally by the Board.

As a landless tribe, we do not currently share in the same advantages afforded to tribes with a reservation or other land base. The irony of the Board's current regulatory structure is that it burdens tribal governments that are already disadvantaged by their landless status while awarding more established and likely prosperous tribes with sales and use tax exemptions. We applaud the Board's efforts to level the playing field.

All recognized tribes in the State of California should have the same rights and privileges whether they have land or not. No tribe is better than another tribe simply because they are fortunate enough to have an established land base. Amending Regulation 1616 to include rights to sales and use tax exemptions for landless tribes serves a very important function of recognizing equality amongst the State's native population.

Thank you again for allowing the greater tribal community to participate and comment on the proposed amendments to Regulation 1616. I look forward to exploring this very important issue upon the Board's issuance of the Second Discussion Paper.

Sincerely yours,

Silvia Burley, Chairperson
s.burley@californiavalleymiwoktribe-nsn.gov



LAW OFFICES OF
CLEMENT, FITZPATRICK & KENWORTHY

INCORPORATED

3333 MENDOCINO AVENUE, SUITE 200
SANTA ROSA, CALIFORNIA 95403

FAX: (707) 940-4205

TELEPHONE: (707) 523-1181

Anthony Cohen
acohen@cfk.com

March 30, 2011

VIA FACSIMILE and U.S. MAIL: (916) 322-4530

Susanne Buehler
Chief, Tax Policy Division, Sales and Use Tax Department
State Board of Equalization
450 N Street
P.O. Box 942879
Sacramento, CA 94279-0092

Re: Comment of Manchester-Point Arena Band of Pomo Indians
On Proposed Regulation 1616 Amendments Re: Landless Tribes

Dear Ms. Buehler:

I write on behalf of the Manchester-Point Arena Band of Pomo Indians, a federally recognized Tribe ("Tribe") with tribal trust land in Northern California. Although the Tribe does have trust land, it is committed to the principle that any action by the State of California that affects the sovereignty of any tribe potentially impacts the State's government-to-government relationship with all tribes. With that principle in mind, by this letter, the Tribe comments upon the "landless tribe" Regulation 1616 amendments being considered by BOE staff, and ultimately by the Board itself.

First, the Tribe commends BOE and its staff for their continuing efforts to address the impacts of California's sales tax policies upon the separate sovereigns within California's borders and to ensure that the effects of those policies are consistent with the tribes' rights under federal law. We note that BOE staff's efforts led to the tentative conclusion that two aspects of the exercise of sovereignty by landless tribes could be adversely affected by imposition of sales taxes upon such tribes' purchases. BOE staff proposed amendments to subdivision (d) of Regulation 1616, "to clarify that a limited exemption from sales and use taxes exists for sales to and purchases by officially recognized landless Indian tribes of tangible personal property *for use by their tribal governments in the governance of tribal members or for the acquisition of trust land.*" [Emphasis added.] (02/16/2011 Initial Discussion Paper.)

"Governance of tribal members" and "the acquisition of trust land" certainly are critical aspects of the exercise of sovereignty by landless sovereigns. The Tribe believes that government-to-government interaction of any tribal government (with or without land) with California or any other

Letter to Susanne Buehler, BOE
March 30, 2011
p.2

sovereign government, for example the submission of this comment by Manchester-Point Arena to the State Board of Equalization, is also an exercise of tribal sovereignty that may not be subject to State sales tax. The Tribe therefore suggests the following amendment to the language proposed by BOE staff:

Sales tax does not apply to sales of tangible personal property to a landless Indian tribe that is officially recognized by either the United States or the State of California when the property is purchased for use by the tribal government in either the governance of tribal members or the conduct of a government-to-government relationship with another sovereign, or for the acquisition of trust land, and the property is delivered to the tribe and ownership of the property transfers to the tribe at the principal place where the landless tribe's government meets to conduct tribal business. Use tax does not apply to the use of tangible personal property purchased by a landless Indian tribe from a retailer and delivered to the tribe at the principal place where the landless tribe's government meets to conduct tribal business unless, within the first 12 months following delivery, the property is used for purposes other than the landless tribe's governance of its tribal members or the conduct of a government-to-government relationship with another sovereign, or for the acquisition of trust land more than it is used for the landless tribe's governance of its tribal members, or the conduct of a government-to-government relationship with another sovereign, or the acquisition of trust land.

Thank you very much for considering adding these provisions to the language that will be recommended by staff to the Board. Please feel free to contact me if you need any more information.

Sincerely,



Anthony Cohen

AC/cl

cc: Chairman Nelson Pinola,
Manchester-Point Arena Band of Pomo Indians



TOMARAS & OGAS, LLP

10755-F SCRIPPS POWAY PARKWAY #281 • SAN DIEGO, CALIFORNIA 92131
TELEPHONE (858) 554-0550 • FACSIMILE (858) 777-5765 • WWW.MTOWLAW.COM

Kathryn A. Ogas
Brenda L. Tomaras

kogas@mtowlaw.com
btomaras@mtowlaw.com

March 30, 2011

VIA E-MAIL

State Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Re: Comments on Proposed Revisions to Regulation 1616 - Landless Indian Tribes

To Whom It May Concern:

The Lytton Rancheria of California, a federally-recognized Indian tribe (Tribe) submits the following comments to the State Board of Equalization's (SBOE) proposal to extend the sales and use tax exemption under Regulation 1616 to landless Indian tribes.

The Tribe appreciates and supports the SBOE's proposal to extend the current sales and use tax exemption to landless Indian tribes. The Tribe believes that the tax exempt status of Indian tribes should be based on their status as sovereign governments rather than the existence or non-existence of reservation land. The Tribe is pleased that the SBOE has acknowledged, through its proposed amendments to Regulation 1616, that the exemption from state sales and use taxes applies equally to all federally recognized Indian tribes. While the Tribe believes that the SBOE's proposed additions to Regulation 1616 are a great start, the Tribe does have a few comments on the proposed language.

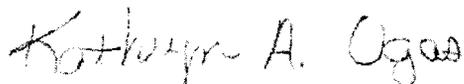
First, the Tribe urges the SBOE to consider revising the proposed language to expand the exemption to include Tribes whose governmental facilities are located off-reservation because the Tribe's reservation is: (i) too small to accommodate such facilities or (ii) not located, for reasons beyond the Tribe's control, in the Tribe's historical territory (making it impossible or infeasible for the Tribe to conduct its governmental operations from such reservation).

Second, the Tribe believes the exempt "uses" should be extended to encompass all purchases made by a Tribe relating to the conduct of its governmental activities. As we have stated above, landless Tribes should be treated the same as Tribes with reservation land. Thus, since all purchases made by Tribes whose tribal offices or business enterprises are located on reservation land are exempt from state sales and use tax, the same should be true for landless Tribes. It may be that the SBOE intended to cover all such purchases through its use of the phrase "in the governance of tribal members." However, it is not clear that this is indeed what the SBOE intended (for example, it is unclear whether office supplies purchased for use at tribal

governmental offices would be exempt from state sales and use taxes). Thus, the Tribe urges the SBOE to revise the proposed language to clarify the scope of the exemption. It would also be useful to both Tribes and vendors to further amend Publication 146 to provide detailed guidance on the scope of this exemption.

The Tribe appreciates the opportunity to submit these comments and thanks the SBOE for its continued efforts to improve Regulation 1616 and engage in government-to-government consultations with Tribes on these important regulatory issues.

Sincerely,



Kathryn A. Ogas
Attorney for the Lytton Rancheria of
California



CALIFORNIA INDIAN LEGAL SERVICES

BISHOP ♦ ESCONDIDO ♦ EUREKA ♦ SACRAMENTO

Sacramento Office: 3814 Auburn Blvd, Suite 72 Sacramento, CA 95821

Phone: 916/978-0960 ext. 305 ♦ Toll Free : 800/829-0284

Fax: 916/978-0964 ♦ Email: acleghorn@calindian.org

Alex Cleghorn, Directing Attorney

March 31, 2011

Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Sent via email at Brad.Miller@boe.ca.gov and U.S. Mail

Re: Comments to Board of Equalization Initial Discussion Paper and Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Landless Tribes

Dear Mr. Miller:

California Indian Legal Services ("CILS") is the oldest non-profit Indian law firm in the state of California. CILS represents individual Native Americans and California Tribes in a wide variety of legal matters, including state taxation. The proposal to amend Regulation 1616 is a welcome change, however we suggest that the Board recognize California's unique history and include landless **and** small land base tribes.

Some historical background may be useful to the Board in considering this issue. In 1850 and 1851 the federal government entered into nearly twenty treaties with California Indians. However these treaties were never ratified by the Senate and were kept secret until the early 1900's. In 1958 Congress passed the Rancheria Act, which sought to terminate forty-one California rancherias. This termination sought to end these tribes' special status as sovereign governments having a trust relationship with the United States. Thirty-eight California tribes had this special status terminated. Through litigation, legislation and administrative efforts many of these terminated tribes have restored this status. However, in many instances restoration of federal recognition did not restore a land base, or may have restored an inadequate land base.

In addition, many California tribes have a land base that is particularly small or unsuited for operation of a tribal government for several reasons. For example, as we previously pointed out in our comments to Publication 146, many reservations and rancherias do not have reliable United States Postal Service and therefore are required to obtain a Post Office box which is usually located outside "Indian Country." Further, many reservations and rancherias may not have access to reliable utilities, including phone or internet service, which makes operating a

March 31, 2011

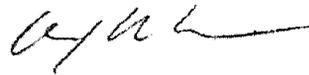
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tribal office difficult. Finally, many reservations and rancherias may not have access to adequate buildings to house tribal government offices. These examples are not exhaustive but merely an attempt to illustrate the reasons why small land base tribes should not be penalized because they are forced to locate tribal offices outside of "Indian Country."

In conclusion, we believe that recognition of these realities for numerous California tribes requires that the board extend the proposal to include not just landless tribes but also small land base tribes. CILS would like to thank the Board for the opportunity to provide comments on the Initial Discussion Paper and Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Landless Tribes. As an Indian law firm representing both individual Native Americans and Tribes in the area of sales and use tax law, we have a direct interest in these issues. I am available to answer any questions regarding our comments at (916) 978-0960 ext. 305. Please feel free to contact me.

Sincerely,

CALIFORNIA INDIAN LEGAL SERVICES



Alex Cleghorn
Directing Attorney

REGULATION HISTORY

TYPE OF REGULATION: Sales and Use Tax

REGULATION: 1616

TITLE: *Federal Areas*

PREPARATION: Bradley Miller/Robert Wilke

LEGAL CONTACT: Bradley Heller/Robert Tucker

The proposed regulatory amendments clarify the application of a limited sales and use tax exemption for sales to, and purchases by, governments of officially recognized Indian tribes under specific circumstances.

HISTORY OF PROPOSED AMENDMENTS:

July 26, 2011: Business Taxes Committee (BTC) Meeting

May 11, 2011: Second Interested Parties Meeting

March 9, 2011: First Interested Parties Meeting

December 14, 2010: Topic Placed on BTC Calendar

Sponsor/Support: Alternative 1 – Staff Recommendation, generally supported by tribal leaders

Oppose: N/A

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

450 N Street, Room 121

Sacramento, California

REPORTER'S TRANSCRIPT

JULY 26, 2011

BUSINESS TAXES COMMITTEE

Reported by: Beverly D. Toms

No. CSR 1662

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P R E S E N T

For the Committee:

Betty T. Yee
Chair

Michelle Steel
Member

Jerome Horton
Member

George Runner
Member

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

Diane Olson, Chief
Board Proceedings Division

Board of Equalization
Staff:

Randy Ferris
Legal Department

Bradley Heller
Legal Department

Susanne Buehler
Sales and Use Tax Department

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Speaker:	
Rebecca Madigan	11

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ITEM 1

Sacramento, California

July 26, 2011

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MR. HORTON: Ms. Olson.

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

MS. YEE: Thank you very much, Ms. Olson. Good morning, Members. We have two items before the Business Taxes Committee. Why don't we take up the first one, which is Proposed Amendments to Regulation 1616, related to Sales to Governments of Officially Recognized Indian Tribes. And I'll ask Mr. Heller to introduce the issue.

MR. HELLER: I'm going to go ahead and -- and defer to the Department.

MS. BUEHLER: Good morning. I'm Susanne Buehler with the Sales and Use Tax Department and with me today is Bradley Heller from our Legal Department.

For agenda item 1 we're asking that you approve either staff recommendation to amend Regulation 1616, Federal Areas Regarding Sales to Governments of Officially Recognized Indian Tribes; or approve Alternative 2, to not make changes to the regulation.

In Alternative 1 we are asking the committee to approve and authorize publication of proposed amendments to provide a limited exemption from tax for sales to and purchases by the tribal governments of officially

1 recognized Indian tribes of tangible personal property
2 for use in tribal self-governance.

3 The limited exemption applies if the tribal
4 government does not have a reservation to conduct tribal
5 government business; the reservation lacks a building in
6 which tribal government can meet or the reservation
7 lacks essential utility services or mail service from
8 the United States Postal Service.

9 The property is purchased for use in tribal
10 self-governance and delivery and ownership of the
11 property transfers to the tribal government at the
12 principal place in which it meets to conduct its
13 business.

14 I believe we may have a speaker on this item
15 and we'd be happy to answer any questions you may have
16 after their presentation.

17 MS. YEE: Thank you very much, Ms. Buehler.
18 Let me ask the public speaker who has signed up for this
19 item to come forward, Mr. Alex Cleghorn.

20 MR. CLEGHORN: Good morning.

21 MS. YEE: Good morning. If you'll take a seat
22 here. Introduce yourself for the record, please, and
23 you have two minutes for your presentation.

24 MR. CLEGHORN: My name is Alex Cleghorn and I'm
25 a Directing Attorney at California Indian Legal
26 Services. And I participated in -- in this process over
27 the last six to nine months, and very briefly I just
28 want to reiterate my support for the staff's

1 recommendation here. I think that they've been very
2 deliberate in -- in learning about the issue. I think
3 they've been responsive to the concerns that have been
4 raised. And really recognizing the practical reality of
5 tribes in California, there are many tribes in
6 California that do not have a land base or have a land
7 base that does not have mail service, does not have
8 phone service and are therefore placing their government
9 offices outside of Indian country or outside of the
10 reservation.

11 I think the proposed changes recognize that and
12 will be workable.

13 MS. YEE: Okay. Thank you very much, Mr.
14 Cleghorn.

15 MR. CLEGHORN: Thank you.

16 MS. YEE: Let me make one comment on this if I
17 may. I want to extend my appreciation to the staff and
18 to members of the tribal communities throughout this
19 State for participating in our interested parties
20 process.

21 It began with the discussions over the
22 publication but certainly as additional issues were
23 identified I have appreciated the ongoing dialogue. And
24 what I wanted to just make my colleagues aware on the
25 dais is that I think what these proceedings have
26 actually indicated to me is that -- is the necessity for
27 some sort of a body, and maybe we call it for lack of a
28 better term a tribal advisory council that really is

1 about a government to government ongoing interface about
2 these issues that come up.

3 I have not liked the fact that we sometimes
4 think about our tribal communities as an afterthought.
5 They are legitimate governments that -- who exist in our
6 State and I will be working with the tribal communities
7 in bringing back to this Board a recommendation for
8 establishing such a council in the future. Okay.

9 Mr. -- Mr. Horton.

10 MR. HORTON: Thank you, as well, Member Yee,
11 for your efforts and outstanding work in this area. As
12 many of you know, I chaired the Government Organization
13 Committee that oversaw tribal relations and for many
14 years the greatest challenge that we faced was just the
15 understanding of sovereignty within the State of
16 California, having a sovereign nation within the State
17 of California and the tax implications, which are a
18 little bit different on the Federal level versus the
19 State level, and much like an ambassador from other
20 countries wherein an ambassador -- and where the
21 ambassadors resides is another nation within the State
22 of California.

23 I mean, we have several nations within the
24 State of California; China, Japan, Europe and so forth,
25 and we acknowledge those because it's part of our
26 history.

27 But the sovereign nations and Indian country is
28 not necessarily something that everyone is conscious of

1 in our organization.

2 And so it's very pleasing to see that from the
3 top down we have communicated our sensitivity to these
4 issues in our awareness of the law.

5 So let's just continue along those lines and I
6 think we'll have great success.

7 MS. YEE: Thank you very much, Mr. Horton.

8 Other comments, Members?

9 Ms. Mandel. Nothing? Okay.

10 Others?

11 Very well, hearing none, is there a motion?

12 MR. HORTON: So moved.

13 MS. MANDEL: Then I'll second --

14 MS. YEE: Okay.

15 MS. MANDEL: -- staff recommendation.

16 MS. YEE: Motion by Mr. Horton to adopt the
17 staff recommendation. Second by Ms. Mandel.

18 Without objection, that motion carries. Thank
19 you very much.

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1 ITEM 2.

2 MS. OLSON: Our next item is Amending
3 Regulation 1684, Collection of Use Tax by Retailers.

4 MS. YEE: Okay, Members, we are on the second
5 item of the committee, amending Regulation 1684 related
6 to collection of Use Tax by retailers.

7 Ms. Buehler.

8 MS. BUEHLER: Randy Ferris from our Legal
9 Department is joining us for this item.

10 MS. YEE: Okay.

11 MS. BUEHLER: For this item staff seeks your
12 approval to begin an interested parties process to
13 discuss the need for rulemaking to implement, interpret
14 and clarify the provisions of ABx1 28, Statutes 2011,
15 Chapter 7.

16 ABx1 28 amended Revenue and Taxation Code 6203
17 which requires retailers that are engaged in business in
18 California to collect Use Tax and remit it to the Board.
19 We believe that it may be helpful to retailers if the
20 Board amended Regulation 1684 to define relevant
21 statutory terms, such as substantial nexus, commonly
22 controlled group and combined reporting group.

23 It may also be helpful if the regulation was
24 amended to explain when a retailer does not have a
25 substantial nexus with California under Section 6203 as
26 amended by ABx1 28, and provide examples of retailers
27 that are and are not required to register with the Board
28 to collect and remit Use Tax.

1 If you approve this item and we follow the
2 standard time line for the interested parties process we
3 anticipate holding the first set of interested party
4 meetings in October 20, 2011.

5 We plan on having meetings with the interested
6 parties in northern and southern California to get input
7 from as many parties as possible.

8 As the interested party process begins the
9 Department will also be continuing its implementation
10 plan for ABx1 28. As you are aware, we plan to utilize
11 our existing processes for registering out-of-state
12 retailers. More specifically, we will be sending
13 internet retailers a questionnaire which is being
14 modified to include questions specific to the new law.
15 Based on the retailers' responses to the questions we
16 will notify them if they need to register with the
17 Board.

18 The first group of questionnaires will be sent
19 to the top 500 internet retailers that are not currently
20 registered with the Board. And second group to the top
21 1,000 retailers. And the third group to the combined
22 reporting taxpayers identified by the Franchise Tax
23 Board.

24 Our implementation plan also includes posting
25 additional information and frequently asked questions on
26 the Board's web site and updating our publications.

27 At this time I would like to turn it over to
28 Mr. Ferris to provide you with more information related

1 to ABx1 28.

2 MS. YEE: Thank you very much, Ms. Buehler.

3 Mr. Ferris, good morning.

4 MR. FERRIS: Good morning. I actually didn't
5 have any prepared remarks with respect to this. I'm --

6 MS. YEE: Okay.

7 MR. FERRIS: I'm here just to help answer
8 questions.

9 MS. YEE: Thank you very much.

10 I believe we have one speaker on this item.
11 Let me have Ms. Madigan come forward before we have the
12 Board discuss the matter.

13 MS. MADIGAN: Thank you.

14 MS. YEE: Good morning.

15 MS. MADIGAN: Good morning.

16 MS. YEE: If you'll state your name for the
17 record, and you have two minutes for your comments.

18 MS. MADIGAN: Thank you. My name is Rebecca
19 Madigan, and I am Executive Director of the Performance
20 Marketing Association.

21 And I represent affiliate marketers. And these
22 are the web site owners that had their incomes
23 devastated when this law went into effect immediately.

24 Unfortunately, online retailers didn't have
25 time to comply with being able to even collect sales tax
26 on their web sites; there wasn't enough time. So they
27 had to terminate affiliates.

28 There is a clause within ABx1 28 that allows

1 for a retailer to work with an affiliate if the
2 affiliate commits to not soliciting that retailers can
3 be exempt from Sales Tax collection. Excuse me.

4 So, I wanted to ask that their -- that process
5 be prioritized because it will help affiliates get back
6 into business very quickly.

7 MS. YEE: Thank you very much, Ms. Madigan.

8 MS. MADIGAN: Thank you.

9 MS. YEE: Mr. Ferris, can you address that
10 particular provision?

11 MR. FERRIS: Yes, I think that she may be
12 referring to processes that are similar to what New York
13 has in place with respect to their similar put through
14 nexus bill.

15 MS. YEE: Uh-huh.

16 MR. FERRIS: And there definitely is a --
17 tension is probably not the right word but there's an
18 issue with respect to how ABx1 28 is written with
19 respect to distinguishing contracts that are advertising
20 contracts versus contracts that are with affiliates of
21 the kind that will cause nexus to exist with the
22 taxing -- with California.

