

Rulemaking File
Table of Contents
Title18. Public Revenue
Sales and Use Tax
Regulation 1668
Sales For Resale

OAL Approval

Index

1. Final Statement of Reasons
2. Updated Informative Digest
3. Business Tax Committee Minutes, October 27, 2015
4. Reporter's Transcript Business Taxes Committee, October 27, 2015
5. Estimate of Cost or Savings, December 24, 2015
6. Economic and Fiscal Impact Statements, December 23, 2015
7. Notice of Publications
8. Notice to Interested Parties, January 8, 2016
9. Statement of Compliance
10. Reporter's Transcript, Item F1, February 23, 2016
11. Draft Minutes, February 23, 2016, and Exhibits

**State of California
Office of Administrative Law**

In re:
Board of Equalization

Regulatory Action:

Title 18, California Code of Regulations

Adopt sections:

Amend sections: 1668

Repeal sections:

**NOTICE OF APPROVAL OF REGULATORY
ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-0310-03

OAL Matter Type: Regular (S)

This rulemaking action by the Board of Equalization amends section 1668 of title 18 of the California Code of Regulations to specify that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, and that the transactions are taxable regardless of whether the sale or purchase was for resale.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 7/1/2016.

Date: April 22, 2016



Eric J. Partington
Attorney

For: Debra M. Cornez
Director

Original: Cynthia Bridges
Copy: Richard Bennion

OFFICE OF ADMINISTRATIVE LAW

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



DEBRA M. CORNEZ
Director

MEMORANDUM

TO: Richard Bennion
FROM: OAL Front Desk
DATE: April 22, 2016
RE: Return of Rulemaking Materials
OAL Matter Number 2016-0310-03
OAL Matter Type Regular (S)

OAL hereby returns the rulemaking record your agency submitted for review regarding "Sales for Resale."

If this is an approved matter, it contains a copy of the regulation(s) stamped "ENDORSED APPROVED" by the Office of Administrative Law and "ENDORSED FILED" by the Secretary of State. The effective date of an approved regulation is specified on the Form 400 (see item B.5).

Beginning January 1, 2013, unless an exemption applies, Government Code section 11343.4 states the effective date of an approved regulation is determined by the date the regulation is filed with the Secretary of State (see the date the Form 400 was stamped "ENDORSED FILED" by the Secretary of State) as follows:

- (1) **January 1** if the regulation or order of repeal is filed on September 1 to November 30, inclusive.
- (2) **April 1** if the regulation or order of repeal is filed on December 1 to February 29, inclusive.
- (3) **July 1** if the regulation or order of repeal is filed on March 1 to May 31, inclusive.
- (4) **October 1** if the regulation or order of repeal is filed on June 1 to August 31, inclusive.

If an exemption concerning the effective date of the regulation approved in this matter applies, then it will be specified on the Form 400. The Notice of Approval that OAL sends to the agency will include the effective date of the regulation. The history note that will appear at the end of the regulation section in the California Code of Regulations will also include the regulation's effective date. Additionally, the effective date of the regulation will be noted on OAL's web site after OAL posts the Internet Web site link to the full text of the regulation that is received from the agency. (Gov. Code, secs. 11343 and 11344.)

Please note this new requirement: Unless an exemption applies, Government Code section 11343 now requires:

1. Section 11343(c)(1): Within 15 days of OAL filing a state agency's regulation with the Secretary of State, the state agency is required to post the regulation on its Internet Web site in an easily marked and identifiable location. The state agency shall keep the regulation posted on its Internet Web site for at least six months from the date the regulation is filed with the Secretary of State.
2. Section 11343(c)(2): Within five (5) days of posting its regulation on its Internet Web site, the state agency shall send to OAL the Internet Web site link of each regulation that the agency posts on its Internet Web site pursuant to section 11343(c)(1).

OAL has established an email address for state agencies to send the Internet Web site link to for each regulation the agency posts. Please send the Internet Web site link for each regulation posted to OAL at postedregslink@oal.ca.gov.

NOTE ABOUT EXEMPTIONS. Posting and linking requirements do not apply to emergency regulations; regulations adopted by FPPC or Conflict of Interest regulations approved by FPPC; or regulations not subject to OAL/APA review. However, an exempt agency may choose to comply with these requirements, and OAL will post the information accordingly.

DO NOT DISCARD OR DESTROY THIS FILE

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

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

Enclosures

NOTICE PUBLICATION/REGULATIONS SUBMISSION

REGULAR

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2015-1223-01	REGULATORY ACTION NUMBER 2016-0310-03S	EMERGENCY NUMBER
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	

ENDORSED - FILED
in the office of the Secretary of State
of the State of CaliforniaAPR 22 2016
1:37 P.M.2016 MAR 10 P 2:33
OFFICE OF
ADMINISTRATIVE LAWAGENCY WITH RULEMAKING AUTHORITY
State Board of Equalization

AGENCY FILE NUMBER (if any)

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

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	NOTICE REGISTER NUMBER 2016, 02-2	PUBLICATION DATE 1-8-2016	

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Sales for Resale	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 1668
TITLE(S) 18	REPEAL

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

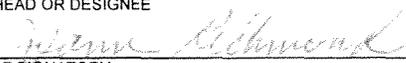
4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs., title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input checked="" type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> §100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY			
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal	
<input type="checkbox"/> Other (Specify) _____			

7. CONTACT PERSON Richard E. Bennion	TELEPHONE NUMBER (916) 445-2130	FAX NUMBER (Optional) (916) 324-3984	E-MAIL ADDRESS (Optional) rbennion@boe.ca.gov
---	------------------------------------	---	--

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

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE March 8, 2016
TYPED NAME AND TITLE OF SIGNATORY Joann Richmond, Chief, Board Proceedings Division	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

APR 22 2016

Office of Administrative Law

**Final Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1668**

1668. Sales for Resale.

(a) Resale Certificate.

The burden of proving that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. If timely taken in proper form as set forth in subdivision (b) and in good faith from a person who is engaged in the business of selling tangible personal property and who holds a California seller's permit as required by Regulation 1699, "~~Permits~~Permits," the certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser. A resale certificate remains in effect until revoked in writing.

(b) Form of Certificate.

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

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name and address of the purchaser.

(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this State, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement that the property described in the document is purchased for resale. The document must contain the phrase "for resale." The use of phrases such as "nontaxable," "exempt," or similar terminology is not acceptable. The property to be purchased under the certificate must be described either by an itemized list of the particular property to be purchased for resale, or by a general description of the kind of property to be purchased for resale.

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

(2) A document containing the essential elements described in subdivision (b)(1) is the minimum form which will be regarded as a resale certificate. However, in order to preclude

potential controversy, the seller should timely obtain from the purchaser a certificate substantially in the form shown in Appendix A of this regulation. If a purchaser operates an auto body repair and/or paint business, a specific resale certificate in substantially the same form as shown in Appendix B of this regulation should be used, rather than the general resale certificate shown in Appendix A.

(3) Blanket Resale Certificate. If a purchaser issues a general (blanket) resale certificate which provides a general description of the items to be purchased, and subsequently issues a purchase order which indicates that the transaction covered by the purchase order is taxable, the resale certificate does not apply with respect to that transaction. However, the purchaser will bear the burden of establishing either that the purchase order was sent to and received by the seller within the seller's billing cycle or prior to delivery of the property to the purchaser (whichever is the later), or that the tax or tax reimbursement was paid to the seller. The purchaser may avoid this burden by using the procedures described in subdivision (b)-(4) below.

(4) Qualified Resale Certificate. If a purchaser wishes to designate on each purchase order whether the property being purchased is for resale, the seller should obtain a qualified resale certificate, i.e., one that states "see purchase order" in the space provided for a description of the property to be purchased. Each purchase order must then specify whether or not the property covered by the order is purchased for resale. The use of the phrases "for resale," "resale = yes," "nontaxable," "taxable = no," or similar terminology on a purchase order, indicating that tax or tax reimbursement should not be added to the sales invoice will be regarded as designating that the property described is purchased for resale provided the combination of the purchase order and the qualified resale certificate contains all the essential elements provided in subdivision (b)(1). However, a purchase order where the applicable amount of tax is shown as \$0 or is left blank will not be accepted as designating that the property is purchased for resale, unless the purchase order also includes the phrase "for resale" or other terminology described above to specify that the property is purchased for resale. If each purchase order does not so specify, or is not issued timely within the meaning of subdivision (a), it will be presumed that the property covered by that purchase order was not purchased for resale and that sale or purchase is subject to tax. If the purchase order includes both items to be resold and items to be used, the purchase order must specify which items are purchased for resale and which items are purchased for use. For example, a purchase order issued for raw materials for resale and also for tooling used to process the raw materials should specify that the raw materials are purchased for resale and that the sale of the tooling is subject to tax.

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

(5) If the seller does not timely obtain a resale certificate, the fact that the purchaser deletes the tax or tax reimbursement from the seller's billing, provides a seller's permit number to the seller, or informs the seller that the transaction is "not taxable" does not relieve the seller from liability for the tax nor from the burden of proving the sale was for resale.