23 And so, part of what would need to happen in
24 any kind of rulemaking exercise with respect to this
25 bill would be to -- to provide more guidance as to how
26 do we distinguish between these contracts, both of which
27 may be paid on a per completed sale basis. What -- what
28 kind of contracts are advertising contracts and what

1 kinds of contracts are these types of affiliate
2 contracts that -- that create nexus. And the -- and
3 depending upon how that -- how that gets distinguished
4 it affects who has the burden with respect to showing
5 whether or not an extra act of solicitation has
6 occurred.

7 MS. YEE: Uh-huh.

8 MR. FERRIS: If it's the -- if it's the kind of
9 contract that the Legislature intends to create nexus
10 then the burden is on the out-of-state retailer to show
11 that their in-state affiliates do not solicit.

12 If the contract is -- based on whatever
13 interpretation and -- and guidance we can help give, if
14 it's construed to be an advertising contract I think the
15 way the bill is written the burden becomes more on the
16 Board to establish that there is some extra act of
17 solicitation going on.

18 MS. YEE: Uh-huh. Okay. Very well.

19 MS. STEEL: Question.

20 MS. YEE: Discussion on this point?

21 Ms. Steel.

22 MS. STEEL: I was against this internet tax to
23 begin with. But further interest parties, what we are
24 seeking from the interest parties? It's more of
25 educational that, you know, let people know the -- they
26 have to collect the sales taxes or what -- what we are
27 looking for from here?

28 MS. BUEHLER: Well, I think part of the process

1 is to find out where there is need for clarification
2 from an interested party perspective. Something that
3 may seem very black and white to the Board of
4 Equalization is not necessarily the same from their
5 perspective.

6 So we really need to open up that dialogue and
7 find out how they're interpreting things as they read
8 the bill versus how we're interpreting them and make
9 sure we come to a common understanding in the
10 regulation.

11 MS. STEEL: So clarification --

12 MS. BUEHLER: Yes.

13 MS. STEEL: -- that, you know, what you --
14 okay. And then second thing is maybe, Mr. Ferris, that
15 if it's going to be on the ballot next year, June, then
16 what happen? If it -- I don't know which it's going to
17 go but if people voted that this is illegal, then what
18 happen?

19 MR. FERRIS: Well, for sure, I think something
20 that would be beyond dispute is that the law would be
21 ineffective from the date of the election forward, if --
22 if the voters vote it down. So that -- that part is
23 certain.

24 There are opinions out there that, for example,
25 the Leg. Counsel has issued an opinion suggesting
26 that -- that they -- they believe that it would become
27 ineffective upon certification of the referendum, as
28 well.

1 So there -- there are a variety of issues
2 related to effectiveness. The one thing we know for
3 certain is it is effective now and for sure it will not
4 be effective if the voters vote it down.

5 MS. YEE: Right.

6 MS. STEEL: Thank you.

7 MS. YEE: Okay. Mr. Runner.

8 MR. RUNNER: Yeah, just -- let's -- let's --
9 I'd like to follow up a little bit more on that. It
10 seems to me that some of the discussions we're having in
11 regards to first interested parties meetings and what
12 not sound like they're going to be in October.

13 MS. BUEHLER: That's correct.

14 MR. RUNNER: When do we estimate that the
15 surveys would be going out?

16 MS. BUEHLER: The surveys are anticipated to go
17 out in about 30 days.

18 MR. RUNNER: About 30 days. And that would be
19 the first set. The second set of surveys would go out
20 when?

21 MS. BUEHLER: We don't have a specific time
22 line, but we would expect it sometime after that. Maybe
23 two or three weeks.

24 MR. RUNNER: Okay. Here -- here's my concern
25 in this process. We do know that there's an active
26 referendum process going on right now. Signatures are
27 actively being collected for this particular issue. I
28 believe the deadline for this particular item, for the

1 turning back in, I believe is September 27th or 6th or
2 something, in -- in that neighborhood.

3 I -- I realize there's been different
4 discussions about what it is that this -- how the law
5 would be applied once those signatures have been -- been
6 gathered. And I know we have an opinion from Leg.
7 Counsel that the law be paused at the time -- I think
8 actually her opinion -- their opinion actually said at
9 the start of the certification process as -- as -- as
10 it's being certified.

11 Let me ask you, has anybody had any written
12 opinion that the law actually continues during that
13 time?

14 MR. FERRIS: I'm not aware of any written
15 opinion.

16 MR. RUNNER: Okay. So the only written opinion
17 we really have is from Leg. Counsel saying that the law
18 basically is suspended during -- during that time. And
19 on top of that I think we actually have -- at least I've
20 seen the letter from the proponents of the Prop 28
21 issue, which is -- which is the basis of this
22 discussion, that also said that it was not intended to
23 undermine the referendum process or make a bill not
24 referendable.

25 MR. FERRIS: Oh, Proposition 25?

26 MR. RUNNER: Yeah, 25, excuse me.

27 MR. FERRIS: Uh-huh.

28 MR. RUNNER: So I'm trying to figure out -- you

1 know, trying to weigh the evidence, if you will, in
2 regards to what we have in terms of a written opinion by
3 Leg. Counsel; what we have by the authors of Prop. 25,
4 and I'm just trying to weigh that against what somebody
5 might have said in a press conference.

6 It seems to me that -- that the legal opinion
7 in terms of -- in terms of actually those that have gone
8 to paper, reviewed the law, have all been over here that
9 the law is suspended.

10 So, I guess that's where I would believe we
11 would be because there's no opinion on this other side
12 over here.

13 So let me follow up on that. Then if -- if
14 indeed the law is suspended during that period of time
15 what authority do we have to convene or to continue to
16 convene public interest -- public information meetings
17 or discussions or talk about regulations on a bill that
18 has basically been suspended?

19 Do we -- what -- what authority would we have
20 if the bill is actually suspended?

21 MR. FERRIS: I think it's -- it's important to
22 take into account that we -- we kind of do rulemaking in
23 two phases.

24 MR. RUNNER: Uh-huh.

25 MR. FERRIS: You know, one phase, which is what
26 we call informal rulemaking where we're just having
27 discussions with interested parties, but it's not the
28 kind of rulemaking that is under the Administrative

1 Procedures Act that leads to for -- what we call formal
2 rulemaking.

3 So usually there's an initial phase where we're
4 just discussing and sometimes -- and then it eventually
5 comes to the Business Taxes Committee. Sometimes the
6 Board in the past has decided, you know, we don't want
7 to do formal rulemaking on this, we're suspending this;
8 we had some initial informal discussions and we're done,
9 we're tabling this. That's occurred.

10 Or sometimes they say, "We do want to go
11 forward with actual formal rulemaking" and then a public
12 notice is given. And then the -- the actual rulemaking
13 process begins.

14 So the kinds of discussions we could have if
15 the Board so directed would be of an informal nature, it
16 would not be the kind of rulemaking public hearings that
17 are under --

18 MR. RUNNER: So, the idea of our rulemaking
19 would be informal potentially?

20 MR. FERRIS: Uh-huh.

21 MR. RUNNER: Would -- would that mean that we
22 would assume that the -- in that informal rulemaking
23 would it be predicated on the assumption that AB 28x was
24 going to be law, or is going to be law, or is law?

25 MR. FERRIS: I think it would be probably
26 premised on the assumption that if it were to be
27 validated by the voters, assuming that the referendum --
28 referendum qualifies -- if it were to be affirmed by the

1 voters, how should the Board implement it.

2 MR. RUNNER: Is it -- wouldn't that be similar
3 to us -- maybe we've done this. Maybe you could point
4 out where we've done this -- a bill that's over in the
5 Legislature running through committees to where we would
6 begin doing rulemaking based upon a bill that's running
7 through committees?

8 Wouldn't that be similar? I mean, because
9 basically it's -- it's a bill that is basically in
10 suspense. Its outcome is going to be determined by the
11 public at a vote then February -- most likely June. Do
12 we have a history of actually doing rulemaking while a
13 bill is basically not law?

14 MR. FERRIS: I think we have had interested
15 parties meetings with respect to pending legislation
16 before.

17 MR. RUNNER: Okay. Let me ask you, again,
18 the -- the -- the other part of this discussion is have
19 we gotten any -- have we got any -- any appropriation in
20 order for us to go down this path?

21 MR. FERRIS: We received \$1,000.

22 MR. RUNNER: And that \$1,000 would go how far
23 in helping us proceed with this interested parties
24 process?

25 MR. FERRIS: Probably our time in this
26 discussion right now. It's true, though.

27 MR. RUNNER: So basically what we would end up
28 doing is reaching into other aspects of our budget in

1 order to do rulemaking -- potential rulemaking on a bill
2 that's in suspense and taking then our --

3 MS. YEE: The bill -- the bill's been signed,
4 Mr. Runner.

5 MR. RUNNER: What's that?

6 MS. YEE: The bill's been signed.

7 MR. RUNNER: Oh, no, no. I'm talking about
8 if -- I'm talking about right now if the bill actually
9 is in suspense as a result of the referendum.

10 So the -- and, again, the -- the dis -- the
11 issue here is that as I was hearing the time line that
12 these processes were going to take place after the bill
13 would be in suspense, if indeed the signatures were
14 gathered.

15 So that's -- that's the crux of the timetable
16 that -- that I'm dealing with.

17 So basically we'd be taking prog -- monies away
18 from other programs that we do have authority to do that
19 are a part of what it is that we do as our core of
20 business here at BOE and putting it into a discussion
21 with interested parties -- and let me think, these
22 interested parties are people who are doing a referendum
23 to repeal the law -- I just don't know what kind of
24 cooperation we're going to get during that period of
25 time.

26 MS. YEE: It's a broader -- it's a broader
27 community than that, Mr. Runner.

28 MR. RUNNER: Well, right, but I don't -- there

1 certainly is a broader community but I'm -- what I'm
2 talking about is that certainly that portion of the
3 community would certainly be of concern in regards to
4 why it is they're participating, what the authority is
5 for them, and quite frankly why should they -- they
6 should spend any time on it, they're just going to wait.

7 Now, let me just follow through in regards to
8 see if I got the timing of this clear. And that is if,
9 indeed, the referendum does take place and the bill is
10 on suspense, like I said there's -- all legal so far in
11 written opinion have said the bill is -- would be in
12 suspense.

13 Let's say -- let's go down a couple of
14 scenarios, the first scenario being the public agrees
15 with the act -- act of the Legislature and so the bill
16 goes into effect. What's the effective nate -- date
17 then of that bill based upon the public vote?

18 MR. FERRIS: Well, you're -- you're asking a
19 question -- what lawyers call a matter of first
20 impression.

21 MR. RUNNER: Uh-huh.

22 MR. FERRIS: There's never been -- to -- to my
23 knowledge there's never been a bill that was immediately
24 effective that was also subject to referendum.

25 MR. RUNNER: Uh-huh.

26 MR. FERRIS: And so we -- Prop 25 has created a
27 new creature that -- at least according to the Leg.
28 Counsel, is a bill that's immediately effective and is

1 subject to referendum.

2 And so, I don't think anyone can give a -- a
3 definitive opinion on this at this point. It probably
4 will get litigated at some point.

5 MR. RUNNER: Well, why don't you help me
6 understand what the -- what the various options could be
7 of interpretation.

8 MR. FERRIS: Well, one --

9 MR. RUNNER: Again, I'm assuming -- and, again,
10 I understand. I'm coming down the path that is saying
11 that the legal -- written legal opinions are all on the
12 fact that the bill has indeed been -- would be
13 referendable.

14 MS. YEE: Mr. Runner, I -- excuse me for
15 interrupting. I -- I think this discussion is -- is
16 speculative, at best. And our legal authority will
17 reside with the opinion of the Attorney General. And we
18 have a -- a bill that is current law. Out of respect to
19 those who are affected immediately by the bill, Ms.
20 Madigan is here asking us to focus on a particular
21 provision of the bill.

22 All we want to do with this interested parties
23 process is to begin to bring the parties -- and they are
24 going to be the ones that, yes, are behind the
25 referendum, but they also are going to be in-state
26 retailers to get a sense of, you know, what this new
27 landscape is going to look like relative to collection
28 of Use Tax.

1 But it's a broader community and we have an
2 obligation to enforce the law, to implement the law.

3 MR. RUNNER: Mad -- Madam Chair, if I could
4 continue with my thoughts and discussion on this,
5 please.

6 MS. YEE: Actually, I'm gonna -- I'm gonna stop
7 you with respect to questionings about the referendum --

8 MR. RUNNER: I --

9 MS. YEE: -- and focus on kind of the -- the
10 question that's before us --

11 MR. RUNNER: I -- I appreciate that that would
12 be your -- your desire. But I believe that my position
13 and role here as a Board Member is appropriate for us to
14 talk about what is the appropriate role for the Board of
15 Equalization to actually involve its staff in its
16 discussions on a potential of a bill that may be in
17 suspense, and that our timetable that were laid out is
18 potentially putting our resources toward implementing a
19 reg. -- implementing a regularita -- a regulatory process
20 when a bill could be in suspense. And then the
21 appropriateness for us and our authority as a body to do
22 that. That is an perfect -- perfect application for
23 this discussion at the moment.

24 MS. YEE: Okay. Mr. Runner, I will let you
25 proceed but I will couch the response as -- because I
26 don't believe our Legal Department are experts on the
27 referendum process -- but I will couch the response as
28 being speculative.

1 MR. RUNNER: Well -- and that's exactly what I
2 actually asked. I asked for different opinions. So I
3 didn't -- I didn't ask for an opinion, I said, well,
4 what are the different opinions out there, and so I'll
5 go back to my question, and that is what are the
6 different opinions that are out there in regards to if
7 indeed the voters then voted to uphold the Legislature
8 in regards to when it would be that this -- this law
9 would go into effect.

10 MR. FERRIS: So -- so they vote to affirm the
11 law?

12 MR. RUNNER: Yeah, let's say -- yes, that would
13 be the first question.

14 MR. FERRIS: Okay. One -- one possible
15 interpretation of this is that because this is a -- a
16 new creature it -- it -- it became effective, in a sense
17 the bell has been rung --

18 MR. RUNNER: Uh-huh.

19 MR. FERRIS: -- right -- that the bell
20 continues to ring until such time as the voters stop it.
21 And if they don't stop it it just continues to ring.
22 That's one way to look at it.

23 Another opinion would be reflected by the Leg.
24 Counsel opinion, which would be that it could -- the
25 bell could ring, then it could stop ringing, and then it
26 could start ringing again.

27 MR. RUNNER: Uh-huh.

28 MR. FERRIS: If the -- and in that sense the

1 voters would hit the bell a second time.

2 MR. RUNNER: Okay.

3 MR. FERRIS: Those are the two basic --

4 MR. RUNNER: And -- and has there even been any
5 legal opining on that second alternative, in terms of a
6 written opinion?

7 MR. FERRIS: On the -- where there would be a
8 suspension of the operation of the statute?

9 MR. RUNNER: Uh-huh.

10 MR. FERRIS: The only written opinion I'm aware
11 of is the Leg. Counsel opinion.

12 MR. RUNNER: Okay. Okay, let me -- and if,
13 indeed, the public uphold -- or -- or the vote was to go
14 ahead and uphold or was to disagree, I guess, would be
15 the way that it would come across -- disagree with the
16 Legislature and overturn that, what would -- at that
17 point would -- are there different opinions as to what
18 the -- what would happen?

19 MR. FERRIS: Again, I think -- well, it's --
20 it's hard to say because a lot of people are holding
21 back, I think stating -- people that might be interested
22 in litigating are -- are not going to the press stating
23 what their litigation positions might be.

24 But there would be the -- the same kinds of
25 options available for people to argue. Again, because
26 these are -- this is a matter of first impression this
27 is a -- a unique creature of law, you can -- you can
28 assume that reasonable arguments can be made on both

1 sides of the issue.

2 MR. RUNNER: Okay. Let me -- let me just say
3 in closing then on -- on this, again I'm -- I'm pretty
4 well convinced that -- again, that we've got one legal
5 opinion opined by the Legislature and we -- by the -- by
6 the Leg. Counsel. We have the authors of the -- of the
7 bill to -- which seems to be the center of this issue,
8 have written their intent, which is pretty important
9 when it comes down to legal interpretations.

10 As the -- as the -- as the Chair of the
11 committee has pointed out that -- that we oftentimes go
12 back to -- to the Attorney General for our opinion.
13 Maybe I guess it would be appropriate for us to make a
14 request -- ask you to make a request of the Attorney
15 General to ask about when it is that this bill would
16 be -- what would be the consequence of this particular
17 bill if, indeed, the -- the referendum moves forward and
18 then determine from their opinion at the Attorney
19 General's office when it is that, quote, the clock
20 stops.

21 And, again, my position -- my concern would be
22 if, indeed, the Leg. Counsel's opinion is the clock
23 stops, the Attorney General could opine the authors have
24 determined the initiative said that it doesn't, I have
25 great difficulty then, Members, for us then to continue
26 a regulatory process on basically a bill and a concept
27 that indeed is on -- that is on pause.

28 And I just don't understand what our role and

1 our authority is, particularly then when it is that we
2 are using limited resources that we have on -- on
3 speculating on what it is the outcome is going to be.

4 So it can -- I'd like to get a -- I guess my
5 request specifically would be for our -- our counsel to
6 go ahead and retain a -- a Attorney General opinion on
7 this -- on this very issue.

8 MS. YEE: Mr. Horton, please.

9 MR. HORTON: Thank you. Members, someone once
10 said that it is -- that the public interest is -- is
11 best served by free -- the free exchange of ideas. And
12 the challenges that we face as an agency if we wait then
13 we're faced with having to notify the public of the
14 results and implement various rules and regulations and
15 so forth and the public be caught off guard.

16 It is in the best interests of the public and
17 this agency to be prepared. This is a -- a process of
18 evolution. It's -- that has been evolving for years.
19 And arguably we probably should have done -- or
20 conducted an interested parties meeting during the
21 legislative process, while the legislation was being
22 considered so that we would be better positioned today
23 to be able to address some of these concerns.

24 So relative to seeking the input from the
25 public and having public discussions about this and
26 where do we go and beginning to determine ourselves as
27 an agency how we believe the regulation -- I mean the
28 law should be interpreted, we should start that process

1 expeditiously and immediately.

2 And we should be informed, meaning that we
3 should seek the -- as I believe we're already -- have
4 already asked that we seek the opinion -- opinion of the
5 Attorney General, and I believe that is forthcoming as
6 to when the initiative is enacted and when it takes
7 place.

8 But irrespective of that, this will evolve.
9 This will take place. We cannot put on blinders and
10 pretend that this is not going to happen.

11 Relative to the cost benefit of this, it is
12 always beneficial to hear from the public, irrespective
13 of what the cost is. We would not have the testimony we
14 had today had we heard from the public and been able to
15 address those concerns prior to this particular hearing.

16 And so, we want to arm ourself with as much
17 information and insight to this problem as we possibly
18 can and I think that's just wisdom and appropriate.

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

20 Let me try to frame the issue that is before us
21 today, Members, before the committee. And as Chair it
22 is my request that we begin discussions and convene
23 interested parties with respect to the application of
24 the provisions of AB 28x that will have implications
25 for, I'm sure, some of the existing provisions of 1684.

26 I believe our responsibility is not an end.
27 And, Mr. Runner, I appreciate where you were going in
28 terms of looking at what may have the potential of

1 stopping us in our tracks relative to continuing to
2 administer this newly enacted law. The assumption that
3 I make is that we have a law; it's in effect. It has
4 specific effects on a number of interested parties of
5 which one is represented here by Ms. Madigan. And these
6 are people's livelihoods that are actually affected
7 right now, and I think we have a responsibility to
8 understand what those issues are.

9 We have a responsibility to clarify any
10 provisions that so require so that it is clear how we're
11 going to administer this law appropriately and fairly.
12 And until the time that we are told, whether it's by the
13 electorate or by a Court or any other higher authority
14 that we should stop our proceedings in this fashion, I
15 believe we have a responsibility to basically uphold the
16 law. It is the law. We took an oath of office to
17 uphold the law.

18 And that's what I'm asking today. It is an
19 informal process. It is about convening of the parties
20 to understand the issues. There will be in addition to
21 what Ms. Madigan has brought us today and I believe and
22 I agree with Mr. Horton, that -- those proceedings
23 should begin as soon as possible.

24 MR. RUNNER: Quick question to the Chair.

25 MS. YEE: Mr. Runner. Mr. Runner

26 MR. RUNNER: Just to follow up on it, I guess
27 I'm -- I guess this is a two-part observation. Number
28 one, is your suggestion that we continue this process

1 between now and -- well, starting now, and even if the
2 signatures are turned in and the law goes on pause that
3 we would continue an active implementation policy plan
4 of AB 28x?

5 MS. YEE: If there is an opinion that this
6 Board recognizes, and I would recognize an opinion by
7 the Attorney General or by a Court of law, but those
8 opinions so directed that the statute would --
9 essentially become inoperative or cease to be operative,
10 then the interested parties process would cease.

11 MR. RUNNER: Okay. So -- so at this point then
12 what -- just to clarify, we -- we would I guess not
13 accept and -- and -- and agree with the opinion that has
14 come out from Leg. Counsel, not that we have to.
15 I mean, I -- I get the fact that we don't have to.