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

(d) Improper Use of Certificate. Except when a resale certificate is issued in accordance with subdivisions (h), ~~(i)~~ or (j):

(1) A purchaser, including any officer or employee of a corporation, is guilty of a misdemeanor punishable as provided in section 7153 if the purchaser, for the purpose of evading payment to the seller of tax or tax reimbursement, gives a resale certificate for property which the purchaser knows at the time of purchase will be used rather than resold.

(2) Any person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate. In addition to the tax, the person shall be liable to the state for a penalty of 10 percent of the tax or five hundred dollars (\$500), whichever is greater, for each purchase made for personal gain or to evade the payment of taxes, as provided in sections 6072 and 6094.5.

(3) In addition to the penalty of 10 percent or five hundred dollars (\$500), whichever is greater, if the person fails to report and pay the use tax due on the use of the property purchased improperly with a resale certificate, the person may be liable for the 10 percent penalty for negligence or the 25 percent penalty for fraud, as provided in sections 6484 and 6485.

(e) Other Evidence to Rebut Presumption of Taxability. A sale for resale is not subject to sales tax. A person who purchases property for resale and who subsequently uses the property owes tax on that use. A resale certificate which is not timely taken is not retroactive and will not relieve the seller of the liability for the tax. Consequently, if the seller does not timely obtain a resale certificate containing the essential elements as described in subdivision (b)(1), the seller will be relieved of liability for the tax only where the seller shows that the property:

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

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

(3) Was consumed by the purchaser and tax was reported directly to the Board by the purchaser on the purchaser's sales and use tax return, or

(4) Was consumed by the purchaser and tax was paid to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.

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

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

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

(A) Purchased for resale and resold in the form of tangible personal property, without any use other than retention, demonstration, or display while being held for sale in the regular course of business;

(B) Purchased for resale and presently in resale inventory, without having been used for any purpose other than retention, demonstration, or display while being held for sale in the regular course of business;

(C) Purchased solely for leasing and was so leased. Tax has been paid directly to the Board measured by the purchase price or rental receipts (-"tangible personal property"); or tax has been paid measured by the purchase price or fair rental value (-"mobile transportation equipment");

(D) Purchased for resale but consumed or used (whether or not subsequently resold); or

(E) Purchased for use.

(F) When the purchaser answers either (D) or (E) affirmatively (box checked), the XYZ letter will inquire further whether:

1. The tax was paid directly to the Board on the purchaser's Sales and Use Tax Return, and if so, in what amount;
2. The tax was added to the billing of the seller and remitted to the seller, and if so, in what amount;
3. The tax was paid directly to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis; or
4. The purchaser confirms that the purchase is a taxable transaction and that tax is applicable.

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

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

(g) Purchaser's Liability for Tax. A purchaser who issues a resale certificate containing the essential elements as described in subdivision (b)(1) and that otherwise appears valid on its face, or who otherwise purchases tangible personal property that is accepted by the Board as purchased for resale pursuant to subdivision (f) and who thereafter makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business is liable for use tax on the cost of the property. The tax is due at the time the property is first stored or used and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property is first so stored or used. A purchaser cannot retroactively rescind or revoke a resale certificate and thereby cause the transaction to be subject to sales tax rather than use tax.

A purchaser who issues a resale certificate for property which the purchaser knows at the time of purchase is not to be resold in the regular course of business is liable for the sales tax on that purchase measured by the gross receipts from the sale to that purchaser. The tax is due as of the time the property was sold to the purchaser and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property was sold to the purchaser.

(h) Mobilehomes. A mobilehome retailer who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, or for installation for occupancy as a residence pursuant to ~~Section~~section 18613 of the Health and Safety Code, and which mobilehome is thereafter subject to property taxation, may issue a resale certificate to the mobilehome vendor even though the retailer is classified as a consumer of the mobilehome by ~~Sections~~sections 6012.8 and 6012.9 of the Revenue and Taxation Code. Also, ~~effective September 19, 1985,~~ a mobilehome retailer, licensed as a mobilehome dealer under ~~Section~~section 18002.6 of the Health and Safety Code, who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, may issue a resale certificate to the mobilehome vendor even though the mobilehome retailer may have the mobilehome installed on a foundation system as an improvement to realty prior to the retailer's sale of the mobilehome to the customer for occupancy as a residence.

Where the mobilehome is acquired by a mobilehome retailer, who is not licensed as a dealer pursuant to ~~Section~~section 18002.6 of the Health and Safety Code, for affixation by the retailer to a permanent foundation, or for other use or consumption (except demonstration or display while holding for sale in the regular course of business), prior to sale, the mobilehome retailer may not issue a resale certificate. The mobilehome retailer shall notify the vendor that the purchase is for consumption and not for resale. When a mobilehome manufacturer or other vendor is informed or has knowledge that the purchaser will install the mobilehome on a permanent foundation prior to its resale, the manufacturer or other vendor is not making a sale for resale. Such vendor is making a taxable retail sale and cannot accept a resale certificate in good faith.

(i) Mobile Transportation Equipment. Any person, other than a person exempt from use tax, such as under Revenue and Taxation Code section 6352, who purchases mobile transportation equipment for the sole purpose of leasing that equipment, may issue a resale certificate for the limited purpose of reporting use tax based on fair rental value as provided in Regulation 1661.

(j) Counterfeit Goods. A sale of tangible personal property with a counterfeit mark on, or in connection with, that sale by a convicted seller is included in the definition of "retail sale" per Revenue and Taxation Code section 6007, and therefore taxable. "Storage" and "use" as defined in Revenue and Taxation Code section 6009.2, includes any purchase of tangible personal property with a counterfeit mark on, or in connection with, that purchase by a convicted purchaser and is subject to tax. This is regardless of whether the counterfeit goods were sold for resale or held with the intent to be resold. A "counterfeit mark" is a spurious mark that is used in a manner described in section 2320 of title 18 of the United States Code.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485 and 7153, Revenue and Taxation Code.

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# 2016-0310-02
 BOARD OF EQUALIZATION
 Definitions, Board Hearing Procedures

This filing of changes without regulatory effect by the Board of Equalization amends sections in Title 18 of the California Code of Regulations, to make non-substantive changes to each section and one attached form. The changes include, deleting references to a repealed regulation, deleting provisions for which the statutory authority was repealed, grammatical and formatting changes.

Title 18
 AMEND: 5600, 5601, 5603
 Filed 04/20/2016
 Agency Contact: Richard Bennion (916) 445-2130

File# 2016-0310-03
 BOARD OF EQUALIZATION
 Sales for Resale

This rulemaking action by the Board of Equalization amends section 1668 of title 18 of the California Code of Regulations to specify that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, and that the transactions are taxable regardless of whether the sale or purchase was for resale.

Title 18
 AMEND: 1668
 Filed 04/22/2016
 Effective 07/01/2016
 Agency Contact: Richard Bennion (916) 445-2130

File# 2016-0310-04
 BOARD OF PHARMACY
 Pharmacy, Related Self-Assessments

This rulemaking action amends sections of Title 16 of the California Code of Regulations to specify new editions for three pharmacy and drug wholesaler self-

assessment forms and to amend those three incorporated self-assessment forms. The forms were last amended in 2011. The amended forms conform to post-2011 amendments to the Code of Federal Regulations, California Business and Professions Code, California Health and Safety Code, and California Code of Regulations (Title 16) regarding compliance with legal requirements for pharmacies and drug wholesalers. The self-assessment forms must be completed by community and hospital pharmacies and by drug wholesalers biennially or within 30 days of any change in: a pharmacy's or drug wholesaler's permit; the pharmacist-in-charge or drug wholesaler's designated representative; or the licensed location of a pharmacy or drug wholesaler.

Title 16
 AMEND: 1715, 1784
 Filed 04/20/2016
 Effective 04/20/2016
 Agency Contact: Lori Martinez (916) 574-7917

File# 2016-0415-01
 CALIFORNIA HORSE RACING BOARD
 Presence of Clenbuterol in Quarter Horses

In this second emergency re-adopt, the regulations require quarter horses that are prescribed clenbuterol to be placed on the Veterinarian's List for veterinary treatment. The regulations also establish reporting requirements for clenbuterol use on quarter horses.

Title 4
 ADOPT: 1866.1
 AMEND: 1844
 Filed 04/25/2016
 Effective 04/25/2016
 Agency Contact: Philip Laird (916) 263-6025

File# 2016-0420-01
 CALIFORNIA INSTITUTE FOR REGENERATIVE MEDICINE
 Amendments to Loan Administration Policy

The California Institute for Regenerative Medicine (CIRM) amended the CIRM Loan Administration Policy (LAP), which is incorporated by reference in title 17, California Code of Regulations, section 100800(b). Current provisions in the LAP allow CIRM to automatically forgive loans to certain loan recipients who meet specified criteria. The amendment to the LAP allows a loan recipient whose loan has been forgiven the option of converting the loan to a grant. By doing this, loan recipients who convert their forgiven loans to grants will be governed by CIRM revenue sharing and intellectual property regulations pertaining to grants in the event future revenue streams are realized.