16 And so, at this point then we would believe
17 that we must seek our own opinion, and if what I'm
18 hearing you correctly then say is that if, indeed, the
19 Attorney General opinion comes out and agrees in concept
20 with the Leg. Counsel opinion and the authors of Prop.
21 25 that we would cease at that point active
22 implementation and discussions in regards to AB 28x?

23 MS. YEE: That would be my intent.

24 MR. RUNNER: Okay. Okay. How -- just to
25 follow up, and -- and how quickly do we think we will
26 hear back from the Attorney General's office?

27 MR. FERRIS: I -- I think that because this is
28 a matter of -- of -- of great public interest perhaps

1 they might be able to do it sooner, but usually it takes
2 six months --

3 MR. RUNNER: Ooh.

4 MR. FERRIS: -- at a minimum.

5 MR. HELLER: Yeah.

6 MR. FERRIS: I think.

7 MR. RUNNER: Let me ask you, in regards to our
8 request of the Attorney General, oftentimes the Attorney
9 General we can -- we can get the Attorney Generals kind
10 of opine on their own or we can ask them to solicit and
11 take other opinions that have -- and -- and review other
12 opinions.

13 Is our assumption that at this point it might
14 be good for them to, for instance, consult and see what
15 the -- the Leg. Counsel has opined on that -- this
16 particular issue?

17 MR. FERRIS: Yeah, that -- that could be
18 appropriate to include that.

19 MR. RUNNER: Okay.

20 MR. FERRIS: It sounds like there -- there is a
21 consensus of the Board that we should inquire --

22 MR. RUNNER: Okay.

23 MR. FERRIS: -- of the A. G. and we can send a
24 package over and that would include the Leg. Counsel
25 opinion.

26 MR. RUNNER: Okay, thank you.

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

28 Other discussion, Members?

1 Mr. Horton.

2 MR. HORTON: Members, we might want to
3 bifurcate the issues --

4 MS. YEE: Uh-huh.

5 MR. HORTON: -- so that there's some clarity
6 here. The implementation of the law versus the
7 preparation by the Board to begin to solicit input and
8 determine what the appropriate actions might be based on
9 the interested parties, those will be impacted by that.

10 I believe that we should start that process
11 immediately, irrespective of what the opinions are. And
12 that we won't know whether or not this takes place until
13 the voters direct us or until litigation takes place
14 prior to, which I don't think is going to happen. But
15 the direction on us preparing or not preparing will come
16 either from the court or public opinion via the election
17 process.

18 MR. FERRIS: Right. I agree, we don't need to
19 ask the Attorney General whether we can have informal
20 discussions.

21 MS. YEE: Right.

22 MR. FERRIS: What we need to ask the Attorney
23 General about is the effective date issues.

24 MR. HORTON: Right. Okay.

25 MS. YEE: Right. Right.

26 MR. HORTON: I'm good.

27 MS. YEE: Correct.

28 Okay. Other discussion, Members?

1 Hearing none -- any other comments by staff?

2 Very well. Hearing none, is there a motion?

3 MS. MANDEL: Move -- move the item to the
4 interested parties process.

5 MS. YEE: I have a motion by Ms. Mandel to move
6 this item to the interested parties process. Is there a
7 second?

8 MR. HORTON: Second.

9 MS. YEE: Second by Mr. Horton.

10 Please call the roll.

11 MS. OLSON: Madam Chair.

12 MS. YEE: Aye.

13 MS. OLSON: Mr. Horton.

14 MR. HORTON: Aye.

15 MS. OLSON: Mr. Runner.

16 MR. RUNNER: No.

17 MS. OLSON: Ms. Steel.

18 MS. STEEL: No.

19 MS. OLSON: Ms. Mandel.

20 MS. MANDEL: Aye.

21 MS. OLSON: Motion carries.

22 MS. YEE: Thank you very much.

23 That concludes our Business Taxes Committee.

24 Thank you.

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REPORTER'S CERTIFICATE.

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State of California)
) ss
County of Sacramento)

I, BEVERLY D. TOMS, Hearing Reporter for the California State Board of Equalization certify that on July 26, 2011 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled hearing; that I transcribed the shorthand writing into typewriting; and that the preceding 33 pages constitute a complete and accurate transcription of the shorthand writing.

Dated: August 4, 2011.



Beverly D Toms

BEVERLY D. TOMS

Hearing Reporter

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

Proposed Amendment of Sales and Use Tax Regulation 1616, *Federal Areas*

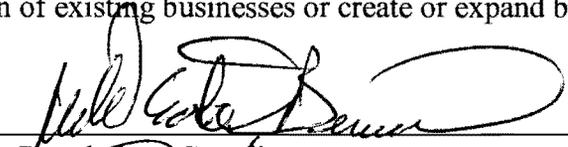
STATEMENT OF COST OR SAVINGS FOR NOTICE OF PUBLIC HEARING

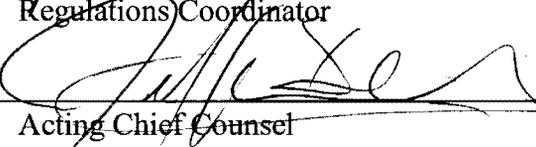
The State Board of Equalization has determined that the proposed action does not impose a mandate on local agencies or school districts. Further, the Board has determined that the action will result in no direct or indirect cost or savings to any State agency, any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code or other non-discretionary cost or savings imposed on local agencies, or cost or savings in Federal funding to the State of California.

The cost impact on private persons or businesses will be insignificant. This proposal will not have a significant adverse economic impact on businesses.

This proposal will not be detrimental to California businesses in competing with businesses in other states.

This proposal will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand business in the State of California.

Statement
Prepared by  Date August 26, 2011
Regulations Coordinator

Approved by  for RF Date 8-29-11
Acting Chief Counsel

If Costs or Savings are Identified, Signatures of Chief, Fiscal Management Division, and Chief, Board Proceedings Division, are Required

Approved by _____ Date _____
Chief, Financial Management Division

Approved by _____ Date _____
Chief, Board Proceedings Division

NOTE: SAM Section 6660 requires that estimates resulting in cost or savings be submitted for Department of Finance concurrence before the notice of proposed regulatory action is released.

ECONOMIC AND FISCAL IMPACT STATEMENT**(REGULATIONS AND ORDERS)**

STD. 399 (REV. 12/2008)

See SAM Section 6601 - 6616 for Instructions and Code Citations

DEPARTMENT NAME State Board of Equalization	CONTACT PERSON Richard E. Bennion	TELEPHONE NUMBER 9164452130
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400 Title 18, Section 1616, Federal Areas		NOTICE FILE NUMBER Z

ECONOMIC IMPACT STATEMENT**A. ESTIMATED PRIVATE SECTOR COST IMPACTS (Include calculations and assumptions in the rulemaking record.)**

1. Check the appropriate box(es) below to indicate whether this regulation:

- | | |
|---|--|
| <input type="checkbox"/> a. Impacts businesses and/or employees | <input type="checkbox"/> e. Imposes reporting requirements |
| <input type="checkbox"/> b. Impacts small businesses | <input type="checkbox"/> f. Imposes prescriptive instead of performance |
| <input type="checkbox"/> c. Impacts jobs or occupations | <input type="checkbox"/> g. Impacts individuals |
| <input type="checkbox"/> d. Impacts California competitiveness | <input checked="" type="checkbox"/> h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.) |

h. (cont.) No significant adverse economic impact on business or employees, small business, jobs or occupations.

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

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits.): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

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

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

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

 Yes No If yes, explain briefly: _____**B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)**

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? \$ _____

a. Initial costs for a small business: \$ _____ Annual ongoing costs: \$ _____ Years: _____

b. Initial costs for a typical business: \$ _____ Annual ongoing costs: \$ _____ Years: _____

c. Initial costs for an individual: \$ _____ Annual ongoing costs: \$ _____ Years: _____

Describe other economic costs that may occur: _____

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

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.): \$ _____

4. Will this regulation directly impact housing costs? Yes No If yes, enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? Yes No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: \$ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

2. Are the benefits the result of : specific statutory requirements, or goals developed by the agency based on broad statutory authority?
Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? \$ _____

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: \$ _____	Cost: \$ _____
Alternative 1:	Benefit: \$ _____	Cost: \$ _____
Alternative 2:	Benefit: \$ _____	Cost: \$ _____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? Yes No
Explain: _____

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

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

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

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

Alternative 1: _____

Alternative 2: _____

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

Regulation:	\$ _____	Cost-effectiveness ratio: \$ _____
Alternative 1:	\$ _____	Cost-effectiveness ratio: \$ _____
Alternative 2:	\$ _____	Cost-effectiveness ratio: \$ _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

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

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

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

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

a. implements the Federal mandate contained in _____

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

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

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

e. will be fully financed from the _____ authorized by Section _____
(FEES, REVENUE, ETC.)
_____ of the _____ Code;

f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;

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

Savings of approximately \$ _____ annually.

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

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

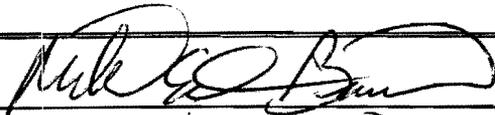
5. No fiscal impact exists because this regulation does not affect any local entity or program.
6. Other.

B. FISCAL EFFECT ON STATE GOVERNMENT *(Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)*

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

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS *(Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)*

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

SIGNATURE		TITLE Regulations Coordinator
AGENCY SECRETARY ¹		DATE
APPROVAL/CONCURRENCE	PROGRAM BUDGET MANAGER	8/29/2011
DEPARTMENT OF FINANCE ²	Exempt under SAM section 6660	DATE
APPROVAL/CONCURRENCE		

1. The signature attests that the agency has completed the STD. 399 according to the instructions in SAM sections 6600-6680, and understands the impacts of the proposed rulemaking. State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization.
2. Finance approval and signature is required when SAM sections 6600-6670 require completion of the Fiscal Impact Statement in the STD. 399.

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2011-0830-01	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
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For use by Office of Administrative Law (OAL) only

RECEIVED FOR FILING PUBLICATION DATE AUG 30 '11 SEP 09 '11 Office of Administrative Law NOTICE	REGULATIONS
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AGENCY WITH RULEMAKING AUTHORITY State Board of Equalization	AGENCY FILE NUMBER (if any)
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A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE Federal Areas	TITLE(S) 18	FIRST SECTION AFFECTED 1616	2. REQUESTED PUBLICATION DATE September 9, 2011
3. NOTICE TYPE <input checked="" type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON Richard E. Bennion	TELEPHONE NUMBER (916) 445-2130	FAX NUMBER (Optional) (916) 324-3984
OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	<input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
------------------------------	--

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT
	AMEND
	REPEAL
TITLE(S)	

3. TYPE OF FILING			
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input type="checkbox"/> Other (Specify) _____	

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective 30th day after filing with Secretary of State	<input type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> §100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

For use by Office of Administrative Law (OAL) only

SIGNATURE OF AGENCY HEAD OR DESIGNEE	DATE
--------------------------------------	------

TYPED NAME AND TITLE OF SIGNATORY

Notice of Proposed Regulatory Action

The State Board of Equalization Proposes to Adopt Amendments to California Code of Regulations, Title 18, Section 1616, *Federal Areas*

NOTICE IS HEREBY GIVEN

The State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1616, *Federal Areas*. Subdivision (d) of Regulation 1616 prescribes the application of the Sales and Use Tax Law (RTC § 6001 et seq.) to sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by Indians. The proposed amendments add new subdivision (d)(4)(G) to Regulation 1616 to implement, interpret, and make specific the provisions of RTC section 6352 by further prescribing the circumstances under which a sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States is exempt from sales and use tax because the tax is preempted by federal law.

PUBLIC HEARING

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on November 15-17, 2011. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at www.boe.ca.gov at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on November 15, 16, or 17, 2011. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1616.

AUTHORITY

RTC section 7051.

REFERENCE

RTC section 6352.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Regulation 1616

RTC section 6352 exempts the sale and the storage, use, or other consumption of tangible personal property from sales and use tax when California is prohibited from taxing the sale or use of tangible personal property under federal law, including the United States Constitution.

In 1831, Chief Justice Marshall recognized that Indian tribes, which are officially recognized by the government of the United States, are independent nations that retain inherent rights to self-government. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 16.) Justice Marshall also recognized that article 1, section 8, clause 3 of the United States Constitution reserves to the United States Government the exclusive authority to regulate commerce with the Indian tribes. (*Id.* at p. 18.)

Subsequent United States Supreme Court opinions further explained that federally-recognized Indian tribes “retain ‘attributes of sovereignty over both their members and their territory’” (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142 [quoting from *United States v. Mazurie* (1975) 419 U.S. 544, 557]), “as a separate people, with the power of regulating their internal and social relations, and thus far [are] not brought under the laws” of the United States or the states in which the tribes reside. (*Bracker*, 448 U.S. at p. 142 [quoting from *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164, 173, which was quoting from *United States v. Kagama* (1886) 118 U.S. 375].)

In 1978, subdivision (d) was added to Regulation 1616 to prescribe the circumstances under which the sale and use of tangible personal property on an Indian reservation¹ are exempt from sales and use tax under RTC section 6352 because the tax is preempted by federal law. Subdivision (d) is based upon United States Supreme Court cases regarding the federal preemption of the states’ authority to tax federally-recognized Indian tribes and their members, which have held that the application of state sales and use tax is preempted with regard to the sale and use of property on Indian reservations if the legal incidence of the tax falls on a tribe or tribal members. Regulation 1616, subdivision (d), is still consistent with United States Supreme Court opinions preempting California sales and use tax when the tax unlawfully infringes upon federally-recognized Indian tribes’ sovereignty over their reservations. (See, e.g., *Wagon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 101-102.)

Pursuant to the current provisions of Regulation 1616, subdivision (d)(4)(A) and (E), sales tax will not apply to the sale of tangible personal property to an Indian if the property is delivered to the Indian and ownership of the property transfers to the Indian on a reservation, and use tax will not apply to tangible personal property delivered to an Indian on

¹ In this context, the term “reservation” refers to all land that is considered “Indian country” as defined by 18 U.S.C. § 1151, which provides that “the term ‘Indian country’ . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

a reservation unless the property is used off a reservation more than it is used on a reservation during the first 12 months following delivery. The federal preemption recognized by the current provisions of Regulation 1616, subdivision (d), allows the government of a federally-recognized Indian tribe to purchase tangible personal property for use in tribal self-governance without being subject to California sales and use tax if the property is delivered to the tribal government on its tribe's reservation and the property is used on the reservation more than it is used off reservation during the first 12 months following delivery. The current provisions of Regulation 1616, subdivision (d), do not address situations where California sales and use tax is preempted by federal law because the tax unlawfully infringes on federally-recognized Indian tribes' sovereignty over their members.

Proposed Amendments to Regulation 1616

United States Supreme Court opinions published after the initial adoption of Regulation 1616, subdivision (d), have established additional "principles with respect to the boundaries between state regulatory authority and tribal self-government" in the context of state taxation. (*Bracker, supra*, 448 U.S. at p. 141.) The United States Supreme Court has held that:

- Federal law preempts a state's authority to tax an activity undertaken on a "reservation or by tribal members" (*Id.* at p. 143) in circumstances where the tax unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them" (*Id.* at p. 142 [quoting from *Williams v. Lee* (1959) 358 U.S. 217, 220]);
- State taxation of Indians is not generally preempted outside Indian reservations, however, state taxation of Indians outside of Indian reservations may nonetheless be preempted under appropriate circumstances (see, e.g., *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, in which Justice O'Connor contemplated whether state taxation may be preempted outside of a tribe's territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court; see also *Wagnon, supra*, 546 U.S. at p. 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149] indicating that there are some exceptions to the "general" rule that states are permitted to tax Indians when they reside outside of Indian reservations); and
- "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members" (*Bracker, supra*, 448 U.S. at p. 142), and state taxation is preempted when "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" indicate that, in a "specific context, the exercise of state authority would violate federal law" (*Id.* at p. 145) because it unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them." (*Id.* at p. 142.)

Therefore, the Board reviewed the particular facts and circumstances applicable to the

imposition of California's sales and use tax on the sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal governments of Indian tribes that are officially recognized by the United States, but cannot satisfy the current provisions of the exemptions prescribed by Regulation 1616, subdivision (d)(4)(A) and (E), because their tribes do not have reservations on which to take delivery of and use their property or their tribes have undeveloped reservations where it would be impractical to take delivery of and use their property.

First, the Board found that there was a major shift in the United States' policies towards Indians that was implemented, at least in part, by the enactment of the Indian Reorganization Act (IRA) of 1934 (Pub.L. No. 73-383 (June 18, 1934) 48 Stat. 984), which represented formal federal recognition of a unique relationship between Indian tribes' sovereignty and land, and the federal government's duty to help restore Indian tribes' economic and governmental self-sufficiency, as sovereigns, through the acquisition of land. Specifically, section 5 of the IRA, which was subsequently codified (with minor amendments) as section 465 of title 25 of the United States Code, currently provides that:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

[¶] . . . [¶]

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Thus, the Department of the Interior "has had discretionary authority to take title to land, in the name of the United States, in trust for the benefit of Indian tribes" since 1934. (44 S.D. L. Rev. 681, 685.) And, when that discretion is exercised, the Secretary of the Interior accepts a fiduciary duty over the trust land and "the land is freed from federal and state taxes." (*Id.* at p. 682.) In other words, a clear connection exists between tribal self-governance, the acquisition of trust land, and the preemption of state taxation.

Second, the Board found that the Department of the Interior's discretion to acquire land for the benefit of Indian tribes creates a tension between Indian tribes and nontribal governments: "Indian tribes need and are entitled to have lands taken into trust. Non-tribal governments are interested in keeping such lands on their tax rolls." (44 S.D. L. Rev. 681, 682.) Moreover, inherent in this federal discretion is the principle that one of the functions of a landless Indian tribe's government is to petition the Secretary of the Interior to acquire lands in trust for the tribe so that the tribe will have territorial

boundaries in which to exercise its sovereignty. As a result, the Board determined that California's taxation of sales to and purchases by federally-recognized Indian tribes of tangible personal property for use by their tribal governments in applying to the Secretary of the Interior for the acquisition of trust lands would unlawfully infringe upon their tribal sovereignty in certain contexts. A determination that is supported by the maxim that "the power to tax involves the power to destroy . . . [and] that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another." (*McCulloch v. State of Maryland* (1819) 17 U.S. 316, 431.)

Third, the Board found that all three branches of the federal government have recognized Indian tribes' interests in tribal sovereignty and the attributes of such sovereignty. The United States Supreme Court has long recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." (*Bracker, supra*, 448 U.S. at p. 142.) Moreover, Congress, in 1995, declared that "(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; and (4) Indian tribes possess the inherent authority to establish their own form of government." (25 U.S.C. § 3601.) Additionally, the United States Department of Justice conducts its Indian affairs under a June 1, 1995, policy memorandum, in which the Attorney General recognizes similar attributes of tribal sovereignty.

Fourth, the Board reviewed the present status of California's Indian tribes and found that the Bureau of Indian Affairs (BIA) provides the following information with respect to their unique status:

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of Guadalupe Hidalgo; the Senate's refusal to ratify the 18 treaties negotiated with California tribes during 1851-52; and the lawless nature of California's settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to "exterminate" the indigenous population.

Under pressure from the California Congressional delegation, the United States Senate not only refused to sign the 18 treaties that had been negotiated, but they also took extraordinary steps to place the treaties under seal. Between the un-ratified treaties and the Land Claims Act of 1851, most California Indians became homeless.

Major shifts in federal Indian policy at the national level during the late 19th century exacerbated the Indian problems in California. Passage of the General Allotment Act in 1887 opened part of the limited lands in

California to non-Indian settlement. In 1905 the public was finally advised of the 18 un-ratified treaties. Citizens sympathetic to the economic and physical distress of California Indians encouraged Congress to pass legislation to acquire isolated parcels of land for homeless California Indians. Between 1906 and 1910 a series of appropriations were passed that provided funds to purchase small tracts of land in central and northern California for landless Indians of those areas. The land acquisitions resulted in what has been referred to as the Rancheria System in California.

In 1934, with the passage of the Indian Reorganization Act (IRA), the reconstituting of tribal governments included the BIA's supervision of elections among California tribes, including most of the Rancheria groups. Although many tribes accepted the provisions of the IRA, few California tribes benefited economically from the IRA because of the continuing inequities in funding of Federal Indian programs.

Beginning in 1944, forces within the BIA began to propose partial liquidation of the Rancheria system. Even the limited efforts to address the needs of California Indians at the turn of the century and again through passage of the IRA were halted by the federal government when it adopted the policy of termination. California became a primary target of this policy when Congress slated forty-one (41), California Rancherias for termination pursuant to the Rancheria Act of 1958.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 Rancherias that were terminated under the original Rancheria Act. Additional tribes have since then been restored as a result of Acts of Congress.

This brief history only begins to explain why the Pacific Regional Office is unique. California tribes today continue to develop their tribal infrastructure as a result of not having the same opportunities that have been provided to other native groups throughout the Country. California has a large number of aboriginal native populations who are not currently recognized by the United States which presents [its] own list of problems.

These unique BIA-recognized circumstances left a number of federally-recognized Indian tribes that are still located in California with no reservations on which to conduct their governmental activities, or undeveloped reservations, which lack adequate meeting facilities, essential utility services, or mail service, making it impractical for the tribes to conduct their governmental activities on their reservations. And, it is due to these unique BIA-recognized circumstances that both landless tribes and the tribes with undeveloped reservations are currently unable to exercise their rights to self-governance without interference from California's sales and use tax.

Therefore, during its July 26, 2011, Business Taxes Committee meeting, the Board determined that the nature of the state, federal, and tribal interests at stake dictate that federal law preempts the imposition of California's sales and use tax on the sale of tangible personal property to and the use of tangible personal property by the tribal governments of federally-recognized California Indian tribes, when such property is purchased for use in tribal self-governance, and the tribal governments have no reservation on which to conduct their governmental activities or the tribal governments have undeveloped reservations where it is impractical to conduct their governmental activities, due to the unique BIA-recognized circumstances discussed above. This is because the taxation of these types of transactions involving off-reservation sales and use, and only these types of off-reservation transactions, would directly interfere with the tribes' sovereignty and therefore unlawfully infringe on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them. The Board has not found any persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off reservation.

The Board determined that it is necessary to amend Regulation 1616 to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The Board determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the sale and use of tangible personal property that is delivered to an officially-recognized Indian tribe at the principal place where the tribe's government meets to conduct tribal business so that there is some way for retailers and the Board to verify exempt transactions. The Board understands that tribes may not own any real estate where their tribal governments can meet to conduct tribal business and they may occasionally meet at more than one place during a given period, and the Board has proposed to adopt a "principal place" test because the Board determined that such a test is sufficiently flexible to take into account the varying circumstances under which some tribal governments meet and therefore does not unlawfully infringe on the tribes' rights to self-governance. The Board also determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the use of tangible personal property if the property is used in tribal self-governance more than it is used for purposes other than tribal self-governance within the first 12 months following delivery. This is because the Board is not preempted from imposing a use tax on property that is used off reservation more than it is used on a reservation within the first 12 months following delivery and that is also used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

As a result, the Board proposes to amend Regulation 1616, to add a new subdivision (d)(4)(G), to implement, interpret, and make specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The objective of the proposed amendments is to clarify the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the

governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

There are no comparable federal regulations or statutes to Regulation 1616.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1616 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

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

The Board has determined that the adoption of the proposed amendments to Regulation 1616 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The adoption of the proposed amendments to Regulation 1616 will recognize the holdings of United States Supreme Court opinions regarding the federal preemption of state taxation when it unlawfully infringes on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them and further clarify the types of transactions that are already exempt from sales and use tax under RTC section 6352. Therefore, the Board has made an initial determination that the adoption of the proposed amendments to Regulation 1616 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1616 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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

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

The Board has determined that the adoption of the proposed amendments to Regulation 1616 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.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

Adoption of the proposed amendments to Regulation 1616 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 this action is proposed, or be as effective as and less burdensome to affected private persons than the proposed action.

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at Bradley.Heller@boe.ca.gov, or by mail at State Board of Equalization, Attn: Bradley M. Heller, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends at 9:30 a.m. on November 15, 2011, or as soon thereafter as the Board begins the public hearing regarding the proposed amendments to Regulations 1616 during the November 15-17, 2011, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1616. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED AMENDMENTS

The Board has prepared an underscored version of the text of Regulation 1616 illustrating the express terms of the proposed amendments and an initial statement of reasons for the adoption of the proposed amendments. 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 to Regulation 1616 and the Initial Statement of Reasons are also available on the Board's Website at www.boe.ca.gov.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1616 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 to the proposed amendments, the Board will make the full text of the resulting 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 amendments orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1616, 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.

**Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1616,**

Section 1616. Federal Areas.

(a) In General. Tax applies to the sale or use of tangible personal property upon federal areas to the same extent that it applies with respect to sale or use elsewhere within this state.

(b) Alcoholic Beverages. Manufacturers, wholesalers and rectifiers who deliver or cause to be delivered alcoholic beverages to persons on federal reservations shall pay the state retailer sales tax on the selling price of such alcoholic beverages so delivered, except when such deliveries are made to persons or organizations which are instrumentalities of the Federal Government or persons or organizations which purchase for resale.

Sales to officers' and non-commissioned officers' clubs and messes may be made without sales tax when the purchasing organizations have been authorized, under appropriate regulations and control instructions, duly prescribed and issued, to sell alcoholic beverages to authorized purchasers.*

(c) Sales Through Vending Machines. Sales through vending machines located on Army, Navy, or Air Force installations are taxable unless the sales are made by operators who lease the machines to exchanges of the Army, Air Force, Navy, or Marine Corps, or other instrumentalities of the United States, including Post Restaurants and Navy Civilian Cafeteria Associations, which acquire title to and sell the merchandise through the machines to authorized purchasers.

For the exemption to apply, the contracts between the operators and the United States instrumentalities and the conduct of the parties must make it clear that the instrumentalities acquire title to the merchandise and sell it through machines leased from the operators to authorized purchasers.

(d) Indian Reservations.

(1) In General. Except as provided in this regulation, tax applies to the sale or use of tangible personal property upon Indian reservations to the same extent that it applies with respect to sale or use elsewhere within this state.

(2) Definitions. For purposes of this regulation "Indian" means any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior.

Indian organizations are entitled to the same exemption as a Indians. "Indian organization" includes Indian tribes and tribal organizations and also includes partnerships all of whose members are Indians. The term includes corporations organized under tribal authority and wholly owned by Indians. The term excludes other corporations, including other corporations wholly owned by Indians.

“Reservation” includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian.

(3) Sales by On-Reservation Retailers.

(A) Sales by Indians.

1. Sales by Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by Indians to non-Indians and Indians who do not reside on a reservation. Sales tax does not apply to sales of tangible personal property by Indian retailers made to non-Indians and Indians who do not reside on a reservation when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on the reservation. Except as exempted below, Indian retailers are required to collect use tax from such purchasers and must register with the Board for that purpose.

Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation.

(B) Sales by non-Indians.

1. Sales by non-Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by retailers when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on a reservation. The sale is exempt whether the retailer is a federally licensed Indian trader or is not so licensed. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by non-Indians to non-Indians and Indians who do not reside on a reservation. Either sales tax or use tax applies to sales of tangible personal property by non-Indian retailers to non-Indians and Indians who do not reside on a reservation.

(C) Resale Certificates. Persons making sales for resale of tangible personal property to retailers conducting business on an Indian reservation should obtain

resale certificates from their purchasers. If the purchaser does not have a permit and all the purchaser's sales are exempt under paragraph (d)(3)(A) of this regulation, the purchaser should make an appropriate notation to that effect on the certificate in lieu of a seller's permit number (see Regulation 1668, "Resale Certificates").

(4) Sales by Off-Reservation Retailers.

(A) Sales Tax -In General. Sales tax does not apply to sales of tangible personal property made to Indians negotiated at places of business located outside Indian reservations if the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation. Generally ownership to property transfers upon delivery if delivery is made by facilities of the retailer and ownership transfers upon shipment if delivery is made by mail or carrier. Except as otherwise expressly provided herein, the sales tax applies if the property is delivered off the reservation or if the ownership to the property transfers to the purchaser off the reservation.

(B) Sales Tax -Permanent Improvements -In General. Sales tax does not apply to a sale to an Indian of tangible personal property (including a trailer coach) to be permanently attached by the purchaser upon the reservation to realty as an improvement if the property is delivered to the Indian on the reservation. A trailer coach will be regarded as having been permanently attached if it is not registered with the Department of Motor Vehicles. Sellers of property to be permanently attached to realty as an improvement should secure exemption certificates from their purchasers (see Regulation 1667, "Exemption Certificates").

(C) Sales Tax -Permanent Improvements -Construction Contractors.

1. Indian contractors. Sales tax does not apply to sales of materials to Indian contractors if the property is delivered to the contractor on a reservation. Sales tax does not apply to sales of fixtures furnished and installed by Indian contractors on Indian reservations. The term "materials" and "fixtures" as used in this paragraph and the following paragraph are as defined in Regulation 1521 "Construction Contractors."

2. Non-Indian contractors. Sales tax applies to sales of materials to non-Indian contractors notwithstanding the delivery of the materials on the reservation and the permanent attachment of the materials to realty. Sales tax does not apply to sales of fixtures furnished and installed by non-Indian contractors on Indian reservations.

(D) Use Tax -In General. Except as provided in paragraphs (d)(4)(E) and (d)(4)(F) of this regulation, use tax applies to the use in this state by an Indian purchaser of tangible personal property purchased from an off-reservation retailer for use in this state.

(E) Use Tax -Exemption. Use tax does not apply to the use of tangible personal property (including vehicles, vessels, and aircraft) purchased by an Indian from an off-reservation retailer and delivered to the purchaser on a reservation unless, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

(F) Leases. Neither sales nor use tax applies to leases otherwise taxable as continuing sales or continuing purchases as respects any period of time the leased property is situated on an Indian reservation when the lease is to an Indian who resides upon the reservation. In the absence of evidence to the contrary, it shall be assumed that the use of the property by the lessee occurs on the reservation if the lessor delivers the property to the lessee on the reservation. Tax applies to the use of leased vehicles registered with the Department of Motor Vehicles to the extent that the vehicles are used off the reservation.

(G) Property Used in Tribal Self-Governance. Sales and use tax does not apply to sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States if:

1. The tribal government's Indian tribe does not have a reservation or the principal place where the tribal government meets to conduct tribal business cannot be its Indian tribe's reservation because the reservation does not have a building in which the tribal government can meet or the reservation lacks one or more essential utility services, such as water, electricity, gas, sewage, or telephone, or mail service from the United States Postal Service;

2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and

3. The property is delivered to the tribal government and ownership of the property transfers to the tribal government at the principal place where the tribal government meets to conduct tribal business.

The purchase of tangible personal property is not exempt from use tax under this paragraph if the property is used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6017, 6021, Revenue and Taxation Code, Public Law No. 817-76th Congress (Buck Act). Vending machines, sales generally, see Regulation 1574. Items dispensed for 10 ¢ or less, see Regulation 1574. Additional reference: Section 6352, Revenue and Taxation Code.

* The following is a summary of the pertinent regulations which have been issued:

(a) General. Air force regulation 34-57, issued under date of February 9, 1968, army regulation 210-65, issued under date of May 4, 1966, and navy general order No. 15, issued under date of May 5, 1965, authorize the sale and possession of alcoholic beverages at bases and installations subject to certain enumerated restrictions.

(b) Air Force. Air force regulation 34-57, paragraph 5, permits commissioned officers' and non-commissioned officers' open messes, subject to regulations established by commanders of major air commands to sell alcoholic beverages to authorized purchasers at bars and cocktail lounges, and provides that commanders will issue detailed control instructions. Paragraphs 8 and 9 require commanders of major air commands to issue regulations relative to package liquor sales and to procurement of alcoholic beverages, respectively.

(c) Army. Army regulation 210-65, paragraph 9, provides that major commanders are authorized to permit at installations or activities within their respective commands the dispensing of alcoholic beverages by the drink or bottle. Paragraph 11 of AR 210-65 provides that when authorized by major commanders as prescribed in paragraph 9, AR 210-65, officers' and non-commissioned officers' open messes may, subject to regulations prescribed by the commanding officer of the installation or activity concerned, dispense alcoholic beverages by the drink, and operate a package store.

(d) Navy. Navy general order No. 15 provides that commanding officers may permit, subject to detailed alcoholic beverage control instructions, the sale of packaged alcoholic beverages by officers' and noncommissioned officers' clubs and messes and the sale and consumption of alcoholic beverages by the drink in such clubs and messes.

Bennion, Richard

From: Bennion, Richard [Richard.Bennion@BOE.CA.GOV]
Sent: Friday, September 09, 2011 1:05 PM
To: BOE_REGULATIONS@LISTSERV.STATE.CA.GOV
Subject: State Board of Equalization - Announcement of Regulatory Change 1616

The State Board of Equalization proposes to amend Regulation 1616, *Federal Areas*, to clarify the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax under Revenue and Taxation Code (RTC) section 6352. A public hearing regarding the adoption of the proposed amendments will be held in Room 121, 450 N Street, Sacramento, at 09:30 a.m., or as soon thereafter as the matter may be heard, on Tuesday, November 15, 2011.

The proposed amendments add a new subdivision (d)(4)(G) to Regulation 1616 for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by clarifying the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

To view the notice of hearing, initial statement of reasons, proposed text, and history click on the following link: http://www.boe.ca.gov/regs/reg_1616.htm.

Questions regarding the substance of the proposed regulation should be directed to: Mr. Bradley Heller, Tax Counsel IV, at 450 N Street, MIC:82, Sacramento, CA 94279-0082, email Bradley.Heller@boe.ca.gov, telephone (916) 323-3091, or FAX (916) 323-3387.

Written comments for the Board's consideration, notices of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed regulatory action should be directed to Rick Bennion, Regulations Coordinator, telephone (916) 445-2130, fax (916) 324-3984, e-mail Richard.Bennion@boe.ca.gov or by mail to: State Board of Equalization, Attn: Rick Bennion, MIC: 80, P.O. Box 942879-0080, Sacramento, CA 94279-0080.

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WEBSITE ACCESS

Materials regarding this proposal can be found at: www.cdfa.ca.gov/dms.

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 1616, Federal Areas

NOTICE IS HEREBY GIVEN

The State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1616, *Federal Areas*. Subdivision (d) of Regulation 1616 prescribes the application of the Sales and Use Tax Law (RTC § 6001 et seq.) to sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by Indians. The proposed amendments add new subdivision (d)(4)(G) to Regulation 1616 to implement, interpret, and make specific the provisions of RTC section 6352 by further prescribing the circumstances under which a sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States is exempt from sales and use tax because the tax is preempted by federal law.

PUBLIC HEARING

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on November 15–17, 2011. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board’s Website at www.boe.ca.gov at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on November 15, 16, or 17,

2011. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1616.

AUTHORITY

RTC section 7051.

REFERENCE

RTC section 6352.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Regulation 1616

RTC section 6352 exempts the sale and the storage, use, or other consumption of tangible personal property from sales and use tax when California is prohibited from taxing the sale or use of tangible personal property under federal law, including the United States Constitution.

In 1831, Chief Justice Marshall recognized that Indian tribes, which are officially recognized by the government of the United States, are independent nations that retain inherent rights to self-government. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 16.) Justice Marshall also recognized that article 1, section 8, clause 3 of the United States Constitution reserves to the United States Government the exclusive authority to regulate commerce with the Indian tribes. (*Id.* at p. 18.)

Subsequent United States Supreme Court opinions further explained that federally-recognized Indian tribes “retain ‘attributes of sovereignty over both their members and their territory’ (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142 [quoting from *United States v. Mazurie* (1975) 419 U.S. 544, 557]), “as a separate people, with the power of regulating their internal and social relations, and thus far [are] not brought under the laws” of the United States or the states in which the tribes reside. (*Bracker*, 448 U.S. at p. 142 [quoting from *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164, 173, which was quoting from *United States v. Kagama* (1886) 118 U.S. 375].)

In 1978, subdivision (d) was added to Regulation 1616 to prescribe the circumstances under which the sale and use of tangible personal property on an Indian

reservation¹ are exempt from sales and use tax under RTC section 6352 because the tax is preempted by federal law. Subdivision (d) is based upon United States Supreme Court cases regarding the federal preemption of the states' authority to tax federally-recognized Indian tribes and their members, which have held that the application of state sales and use tax is preempted with regard to the sale and use of property on Indian reservations if the legal incidence of the tax falls on a tribe or tribal members. Regulation 1616, subdivision (d), is still consistent with United States Supreme Court opinions preempting California sales and use tax when the tax unlawfully infringes upon federally-recognized Indian tribes' sovereignty over their reservations. (See, e.g., *Wagnon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 101–102.)

Pursuant to the current provisions of Regulation 1616, subdivision (d)(4)(A) and (E), sales tax will not apply to the sale of tangible personal property to an Indian if the property is delivered to the Indian and ownership of the property transfers to the Indian on a reservation, and use tax will not apply to tangible personal property delivered to an Indian on a reservation unless the property is used off a reservation more than it is used on a reservation during the first 12 months following delivery. The federal preemption recognized by the current provisions of Regulation 1616, subdivision (d), allows the government of a federally-recognized Indian tribe to purchase tangible personal property for use in tribal self-governance without being subject to California sales and use tax if the property is delivered to the tribal government on its tribe's reservation and the property is used on the reservation more than it is used off reservation during the first 12 months following delivery. The current provisions of Regulation 1616, subdivision (d), do not address situations where California sales and use tax is preempted by federal law because the tax unlawfully infringes on federally-recognized Indian tribes' sovereignty over their members.

Proposed Amendments to Regulation 1616

United States Supreme Court opinions published after the initial adoption of Regulation 1616, subdivision (d), have established additional "principles with respect

¹In this context, the term "reservation" refers to all land that is considered "Indian country" as defined by 18 U.S.C. § 1151, which provides that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

to the boundaries between state regulatory authority and tribal self-government" in the context of state taxation. (*Bracker, supra*, 448 U.S. at p. 141.) The United States Supreme Court has held that:

- Federal law preempts a state's authority to tax an activity undertaken on a "reservation or by tribal members" (*Id.* at p. 143) in circumstances where the tax unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them" (*Id.* at p. 142 [quoting from *Williams v. Lee* (1959) 358 U.S. 217, 220]);
- State taxation of Indians is not generally preempted outside Indian reservations, however, state taxation of Indians outside of Indian reservations may nonetheless be preempted under appropriate circumstances (see, e.g., *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, in which Justice O'Connor contemplated whether state taxation may be preempted outside of a tribe's territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court; see also *Wagnon, supra*, 546 U.S. at p. 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148–149] indicating that there are some exceptions to the "general" rule that states are permitted to tax Indians when they reside outside of Indian reservations); and
- "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members" (*Bracker, supra*, 448 U.S. at p. 142), and state taxation is preempted when "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" indicate that, in a "specific context, the exercise of state authority would violate federal law" (*Id.* at p. 145) because it unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them." (*Id.* at p. 142.)

Therefore, the Board reviewed the particular facts and circumstances applicable to the imposition of California's sales and use tax on the sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal governments of Indian tribes that are officially recognized by the United States, but cannot satisfy the current provisions of the exemptions prescribed by Regulation 1616, subdivision (d)(4)(A) and (E), because their tribes do not have reservations on which to take delivery of and use their property or their tribes have undeveloped reservations where it would be impractical to take delivery of and use their property.

First, the Board found that there was a major shift in the United States' policies towards Indians that was implemented, at least in part, by the enactment of the Indian Reorganization Act (IRA) of 1934 (Pub.L. No. 73-383 (June 18, 1934) 48 Stat. 984), which represented formal federal recognition of a unique relationship between Indian tribes' sovereignty and land, and the federal government's duty to help restore Indian tribes' economic and governmental self-sufficiency, as sovereigns, through the acquisition of land. Specifically, section 5 of the IRA, which was subsequently codified (with minor amendments) as section 465 of title 25 of the United States Code, currently provides that:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

¶ . . . ¶

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Thus, the Department of the Interior "has had discretionary authority to take title to land, in the name of the United States, in trust for the benefit of Indian tribes" since 1934. (44 S.D. L. Rev. 681, 685.) And, when that discretion is exercised, the Secretary of the Interior accepts a fiduciary duty over the trust land and "the land is freed from federal and state taxes." (*Id.* at p. 682.) In other words, a clear connection exists between tribal self-governance, the acquisition of trust land, and the preemption of state taxation.

Second, the Board found that the Department of the Interior's discretion to acquire land for the benefit of Indian tribes creates a tension between Indian tribes and nontribal governments: "Indian tribes need and are entitled to have lands taken into trust. Non-tribal governments are interested in keeping such lands on their tax rolls." (44 S.D. L. Rev. 681, 682.) Moreover, inherent in this federal discretion is the principle that one of the functions of a landless Indian tribe's government is to petition the Secretary of the Interior to acquire lands in trust for the tribe so that the tribe will have territorial boundaries in which to exercise its sovereignty. As a result, the Board determined that California's taxation of sales to and purchases by federally-recognized Indian tribes of tangible personal property for use by their trib-

al governments in applying to the Secretary of the Interior for the acquisition of trust lands would unlawfully infringe upon their tribal sovereignty in certain contexts. A determination that is supported by the maxim that "the power to tax involves the power to destroy . . . [and] that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another." (*McCulloch v. State of Maryland* (1819) 17 U.S. 316, 431.)

Third, the Board found that all three branches of the federal government have recognized Indian tribes' interests in tribal sovereignty and the attributes of such sovereignty. The United States Supreme Court has long recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." (*Bracker, supra*, 448 U.S. at p. 142.) Moreover, Congress, in 1995, declared that "(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; and (4) Indian tribes possess the inherent authority to establish their own form of government." (25 U.S.C. § 3601.) Additionally, the United States Department of Justice conducts its Indian affairs under a June 1, 1995, policy memorandum, in which the Attorney General recognizes similar attributes of tribal sovereignty.