Rulemaking File Index

Title 18. Public Revenue

Sales and Use Tax

Regulation 1668, *Sales For Resale*

1. [Final Statement of Reasons](#)
2. [Updated Informative Digest](#)
3. [Business Tax Committee Minutes, October 27, 2015](#)
 - Minutes
 - Deputy Director memo dated October 16, 2015
 - BTC Agenda
 - Formal Issue Paper Number 15-008
 - Exhibit 1 Revenue Estimate
 - Exhibit 2 Text Regulation 1668
4. [Reporter's Transcript Business Taxes Committee, October 27, 2015](#)
5. [Estimate of Cost or Savings, December 24, 2015](#)
6. [Economic and Fiscal Impact Statements, December 23, 2015](#)
7. [Notice of Publications](#)
 - Form 400 and Notice, Publication Date January 8, 2016
 - Email sent to Interested Parties, January 8, 2016
 - CA Regulatory Notice Register 2016, Volume No. 2-Z
8. [Notice to Interested Parties, January 8, 2016](#)

The following items are exhibited:

 - Notice of Hearing
 - Initial Statement of Reasons
 - Proposed Text of Regulation 1668
 - Regulation History
9. [Statement of Compliance](#)
10. [Reporter's Transcript, Item F1, February 23, 2016](#)
11. [Draft Minutes, February 23, 2016, and Exhibits](#)
 - Notice of Proposed Regulatory Action
 - Initial Statement of Reasons
 - Proposed Text of Regulation 1668
 - Regulation History

VERIFICATION

I, Richard E. Bennion, Regulations Coordinator of the State Board of Equalization, state that the rulemaking file of which the contents as listed in the index is complete, and that the record was closed on March 8, 2016 and was reopened on April 21, 2016 for the purpose of amending the Updated Informative Digest, and Index, and was closed on April 22, 2016 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.

April 22, 2016

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
Proposed Amendments to California Code of Regulations,
Title 18, Section 1668, *Sales for Resale***

UPDATE OF INFORMATION IN THE INITIAL STATEMENT OF REASONS

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1668, *Sales for Resale*, on February 23, 2016. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1668 without making any changes. The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on February 23, 2016, to comment on the proposed regulatory action.

The factual basis, specific purposes, and necessity for, the problems to be addressed by, and the anticipated benefits from the adoption of the proposed amendments to Regulation 1668 are the same as provided in the initial statement of reasons. The Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and implementing, interpreting, and making specific the amendments made to Revenue and Taxation Code (RTC) section 6007 and the enactment of RTC section 6009.2, by Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477).

The adoption of the proposed amendments to Regulation 1668 is not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to Regulation 1668 or the proposed amendments to Regulation 1668.

The Board did not rely on any data or technical, theoretical, or empirical study, report, or similar document in proposing or adopting the proposed amendments to Regulation 1668 that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period.

In addition, the factual basis has not changed for the Board's initial determination that the proposed regulatory action will not have a significant adverse economic impact on business, the Board's determination that the proposed regulatory action is not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, and the Board's economic impact assessment, which determined that the Board's proposed regulatory action:

- Will neither create nor eliminate jobs in the State of California;
- Nor result in the elimination of existing businesses;
- Nor create or expand business in the State of California; and
- Will not affect the benefits of Regulation 1668 to the health and welfare of California residents, worker safety, or the state's environment.

The proposed amendments to Regulation 1668 may affect small business.

No Mandate on Local Agencies or School Districts

The Board has determined that the adoption of the proposed amendments to Regulation 1668 does not impose a mandate on local agencies or school districts.

Public Comments

The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on February 23, 2016, to comment on the proposed regulatory action.

Determination Regarding Alternatives

By its motion on February 23, 2016, the Board determined that no alternative to the proposed amendments to Regulation 1668 would be more effective in carrying out the purposes for which the amendments are proposed, would be as effective and less burdensome to affected private persons than the adopted amendments, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provisions of the law.

The Board did not reject any reasonable alternatives to the proposed amendments to Regulation 1668 that would lessen any adverse impact the proposed amendments may have on small business.

No reasonable alternative has been identified and brought to the Board's attention that would lessen any adverse impact the proposed action may have on small business, be more effective in carrying out the purposes for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

**Updated Informative Digest for the State Board of Equalization's
Adoption of Proposed Amendments to California Code of Regulations,
Title 18, Section 1668, *Sales for Resale***

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1668, *Sales for Resale*, on February 23, 2016. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1668 without making any changes.

The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on February 23, 2016, to comment on the proposed regulatory action.

There has been one change to the applicable laws and no changes to the effects of, the objectives of, and anticipated benefits from the adoption of the proposed amendments to Regulation 1668 described in the informative digest included in the notice of proposed regulatory action.

Effective January 1, 2016, Assembly Bill No. (AB) 160 (Stats. 2015, ch. 427) amended Revenue and Taxation Code (RTC) sections 6007, subdivision (b), and 6009.2, subdivision (b), discussed in the notice of proposed regulatory action. The amendments slightly expanded the scope of the subdivisions so that they apply to a convicted seller's or convicted purchaser's sale or purchase of tangible personal property with a counterfeit or illicit label (as defined in 18 U.S.C. § 2318), not only a counterfeit mark, on or in connection with the sale or purchase. The amendments also further defined the terms "convicted seller" and "convicted purchaser" to include persons convicted of a counterfeiting offense, including but not limited to, a violation under sections 2318 and 2319 of title 18 of the United States Code, in addition to persons convicted of violations under section 2320 of title 18 of the United State Code and Penal Code sections 350 and 653w.

The Board did not make any changes to the proposed amendments adding subdivision (j) to Regulation 1668 as a result of the amendments made to RTC sections 6007 and 6009.2 by AB 160 because the current regulatory amendments are consistent with the current provisions of the statutes. The current regulatory amendments do not define "convicted seller" or "convicted purchaser," so it is not necessary to change the regulatory amendments to conform to the changes to the statutory definitions of those terms. And, the current provisions of new subdivision (j) provide notice regarding and specifically refer readers to the definitions of "retail sale" in RTC section 6007 and "storage" and "use" in RTC section 6009.2 and the Board has not determined that it is necessary for new subdivision (j) to specifically refer to convicted sellers' and convicted purchasers' sales and purchases of tangible personal property with a counterfeit or illicit label at this time.

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

Current Law

The Sales and Use Tax Law (RTC, § 6001 et seq.) imposes sales tax on retailers for the privilege of selling tangible personal property at retail in California and provides that sales tax is measured by the gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Reg. 1700, subd. (a)(1).)

When sales tax does not apply, the Sales and Use Tax Law imposes use tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer, unless specifically exempted or excluded by statute. The obligation to pay the use tax is on the consumer. However, every retailer “engaged in business” in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the Board, and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (Reg. 1684.)

RTC section 6007 defines the terms “retail sale” or “sale at retail” to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. RTC sections 6008 and 6009 define “storage” and “use,” respectively. “Storage” includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. “Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

RTC sections 6091 through 6095 (sales tax) and 6241 through 6245 (use tax) generally establish the presumption that the sale or storage, use or other consumption of tangible personal property is subject to sales or use tax, place the burden on the retailer to establish that tax does not apply, unless the retailer takes a certificate from the purchaser to the effect that the property is purchased for resale, and impose liability on persons who purchase tangible personal property with a resale certificate and subsequently make any use of the property other than retention, demonstration, or display while holding it for resale in the regular course

of business. The Board previously adopted Regulation 1668 to implement, interpret, and make specific the RTC provisions regarding sales for resale, including prescribing the form of resale certificates, prescribing the circumstances under which a retailer can overcome the presumption of taxability by timely taking a resale certificate from a purchaser in good faith, and establishing the presumption that a resale certificate is taken in good faith in the absence of evidence to the contrary.

In addition, RTC section 6094.5 generally provides that “[a]ny person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate,” and “a penalty of 10 percent of the tax or five hundred dollars (\$500) whichever is greater, for each purchase made [with a resale certificate] for personal gain or to evade the payment of taxes,” and is guilty of a misdemeanor for each purchase made with a resale certificate for the purpose of evading payment to the seller of the amount of the tax applicable to the transaction. RTC sections 6484 and 6485 alternatively provide for the imposition of a 10 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to negligence or the intentional disregard of the Sales and Use Tax Law or the Board’s regulations or a 25 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to fraud or an intent to evade the Sales and Use Tax Law or the Board’s regulations. And, Regulation 1668, subdivision (d), clarifies that all of these statutory provisions providing for civil and criminal penalties may apply to a person who makes an improper use of a resale certificate and thereafter fails to report the tax due as a result of such misuse.

Also, RTC sections 6012.8 and 6012.9 specify that mobilehome retailers are consumers of mobilehomes under specified circumstances. RTC sections 6012.8 and 6012.9 permit mobilehome retailers to give resale certificates for the purchase of mobilehomes under such circumstances to facilitate the reporting of their tax liabilities when they ultimately sell the mobilehomes to their customers for installation for occupancy as a residence. RTC section 6012.8 was also amended, effective September 19, 1985, to provide that a mobilehome retailer can issue a resale certificate for the purchase of a mobilehome regardless of whether the retailer installs the mobilehome on a foundation system as an improvement to realty prior to selling the mobilehome to its customer. And, the provisions of RTC sections 6012.8 and 6012.9 providing for the issuance of resale certificates by mobilehome retailers, including the effective date of the 1985 amendments to RTC section 6012.8, are implemented, interpreted, and made specific by Regulation 1668, subdivision (h).

Further, Regulation 1661, *Leases of Mobile Transportation Equipment*, explains that, under RTC sections 6006, 6010, 6094, and 6244, lessors are consumers of mobile transportation equipment (MTE) and if they purchase MTE without the payment of tax or tax reimbursement, they may elect to pay use tax measured by the “fair rental value” of the MTE. Regulations 1661 and 1668, subdivision (i), also both specify that, under RTC sections 6092.1 and 6243.1, a lessor of MTE, other than a lessor exempt from use tax, may issue a resale certificate for the purchase of MTE for the limited purpose of reporting use tax based on fair rental value in accordance with RTC sections 6094 and 6244. And, Regulation 1668, subdivision (d), clarifies that its civil and criminal penalty provisions do not apply in the narrow circumstances where a resale certificate is issued in accordance with subdivision (h) or (i).

Furthermore, prior to September 19, 2014, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

Effective September 19, 2014, Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477) amended RTC section 6007 and enacted RTC section 6009.2 to establish that any sale by a convicted seller or purchase by a convicted purchaser of counterfeit goods is subject to tax. Specifically, it added a new subdivision (b) to RTC section 6007 to further define “retail sale” to include “any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business.” Similarly, the bill added new RTC section 6009.2 to further define “storage” and “use” to include any “purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale.” RTC section 6007 defines “convicted seller” and RTC section 6009.2 defines “convicted purchaser” to mean a person convicted of a violation under section 2320 of title 18 of the United States Code or under sections 350 or 653w of the Penal Code on or after the date of the sale or purchase, respectively. Both statutes provide that “[c]ounterfeit mark” has the same meaning as that term is defined in Section 2320 of Title 18 of the United States Code” and both statutes require that a notice of deficiency determination, issued to a convicted seller or purchaser, “shall be mailed within one year after the last day of the calendar month following the date of conviction.” Therefore, AB 2681 now makes sales and purchases of counterfeit goods by a convicted seller or convicted

purchaser subject to tax, including resale transactions. In addition, it does not matter if the person convicted is the manufacturer, wholesaler, distributor, or retailer of the counterfeit goods.

Effects, Objectives, and Benefits of the Proposed Amendments to Regulation 1668

Need for Clarification

Regulation 1668 was last amended in 2009, which was prior to the passage of AB 2681. Therefore, the Board's Business Taxes Committee (BTC) staff determined that there is an issue (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) because Regulation 1668 does not currently indicate that AB 2681 made amendments to RTC section 6007 and add RTC section 6009.2 to change the application of sales and use tax to sales and purchases of counterfeit goods for resale. BTC staff also determined that amendments to Regulation 1668 are needed in order to have the effect and accomplish the objective of addressing the issue (or problem) by making Regulation 1668 consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2 regarding persons convicted of selling or purchasing counterfeit goods (discussed above).

Interested Parties Process

As a result of AB 2681, BTC staff drafted amendments to add a new subdivision (j), entitled "Counterfeit Goods," to Regulation 1668 and add references to RTC sections 6007 and 6009.2 to Regulation 1668's reference note. The new subdivision clarifies that convicted sellers' sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale. It also clarifies that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

Staff also considered whether the civil and criminal penalty provisions of Regulation 1668, subdivision (d) (discussed above), apply in instances where a seller provides a resale certificate for the purchase of counterfeit goods for resale in the regular course of business without the payment of sales tax reimbursement or use tax and the seller is subsequently convicted of purchasing counterfeit goods. It was determined that the provisions of AB 2681 effectively impose a specific penalty on such a seller by making the seller liable for tax on such purchase, and it would be inconsistent with the provisions of AB 2681 to also impose the civil and criminal penalties provided by RTC sections 6094.5, 6484, and 6485 on such a seller with regard to such a purchase. Therefore, BTC staff also drafted amendments

to clarify that Regulation 1668, subdivision (d), does not apply in the narrow circumstances where a resale certificate is issued in accordance with new subdivision (j), and the exception from subdivision (d) is consistent with the existing exceptions from subdivision (d) for resale certificates issued in accordance with subdivisions (h) and (i) (discussed above).

In addition to the proposed amendments regarding convicted sellers and purchasers of counterfeit goods, staff drafted amendments that deleted the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed. Staff also drafted non-substantive amendments to italicize the name of Regulation 1699, *Permits*, in subdivision (a), replace “State” with “state” in subdivision (b)(1)(C), delete an inadvertent space in the reference to subdivision “(b) (4)” in subdivision (b)(3), add a comma after “(\$500)” in subdivision (d)(2), insert “the” before “person” in the last sentence in subdivision (f)(1), delete an inadvertent space from before the parenthetical reference to “mobile transportation equipment” in subdivision (f)(2)(C), replace the period with a semicolon at the end of subdivision (f)(2)(F)3, delete inadvertent brackets from subdivision (f)(3), and replace “Section” and “Sections” with “section” and “sections” throughout subdivision (h).

BTC staff subsequently made its draft amendments to Regulation 1668 available to the interested parties and one interested parties meeting was held to discuss staff’s draft amendments. At the meeting, staff’s recommendations were well received and no submissions from interested parties with alternative language were received. Because BTC staff did not receive any other inquiries or comments regarding the draft amendments during or subsequent to the first interested parties meeting and staff had no changes to its recommendation to amend Regulation 1668, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff’s draft amendments.

October 27, 2015, BTC Meeting

Subsequently, staff prepared Formal Issue Paper 15-008 and distributed it to the Board Members for consideration at the Board’s October 27, 2015, BTC meeting. Formal Issue Paper 15-008 recommended that the Board propose to adopt the draft amendments to Regulation 1668 (discussed above) in order to incorporate the provisions of RTC sections 6007 and 6009.2, as amended and enacted by AB 2681, by:

- Adding a new subdivision (j).

- Amending subdivision (d) so that it does not apply where a resale certificate is issued in accordance with new subdivision (j).
- Adding references to RTC sections 6007 and 6009.2 to the regulation's reference note.

Formal Issue Paper 15-008 also recommended that the Board delete the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed, and that the Board make the non-substantive amendments to the regulation (discussed above). During the October 27, 2015, BTC meeting, the Board Members unanimously voted to propose the amendments to Regulation 1668 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1668 are reasonably necessary to have the effect and accomplish the objective of making the regulation consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2, and addressing the issue (or problem) that Regulation 1668 does not currently indicate that AB 2681 added RTC section 6007, subdivision (b), and section 6009.2. The Board also determined that the proposed amendments are reasonably necessary to have the effect and accomplish the objective of updating Regulation 1668, subdivision (h), and making the regulation grammatically correct and internally consistent.

The Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and implementing, interpreting, and making specific the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1668 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1668 is the only state regulation that provides specific guidance regarding the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1668 or the proposed amendments to Regulation 1668.

**BOARD OF EQUALIZATION
BUSINESS TAXES COMMITTEE MEETING MINUTES**

HONORABLE DIANE L. HARKEY, COMMITTEE CHAIR

450 N STREET, SACRAMENTO

MEETING DATE: OCTOBER 27, 2015, TIME: 10:00 A.M.

ACTION ITEMS & STATUS REPORT ITEMS**Agenda Item No: 1****Title: Proposed revisions to Regulation 1668, *Sales for Resale*****Issue/Topic:**

Whether the Board should amend Regulation 1668, *Sales for Resale*, to state that sales or purchases of counterfeit goods by a convicted seller or purchaser are subject to tax regardless of whether their intentions were to resell them.

Committee Discussion:

Staff introduced the issue. There was no discussion of this item.

Committee Action/Recommendation/Direction:

Upon motion by Mr. Runner and seconded by Ms. Ma, without objection, the Committee approved and authorized for publication the proposed amendments to Regulation 1668, *Sales for Resale*. A copy of the proposed amendments to Regulation 1668 is attached.

Agenda Item No.: 2**Title: Proposed Amendments to Regulation 1698, *Records* and Regulation 4901, *Records*****Issue:**

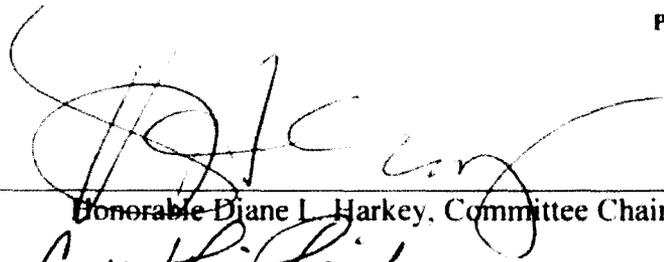
Whether the Board should amend Sales and Use Tax Regulation 1698, *Records*, and Special Taxes and Fees Regulation 4901, *Records*, to include and define electronic cash register, computerized point of sale systems, and electronic records.