Fourth, the Board reviewed the present status of California's Indian tribes and found that the Bureau of Indian Affairs (BIA) provides the following information with respect to their unique status:

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of Guadalupe Hidalgo; the Senate's refusal to ratify the 18 treaties negotiated with California tribes during 1851-52; and the lawless nature of California's settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to "exterminate" the indigenous population.

Under pressure from the California Congressional delegation, the United States Senate not only refused to sign the 18 treaties that had been negotiated, but they also took extraordinary steps to place the treaties under seal. Between the

un-ratified treaties and the Land Claims Act of 1851, most California Indians became homeless.

Major shifts in federal Indian policy at the national level during the late 19th century exacerbated the Indian problems in California. Passage of the General Allotment Act in 1887 opened part of the limited lands in California to non-Indian settlement. In 1905 the public was finally advised of the 18 un-ratified treaties. Citizens sympathetic to the economic and physical distress of California Indians encouraged Congress to pass legislation to acquire isolated parcels of land for homeless California Indians. Between 1906 and 1910 a series of appropriations were passed that provided funds to purchase small tracts of land in central and northern California for landless Indians of those areas. The land acquisitions resulted in what has been referred to as the Rancheria System in California.

In 1934, with the passage of the Indian Reorganization Act (IRA), the reconstituting of tribal governments included the BIA's supervision of elections among California tribes, including most of the Rancheria groups. Although many tribes accepted the provisions of the IRA, few California tribes benefited economically from the IRA because of the continuing inequities in funding of Federal Indian programs.

Beginning in 1944, forces within the BIA began to propose partial liquidation of the Rancheria system. Even the limited efforts to address the needs of California Indians at the turn of the century and again through passage of the IRA were halted by the federal government when it adopted the policy of termination. California became a primary target of this policy when Congress slated forty-one (41), California Rancherias for termination pursuant to the Rancheria Act of 1958.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 Rancherias that were terminated under the original Rancheria Act. Additional tribes have since then been restored as a result of Acts of Congress.

This brief history only begins to explain why the Pacific Regional Office is unique. California tribes today continue to develop their tribal infrastructure as a result of not having the same opportunities that have been provided to other native groups throughout the Country. California has a large number of aboriginal native populations who are not currently recognized by the United States which presents [its] own list of problems.

These unique BIA-recognized circumstances left a number of federally-recognized Indian tribes that are still located in California with no reservations on which to conduct their governmental activities, or undeveloped reservations, which lack adequate meeting facilities, essential utility services, or mail service, making it impractical for the tribes to conduct their governmental activities on their reservations. And, it is due to these unique BIA-recognized circumstances that both landless tribes and the tribes with undeveloped reservations are currently unable to exercise their rights to self-governance without interference from California's sales and use tax.

Therefore, during its July 26, 2011, Business Taxes Committee meeting, the Board determined that the nature of the state, federal, and tribal interests at stake dictate that federal law preempts the imposition of California's sales and use tax on the sale of tangible personal property to and the use of tangible personal property by the tribal governments of federally-recognized California Indian tribes, when such property is purchased for use in tribal self-governance, and the tribal governments have no reservation on which to conduct their governmental activities or the tribal governments have undeveloped reservations where it is impractical to conduct their governmental activities, due to the unique BIA-recognized circumstances discussed above. This is because the taxation of these types of transactions involving off-reservation sales and use, and only these types of off-reservation transactions, would directly interfere with the tribes' sovereignty and therefore unlawfully infringe on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them. The Board has not found any persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off reservation.

The Board determined that it is necessary to amend Regulation 1616 to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The Board determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the sale and use of tangible personal property that is delivered to an officially-recognized Indian tribe at the principal place where the tribe's government meets to conduct tribal business so that there is some way for retailers and the Board to verify exempt transactions. The Board understands that tribes may not own any real estate where their tribal governments can meet to conduct tribal business and they may occasionally meet at more than one place during a given period, and the Board has

proposed to adopt a "principal place" test because the Board determined that such a test is sufficiently flexible to take into account the varying circumstances under which some tribal governments meet and therefore does not unlawfully infringe on the tribes' rights to self-governance. The Board also determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the use of tangible personal property if the property is used in tribal self-governance more than it is used for purposes other than tribal self-governance within the first 12 months following delivery. This is because the Board is not preempted from imposing a use tax on property that is used off reservation more than it is used on a reservation within the first 12 months following delivery and that is also used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

As a result, the Board proposes to amend Regulation 1616, to add a new subdivision (d)(4)(G), to implement, interpret, and make specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The objective of the proposed amendments is to clarify the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

There are no comparable federal regulations or statutes to Regulation 1616.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1616 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

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

The Board has determined that the adoption of the proposed amendments to Regulation 1616 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed

on local agencies, or cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The adoption of the proposed amendments to Regulation 1616 will recognize the holdings of United States Supreme Court opinions regarding the federal preemption of state taxation when it unlawfully infringes on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them and further clarify the types of transactions that are already exempt from sales and use tax under RTC section 6352. Therefore, the Board has made an initial determination that the adoption of the proposed amendments to Regulation 1616 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1616 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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

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

The Board has determined that the adoption of the proposed amendments to Regulation 1616 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.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

Adoption of the proposed amendments to Regulation 1616 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 this action is proposed, or be as effective as and less burdensome to affected private persons than the proposed action.

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at Bradley.Heller@boe.ca.gov, or by mail at State Board of Equalization, Attn: Bradley M. Heller, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends at 9:30 a.m. on November 15, 2011, or as soon thereafter as the Board begins the public hearing regarding the proposed amendments to Regulations 1616 during the November 15-17, 2011, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1616. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED AMENDMENTS

The Board has prepared an underscored version of the text of Regulation 1616 illustrating the express terms of the proposed amendments and an initial statement of reasons for the adoption of the proposed amendments. 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 to Regulation 1616 and the Initial State-

ment of Reasons are also available on the Board's Website at www.boe.ca.gov.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1616 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 to the proposed amendments, the Board will make the full text of the resulting 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 amendments orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1616, the Board will prepare a Final Statement of Reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

TITLE 22. EMERGENCY MEDICAL SERVICES AUTHORITY

NOTICE OF PROPOSED RULEMAKING

The Emergency Medical Services Authority (EMSA) proposes to adopt the proposed Paramedic Regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARING

EMSA will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period.

WRITTEN COMMENT PERIOD

Interested persons are invited to submit written comments on the proposed regulatory action to the EMSA.



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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

BETTY T. YEE
First District, San Francisco

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

MICHELLE STEEL
Third District, Rolling Hills Estates

JEROME E. HORTON
Fourth District, Los Angeles

JOHN CHIANG
State Controller

KRISTINE CAZADD
Interim Executive Director

September 9, 2011

To Interested Parties:

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

Proposed to Amend Regulation 1616, *Federal Areas*

NOTICE IS HEREBY GIVEN

The State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1616, *Federal Areas*. Subdivision (d) of Regulation 1616 prescribes the application of the Sales and Use Tax Law (RTC § 6001 et seq.) to sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by Indians. The proposed amendments add new subdivision (d)(4)(G) to Regulation 1616 to implement, interpret, and make specific the provisions of RTC section 6352 by further prescribing the circumstances under which a sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States is exempt from sales and use tax because the tax is preempted by federal law.

PUBLIC HEARING

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on November 15-17, 2011. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at www.boe.ca.gov at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on November 15, 16, or 17, 2011. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1616.

AUTHORITY

RTC section 7051.

REFERENCE

RTC section 6352.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Regulation 1616

RTC section 6352 exempts the sale and the storage, use, or other consumption of tangible personal property from sales and use tax when California is prohibited from taxing the sale or use of tangible personal property under federal law, including the United States Constitution.

In 1831, Chief Justice Marshall recognized that Indian tribes, which are officially recognized by the government of the United States, are independent nations that retain inherent rights to self-government. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 16.) Justice Marshall also recognized that article 1, section 8, clause 3 of the United States Constitution reserves to the United States Government the exclusive authority to regulate commerce with the Indian tribes. (*Id.* at p. 18.)

Subsequent United States Supreme Court opinions further explained that federally-recognized Indian tribes “retain ‘attributes of sovereignty over both their members and their territory’” (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142 [quoting from *United States v. Mazurie* (1975) 419 U.S. 544, 557]), “as a separate people, with the power of regulating their internal and social relations, and thus far [are] not brought under the laws” of the United States or the states in which the tribes reside. (*Bracker*, 448 U.S. at p. 142 [quoting from *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164, 173, which was quoting from *United States v. Kagama* (1886) 118 U.S. 375].)

In 1978, subdivision (d) was added to Regulation 1616 to prescribe the circumstances under which the sale and use of tangible personal property on an Indian reservation¹ are exempt from sales and use tax under RTC section 6352 because the tax is preempted by federal law. Subdivision (d) is based upon United States Supreme Court cases regarding the federal preemption of the states’ authority to tax federally-recognized Indian tribes and their members, which have held that the application of state sales and use tax is preempted with regard to the

¹ In this context, the term “reservation” refers to all land that is considered “Indian country” as defined by 18 U.S.C. § 1151, which provides that “the term ‘Indian country’ . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

sale and use of property on Indian reservations if the legal incidence of the tax falls on a tribe or tribal members. Regulation 1616, subdivision (d), is still consistent with United States Supreme Court opinions preempting California sales and use tax when the tax unlawfully infringes upon federally-recognized Indian tribes' sovereignty over their reservations. (See, e.g., *Wagnon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 101-102.)

Pursuant to the current provisions of Regulation 1616, subdivision (d)(4)(A) and (E), sales tax will not apply to the sale of tangible personal property to an Indian if the property is delivered to the Indian and ownership of the property transfers to the Indian on a reservation, and use tax will not apply to tangible personal property delivered to an Indian on a reservation unless the property is used off a reservation more than it is used on a reservation during the first 12 months following delivery. The federal preemption recognized by the current provisions of Regulation 1616, subdivision (d), allows the government of a federally-recognized Indian tribe to purchase tangible personal property for use in tribal self-governance without being subject to California sales and use tax if the property is delivered to the tribal government on its tribe's reservation and the property is used on the reservation more than it is used off reservation during the first 12 months following delivery. The current provisions of Regulation 1616, subdivision (d), do not address situations where California sales and use tax is preempted by federal law because the tax unlawfully infringes on federally-recognized Indian tribes' sovereignty over their members.

Proposed Amendments to Regulation 1616

United States Supreme Court opinions published after the initial adoption of Regulation 1616, subdivision (d), have established additional "principles with respect to the boundaries between state regulatory authority and tribal self-government" in the context of state taxation. (*Bracker, supra*, 448 U.S. at p. 141.) The United States Supreme Court has held that:

- Federal law preempts a state's authority to tax an activity undertaken on a "reservation or by tribal members" (*Id.* at p. 143) in circumstances where the tax unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them" (*Id.* at p. 142 [quoting from *Williams v. Lee* (1959) 358 U.S. 217, 220]);
- State taxation of Indians is not generally preempted outside Indian reservations, however, state taxation of Indians outside of Indian reservations may nonetheless be preempted under appropriate circumstances (see, e.g., *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, in which Justice O'Connor contemplated whether state taxation may be preempted outside of a tribe's territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court; see also *Wagnon, supra*, 546 U.S. at p. 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149] indicating that there are some exceptions to the "general" rule that states are permitted to tax Indians when they reside outside of Indian reservations); and
- "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members" (*Bracker, supra*, 448 U.S.

at p. 142), and state taxation is preempted when “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” indicate that, in a “specific context, the exercise of state authority would violate federal law” (*Id.* at p. 145) because it unlawfully infringes on the right of federally-recognized Indian tribes “to make their own laws and be ruled by them.” (*Id.* at p. 142.)

Therefore, the Board reviewed the particular facts and circumstances applicable to the imposition of California’s sales and use tax on the sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal governments of Indian tribes that are officially recognized by the United States, but cannot satisfy the current provisions of the exemptions prescribed by Regulation 1616, subdivision (d)(4)(A) and (E), because their tribes do not have reservations on which to take delivery of and use their property or their tribes have undeveloped reservations where it would be impractical to take delivery of and use their property.

First, the Board found that there was a major shift in the United States’ policies towards Indians that was implemented, at least in part, by the enactment of the Indian Reorganization Act (IRA) of 1934 (Pub.L. No. 73-383 (June 18, 1934) 48 Stat. 984), which represented formal federal recognition of a unique relationship between Indian tribes’ sovereignty and land, and the federal government’s duty to help restore Indian tribes’ economic and governmental self-sufficiency, as sovereigns, through the acquisition of land. Specifically, section 5 of the IRA, which was subsequently codified (with minor amendments) as section 465 of title 25 of the United States Code, currently provides that:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

[¶] . . . [¶]

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Thus, the Department of the Interior “has had discretionary authority to take title to land, in the name of the United States, in trust for the benefit of Indian tribes” since 1934. (44 S.D. L. Rev. 681, 685.) And, when that discretion is exercised, the Secretary of the Interior accepts a fiduciary duty over the trust land and “the land is freed from federal and state taxes.” (*Id.* at p. 682.) In other words, a clear connection exists between tribal self-governance, the acquisition of trust land, and the preemption of state taxation.

Second, the Board found that the Department of the Interior's discretion to acquire land for the benefit of Indian tribes creates a tension between Indian tribes and nontribal governments: "Indian tribes need and are entitled to have lands taken into trust. Non-tribal governments are interested in keeping such lands on their tax rolls." (44 S.D. L. Rev. 681, 682.) Moreover, inherent in this federal discretion is the principle that one of the functions of a landless Indian tribe's government is to petition the Secretary of the Interior to acquire lands in trust for the tribe so that the tribe will have territorial boundaries in which to exercise its sovereignty. As a result, the Board determined that California's taxation of sales to and purchases by federally-recognized Indian tribes of tangible personal property for use by their tribal governments in applying to the Secretary of the Interior for the acquisition of trust lands would unlawfully infringe upon their tribal sovereignty in certain contexts. A determination that is supported by the maxim that "the power to tax involves the power to destroy . . . [and] that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another." (*McCulloch v. State of Maryland* (1819) 17 U.S. 316, 431.)

Third, the Board found that all three branches of the federal government have recognized Indian tribes' interests in tribal sovereignty and the attributes of such sovereignty. The United States Supreme Court has long recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." (*Bracker, supra*, 448 U.S. at p. 142.) Moreover, Congress, in 1995, declared that "(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; and (4) Indian tribes possess the inherent authority to establish their own form of government." (25 U.S.C. § 3601.) Additionally, the United States Department of Justice conducts its Indian affairs under a June 1, 1995, policy memorandum, in which the Attorney General recognizes similar attributes of tribal sovereignty.

Fourth, the Board reviewed the present status of California's Indian tribes and found that the Bureau of Indian Affairs (BIA) provides the following information with respect to their unique status:

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of Guadalupe Hidalgo; the Senate's refusal to ratify the 18 treaties negotiated with California tribes during 1851-52; and the lawless nature of California's settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to "exterminate" the indigenous population.

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ratified treaties and the Land Claims Act of 1851, most California Indians became homeless.

Major shifts in federal Indian policy at the national level during the late 19th century exacerbated the Indian problems in California. Passage of the General Allotment Act in 1887 opened part of the limited lands in California to non-Indian settlement. In 1905 the public was finally advised of the 18 un-ratified treaties. Citizens sympathetic to the economic and physical distress of California Indians encouraged Congress to pass legislation to acquire isolated parcels of land for homeless California Indians. Between 1906 and 1910 a series of appropriations were passed that provided funds to purchase small tracts of land in central and northern California for landless Indians of those areas. The land acquisitions resulted in what has been referred to as the Rancheria System in California.

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Beginning in 1944, forces within the BIA began to propose partial liquidation of the Rancheria system. Even the limited efforts to address the needs of California Indians at the turn of the century and again through passage of the IRA were halted by the federal government when it adopted the policy of termination. California became a primary target of this policy when Congress slated forty-one (41), California Rancherias for termination pursuant to the Rancheria Act of 1958.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 Rancherias that were terminated under the original Rancheria Act. Additional tribes have since then been restored as a result of Acts of Congress.

This brief history only begins to explain why the Pacific Regional Office is unique. California tribes today continue to develop their tribal infrastructure as a result of not having the same opportunities that have been provided to other native groups throughout the Country. California has a large number of aboriginal native populations who are not currently recognized by the United States which presents [its] own list of problems.

These unique BIA-recognized circumstances left a number of federally-recognized Indian tribes that are still located in California with no reservations on which to conduct their governmental activities, or undeveloped reservations, which lack adequate meeting facilities, essential utility services, or mail service, making it impractical for the tribes to conduct their governmental activities on their reservations. And, it is due to these unique BIA-recognized circumstances that

both landless tribes and the tribes with undeveloped reservations are currently unable to exercise their rights to self-governance without interference from California's sales and use tax.

Therefore, during its July 26, 2011, Business Taxes Committee meeting, the Board determined that the nature of the state, federal, and tribal interests at stake dictate that federal law preempts the imposition of California's sales and use tax on the sale of tangible personal property to and the use of tangible personal property by the tribal governments of federally-recognized California Indian tribes, when such property is purchased for use in tribal self-governance, and the tribal governments have no reservation on which to conduct their governmental activities or the tribal governments have undeveloped reservations where it is impractical to conduct their governmental activities, due to the unique BIA-recognized circumstances discussed above. This is because the taxation of these types of transactions involving off-reservation sales and use, and only these types of off-reservation transactions, would directly interfere with the tribes' sovereignty and therefore unlawfully infringe on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them. The Board has not found any persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off reservation.

The Board determined that it is necessary to amend Regulation 1616 to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The Board determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the sale and use of tangible personal property that is delivered to an officially-recognized Indian tribe at the principal place where the tribe's government meets to conduct tribal business so that there is some way for retailers and the Board to verify exempt transactions. The Board understands that tribes may not own any real estate where their tribal governments can meet to conduct tribal business and they may occasionally meet at more than one place during a given period, and the Board has proposed to adopt a "principal place" test because the Board determined that such a test is sufficiently flexible to take into account the varying circumstances under which some tribal governments meet and therefore does not unlawfully infringe on the tribes' rights to self-governance. The Board also determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the use of tangible personal property if the property is used in tribal self-governance more than it is used for purposes other than tribal self-governance within the first 12 months following delivery. This is because the Board is not preempted from imposing a use tax on property that is used off reservation more than it is used on a reservation within the first 12 months following delivery and that is also used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

As a result, the Board proposes to amend Regulation 1616, to add a new subdivision (d)(4)(G), to implement, interpret, and make specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The objective of the proposed amendments is to clarify the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized

Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

There are no comparable federal regulations or statutes to Regulation 1616.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1616 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

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

The Board has determined that the adoption of the proposed amendments to Regulation 1616 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The adoption of the proposed amendments to Regulation 1616 will recognize the holdings of United States Supreme Court opinions regarding the federal preemption of state taxation when it unlawfully infringes on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them and further clarify the types of transactions that are already exempt from sales and use tax under RTC section 6352. Therefore, the Board has made an initial determination that the adoption of the proposed amendments to Regulation 1616 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1616 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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

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

The Board has determined that the adoption of the proposed amendments to Regulation 1616 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.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

Adoption of the proposed amendments to Regulation 1616 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 this action is proposed, or be as effective as and less burdensome to affected private persons than the proposed action.

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at Bradley.Heller@boe.ca.gov, or by mail at State Board of Equalization, Attn: Bradley M. Heller, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends at 9:30 a.m. on November 15, 2011, or as soon thereafter as the Board begins the public hearing regarding the proposed amendments to Regulations 1616 during the November 15-17, 2011, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1616. The Board will only consider written comments received by that time.

**AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF
PROPOSED AMENDMENTS**

The Board has prepared an underscored version of the text of Regulation 1616 illustrating the express terms of the proposed amendments and an initial statement of reasons for the adoption of the proposed amendments. 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 to Regulation 1616 and the Initial Statement of Reasons are also available on the Board's Website at www.boe.ca.gov.

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

The Board may adopt the proposed amendments to Regulation 1616 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 to the proposed amendments, the Board will make the full text of the resulting 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 amendments orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1616, the Board will prepare a Final Statement of Reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

Sincerely,



Diane G. Olson, Chief
Board Proceedings Division

Initial Statement of Reasons

Adoption of Proposed Amendments to California Code of Regulations, Title 18, Section 1616, *Federal Areas*

SPECIFIC PURPOSE AND NECESSITY

Current Regulation 1616

Revenue and Taxation Code (RTC) section 6352 exempts the sale and the storage, use, or other consumption of tangible personal property from sales and use tax when California is prohibited from taxing the sale or use of tangible personal property under federal law, including the United States Constitution.

In 1831, Chief Justice Marshall recognized that Indian tribes, which are officially recognized by the government of the United States, are independent nations that retain inherent rights to self-government. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 16.) Justice Marshall also recognized that article 1, section 8, clause 3 of the United States Constitution reserves to the United States Government the exclusive authority to regulate commerce with the Indian tribes. (*Id.* at p. 18.)

Subsequent United States Supreme Court opinions further explained that federally-recognized Indian tribes “retain ‘attributes of sovereignty over both their members and their territory’” (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142 [quoting from *United States v. Mazurie* (1975) 419 U.S. 544, 557]), “as a separate people, with the power of regulating their internal and social relations, and thus far [are] not brought under the laws” of the United States or the states in which the tribes reside. (*Bracker*, 448 U.S. at p. 142 [quoting from *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164, 173, which was quoting from *United States v. Kagama* (1886) 118 U.S. 375].)

In 1978, the State Board of Equalization (Board) added subdivision (d) to California Code of Regulations, title 18, section (Regulation) 1616, *Federal Areas*, to prescribe the circumstances under which the sale and use of tangible personal property on an Indian reservation¹ are exempt from sales and use tax under RTC section 6352 because the tax is

¹ In this context, the term “reservation” refers to all land that is considered “Indian country” as defined by 18 U.S.C. § 1151, which provides that “the term ‘Indian country’ . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

preempted by federal law. Subdivision (d) is based upon United States Supreme Court cases regarding the federal preemption of the states' authority to tax federally-recognized Indian tribes and their members, which have held that the application of state sales and use tax is preempted with regard to the sale and use of property on Indian reservations if the legal incidence of the tax falls on a tribe or tribal members. Regulation 1616, subdivision (d), is still consistent with United States Supreme Court opinions preempting California sales and use tax when the tax unlawfully infringes upon federally-recognized Indian tribes' sovereignty over their reservations. (See, e.g., *Wagnon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 101-102.)

Pursuant to the current provisions of Regulation 1616, subdivision (d)(4)(A) and (E), sales tax will not apply to the sale of tangible personal property to an Indian if the property is delivered to the Indian and ownership of the property transfers to the Indian on a reservation, and use tax will not apply to tangible personal property delivered to an Indian on a reservation unless the property is used off a reservation more than it is used on a reservation during the first 12 months following delivery. The federal preemption recognized by the current provisions of Regulation 1616, subdivision (d), allows the government of a federally-recognized Indian tribe to purchase tangible personal property for use in tribal self-governance without being subject to California sales and use tax if the property is delivered to the tribal government on its tribe's reservation and the property is used on the reservation more than it is used off reservation during the first 12 months following delivery. The current provisions of Regulation 1616, subdivision (d), do not address situations where California sales and use tax is preempted by federal law because the tax unlawfully infringes on federally-recognized Indian tribes' sovereignty over their members.

Proposed Amendments to Regulation 1616

United States Supreme Court opinions published after the initial adoption of Regulation 1616, subdivision (d), have established additional "principles with respect to the boundaries between state regulatory authority and tribal self-government" in the context of state taxation. (*Bracker, supra*, 448 U.S. at p. 141.) The United States Supreme Court has held that:

- Federal law preempts a state's authority to tax an activity undertaken on a "reservation or by tribal members" (*Id.* at p. 143) in circumstances where the tax unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them" (*Id.* at p. 142 [quoting from *Williams v. Lee* (1959) 358 U.S. 217, 220]);
- State taxation of Indians is not generally preempted outside Indian reservations, however, state taxation of Indians outside of Indian reservations may nonetheless be preempted under appropriate circumstances (see, e.g., *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, in which Justice O'Connor contemplated whether state taxation may be preempted outside of a tribe's territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court; see also *Wagnon, supra*, 546 U.S. at

p. 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149] indicating that there are some exceptions to the “general” rule that states are permitted to tax Indians when they reside outside of Indian reservations); and

- “[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members” (*Bracker, supra*, 448 U.S. at p. 142), and state taxation is preempted when “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” indicate that, in a “specific context, the exercise of state authority would violate federal law” (*Id.* at p. 145) because it unlawfully infringes on the right of federally-recognized Indian tribes “to make their own laws and be ruled by them.” (*Id.* at p. 142.)

Therefore, the Board reviewed the particular facts and circumstances applicable to the imposition of California’s sales and use tax on the sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal governments of Indian tribes that are officially recognized by the United States, but cannot satisfy the current provisions of the exemptions prescribed by Regulation 1616, subdivision (d)(4)(A) and (E), because their tribes do not have reservations on which to take delivery of and use their property or their tribes have undeveloped reservations where it would be impractical to take delivery of and use their property.

First, the Board found that there was a major shift in the United States’ policies towards Indians that was implemented, at least in part, by the enactment of the Indian Reorganization Act (IRA) of 1934 (Pub.L. No. 73-383 (June 18, 1934) 48 Stat. 984), which represented formal federal recognition of a unique relationship between Indian tribes’ sovereignty and land, and the federal government’s duty to help restore Indian tribes’ economic and governmental self-sufficiency, as sovereigns, through the acquisition of land. Specifically, section 5 of the IRA, which was subsequently codified (with minor amendments) as section 465 of title 25 of the United States Code, currently provides that:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

[¶] . . . [¶]

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Thus, the Department of the Interior “has had discretionary authority to take title to land, in the name of the United States, in trust for the benefit of Indian tribes” since 1934. (44 S.D. L. Rev. 681, 685.) And, when that discretion is exercised, the Secretary of the Interior accepts a fiduciary duty over the trust land and “the land is freed from federal and state taxes.” (*Id.* at p. 682.) In other words, a clear connection exists between tribal self-governance, the acquisition of trust land, and the preemption of state taxation.

Second, the Board found that the Department of the Interior’s discretion to acquire land for the benefit of Indian tribes creates a tension between Indian tribes and nontribal governments: “Indian tribes need and are entitled to have lands taken into trust. Non-tribal governments are interested in keeping such lands on their tax rolls.” (44 S.D. L. Rev. 681, 682.) Moreover, inherent in this federal discretion is the principle that one of the functions of a landless Indian tribe’s government is to petition the Secretary of the Interior to acquire lands in trust for the tribe so that the tribe will have territorial boundaries in which to exercise its sovereignty. As a result, the Board determined that California’s taxation of sales to and purchases by federally-recognized Indian tribes of tangible personal property for use by their tribal governments in applying to the Secretary of the Interior for the acquisition of trust lands would unlawfully infringe upon their tribal sovereignty in certain contexts. A determination that is supported by the maxim that “the power to tax involves the power to destroy . . . [and] that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another.” (*McCulloch v. State of Maryland* (1819) 17 U.S. 316, 431.)

Third, the Board found that all three branches of the federal government have recognized Indian tribes’ interests in tribal sovereignty and the attributes of such sovereignty. The United States Supreme Court has long recognized that Indian tribes retain “attributes of sovereignty over both their members and their territory.” (*Bracker, supra*, 448 U.S. at p. 142.) Moreover, Congress, in 1995, declared that “(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; and (4) Indian tribes possess the inherent authority to establish their own form of government.” (25 U.S.C. § 3601.) Additionally, the United States Department of Justice conducts its Indian affairs under a June 1, 1995, policy memorandum, in which the Attorney General recognizes similar attributes of tribal sovereignty.

Fourth, the Board reviewed the present status of California’s Indian tribes and found that the Bureau of Indian Affairs (BIA) provides the following information with respect to their unique status:

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of

Guadalupe Hidalgo; the Senate's refusal to ratify the 18 treaties negotiated with California tribes during 1851-52; and the lawless nature of California's settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to "exterminate" the indigenous population.

Under pressure from the California Congressional delegation, the United States Senate not only refused to sign the 18 treaties that had been negotiated, but they also took extraordinary steps to place the treaties under seal. Between the un-ratified treaties and the Land Claims Act of 1851, most California Indians became homeless.

Major shifts in federal Indian policy at the national level during the late 19th century exacerbated the Indian problems in California. Passage of the General Allotment Act in 1887 opened part of the limited lands in California to non-Indian settlement. In 1905 the public was finally advised of the 18 un-ratified treaties. Citizens sympathetic to the economic and physical distress of California Indians encouraged Congress to pass legislation to acquire isolated parcels of land for homeless California Indians. Between 1906 and 1910 a series of appropriations were passed that provided funds to purchase small tracts of land in central and northern California for landless Indians of those areas. The land acquisitions resulted in what has been referred to as the Rancheria System in California.

In 1934, with the passage of the Indian Reorganization Act (IRA), the reconstituting of tribal governments included the BIA's supervision of elections among California tribes, including most of the Rancheria groups. Although many tribes accepted the provisions of the IRA, few California tribes benefited economically from the IRA because of the continuing inequities in funding of Federal Indian programs.

Beginning in 1944, forces within the BIA began to propose partial liquidation of the Rancheria system. Even the limited efforts to address the needs of California Indians at the turn of the century and again through passage of the IRA were halted by the federal government when it adopted the policy of termination. California became a primary target of this policy when Congress slated forty-one (41), California Rancherias for termination pursuant to the Rancheria Act of 1958.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 Rancherias that were terminated under the original Rancheria Act. Additional tribes have since then been restored as a result of Acts of Congress.

This brief history only begins to explain why the Pacific Regional Office is unique. California tribes today continue to develop their tribal infrastructure as a result of not having the same opportunities that have

been provided to other native groups throughout the Country. California has a large number of aboriginal native populations who are not currently recognized by the United States which presents [its] own list of problems.

These unique BIA-recognized circumstances left a number of federally-recognized Indian tribes that are still located in California with no reservations on which to conduct their governmental activities, or undeveloped reservations, which lack adequate meeting facilities, essential utility services, or mail service, making it impractical for the tribes to conduct their governmental activities on their reservations. And, it is due to these unique BIA-recognized circumstances that both landless tribes and the tribes with undeveloped reservations are currently unable to exercise their rights to self-governance without interference from California's sales and use tax.

Therefore, during its July 26, 2011, Business Taxes Committee meeting, the Board determined that the nature of the state, federal, and tribal interests at stake dictate that federal law preempts the imposition of California's sales and use tax on the sale of tangible personal property to and the use of tangible personal property by the tribal governments of federally-recognized California Indian tribes, when such property is purchased for use in tribal self-governance, and the tribal governments have no reservation on which to conduct their governmental activities or the tribal governments have undeveloped reservations where it is impractical to conduct their governmental activities, due to the unique BIA-recognized circumstances discussed above. This is because the taxation of these types of transactions involving off-reservation sales and use, and only these types of off-reservation transactions, would directly interfere with the tribes' sovereignty and therefore unlawfully infringe on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them. The Board has not found any persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off reservation.

The Board determined that it is necessary to amend Regulation 1616 to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above and clarifying the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

The Board determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the sale and use of tangible personal property that is delivered to an officially-recognized Indian tribe at the principal place where the tribe's government meets to conduct tribal business so that there is some way for retailers and the Board to verify exempt transactions. The Board understands that tribes may not own any real estate where their tribal governments can meet to conduct tribal business and they may occasionally meet at more than one place during a given period, and the Board has proposed to adopt a "principal place" test because the Board determined that such a test is sufficiently flexible to take into account the varying

circumstances under which some tribal governments meet and therefore does not unlawfully infringe on the tribes' rights to self-governance.

The Board determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the use of tangible personal property if the property is used in tribal self-governance more than it is used for purposes other than tribal self-governance within the first 12 months following delivery. This is because the Board also determined that that the nature of the state, federal, and tribal interests at stake indicate that California is not preempted from imposing a use tax on property that is used off reservation more than it is used on a reservation within the first 12 months following delivery and that is also used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

As a result, the Board proposes to amend Regulation 1616, to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above and clarifying the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

There are no comparable federal regulations or statutes to Regulation 1616.

DOCUMENTS RELIED UPON

Board staff prepared Formal Issue Paper 11-005 regarding the proposed amendments to Regulation 1616 and submitted it to the Board for consideration at the Board's July 26, 2011, Business Taxes Committee meeting. The Board relied upon Formal Issue Paper 11-005, the exhibits to the formal issue paper, and comments made during the July 26, 2011, discussion of the formal issue paper in deciding to propose the amendments to Regulation 1616, subdivision (d), described above.

ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1616 at this time or, alternatively, whether to take no action at this time. However, the Board decided to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1616 at this time because the amendments are necessary to implement, interpret, and make specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above and clarifying the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

No reasonable alternative to the proposed amendments to Regulation 1616 has been brought to the Board's attention that would be effective in carrying out the purpose for which the amendments are proposed and that would lessen any adverse impact on small business, if any, from the proposed regulatory action and the Board has not rejected any such alternative.

NO ADVERSE ECONOMIC IMPACT ON BUSINESS

The adoption of the proposed amendments to Regulation 1616 will recognize the holdings of United States Supreme Court opinions regarding the preemption of state taxation when it unlawfully infringes on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them and further clarify the types of transactions that are already exempt from sales and use tax under RTC section 6352. Therefore, the Board has made an initial determination that the adoption of the proposed amendments to Regulation 1616 will not have a significant adverse economic impact on business, including small business.

The proposed regulation may affect small business.

**Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1616,**

Section 1616. Federal Areas.

(a) In General. Tax applies to the sale or use of tangible personal property upon federal areas to the same extent that it applies with respect to sale or use elsewhere within this state.

(b) Alcoholic Beverages. Manufacturers, wholesalers and rectifiers who deliver or cause to be delivered alcoholic beverages to persons on federal reservations shall pay the state retailer sales tax on the selling price of such alcoholic beverages so delivered, except when such deliveries are made to persons or organizations which are instrumentalities of the Federal Government or persons or organizations which purchase for resale.

Sales to officers' and non-commissioned officers' clubs and messes may be made without sales tax when the purchasing organizations have been authorized, under appropriate regulations and control instructions, duly prescribed and issued, to sell alcoholic beverages to authorized purchasers.*

(c) Sales Through Vending Machines. Sales through vending machines located on Army, Navy, or Air Force installations are taxable unless the sales are made by operators who lease the machines to exchanges of the Army, Air Force, Navy, or Marine Corps, or other instrumentalities of the United States, including Post Restaurants and Navy Civilian Cafeteria Associations, which acquire title to and sell the merchandise through the machines to authorized purchasers.

For the exemption to apply, the contracts between the operators and the United States instrumentalities and the conduct of the parties must make it clear that the instrumentalities acquire title to the merchandise and sell it through machines leased from the operators to authorized purchasers.

(d) Indian Reservations.

(1) In General. Except as provided in this regulation, tax applies to the sale or use of tangible personal property upon Indian reservations to the same extent that it applies with respect to sale or use elsewhere within this state.

(2) Definitions. For purposes of this regulation "Indian" means any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior.

Indian organizations are entitled to the same exemption as a Indians. "Indian organization" includes Indian tribes and tribal organizations and also includes partnerships all of whose members are Indians. The term includes corporations organized under tribal authority and wholly owned by Indians. The term excludes other corporations, including other corporations wholly owned by Indians.

“Reservation” includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian.

(3) Sales by On-Reservation Retailers.

(A) Sales by Indians.

1. Sales by Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by Indians to non-Indians and Indians who do not reside on a reservation. Sales tax does not apply to sales of tangible personal property by Indian retailers made to non-Indians and Indians who do not reside on a reservation when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on the reservation. Except as exempted below, Indian retailers are required to collect use tax from such purchasers and must register with the Board for that purpose.

Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation.

(B) Sales by non-Indians.

1. Sales by non-Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by retailers when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on a reservation. The sale is exempt whether the retailer is a federally licensed Indian trader or is not so licensed. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by non-Indians to non-Indians and Indians who do not reside on a reservation. Either sales tax or use tax applies to sales of tangible personal property by non-Indian retailers to non-Indians and Indians who do not reside on a reservation.

(C) Resale Certificates. Persons making sales for resale of tangible personal property to retailers conducting business on an Indian reservation should obtain

resale certificates from their purchasers. If the purchaser does not have a permit and all the purchaser's sales are exempt under paragraph (d)(3)(A) of this regulation, the purchaser should make an appropriate notation to that effect on the certificate in lieu of a seller's permit number (see Regulation 1668, "Resale Certificates").

(4) Sales by Off-Reservation Retailers.

(A) Sales Tax -In General. Sales tax does not apply to sales of tangible personal property made to Indians negotiated at places of business located outside Indian reservations if the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation. Generally ownership to property transfers upon delivery if delivery is made by facilities of the retailer and ownership transfers upon shipment if delivery is made by mail or carrier. Except as otherwise expressly provided herein, the sales tax applies if the property is delivered off the reservation or if the ownership to the property transfers to the purchaser off the reservation.

(B) Sales Tax -Permanent Improvements -In General. Sales tax does not apply to a sale to an Indian of tangible personal property (including a trailer coach) to be permanently attached by the purchaser upon the reservation to realty as an improvement if the property is delivered to the Indian on the reservation. A trailer coach will be regarded as having been permanently attached if it is not registered with the Department of Motor Vehicles. Sellers of property to be permanently attached to realty as an improvement should secure exemption certificates from their purchasers (see Regulation 1667, "Exemption Certificates").

(C) Sales Tax -Permanent Improvements -Construction Contractors.

1. Indian contractors. Sales tax does not apply to sales of materials to Indian contractors if the property is delivered to the contractor on a reservation. Sales tax does not apply to sales of fixtures furnished and installed by Indian contractors on Indian reservations. The term "materials" and "fixtures" as used in this paragraph and the following paragraph are as defined in Regulation 1521 "Construction Contractors."

2. Non-Indian contractors. Sales tax applies to sales of materials to non-Indian contractors notwithstanding the delivery of the materials on the reservation and the permanent attachment of the materials to realty. Sales tax does not apply to sales of fixtures furnished and installed by non-Indian contractors on Indian reservations.

(D) Use Tax -In General. Except as provided in paragraphs (d)(4)(E) and (d)(4)(F) of this regulation, use tax applies to the use in this state by an Indian purchaser of tangible personal property purchased from an off-reservation retailer for use in this state.

(E) Use Tax -Exemption. Use tax does not apply to the use of tangible personal property (including vehicles, vessels, and aircraft) purchased by an Indian from an off-reservation retailer and delivered to the purchaser on a reservation unless, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

(F) Leases. Neither sales nor use tax applies to leases otherwise taxable as continuing sales or continuing purchases as respects any period of time the leased property is situated on an Indian reservation when the lease is to an Indian who resides upon the reservation. In the absence of evidence to the contrary, it shall be assumed that the use of the property by the lessee occurs on the reservation if the lessor delivers the property to the lessee on the reservation. Tax applies to the use of leased vehicles registered with the Department of Motor Vehicles to the extent that the vehicles are used off the reservation.

(G) Property Used in Tribal Self-Governance. Sales and use tax does not apply to sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States if:

1. The tribal government's Indian tribe does not have a reservation or the principal place where the tribal government meets to conduct tribal business cannot be its Indian tribe's reservation because the reservation does not have a building in which the tribal government can meet or the reservation lacks one or more essential utility services, such as water, electricity, gas, sewage, or telephone, or mail service from the United States Postal Service;

2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and

3. The property is delivered to the tribal government and ownership of the property transfers to the tribal government at the principal place where the tribal government meets to conduct tribal business.

The purchase of tangible personal property is not exempt from use tax under this paragraph if the property is used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6017, 6021, Revenue and Taxation Code, Public Law No. 817-76th Congress (Buck Act). Vending machines, sales generally, see Regulation 1574. Items dispensed for 10 ¢ or less, see Regulation 1574. Additional reference: Section 6352, Revenue and Taxation Code.

* The following is a summary of the pertinent regulations which have been issued:

(a) General. Air force regulation 34-57, issued under date of February 9, 1968, army regulation 210-65, issued under date of May 4, 1966, and navy general order No. 15, issued under date of May 5, 1965, authorize the sale and possession of alcoholic beverages at bases and installations subject to certain enumerated restrictions.

(b) Air Force. Air force regulation 34-57, paragraph 5, permits commissioned officers' and non-commissioned officers' open messes, subject to regulations established by commanders of major air commands to sell alcoholic beverages to authorized purchasers at bars and cocktail lounges, and provides that commanders will issue detailed control instructions. Paragraphs 8 and 9 require commanders of major air commands to issue regulations relative to package liquor sales and to procurement of alcoholic beverages, respectively.

(c) Army. Army regulation 210-65, paragraph 9, provides that major commanders are authorized to permit at installations or activities within their respective commands the dispensing of alcoholic beverages by the drink or bottle. Paragraph 11 of AR 210-65 provides that when authorized by major commanders as prescribed in paragraph 9, AR 210-65, officers' and non-commissioned officers' open messes may, subject to regulations prescribed by the commanding officer of the installation or activity concerned, dispense alcoholic beverages by the drink, and operate a package store.

(d) Navy. Navy general order No. 15 provides that commanding officers may permit, subject to detailed alcoholic beverage control instructions, the sale of packaged alcoholic beverages by officers' and noncommissioned officers' clubs and messes and the sale and consumption of alcoholic beverages by the drink in such clubs and messes.

Regulation History

Type of Regulation: Sales and Use Tax

Regulation: 1616

Title: 1616, *Federal Areas*

Preparation: Brad Heller

Legal Contact: Brad Heller

Board proposes to amend Regulation 1616, *Federal Areas*, to clarify the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax.

History of Proposed Regulation:

November 15-17, 2011	Public Hearing
September 9, 2011	OAL publication date; 45-day public comment period begins; Interested Parties mailing
August 30, 2011	Notice to OAL
July 27, 2011	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA

Support: NA

Oppose: NA

Statement of Compliance

The State Board of Equalization, in process of adopting Sales and Use Tax Regulation 1616, *Federal Areas*, did comply with the provision of Government Code section 11346.4(a)(1) through (4). A notice to interested parties was mailed on September 9, 2011, 67 days prior to the public hearing.