Committee Discussion:

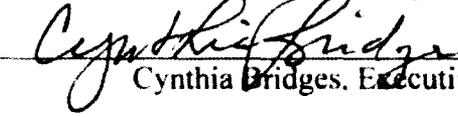
Staff introduced the issue. There was no discussion of this item.

Committee Action:

Upon motion by Mr. Horton, seconded by Ms. Stowers, without objection, the Committee approved and authorized for publication the proposed regulatory amendments. A copy of the proposed amendments to Regulation 1698 and Regulation 4901 are attached.



Honorable Diane L. Harkey, Committee Chair



Cynthia Bridges, Executive Director

BOARD APPROVED

at the October 27, 2015 Board Meeting



Joann Richmond, Chief
Board Proceedings Division

§ 1668. Sales for Resale.

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

Reference: Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485 and 7153, Revenue and Taxation Code.

(a) Resale Certificate.

The burden of proving that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. If timely taken in proper form as set forth in subdivision (b) and in good faith from a person who is engaged in the business of selling tangible personal property and who holds a California seller's permit as required by Regulation 1699, "~~Permits~~Permits," the certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser. A resale certificate remains in effect until revoked in writing.

(b) Form of Certificate.

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

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name and address of the purchaser.

(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this State, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement that the property described in the document is purchased for resale. The document must contain the phrase "for resale." The use of phrases such as "nontaxable," "exempt," or similar terminology is not acceptable. The property to be purchased under the certificate must be described either by an itemized list of the particular property to be purchased for resale, or by a general description of the kind of property to be purchased for resale.

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

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

(2) A document containing the essential elements described in subdivision (b)(1) is the minimum form which will be regarded as a resale certificate. However, in order to preclude potential controversy, the seller should timely obtain from the purchaser a certificate substantially in the form shown in Appendix A of this regulation. If a purchaser operates an auto body repair and/or paint business, a specific resale certificate in substantially the same form as shown in Appendix B of this regulation should be used, rather than the general resale certificate shown in Appendix A.

(3) Blanket Resale Certificate. If a purchaser issues a general (blanket) resale certificate which provides a general description of the items to be purchased, and subsequently issues a purchase order which indicates that the transaction covered by the purchase order is taxable, the resale certificate does not apply with respect to that transaction. However, the purchaser will bear the burden of establishing either that the purchase order was sent to and received by the seller within the seller's billing cycle or prior to delivery of the property to the purchaser (whichever is the later), or that the tax or tax reimbursement was paid to the seller. The purchaser may avoid this burden by using the procedures described in subdivision (b)-(4) below.

(4) Qualified Resale Certificate. If a purchaser wishes to designate on each purchase order whether the property being purchased is for resale, the seller should obtain a qualified resale certificate, i.e., one that states "see purchase order" in the space provided for a description of the property to be purchased. Each purchase order must then specify whether or not the property covered by the order is purchased for resale. The use of the phrases "for resale," "resale = yes," "nontaxable," "taxable = no," or similar terminology on a purchase order, indicating that tax or tax reimbursement should not be added to the sales invoice will be regarded as designating that the property described is purchased for resale provided the combination of the purchase order and the qualified resale certificate contains all the essential elements provided in subdivision (b)(1). However, a purchase order where the applicable amount of tax is shown as \$0 or is left blank will not be accepted as designating that the property is purchased for resale, unless the purchase order also includes the phrase "for resale" or other terminology described above to specify that the property is purchased for resale. If each purchase order does not so specify, or is not issued timely within the meaning of subdivision (a), it will be presumed that the property covered by that purchase order was not purchased for resale and that sale or purchase is subject to tax. If the purchase order includes both items to be resold and items to be used, the purchase order must specify which items are purchased for resale and which items are purchased for use. For example, a purchase order issued for raw materials for resale and also for tooling used to process the raw materials should specify that the raw materials are purchased for resale and that the sale of the tooling is subject to tax.

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

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

(5) If the seller does not timely obtain a resale certificate, the fact that the purchaser deletes the tax or tax reimbursement from the seller's billing, provides a seller's permit number to the seller, or informs the seller that the transaction is "not taxable" does not relieve the seller from liability for the tax nor from the burden of proving the sale was for resale.

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

(d) Improper Use of Certificate. Except when a resale certificate is issued in accordance with subdivisions (h), ~~or (i)~~ or (j):

(1) A purchaser, including any officer or employee of a corporation, is guilty of a misdemeanor punishable as provided in section 7153 if the purchaser, for the purpose of evading payment to the seller of tax or tax reimbursement, gives a resale certificate for property which the purchaser knows at the time of purchase will be used rather than resold.

(2) Any person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate. In addition to the tax, the person shall be liable to the state for a penalty of 10 percent of the tax or five hundred dollars (\$500), whichever is greater, for each purchase made for personal gain or to evade the payment of taxes, as provided in sections 6072 and 6094.5.

(3) In addition to the penalty of 10 percent or five hundred dollars (\$500), whichever is greater, if the person fails to report and pay the use tax due on the use of the property purchased improperly with a resale certificate, the person may be liable for the 10 percent penalty for negligence or the 25 percent penalty for fraud, as provided in sections 6484 and 6485.

(e) Other Evidence to Rebut Presumption of Taxability. A sale for resale is not subject to sales tax. A person who purchases property for resale and who subsequently uses the property owes tax on that use. A resale certificate which is not timely taken is not retroactive and will not relieve the seller of the liability for the tax. Consequently, if the seller does not timely obtain a resale certificate containing the essential elements as described in subdivision (b)(1), the seller will be relieved of liability for the tax only where the seller shows that the property:

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

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

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

(3) Was consumed by the purchaser and tax was reported directly to the Board by the purchaser on the purchaser's sales and use tax return, or

(4) Was consumed by the purchaser and tax was paid to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.

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

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

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

(A) Purchased for resale and resold in the form of tangible personal property, without any use other than retention, demonstration, or display while being held for sale in the regular course of business;

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

(B) Purchased for resale and presently in resale inventory, without having been used for any purpose other than retention, demonstration, or display while being held for sale in the regular course of business;

(C) Purchased solely for leasing and was so leased. Tax has been paid directly to the Board measured by the purchase price or rental receipts ("tangible personal property"); or tax has been paid measured by the purchase price or fair rental value (-"mobile transportation equipment");

(D) Purchased for resale but consumed or used (whether or not subsequently resold); or

(E) Purchased for use.

(F) When the purchaser answers either (D) or (E) affirmatively (box checked), the XYZ letter will inquire further whether:

1. The tax was paid directly to the Board on the purchaser's Sales and Use Tax Return, and if so, in what amount;
2. The tax was added to the billing of the seller and remitted to the seller, and if so, in what amount;
3. The tax was paid directly to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis; or
4. The purchaser confirms that the purchase is a taxable transaction and that tax is applicable.

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

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

(g) Purchaser's Liability for Tax. A purchaser who issues a resale certificate containing the essential elements as described in subdivision (b)(1) and that otherwise appears valid on its face, or who otherwise purchases tangible personal property that is accepted by the Board as

purchased for resale pursuant to subdivision (f) and who thereafter makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business is liable for use tax on the cost of the property. The tax is due at the time the property is first stored or used and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property is first so stored or used. A purchaser cannot retroactively rescind or revoke a resale certificate and thereby cause the transaction to be subject to sales tax rather than use tax.

A purchaser who issues a resale certificate for property which the purchaser knows at the time of purchase is not to be resold in the regular course of business is liable for the sales tax on that purchase measured by the gross receipts from the sale to that purchaser. The tax is due as of the time the property was sold to the purchaser and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property was sold to the purchaser.

(h) Mobilehomes. A mobilehome retailer who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, or for installation for occupancy as a residence pursuant to ~~Section~~section 18613 of the Health and Safety Code, and which mobilehome is thereafter subject to property taxation, may issue a resale certificate to the mobilehome vendor even though the retailer is classified as a consumer of the mobilehome by ~~Sections~~sections 6012.8 and 6012.9 of the Revenue and Taxation Code. Also, ~~effective September 19, 1985,~~a mobilehome retailer, licensed as a mobilehome dealer under ~~Section~~section 18002.6 of the Health and Safety Code, who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, may issue a resale certificate to the mobilehome vendor even though the mobilehome retailer may have the mobilehome installed on a foundation system as an improvement to realty prior to the retailer's sale of the mobilehome to the customer for occupancy as a residence.

Where the mobilehome is acquired by a mobilehome retailer, who is not licensed as a dealer pursuant to ~~Section~~section 18002.6 of the Health and Safety Code, for affixation by the retailer to a permanent foundation, or for other use or consumption (except demonstration or display while holding for sale in the regular course of business), prior to sale, the mobilehome retailer may not issue a resale certificate. The mobilehome retailer shall notify the vendor that the purchase is for consumption and not for resale. When a mobilehome manufacturer or other vendor is informed or has knowledge that the purchaser will install the mobilehome on a permanent foundation prior to its resale, the manufacturer or other vendor is not making a sale for resale. Such vendor is making a taxable retail sale and cannot accept a resale certificate in good faith.