November 16, 2011

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

Richard Bennion
Regulations Coordinator
State Board of Equalization

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

450 N STREET

SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT

NOVEMBER 15, 2011

ITEM F PUBLIC HEARINGS

ITEM F1

PROPOSED ADOPTION OF AMENDMENTS TO

REGULATION 1616, FEDERAL AREAS

Reported by: Juli Price Jackson

No. CSR 5214

P R E S E N T

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For the Board
of Equalization:

Jerome E. Horton
Chairman

Michelle Steel
Vice-Chairwoman

Betty T. Yee
Member

George Runner
Member

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

Diane G. Olson
Chief, Board
Proceedings Division

For Board Staff:

Bradley Heller
Legal Department

---oOo---

1 450 N STREET
2 SACRAMENTO, CALIFORNIA
3 NOVEMBER 15, 2011

4 ---oOo---

5 MR. HORTON: Ms. Olson, what is our next
6 matter?

7 MS. OLSON: Our next matter is F1, Proposed
8 Adoption of Amendments to Regulation 1616, Federal
9 Areas.

10 MR. HORTON: Members, Mr. Heller's before us to
11 make a presentation.

12 MR. HELLER: Good afternoon, Chairman Horton,
13 Members of the Board. I'm Bradley Heller from the
14 Board's Legal Department and I'm here to request that
15 the Board adopt the proposed amendments to Sales and Use
16 Tax Regulation 1616, Federal Areas, that the Board
17 authorized for publication during its Business Taxes
18 Committee meeting on July 26th.

19 The proposed amendments add a new subdivision,
20 (G)(4), to the regulation to recognize that federal law
21 preempts the imposition of California's sales and use
22 tax on the sale of tangible personal property to and the
23 use of tangible personal property by the tribal
24 governments of federally recognized California Indian
25 tribes when such property is purchased for use in tribal
26 self-governance and the tribal governments have no
27 reservation on which to conduct their governmental
28 activities or the tribal governments have under --

1 excuse me, have undeveloped reservations where it's
2 impractical to conduct their governmental activities.

3 I can answer any questions you may have.

4 MR. HORTON: Thank you very much for your
5 presentation.

6 Discussion, Members?

7 Member Yee.

8 MS. YEE: Thank you, Mr. Chairman.

9 I have no objections to this, obviously. I
10 just wanted to thank staff again for its diligence in
11 working with the various representatives of the tribal
12 communities.

13 And also I want to recognize a couple of
14 members who are here, out in the audience today.

15 Thank you for your cooperation in putting this
16 together, thank you.

17 MR. HORTON: Members -- further discussion,
18 Members?

19 MR. RUNNER: Move adoption.

20 MR. HORTON: It's moved by Mr. Runner to
21 adopt.

22 MS. YEE: Second.

23 MR. HORTON: Second by Member Yee.

24 Without objection, Members, such will be the
25 order.

26 ----o0o----

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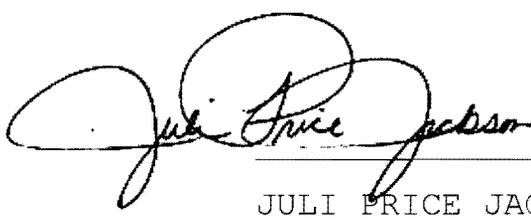
REPORTER'S CERTIFICATE

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State of California)
) ss
County of Sacramento)

I, JULI PRICE JACKSON, Hearing Reporter for the California State Board of Equalization certify that on NOVEMBER 15, 2011 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled hearing; that I transcribed the shorthand writing into typewriting; and that the preceding pages 1 through 4 constitute a complete and accurate transcription of the shorthand writing.

Dated: NOVEMBER 17, 2011

JULI PRICE JACKSON
Hearing Reporter

Tuesday, November 15, 2011

PUBLIC HEARINGS**Proposed Adoption of Amendments to Regulation 1616, *Federal Areas***

Bradley Heller, Tax Counsel, Legal Department, made introductory remarks regarding the adoption of proposed amendments clarifying the types of transactions with governments of federally-recognized Indian tribes that are exempt under Revenue and Taxation Code, section 6352 (Exhibit 11.2).

Speakers were invited to address the Board, but there were none.

Action: Upon motion of Mr. Runner, seconded by Ms. Yee and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board adopted amendments to Regulation 1616 as recommended by staff.

Proposed Adoption of Amendments to Regulation 1807, *Petitions for Reallocation of Local Tax*, and, Regulation 1828, *Petitions for Distribution or Redistribution of Transactions and Use Tax*

Bradley Heller, Tax Counsel, Legal Department, made introductory remarks regarding the adoption of proposed amendments to improve the Board's review of local sales and use tax and district transactions and use tax petitions (Exhibit 11.3).

Speakers: Robin Sturdivant, Local Government Advocate, The HdL Companies
Johan Klehs, President, Johan Klehs & Company, Representing City of
Livermore

Action: Upon motion of Ms. Yee, seconded by Ms. Steel and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board approved further changes to the published version of regulations 1807 and 1828 and ordered that the changed version be placed in the rulemaking file for 15 days.

LEGAL APPEALS MATTERS, CONSENT

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

Tirebusters, Inc., 390462 (CH)
2-1-93 to 12-31-03, \$644,280.69 Tax, \$63,912.70 Failure to File Penalty, \$1,288.96 Fraud
Penalty, \$319,563.02 Knowingly Operating without a Permit Penalty

Action: Redetermine as recommended by the Appeals Division.



STATE BOARD OF EQUALIZATION

50 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-80
916-445-2130 • FAX 916-324-3984
www.boe.ca.gov

BETTY T. YEE
First District, San Francisco

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

MICHELLE STEEL
Third District, Rolling Hills Estates

JEROME E. HORTON
Fourth District, Los Angeles

JOHN CHIANG
State Controller

KRISTINE CAZADD
Interim Executive Director

STATE BOARD OF EQUALIZATION



BOARD APPROVED

At the November 15, 2011 Board Meeting

Diane G. Olson
Diane G. Olson, Chief
Board Proceedings Division

September 9, 2011

To Interested Parties:

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

Proposed to Amend Regulation 1616, *Federal Areas*

NOTICE IS HEREBY GIVEN

The State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1616, *Federal Areas*. Subdivision (d) of Regulation 1616 prescribes the application of the Sales and Use Tax Law (RTC § 6001 et seq.) to sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by Indians. The proposed amendments add new subdivision (d)(4)(G) to Regulation 1616 to implement, interpret, and make specific the provisions of RTC section 6352 by further prescribing the circumstances under which a sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States is exempt from sales and use tax because the tax is preempted by federal law.

PUBLIC HEARING

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on November 15-17, 2011. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at www.boe.ca.gov at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on November 15, 16, or 17, 2011. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1616.

AUTHORITY

RTC section 7051.

REFERENCE

RTC section 6352.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Regulation 1616

RTC section 6352 exempts the sale and the storage, use, or other consumption of tangible personal property from sales and use tax when California is prohibited from taxing the sale or use of tangible personal property under federal law, including the United States Constitution.

In 1831, Chief Justice Marshall recognized that Indian tribes, which are officially recognized by the government of the United States, are independent nations that retain inherent rights to self-government. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 16.) Justice Marshall also recognized that article 1, section 8, clause 3 of the United States Constitution reserves to the United States Government the exclusive authority to regulate commerce with the Indian tribes. (*Id.* at p. 18.)

Subsequent United States Supreme Court opinions further explained that federally-recognized Indian tribes “retain ‘attributes of sovereignty over both their members and their territory’” (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142 [quoting from *United States v. Mazurie* (1975) 419 U.S. 544, 557]), “as a separate people, with the power of regulating their internal and social relations, and thus far [are] not brought under the laws” of the United States or the states in which the tribes reside. (*Bracker*, 448 U.S. at p. 142 [quoting from *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164, 173, which was quoting from *United States v. Kagama* (1886) 118 U.S. 375].)

In 1978, subdivision (d) was added to Regulation 1616 to prescribe the circumstances under which the sale and use of tangible personal property on an Indian reservation¹ are exempt from sales and use tax under RTC section 6352 because the tax is preempted by federal law. Subdivision (d) is based upon United States Supreme Court cases regarding the federal preemption of the states’ authority to tax federally-recognized Indian tribes and their members, which have held that the application of state sales and use tax is preempted with regard to the

¹ In this context, the term “reservation” refers to all land that is considered “Indian country” as defined by 18 U.S.C. § 1151, which provides that “the term ‘Indian country’ . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

sale and use of property on Indian reservations if the legal incidence of the tax falls on a tribe or tribal members. Regulation 1616, subdivision (d), is still consistent with United States Supreme Court opinions preempting California sales and use tax when the tax unlawfully infringes upon federally-recognized Indian tribes' sovereignty over their reservations. (See, e.g., *Wagnon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 101-102.)

Pursuant to the current provisions of Regulation 1616, subdivision (d)(4)(A) and (E), sales tax will not apply to the sale of tangible personal property to an Indian if the property is delivered to the Indian and ownership of the property transfers to the Indian on a reservation, and use tax will not apply to tangible personal property delivered to an Indian on a reservation unless the property is used off a reservation more than it is used on a reservation during the first 12 months following delivery. The federal preemption recognized by the current provisions of Regulation 1616, subdivision (d), allows the government of a federally-recognized Indian tribe to purchase tangible personal property for use in tribal self-governance without being subject to California sales and use tax if the property is delivered to the tribal government on its tribe's reservation and the property is used on the reservation more than it is used off reservation during the first 12 months following delivery. The current provisions of Regulation 1616, subdivision (d), do not address situations where California sales and use tax is preempted by federal law because the tax unlawfully infringes on federally-recognized Indian tribes' sovereignty over their members.

Proposed Amendments to Regulation 1616

United States Supreme Court opinions published after the initial adoption of Regulation 1616, subdivision (d), have established additional "principles with respect to the boundaries between state regulatory authority and tribal self-government" in the context of state taxation. (*Bracker, supra*, 448 U.S. at p. 141.) The United States Supreme Court has held that:

- Federal law preempts a state's authority to tax an activity undertaken on a "reservation or by tribal members" (*Id.* at p. 143) in circumstances where the tax unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them" (*Id.* at p. 142 [quoting from *Williams v. Lee* (1959) 358 U.S. 217, 220]);
- State taxation of Indians is not generally preempted outside Indian reservations, however, state taxation of Indians outside of Indian reservations may nonetheless be preempted under appropriate circumstances (see, e.g., *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, in which Justice O'Connor contemplated whether state taxation may be preempted outside of a tribe's territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court; see also *Wagnon, supra*, 546 U.S. at p. 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149] indicating that there are some exceptions to the "general" rule that states are permitted to tax Indians when they reside outside of Indian reservations); and
- "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members" (*Bracker, supra*, 448 U.S.

at p. 142), and state taxation is preempted when “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” indicate that, in a “specific context, the exercise of state authority would violate federal law” (*Id.* at p. 145) because it unlawfully infringes on the right of federally-recognized Indian tribes “to make their own laws and be ruled by them.” (*Id.* at p. 142.)

Therefore, the Board reviewed the particular facts and circumstances applicable to the imposition of California’s sales and use tax on the sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal governments of Indian tribes that are officially recognized by the United States, but cannot satisfy the current provisions of the exemptions prescribed by Regulation 1616, subdivision (d)(4)(A) and (E), because their tribes do not have reservations on which to take delivery of and use their property or their tribes have undeveloped reservations where it would be impractical to take delivery of and use their property.

First, the Board found that there was a major shift in the United States’ policies towards Indians that was implemented, at least in part, by the enactment of the Indian Reorganization Act (IRA) of 1934 (Pub.L. No. 73-383 (June 18, 1934) 48 Stat. 984), which represented formal federal recognition of a unique relationship between Indian tribes’ sovereignty and land, and the federal government’s duty to help restore Indian tribes’ economic and governmental self-sufficiency, as sovereigns, through the acquisition of land. Specifically, section 5 of the IRA, which was subsequently codified (with minor amendments) as section 465 of title 25 of the United States Code, currently provides that:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

[¶] . . . [¶]

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Thus, the Department of the Interior “has had discretionary authority to take title to land, in the name of the United States, in trust for the benefit of Indian tribes” since 1934. (44 S.D. L. Rev. 681, 685.) And, when that discretion is exercised, the Secretary of the Interior accepts a fiduciary duty over the trust land and “the land is freed from federal and state taxes.” (*Id.* at p. 682.) In other words, a clear connection exists between tribal self-governance, the acquisition of trust land, and the preemption of state taxation.

Second, the Board found that the Department of the Interior's discretion to acquire land for the benefit of Indian tribes creates a tension between Indian tribes and nontribal governments: "Indian tribes need and are entitled to have lands taken into trust. Non-tribal governments are interested in keeping such lands on their tax rolls." (44 S.D. L. Rev. 681, 682.) Moreover, inherent in this federal discretion is the principle that one of the functions of a landless Indian tribe's government is to petition the Secretary of the Interior to acquire lands in trust for the tribe so that the tribe will have territorial boundaries in which to exercise its sovereignty. As a result, the Board determined that California's taxation of sales to and purchases by federally-recognized Indian tribes of tangible personal property for use by their tribal governments in applying to the Secretary of the Interior for the acquisition of trust lands would unlawfully infringe upon their tribal sovereignty in certain contexts. A determination that is supported by the maxim that "the power to tax involves the power to destroy . . . [and] that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another." (*McCulloch v. State of Maryland* (1819) 17 U.S. 316, 431.)

Third, the Board found that all three branches of the federal government have recognized Indian tribes' interests in tribal sovereignty and the attributes of such sovereignty. The United States Supreme Court has long recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." (*Bracker, supra*, 448 U.S. at p. 142.) Moreover, Congress, in 1995, declared that "(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; and (4) Indian tribes possess the inherent authority to establish their own form of government." (25 U.S.C. § 3601.) Additionally, the United States Department of Justice conducts its Indian affairs under a June 1, 1995, policy memorandum, in which the Attorney General recognizes similar attributes of tribal sovereignty.

Fourth, the Board reviewed the present status of California's Indian tribes and found that the Bureau of Indian Affairs (BIA) provides the following information with respect to their unique status:

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of Guadalupe Hidalgo; the Senate's refusal to ratify the 18 treaties negotiated with California tribes during 1851-52; and the lawless nature of California's settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to "exterminate" the indigenous population.

Under pressure from the California Congressional delegation, the United States Senate not only refused to sign the 18 treaties that had been negotiated, but they also took extraordinary steps to place the treaties under seal. Between the un-

ratified treaties and the Land Claims Act of 1851, most California Indians became homeless.

Major shifts in federal Indian policy at the national level during the late 19th century exacerbated the Indian problems in California. Passage of the General Allotment Act in 1887 opened part of the limited lands in California to non-Indian settlement. In 1905 the public was finally advised of the 18 un-ratified treaties. Citizens sympathetic to the economic and physical distress of California Indians encouraged Congress to pass legislation to acquire isolated parcels of land for homeless California Indians. Between 1906 and 1910 a series of appropriations were passed that provided funds to purchase small tracts of land in central and northern California for landless Indians of those areas. The land acquisitions resulted in what has been referred to as the Rancheria System in California.

In 1934, with the passage of the Indian Reorganization Act (IRA), the reconstituting of tribal governments included the BIA's supervision of elections among California tribes, including most of the Rancheria groups. Although many tribes accepted the provisions of the IRA, few California tribes benefited economically from the IRA because of the continuing inequities in funding of Federal Indian programs.

Beginning in 1944, forces within the BIA began to propose partial liquidation of the Rancheria system. Even the limited efforts to address the needs of California Indians at the turn of the century and again through passage of the IRA were halted by the federal government when it adopted the policy of termination. California became a primary target of this policy when Congress slated forty-one (41), California Rancherias for termination pursuant to the Rancheria Act of 1958.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 Rancherias that were terminated under the original Rancheria Act. Additional tribes have since then been restored as a result of Acts of Congress.

This brief history only begins to explain why the Pacific Regional Office is unique. California tribes today continue to develop their tribal infrastructure as a result of not having the same opportunities that have been provided to other native groups throughout the Country. California has a large number of aboriginal native populations who are not currently recognized by the United States which presents [its] own list of problems.

These unique BIA-recognized circumstances left a number of federally-recognized Indian tribes that are still located in California with no reservations on which to conduct their governmental activities, or undeveloped reservations, which lack adequate meeting facilities, essential utility services, or mail service, making it impractical for the tribes to conduct their governmental activities on their reservations. And, it is due to these unique BIA-recognized circumstances that

both landless tribes and the tribes with undeveloped reservations are currently unable to exercise their rights to self-governance without interference from California's sales and use tax.

Therefore, during its July 26, 2011, Business Taxes Committee meeting, the Board determined that the nature of the state, federal, and tribal interests at stake dictate that federal law preempts the imposition of California's sales and use tax on the sale of tangible personal property to and the use of tangible personal property by the tribal governments of federally-recognized California Indian tribes, when such property is purchased for use in tribal self-governance, and the tribal governments have no reservation on which to conduct their governmental activities or the tribal governments have undeveloped reservations where it is impractical to conduct their governmental activities, due to the unique BIA-recognized circumstances discussed above. This is because the taxation of these types of transactions involving off-reservation sales and use, and only these types of off-reservation transactions, would directly interfere with the tribes' sovereignty and therefore unlawfully infringe on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them. The Board has not found any persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off reservation.

The Board determined that it is necessary to amend Regulation 1616 to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The Board determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the sale and use of tangible personal property that is delivered to an officially-recognized Indian tribe at the principal place where the tribe's government meets to conduct tribal business so that there is some way for retailers and the Board to verify exempt transactions. The Board understands that tribes may not own any real estate where their tribal governments can meet to conduct tribal business and they may occasionally meet at more than one place during a given period, and the Board has proposed to adopt a "principal place" test because the Board determined that such a test is sufficiently flexible to take into account the varying circumstances under which some tribal governments meet and therefore does not unlawfully infringe on the tribes' rights to self-governance. The Board also determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the use of tangible personal property if the property is used in tribal self-governance more than it is used for purposes other than tribal self-governance within the first 12 months following delivery. This is because the Board is not preempted from imposing a use tax on property that is used off reservation more than it is used on a reservation within the first 12 months following delivery and that is also used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

As a result, the Board proposes to amend Regulation 1616, to add a new subdivision (d)(4)(G), to implement, interpret, and make specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The objective of the proposed amendments is to clarify the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized

Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

There are no comparable federal regulations or statutes to Regulation 1616.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1616 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

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

The Board has determined that the adoption of the proposed amendments to Regulation 1616 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The adoption of the proposed amendments to Regulation 1616 will recognize the holdings of United States Supreme Court opinions regarding the federal preemption of state taxation when it unlawfully infringes on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them and further clarify the types of transactions that are already exempt from sales and use tax under RTC section 6352. Therefore, the Board has made an initial determination that the adoption of the proposed amendments to Regulation 1616 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1616 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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

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

The Board has determined that the adoption of the proposed amendments to Regulation 1616 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.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

Adoption of the proposed amendments to Regulation 1616 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 this action is proposed, or be as effective as and less burdensome to affected private persons than the proposed action.

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at Bradley.Heller@boe.ca.gov, or by mail at State Board of Equalization, Attn: Bradley M. Heller, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends at 9:30 a.m. on November 15, 2011, or as soon thereafter as the Board begins the public hearing regarding the proposed amendments to Regulations 1616 during the November 15-17, 2011, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1616. The Board will only consider written comments received by that time.

**AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF
PROPOSED AMENDMENTS**

The Board has prepared an underscored version of the text of Regulation 1616 illustrating the express terms of the proposed amendments and an initial statement of reasons for the adoption of the proposed amendments. 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 to Regulation 1616 and the Initial Statement of Reasons are also available on the Board's Website at www.boe.ca.gov.

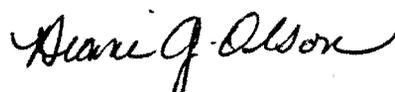
**SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE
SECTION 11346.8**

The Board may adopt the proposed amendments to Regulation 1616 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 to the proposed amendments, the Board will make the full text of the resulting 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 amendments orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1616, the Board will prepare a Final Statement of Reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

Sincerely,



Diane G. Olson, Chief
Board Proceedings Division

Initial Statement of Reasons

Adoption of Proposed Amendments to California Code of Regulations, Title 18, Section 1616, *Federal Areas*

SPECIFIC PURPOSE AND NECESSITY

Current Regulation 1616

Revenue and Taxation Code (RTC) section 6352 exempts the sale and the storage, use, or other consumption of tangible personal property from sales and use tax when California is prohibited from taxing the sale or use of tangible personal property under federal law, including the United States Constitution.

In 1831, Chief Justice Marshall recognized that Indian tribes, which are officially recognized by the government of the United States, are independent nations that retain inherent rights to self-government. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 16.) Justice Marshall also recognized that article 1, section 8, clause 3 of the United States Constitution reserves to the United States Government the exclusive authority to regulate commerce with the Indian tribes. (*Id.* at p. 18.)