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

(i) Mobile Transportation Equipment. Any person, other than a person exempt from use tax, such as under Revenue and Taxation Code section 6352, who purchases mobile transportation equipment for the sole purpose of leasing that equipment, may issue a resale certificate for the limited purpose of reporting use tax based on fair rental value as provided in Regulation 1661.

(j) Counterfeit Goods. A sale of tangible personal property with a counterfeit mark on, or in connection with, that sale by a convicted seller is included in the definition of “retail sale” per Revenue and Taxation Code section 6007, and therefore taxable. “Storage” and “use” as defined in Revenue and Taxation Code section 6009.2, includes any purchase of tangible personal property with a counterfeit mark on, or in connection with, that purchase by a convicted purchaser and is subject to tax. This is regardless of whether the counterfeit goods were sold for resale or held with the intent to be resold. A “counterfeit mark” is a spurious mark that is used in a manner described in section 2320 of Title 18 of the United States Code.

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

REGULATION 1698. RECORDS.

Reference: Sections 6455, 7053, and 7054, Revenue and Taxation Code.

(a) DEFINITIONS.

(1) "Database Management System"—a software system that controls, relates, retrieves, and provides accessibility to data stored in a database.

(2) "Electronic cash register"— a device that keeps a register or supporting documents through the means of an electronic device or computer system designed to record transaction data for the purpose of computing, compiling, or processing retail sales transaction data. This can include integrated point of sale systems.

(23) "Electronic data interchange" or "EDI technology"—the computer to computer exchange of business transactions in a standardized structured electronic format.

(3) ~~"Hardcopy"—any document, record, report or other data maintained in a paper format.~~

(4) ~~"Machine-sensible~~Electronic records"—a collection of related information in an electronic, machine-sensible format. ~~Machine-sensible~~Electronic records do not include hardcopy records that are created or recorded on paper or stored in or by a storage-only imaging system such as microfilm, ~~or microfiche,~~ PDF files, or other media used in electronic imaging. Electronic records include records recorded and maintained by electronic cash registers.

(5) "Hardcopy"—any document, record, report or other data maintained in a paper format.

(56) "Taxpayer"—every seller or retailer of tangible personal property in this state and every person storing, using or otherwise consuming in this state tangible personal property purchased from a retailer, and every lessor and lessee of tangible personal property for use in this state.

(b) GENERAL.

(1) A taxpayer shall maintain and make available for examination on request by the Board or its authorized representative, all records necessary to determine the correct tax liability under the Sales and Use Tax Law and all records necessary for the proper completion of the sales and use tax return. Such records include but are not limited to:

(A) Normal books of account ordinarily maintained by the average prudent businessperson engaged in the activity in question.

(B) Bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account.

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

(C) Schedules or working papers used in connection with the preparation of tax returns.

(2) ~~Machine-sensible~~Electronic records are considered records under Revenue and Taxation Code sections 7053 and 7054.

(c) ~~MACHINE-SENSIBLE~~ELECTRONIC RECORDS.

(1) GENERAL.

(A) ~~Machine-sensible~~Electronic records used to establish tax compliance shall contain sufficient source document (transaction-level) information so that the details underlying the ~~machine-sensible~~electronic records can be identified and made available to the Board upon request. A taxpayer has discretion to discard duplicated records and redundant information provided the integrity of the audit trail is preserved and the responsibilities under this regulation are met.

(B) At the time of an examination, the retained records must be capable of being retrieved and converted to a standard magnetic record format e.g., Extended Binary Coded Decimal Interchange Code (EBCDIC) or American Standard Code for Information Interchange (ASCII) flat file.

(C) Taxpayers are not required to construct ~~machine-sensible~~electronic records other than those created in the ordinary course of business. A taxpayer who does not create the electronic equivalent of a traditional paper document in the ordinary course of business is not required to construct such a record for tax purposes.

(2) ELECTRONIC DATA INTERCHANGE REQUIREMENTS.

(A) Where a taxpayer uses electronic data interchange (EDI) processes and technology, the level of record detail, in combination with other records related to the transactions, must be equivalent to that contained in an acceptable paper record. For example, the retained records should contain such information as:

1. vendor name,
2. invoice date,
3. product description,
4. quantity purchased,
5. price,

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

6. amount of tax,
7. indication of tax status (e.g., for resale), and
8. shipping detail.

Codes may be used to identify some or all of the data elements, provided the taxpayer maintains a method which allows the Board to interpret the coded information.

(B) The taxpayer may capture the information necessary to satisfy subdivision (c)(2)(A) at any level within the accounting system and need not retain the original EDI transaction records provided the audit trail, authenticity, and integrity of the retained records can be established. For example, a taxpayer using EDI technology receives electronic invoices from its suppliers. The taxpayer decides to retain the invoice data from completed and verified EDI transactions in its accounts payable system rather than to retain the EDI transactions themselves. Since neither the EDI transaction nor the accounts payable system capture information from the invoice pertaining to product description and vendor name (i.e., they contain only codes for that information), the taxpayer must also retain other records, such as its vendor master file and product code description lists, and make them available to the Board. In this example, the taxpayer need not retain its EDI transaction for tax purposes.

(3) ELECTRONIC DATA PROCESSING SYSTEMS REQUIREMENTS.
The requirements for an electronic data processing (EDP) accounting system should be similar to that of a manual accounting system, in that an adequately designed accounting system should incorporate methods and records that will satisfy the requirements of this regulation.

(4) BUSINESS PROCESS INFORMATION.

(A) Upon request of the Board, the taxpayer shall provide a description of the business process that created the retained records. Such description shall include the relationship between the records and the tax documents prepared by the taxpayer and the measures employed to ensure the integrity of the records.

(B) The taxpayer shall be capable of demonstrating:

1. the functions being performed as they relate to the flow of data through the system;
2. the internal controls used to ensure accurate and reliable processing, and;
3. the internal controls used to prevent unauthorized addition, alteration, or deletion of retained records.

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

(C) The following specific documentation is required for ~~machine-sensible~~electronic records retained pursuant to this regulation:

1. record formats or layouts;
2. field definitions (including the meaning of all codes used to represent information);
3. file descriptions (e.g., data set name); and
4. detailed charts of accounts and account descriptions.

(d) ~~MACHINE-SENSIBLE~~ELECTRONIC RECORDS MAINTENANCE REQUIREMENTS.

(1) The taxpayer's computer hardware or software shall accommodate the extraction and conversion of retained ~~electronic~~machine-sensible records to a standard magnetic record format as provided in subdivision (c)(1)(B).

(2) The Board recommends but does not require that taxpayers refer to the National Archives and Record Administration's (NARA) standards for guidance on the maintenance and storage of electronic records, such as the labeling of records, the location and security of the storage environment, the creation of back-up copies, and the use of periodic testing to confirm the continued integrity of the records.

(e) ACCESS TO ~~MACHINE-SENSIBLE~~ELECTRONIC RECORDS.

(1) The manner in which the Board is provided access to ~~machine-sensible~~electronic records may be satisfied through a variety of means that shall take into account a taxpayer's facts and circumstances through consultation with the taxpayer.

(2) Such access will be provided in one or more of the following manners:

(A) The taxpayer may arrange to provide the Board with the hardware, software, and personnel resources to access the ~~machine-sensible~~electronic records.

(B) The taxpayer may arrange for a third party to provide the hardware, software, and personnel resources necessary to access the ~~machine-sensible~~electronic records.

(C) The taxpayer may convert the ~~machine-sensible~~electronic records to a standard record format specified by the Board, including copies of files, on a magnetic medium that is agreed to by the Board.

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

(D) The taxpayer and the Board may agree on other means of providing access to the ~~machine-sensible~~electronic records.

(f) TAXPAYER RESPONSIBILITY AND DISCRETIONARY AUTHORITY.

(1) In conjunction with meeting the requirements of subdivision (c), a taxpayer may create files solely for the use of the Board. For example, if a data base management system is used, it is consistent with this regulation for the taxpayer to create and retain a file that contains the transaction-level detail from the data base management system and that meets the requirements of subdivision (c). The taxpayer should document the process that created the separate file to show the relationship between that file and the original records.

(2) A taxpayer may contract with a third party to provide custodial or management services of the records. Such a contract shall not relieve the taxpayer of its responsibilities under this regulation.

(g) HARDCOPY RECORDS.

(1) Except as specifically provided, taxpayers are not relieved of the responsibility to retain hardcopy records that are created or received in the ordinary course of business as required by existing law and regulations. Hardcopy records may be retained on a record keeping medium as provided in subdivision (h).

(2) If hardcopy transaction level documents are not produced or received in the ordinary course of transacting business (e.g., when the taxpayer uses electronic data interchange technology), such hardcopy records need not be created.

(3) Hardcopy records generated at the time of a transaction using a credit or debit card must be retained unless all the details necessary to determine correct tax liability relating to the transaction are subsequently received and retained by the taxpayer in accordance with this regulation. Such details include those listed in subdivision (c)(2)(A).

(4) Computer printouts that are created for validation, control, or other temporary purposes need not be retained.

(h) ALTERNATIVE STORAGE MEDIA.