Subsequent United States Supreme Court opinions further explained that federally-recognized Indian tribes “retain ‘attributes of sovereignty over both their members and their territory’” (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142 [quoting from *United States v. Mazurie* (1975) 419 U.S. 544, 557]), “as a separate people, with the power of regulating their internal and social relations, and thus far [are] not brought under the laws” of the United States or the states in which the tribes reside. (*Bracker*, 448 U.S. at p. 142 [quoting from *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164, 173, which was quoting from *United States v. Kagama* (1886) 118 U.S. 375].)

In 1978, the State Board of Equalization (Board) added subdivision (d) to California Code of Regulations, title 18, section (Regulation) 1616, *Federal Areas*, to prescribe the circumstances under which the sale and use of tangible personal property on an Indian reservation¹ are exempt from sales and use tax under RTC section 6352 because the tax is

¹ In this context, the term “reservation” refers to all land that is considered “Indian country” as defined by 18 U.S.C. § 1151, which provides that “the term ‘Indian country’ . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

preempted by federal law. Subdivision (d) is based upon United States Supreme Court cases regarding the federal preemption of the states' authority to tax federally-recognized Indian tribes and their members, which have held that the application of state sales and use tax is preempted with regard to the sale and use of property on Indian reservations if the legal incidence of the tax falls on a tribe or tribal members. Regulation 1616, subdivision (d); is still consistent with United States Supreme Court opinions preempting California sales and use tax when the tax unlawfully infringes upon federally-recognized Indian tribes' sovereignty over their reservations. (See, e.g., *Wagnon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 101-102.)

Pursuant to the current provisions of Regulation 1616, subdivision (d)(4)(A) and (E), sales tax will not apply to the sale of tangible personal property to an Indian if the property is delivered to the Indian and ownership of the property transfers to the Indian on a reservation, and use tax will not apply to tangible personal property delivered to an Indian on a reservation unless the property is used off a reservation more than it is used on a reservation during the first 12 months following delivery. The federal preemption recognized by the current provisions of Regulation 1616, subdivision (d), allows the government of a federally-recognized Indian tribe to purchase tangible personal property for use in tribal self-governance without being subject to California sales and use tax if the property is delivered to the tribal government on its tribe's reservation and the property is used on the reservation more than it is used off reservation during the first 12 months following delivery. The current provisions of Regulation 1616, subdivision (d), do not address situations where California sales and use tax is preempted by federal law because the tax unlawfully infringes on federally-recognized Indian tribes' sovereignty over their members.

Proposed Amendments to Regulation 1616

United States Supreme Court opinions published after the initial adoption of Regulation 1616, subdivision (d), have established additional "principles with respect to the boundaries between state regulatory authority and tribal self-government" in the context of state taxation. (*Bracker, supra*, 448 U.S. at p. 141.) The United States Supreme Court has held that:

- Federal law preempts a state's authority to tax an activity undertaken on a "reservation or by tribal members" (*Id.* at p. 143) in circumstances where the tax unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them" (*Id.* at p. 142 [quoting from *Williams v. Lee* (1959) 358 U.S. 217, 220]);
- State taxation of Indians is not generally preempted outside Indian reservations, however, state taxation of Indians outside of Indian reservations may nonetheless be preempted under appropriate circumstances (see, e.g., *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, in which Justice O'Connor contemplated whether state taxation may be preempted outside of a tribe's territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court; see also *Wagnon, supra*, 546 U.S. at

p. 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149] indicating that there are some exceptions to the “general” rule that states are permitted to tax Indians when they reside outside of Indian reservations); and

- “[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members” (*Bracker, supra*, 448 U.S. at p. 142), and state taxation is preempted when “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” indicate that, in a “specific context, the exercise of state authority would violate federal law” (*Id.* at p. 145) because it unlawfully infringes on the right of federally-recognized Indian tribes “to make their own laws and be ruled by them.” (*Id.* at p. 142.)

Therefore, the Board reviewed the particular facts and circumstances applicable to the imposition of California’s sales and use tax on the sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal governments of Indian tribes that are officially recognized by the United States, but cannot satisfy the current provisions of the exemptions prescribed by Regulation 1616, subdivision (d)(4)(A) and (E), because their tribes do not have reservations on which to take delivery of and use their property or their tribes have undeveloped reservations where it would be impractical to take delivery of and use their property.

First, the Board found that there was a major shift in the United States’ policies towards Indians that was implemented, at least in part, by the enactment of the Indian Reorganization Act (IRA) of 1934 (Pub.L. No. 73-383 (June 18, 1934) 48 Stat. 984), which represented formal federal recognition of a unique relationship between Indian tribes’ sovereignty and land, and the federal government’s duty to help restore Indian tribes’ economic and governmental self-sufficiency, as sovereigns, through the acquisition of land. Specifically, section 5 of the IRA, which was subsequently codified (with minor amendments) as section 465 of title 25 of the United States Code, currently provides that:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

[¶] . . . [¶]

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Thus, the Department of the Interior “has had discretionary authority to take title to land, in the name of the United States, in trust for the benefit of Indian tribes” since 1934. (44 S.D. L. Rev. 681, 685.) And, when that discretion is exercised, the Secretary of the Interior accepts a fiduciary duty over the trust land and “the land is freed from federal and state taxes.” (*Id.* at p. 682.) In other words, a clear connection exists between tribal self-governance, the acquisition of trust land, and the preemption of state taxation.

Second, the Board found that the Department of the Interior’s discretion to acquire land for the benefit of Indian tribes creates a tension between Indian tribes and nontribal governments: “Indian tribes need and are entitled to have lands taken into trust. Non-tribal governments are interested in keeping such lands on their tax rolls.” (44 S.D. L. Rev. 681, 682.) Moreover, inherent in this federal discretion is the principle that one of the functions of a landless Indian tribe’s government is to petition the Secretary of the Interior to acquire lands in trust for the tribe so that the tribe will have territorial boundaries in which to exercise its sovereignty. As a result, the Board determined that California’s taxation of sales to and purchases by federally-recognized Indian tribes of tangible personal property for use by their tribal governments in applying to the Secretary of the Interior for the acquisition of trust lands would unlawfully infringe upon their tribal sovereignty in certain contexts. A determination that is supported by the maxim that “the power to tax involves the power to destroy . . . [and] that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another.” (*McCulloch v. State of Maryland* (1819) 17 U.S. 316, 431.)

Third, the Board found that all three branches of the federal government have recognized Indian tribes’ interests in tribal sovereignty and the attributes of such sovereignty. The United States Supreme Court has long recognized that Indian tribes retain “attributes of sovereignty over both their members and their territory.” (*Bracker, supra*, 448 U.S. at p. 142.) Moreover, Congress, in 1995, declared that “(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; and (4) Indian tribes possess the inherent authority to establish their own form of government.” (25 U.S.C. § 3601.) Additionally, the United States Department of Justice conducts its Indian affairs under a June 1, 1995, policy memorandum, in which the Attorney General recognizes similar attributes of tribal sovereignty.

Fourth, the Board reviewed the present status of California’s Indian tribes and found that the Bureau of Indian Affairs (BIA) provides the following information with respect to their unique status:

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of

Guadalupe Hidalgo; the Senate's refusal to ratify the 18 treaties negotiated with California tribes during 1851-52; and the lawless nature of California's settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to "exterminate" the indigenous population.

Under pressure from the California Congressional delegation, the United States Senate not only refused to sign the 18 treaties that had been negotiated, but they also took extraordinary steps to place the treaties under seal. Between the un-ratified treaties and the Land Claims Act of 1851, most California Indians became homeless.

Major shifts in federal Indian policy at the national level during the late 19th century exacerbated the Indian problems in California. Passage of the General Allotment Act in 1887 opened part of the limited lands in California to non-Indian settlement. In 1905 the public was finally advised of the 18 un-ratified treaties. Citizens sympathetic to the economic and physical distress of California Indians encouraged Congress to pass legislation to acquire isolated parcels of land for homeless California Indians. Between 1906 and 1910 a series of appropriations were passed that provided funds to purchase small tracts of land in central and northern California for landless Indians of those areas. The land acquisitions resulted in what has been referred to as the Rancheria System in California.

In 1934, with the passage of the Indian Reorganization Act (IRA), the reconstituting of tribal governments included the BIA's supervision of elections among California tribes, including most of the Rancheria groups. Although many tribes accepted the provisions of the IRA, few California tribes benefited economically from the IRA because of the continuing inequities in funding of Federal Indian programs.

Beginning in 1944, forces within the BIA began to propose partial liquidation of the Rancheria system. Even the limited efforts to address the needs of California Indians at the turn of the century and again through passage of the IRA were halted by the federal government when it adopted the policy of termination. California became a primary target of this policy when Congress slated forty-one (41), California Rancherias for termination pursuant to the Rancheria Act of 1958.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 Rancherias that were terminated under the original Rancheria Act. Additional tribes have since then been restored as a result of Acts of Congress.

This brief history only begins to explain why the Pacific Regional Office is unique. California tribes today continue to develop their tribal infrastructure as a result of not having the same opportunities that have

been provided to other native groups throughout the Country. California has a large number of aboriginal native populations who are not currently recognized by the United States which presents [its] own list of problems.

These unique BIA-recognized circumstances left a number of federally-recognized Indian tribes that are still located in California with no reservations on which to conduct their governmental activities, or undeveloped reservations, which lack adequate meeting facilities, essential utility services, or mail service, making it impractical for the tribes to conduct their governmental activities on their reservations. And, it is due to these unique BIA-recognized circumstances that both landless tribes and the tribes with undeveloped reservations are currently unable to exercise their rights to self-governance without interference from California's sales and use tax.

Therefore, during its July 26, 2011, Business Taxes Committee meeting, the Board determined that the nature of the state, federal, and tribal interests at stake dictate that federal law preempts the imposition of California's sales and use tax on the sale of tangible personal property to and the use of tangible personal property by the tribal governments of federally-recognized California Indian tribes, when such property is purchased for use in tribal self-governance, and the tribal governments have no reservation on which to conduct their governmental activities or the tribal governments have undeveloped reservations where it is impractical to conduct their governmental activities, due to the unique BIA-recognized circumstances discussed above. This is because the taxation of these types of transactions involving off-reservation sales and use, and only these types of off-reservation transactions, would directly interfere with the tribes' sovereignty and therefore unlawfully infringe on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them. The Board has not found any persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off reservation.

The Board determined that it is necessary to amend Regulation 1616 to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above and clarifying the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

The Board determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the sale and use of tangible personal property that is delivered to an officially-recognized Indian tribe at the principal place where the tribe's government meets to conduct tribal business so that there is some way for retailers and the Board to verify exempt transactions. The Board understands that tribes may not own any real estate where their tribal governments can meet to conduct tribal business and they may occasionally meet at more than one place during a given period, and the Board has proposed to adopt a "principal place" test because the Board determined that such a test is sufficiently flexible to take into account the varying

circumstances under which some tribal governments meet and therefore does not unlawfully infringe on the tribes' rights to self-governance.

The Board determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the use of tangible personal property if the property is used in tribal self-governance more than it is used for purposes other than tribal self-governance within the first 12 months following delivery. This is because the Board also determined that that the nature of the state, federal, and tribal interests at stake indicate that California is not preempted from imposing a use tax on property that is used off reservation more than it is used on a reservation within the first 12 months following delivery and that is also used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

As a result, the Board proposes to amend Regulation 1616, to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above and clarifying the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

There are no comparable federal regulations or statutes to Regulation 1616.

DOCUMENTS RELIED UPON

Board staff prepared Formal Issue Paper 11-005 regarding the proposed amendments to Regulation 1616 and submitted it to the Board for consideration at the Board's July 26, 2011, Business Taxes Committee meeting. The Board relied upon Formal Issue Paper 11-005, the exhibits to the formal issue paper, and comments made during the July 26, 2011, discussion of the formal issue paper in deciding to propose the amendments to Regulation 1616, subdivision (d), described above.

ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1616 at this time or, alternatively, whether to take no action at this time. However, the Board decided to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1616 at this time because the amendments are necessary to implement, interpret, and make specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above and clarifying the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

No reasonable alternative to the proposed amendments to Regulation 1616 has been brought to the Board's attention that would be effective in carrying out the purpose for which the amendments are proposed and that would lessen any adverse impact on small business, if any, from the proposed regulatory action and the Board has not rejected any such alternative.

NO ADVERSE ECONOMIC IMPACT ON BUSINESS

The adoption of the proposed amendments to Regulation 1616 will recognize the holdings of United States Supreme Court opinions regarding the preemption of state taxation when it unlawfully infringes on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them and further clarify the types of transactions that are already exempt from sales and use tax under RTC section 6352. Therefore, the Board has made an initial determination that the adoption of the proposed amendments to Regulation 1616 will not have a significant adverse economic impact on business, including small business.

The proposed regulation may affect small business.

**Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1616,**

Section 1616. Federal Areas.

(a) In General. Tax applies to the sale or use of tangible personal property upon federal areas to the same extent that it applies with respect to sale or use elsewhere within this state.

(b) Alcoholic Beverages. Manufacturers, wholesalers and rectifiers who deliver or cause to be delivered alcoholic beverages to persons on federal reservations shall pay the state retailer sales tax on the selling price of such alcoholic beverages so delivered, except when such deliveries are made to persons or organizations which are instrumentalities of the Federal Government or persons or organizations which purchase for resale.

Sales to officers' and non-commissioned officers' clubs and messes may be made without sales tax when the purchasing organizations have been authorized, under appropriate regulations and control instructions, duly prescribed and issued, to sell alcoholic beverages to authorized purchasers.*

(c) Sales Through Vending Machines. Sales through vending machines located on Army, Navy, or Air Force installations are taxable unless the sales are made by operators who lease the machines to exchanges of the Army, Air Force, Navy, or Marine Corps, or other instrumentalities of the United States, including Post Restaurants and Navy Civilian Cafeteria Associations, which acquire title to and sell the merchandise through the machines to authorized purchasers.

For the exemption to apply, the contracts between the operators and the United States instrumentalities and the conduct of the parties must make it clear that the instrumentalities acquire title to the merchandise and sell it through machines leased from the operators to authorized purchasers.

(d) Indian Reservations.

(1) In General. Except as provided in this regulation, tax applies to the sale or use of tangible personal property upon Indian reservations to the same extent that it applies with respect to sale or use elsewhere within this state.

(2) Definitions. For purposes of this regulation "Indian" means any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior.

Indian organizations are entitled to the same exemption as a Indians. "Indian organization" includes Indian tribes and tribal organizations and also includes partnerships all of whose members are Indians. The term includes corporations organized under tribal authority and wholly owned by Indians. The term excludes other corporations, including other corporations wholly owned by Indians.

“Reservation” includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian.

(3) Sales by On-Reservation Retailers.

(A) Sales by Indians.

1. Sales by Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by Indians to non-Indians and Indians who do not reside on a reservation. Sales tax does not apply to sales of tangible personal property by Indian retailers made to non-Indians and Indians who do not reside on a reservation when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on the reservation. Except as exempted below, Indian retailers are required to collect use tax from such purchasers and must register with the Board for that purpose.

Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation.

(B) Sales by non-Indians.

1. Sales by non-Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by retailers when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on a reservation. The sale is exempt whether the retailer is a federally licensed Indian trader or is not so licensed. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by non-Indians to non-Indians and Indians who do not reside on a reservation. Either sales tax or use tax applies to sales of tangible personal property by non-Indian retailers to non-Indians and Indians who do not reside on a reservation.

(C) Resale Certificates. Persons making sales for resale of tangible personal property to retailers conducting business on an Indian reservation should obtain

resale certificates from their purchasers. If the purchaser does not have a permit and all the purchaser's sales are exempt under paragraph (d)(3)(A) of this regulation, the purchaser should make an appropriate notation to that effect on the certificate in lieu of a seller's permit number (see Regulation 1668, "Resale Certificates").

(4) Sales by Off-Reservation Retailers.

(A) Sales Tax -In General. Sales tax does not apply to sales of tangible personal property made to Indians negotiated at places of business located outside Indian reservations if the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation. Generally ownership to property transfers upon delivery if delivery is made by facilities of the retailer and ownership transfers upon shipment if delivery is made by mail or carrier. Except as otherwise expressly provided herein, the sales tax applies if the property is delivered off the reservation or if the ownership to the property transfers to the purchaser off the reservation.

(B) Sales Tax -Permanent Improvements -In General. Sales tax does not apply to a sale to an Indian of tangible personal property (including a trailer coach) to be permanently attached by the purchaser upon the reservation to realty as an improvement if the property is delivered to the Indian on the reservation. A trailer coach will be regarded as having been permanently attached if it is not registered with the Department of Motor Vehicles. Sellers of property to be permanently attached to realty as an improvement should secure exemption certificates from their purchasers (see Regulation 1667, "Exemption Certificates").

(C) Sales Tax -Permanent Improvements -Construction Contractors.

1. Indian contractors. Sales tax does not apply to sales of materials to Indian contractors if the property is delivered to the contractor on a reservation. Sales tax does not apply to sales of fixtures furnished and installed by Indian contractors on Indian reservations. The term "materials" and "fixtures" as used in this paragraph and the following paragraph are as defined in Regulation 1521 "Construction Contractors."

2. Non-Indian contractors. Sales tax applies to sales of materials to non-Indian contractors notwithstanding the delivery of the materials on the reservation and the permanent attachment of the materials to realty. Sales tax does not apply to sales of fixtures furnished and installed by non-Indian contractors on Indian reservations.

(D) Use Tax -In General. Except as provided in paragraphs (d)(4)(E) and (d)(4)(F) of this regulation, use tax applies to the use in this state by an Indian purchaser of tangible personal property purchased from an off-reservation retailer for use in this state.

(E) Use Tax -Exemption. Use tax does not apply to the use of tangible personal property (including vehicles, vessels, and aircraft) purchased by an Indian from an off-reservation retailer and delivered to the purchaser on a reservation unless, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

(F) Leases. Neither sales nor use tax applies to leases otherwise taxable as continuing sales or continuing purchases as respects any period of time the leased property is situated on an Indian reservation when the lease is to an Indian who resides upon the reservation. In the absence of evidence to the contrary, it shall be assumed that the use of the property by the lessee occurs on the reservation if the lessor delivers the property to the lessee on the reservation. Tax applies to the use of leased vehicles registered with the Department of Motor Vehicles to the extent that the vehicles are used off the reservation.

(G) Property Used in Tribal Self-Governance. Sales and use tax does not apply to sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States if:

1. The tribal government's Indian tribe does not have a reservation or the principal place where the tribal government meets to conduct tribal business cannot be its Indian tribe's reservation because the reservation does not have a building in which the tribal government can meet or the reservation lacks one or more essential utility services, such as water, electricity, gas, sewage, or telephone, or mail service from the United States Postal Service;

2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and

3. The property is delivered to the tribal government and ownership of the property transfers to the tribal government at the principal place where the tribal government meets to conduct tribal business.

The purchase of tangible personal property is not exempt from use tax under this paragraph if the property is used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6017, 6021, Revenue and Taxation Code, Public Law No. 817-76th Congress (Buck Act). Vending machines, sales generally, see Regulation 1574. Items dispensed for 10 ¢ or less, see Regulation 1574. Additional reference: Section 6352, Revenue and Taxation Code.

* The following is a summary of the pertinent regulations which have been issued:

(a) General. Air force regulation 34-57, issued under date of February 9, 1968, army regulation 210-65, issued under date of May 4, 1966, and navy general order No. 15, issued under date of May 5, 1965, authorize the sale and possession of alcoholic beverages at bases and installations subject to certain enumerated restrictions.

(b) Air Force. Air force regulation 34-57, paragraph 5, permits commissioned officers' and non-commissioned officers' open messes, subject to regulations established by commanders of major air commands to sell alcoholic beverages to authorized purchasers at bars and cocktail lounges, and provides that commanders will issue detailed control instructions. Paragraphs 8 and 9 require commanders of major air commands to issue regulations relative to package liquor sales and to procurement of alcoholic beverages, respectively.

(c) Army. Army regulation 210-65, paragraph 9, provides that major commanders are authorized to permit at installations or activities within their respective commands the dispensing of alcoholic beverages by the drink or bottle. Paragraph 11 of AR 210-65 provides that when authorized by major commanders as prescribed in paragraph 9, AR 210-65, officers' and non-commissioned officers' open messes may, subject to regulations prescribed by the commanding officer of the installation or activity concerned, dispense alcoholic beverages by the drink, and operate a package store.

(d) Navy. Navy general order No. 15 provides that commanding officers may permit, subject to detailed alcoholic beverage control instructions, the sale of packaged alcoholic beverages by officers' and noncommissioned officers' clubs and messes and the sale and consumption of alcoholic beverages by the drink in such clubs and messes.

Regulation History

Type of Regulation: Sales and Use Tax

Regulation: 1616

Title: 1616, *Federal Areas*

Preparation: Brad Heller

Legal Contact: Brad Heller

Board proposes to amend Regulation 1616, *Federal Areas*, to clarify the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax.

History of Proposed Regulation:

November 15-17, 2011	Public Hearing
September 9, 2011	OAL publication date; 45-day public comment period begins; Interested Parties mailing
August 30, 2011	Notice to OAL
July 27, 2011	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA

Support: NA

Oppose: NA