(1) For purposes of storage and retention, taxpayers may convert hardcopy documents received or produced in the normal course of business and required to be retained under this regulation to storage-only imaging media such as microfilm, ~~or~~ microfiche, PDF files, or other media used in electronic imaging and may discard the original hardcopy documents, provided the conditions of this subdivision are met. Documents which may be stored on these media include,

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

but are not limited to general books of account, journals, voucher registers, general and subsidiary ledgers, and supporting records of details, such as sales invoices, purchase invoices, exemption certificates, and credit memoranda.

(2) Storage-only imaging media such as microfilm, and microfiche, PDF files, or other media used in electronic imaging systems shall meet the following requirements.

(A) Documentation establishing the procedures for converting the hardcopy documents to the storage-only imaging system must be maintained and made available on request. Such documentation shall, at a minimum, contain a sufficient description to allow an original document to be followed through the conversion system as well as internal procedures established for inspection and quality assurance.

(B) Procedures must be established for the effective identification, processing, storage, and preservation of the stored documents and for making them available for the period they are required to be retained under subdivision (i).

(C) Upon request by the Board, a taxpayer must provide facilities and equipment for reading, locating, and reproducing any documents maintained on storage-only imaging media.

(D) When displayed on such equipment or reproduced on paper, the documents must exhibit a high degree of legibility and readability. For this purpose, legibility is defined as the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. Readability is defined as the quality of a group of letters or numerals being recognizable as words or complete numbers.

(E) All data on storage-only imaging media must be maintained and arranged in a manner that permits the location of any particular record.

(F) There is no substantial evidence that the storage-only imaging medium lacks authenticity or integrity.

(i) RECORD RETENTION—TIME PERIOD. All records required to be retained under this regulation must be preserved for a period of not less than four years unless the State Board of Equalization authorizes in writing their destruction within a lesser period.

For reporting periods beginning before January 1, 2003 that are subject to the extended ten-year statute of limitations contained in Revenue and Taxation Code section 7073(d), records required to be retained under this regulation must be preserved for a period of not less than ten years.

For example, if a taxpayer has a point of sale system that overwrites data after a period of time less than four years, the taxpayer should transfer, maintain, and have available, all data that

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

would have been overwritten or otherwise removed from the system for the required time periods indicated above.

(j) RECORD RETENTION LIMITATION AGREEMENTS.

(1) The Board has the authority to enter into or revoke a record retention limitation agreement with the taxpayer to modify or waive any of the specific requirements in this regulation. A taxpayer's request for an agreement must specify which records (if any) the taxpayer proposes not to retain and provide the reasons for not retaining such records, as well as, proposing any other terms of the requested agreement. The taxpayer shall remain subject to all requirements of this regulation that are not modified, waived, or superseded by a duly approved record retention limitation agreement.

(A) If a taxpayer seeks to limit its retention of ~~electronic~~~~machine-sensible~~ records, the taxpayer may request a record retention limitation agreement, which shall;

1. document understandings reached with the Board, which may include, but is not limited to, any one or more of the following issues:
 - a. the conversion of files created on an obsolete computer system;
 - b. restoration of lost or damaged files and the actions to be taken;
 - c. use of taxpayer computer resources, and
2. specifically identify which of the taxpayer's records the Board determines are not necessary for retention and which the taxpayer may discard, and
3. authorize variances, if any, from the normal provisions of this regulation.

(B) The Board shall consider a taxpayer's request for a record retention limitation agreement and notify the taxpayer of the actions to be taken.

(C) The Board's decision to enter or not to enter into a record retention limitation agreement shall not relieve the taxpayer of the responsibility to keep adequate and complete records supporting entries shown on any tax or information return.

(2) A taxpayer's record retention practices shall be subject to evaluation by the Board when a record retention limitation agreement exists. The evaluation may include a review of the taxpayer's relevant data processing and accounting systems with respect to EDP systems, including systems using EDI technology.

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

(A) The Board shall notify the taxpayer of the results of any evaluation, including acceptance or disapproval of any proposals made by the taxpayer (e.g., to discard certain records) or any changes considered necessary to bring the taxpayer's practices into compliance with this regulation.

(B) Since the evaluation of a taxpayer's record retention practices is not directly related to the determination of tax reporting accuracy for a particular period or return, an evaluation made under this regulation is not an "examination of records" under section 7054 of the Revenue and Taxation Code.

(C) Unless otherwise specified, an agreement shall not apply to accounting and tax systems added subsequent to the completion of the record evaluation. All ~~machine-sensible~~ electronic records produced by a subsequently added accounting or tax system shall be retained by the taxpayer in accordance with this regulation until a new evaluation is conducted by the Board.

(D) Unless otherwise specified, an agreement made under this subdivision shall not apply to any person, company, corporation, or organization that, subsequent to the taxpayer's signing of a record retention limitation agreement, acquires or is acquired by the taxpayer. All ~~machine-sensible~~ electronic records produced by the acquired or the acquiring person, company, corporation, or organization, shall be retained pursuant to this regulation.

(3) In addition to the record retention evaluation under subdivision (j)(2), the Board may conduct tests to establish the authenticity, readability, completeness, and integrity of the ~~machine-sensible~~ electronic records retained under a record retention limitation agreement. The state shall notify the taxpayer of the results of such tests. These tests may include the testing of EDI and other procedures and a review of the internal controls and security procedures associated with the creation and storage of the records.

(k) FAILURE TO MAINTAIN RECORDS.

Failure to maintain and keep complete and accurate records will be considered evidence of negligence or intent to evade the tax and may result in penalties or other appropriate administrative action.

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

REGULATION 4901. RECORDS.

Reference: Sections 8301, 8302, 8303, 8304, 9253, 9254, 30453, 30454, 32551, 32453, 40172, 40173, 40174, 40175, 41056, 41073, 41129.30, 43502, 45852, 46602, 46603, 50153, 55302, 60604, 60605, and 60606, Revenue and Taxation Code.

(a) DEFINITIONS.

(1) "Applicable Tax Laws" means any of the following:

(A) Aircraft Jet Fuel Tax, Revenue and Taxation Code ~~Sections~~ Sections 7385–7398, and 7486–8406;

(B) Alcoholic Beverage Tax, Revenue and Taxation Code ~~Sections~~ Sections 32001–32557;

~~**(C)** Marine Invasive Species Fee, Public Resources Code Sections 71200–71271; Revenue and Taxation Code Sections 44000–44008, 55001–55381;~~

~~**(D)** California Tire Fee, Public Resources Code Sections 42860–42895; Revenue and Taxation Code Sections 55001–55381;~~

~~**(E)** Childhood Lead Poisoning Prevention Fee, Health and Safety Code ~~Section~~ Section 105310; Revenue and Taxation Code ~~Sections~~ Sections 43001–43651;~~

~~**(F)** Cigarette and Tobacco Products Tax, Revenue and Taxation Code ~~Sections~~ Sections 30001–30481;~~

~~**(G)** Diesel Fuel Tax, Revenue and Taxation Code ~~Sections~~ Sections 60001–60709;~~

~~**(H)** Emergency Telephone Users Surcharge, Revenue and Taxation Code ~~Sections~~ Sections 41001–41176;~~

~~**(I)** Energy Resources Surcharge, Revenue and Taxation Code ~~Sections~~ Sections 40001–40216;~~

~~**(J)** Fee Collection Procedures Law, Revenue and Taxation Code sections 55001-55381.~~

~~**(K)** Hazardous Substances Tax, Health and Safety Code ~~Sections~~ Sections 25174.1, 25205.2, 25205.5, 25205.6, and 25205.7; Revenue and Taxation Code ~~Sections~~ Sections 43001–43651;~~

~~**(L)** Integrated Waste Management Fee, Public Resources Code ~~Sections~~ Sections 40000–48008; Revenue and Taxation Code ~~Sections~~ Sections 45001–45984;~~

~~**(M)** Motor Vehicle Fuel Tax, Revenue and Taxation Code ~~Sections~~ Sections 7301–8526;~~

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

~~(M) Natural Gas Surcharge, Public Utilities Code Sections 890-900; Revenue and Taxation Code Sections 55001-55381;~~

~~(NL) Occupational Lead Poisoning Prevention Fee, Health and Safety Code Section 105190; Revenue and Taxation Code Sections 43001-43651;~~

~~(OM) Oil Spill Response, Prevention, and Administration Fees, Revenue and Taxation Code Sections 46001-46751;~~

~~(PN) Underground Storage Tank Maintenance Fee, Revenue and Taxation Code Sections 50101-50162; and~~

~~(QO) Use Fuel Tax, Revenue and Taxation Code Sections 8601-9355;~~

~~(R) Covered Electronic Waste Recycling Fee, Health and Safety Code Sections 25214.9-25214.10.2; Public Resources Code Sections 42460-42486; Revenue and Taxation Code Sections 55001-55381;~~

~~(S) Water Rights Fee, Water Code Sections 1525-1552, 13050, 13160.1; Revenue and Taxation Code Sections 55001-55381.~~

(2) "Database Management System"—a software system that controls, relates, retrieves, and provides accessibility to data stored in a database.

(3) "Electronic cash register"—a device that keeps a register or supporting documents through the means of an electronic device or computer system designed to record transaction data for the purpose of computing, compiling, or processing retail sales transaction data. This can include integrated point of sale systems.

(34) "Electronic data interchange" or "EDI technology"—the computer to computer exchange of business transactions in a standardized structured electronic format.

~~(4) "Hardcopy"—any document, record, report or other data maintained in a paper format.~~

(5) ~~"Machine-sensibleElectronic record"—a collection of related information in an electronic format. Machine-sensibleElectronic records do not include hardcopy records that are created or recorded on paper or stored in or by a storage-only imaging system such as microfilm, or microfiche, PDF files, or other media used in electronic imaging. Electronic records include records recorded and maintained by electronic cash registers.~~

(6) "Hardcopy"—any document, record, report or other data maintained in a paper format.

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

(67) "Taxpayer" includes "fee payer" and means any person liable for the payment of a tax or a fee specified under any of the applicable tax laws.

(78) "Tax" includes "fee" and means any amount of tax or fee specified under any of the applicable tax laws.

(b) GENERAL.

(1) A taxpayer shall maintain and make available for examination on request by the ~~h~~Board or its authorized representative, all records necessary to determine the correct tax liability under the applicable tax laws and all records necessary for the proper completion of the required tax return or report. Such records include but are not limited to:

(A) Books of account or other similar summary information ordinarily maintained by the taxpayer as required by law or practice or otherwise in the possession of the taxpayer or third party at the direction or request of the taxpayer.

(B) Bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account.

(C) Schedules or working papers used in connection with the preparation of tax returns and reports.

(2) ~~Machine-sensible~~Electronic records are considered records under Revenue and Taxation Code Sections 8301–8306, 9253, 9254, 30453, 30454, 32551, 32453, 40172–40175, 41056, 41073, 41129.30, 43502, 45852, 46602, 46603, 50153, 55302, and 60604–60606, ~~Revenue and Taxation Code.~~

(c) ~~MACHINE-SENSIBLE~~ELECTRONIC RECORDS.

(1) GENERAL.

(A) ~~Machine-sensible~~Electronic records used to establish tax compliance shall contain sufficient source document (transaction-level) information so that the details underlying the ~~machine-sensible~~electronic records can be identified and made available to the ~~h~~Board upon request. A taxpayer has discretion to discard duplicated records and redundant information provided the integrity of the audit trail is preserved and the responsibilities under this regulation are met.

(B) At the time of an examination, the retained records must be capable of being retrieved and converted to a standard magnetic record format which the ~~h~~Board has the technological

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

capability to use, such as Extended Binary Coded Decimal Interchange Code (EBCDIC) or American Standard Code for Information Interchange (ASCII) flat file.

(C) Taxpayers are not required to construct ~~machine-sensible~~electronic records other than those created in the ordinary course of business. A taxpayer who does not create the electronic equivalent of a traditional paper document in the ordinary course of business is not required to construct such a record for tax purposes.

(2) ELECTRONIC DATA INTERCHANGE REQUIREMENTS.

(A) Where a taxpayer uses electronic data interchange (EDI) processes and technology, the level of record detail, in combination with other records related to the transactions, must be equivalent to that contained in an acceptable paper record. For example, the retained records should contain such information as:

1. vendor name,
2. invoice date,
3. product description,
4. quantity purchased,
5. price,
6. amount of tax,
7. indication of tax status (e.g., exempt), and
8. shipping detail.

Codes may be used to identify some or all of the data elements, provided the taxpayer maintains a method which allows the ~~b~~Board to interpret the coded information.

(B) The taxpayer may capture the information necessary to satisfy subdivision (c)(2)(A) at any level within the accounting system and need not retain the original EDI transaction records provided the audit trail, authenticity, and integrity of the retained records can be established. For example, a taxpayer using EDI technology receives electronic invoices from its suppliers. The taxpayer decides to retain the invoice data from completed and verified EDI transactions in its accounts payable system rather than to retain the EDI transactions themselves. Since neither the EDI transaction nor the accounts payable system capture information from the invoice pertaining to product description and vendor name (i.e., they contain only codes for that information), the taxpayer must also retain other records, such as its vendor master file and product code

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

description lists, and make them available to the ~~h~~Board. In this example, the taxpayer need not retain its EDI transaction for tax purposes.

(3) ELECTRONIC DATA PROCESSING SYSTEMS REQUIREMENTS. The requirements for an electronic data processing (EDP) accounting system should be similar to that of a manual accounting system, in that an adequately designed accounting system should incorporate methods and records that will satisfy the requirements of this regulation.

(4) BUSINESS PROCESS INFORMATION.

(A) Upon request of the ~~h~~Board, the taxpayer shall provide a description of the business process that created the retained records. Such description shall include the relationship between the records and the tax documents prepared by the taxpayer and the measures employed to ensure the integrity of the records.

(B) The taxpayer shall be capable of demonstrating:

1. the functions being performed as they relate to the flow of data through the system;
2. the internal controls used to ensure accurate and reliable processing, and;
3. the internal controls used to prevent unauthorized addition, alteration, or deletion of retained records.

(C) The following specific documentation is required for ~~machine-sensible~~ electronic records retained pursuant to this regulation:

1. record formats or layouts;
2. field definitions (including the meaning of all codes used to represent information);
3. file descriptions (e.g., data set name); and
4. detailed charts of accounts and account descriptions.

(d) ~~MACHINE SENSIBLE~~ ELECTRONIC RECORDS MAINTENANCE REQUIREMENTS.

(1) The taxpayer's computer hardware or software shall accommodate the extraction and conversion of retained ~~machine-sensible~~ electronic records to a standard magnetic record format as provided in subdivision (c)(1)(B).

(2) The ~~h~~Board recommends but does not require that taxpayers refer to the National Archives and Record Administration's (NARA) standards for guidance on the maintenance and storage of

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

electronic records, such as the labeling of records, the location and security of the storage environment, the creation of back-up copies, and the use of periodic testing to confirm the continued integrity of the records.

(e) ACCESS TO ~~MACHINE-SENSIBLE~~ELECTRONIC RECORDS.

(1) The manner in which the ~~the~~ Board is provided access to ~~machine-sensible~~electronic records may be satisfied through a variety of means that shall take into account a taxpayer's facts and circumstances through consultation with the taxpayer.

(2) Such access will be provided in one or more of the following manners:

(A) The taxpayer may arrange to provide the ~~the~~ Board with the hardware, software, and personnel resources to access the ~~machine-sensible~~electronic records.

(B) The taxpayer may arrange for a third party to provide the hardware, software, and personnel resources necessary to access the ~~machine-sensible~~electronic records.

(C) The taxpayer may convert the ~~machine-sensible~~electronic records to a standard record format specified by the ~~the~~ Board, including copies of files, on a magnetic medium that is agreed to by the ~~the~~ Board.

(D) The taxpayer and the ~~the~~ Board may agree on other means of providing access to the ~~machine-sensible~~electronic records.

(f) TAXPAYER RESPONSIBILITY AND DISCRETIONARY AUTHORITY.

(1) In conjunction with meeting the requirements of subdivision (c), a taxpayer may create files solely for the use of the ~~the~~ Board. For example, if a data base management system is used, it is consistent with this regulation for the taxpayer to create and retain a file that contains the transaction-level detail from the data base management system and that meets the requirements of subdivision (c). The taxpayer should document the process that created the separate file to show the relationship between that file and the original records.

(2) A taxpayer may contract with a third party to provide custodial or management services of the records. Such a contract shall not relieve the taxpayer of its responsibilities under this regulation.

(g) HARDCOPY RECORDS.

(1) Except as specifically provided, taxpayers are not relieved of the responsibility to retain hardcopy records that are created or received in the ordinary course of business as required by

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

existing law and regulations. Hardcopy records may be retained on a record keeping medium as provided in subdivision (h).

(2) If hardcopy transaction level documents are not produced or received in the ordinary course of transacting business (e.g., when the taxpayer uses electronic data interchange technology), such hardcopy records need not be created.

(3) Hardcopy records generated at the time of a transaction using a credit or debit card must be retained unless all the details necessary to determine correct tax liability relating to the transaction are subsequently received and retained by the taxpayer in accordance with this regulation. Such details include those listed in subdivision (c)(2)(A).

(4) Computer printouts that are created for validation, control, or other temporary purposes need not be retained.

(h) ALTERNATIVE STORAGE MEDIA.

(1) For purposes of storage and retention, taxpayers may convert hardcopy documents received or produced in the normal course of business and required to be retained under this regulation to storage-only imaging media such as microfilm, microfiche, PDF files, or other media used in electronic imaging and may discard the original hardcopy documents, provided the conditions of subdivision (h) are met. Documents which may be stored on these media include, but are not limited to general books of account, journals, voucher registers, general and subsidiary ledgers, and supporting records of details, such as sales invoices, purchase invoices, exemption certificates, and credit memoranda.

(2) Storage-only imaging media such as microfilm, microfiche, PDF files, or other media used in electronic imaging systems shall meet the following requirements.

(A) Documentation establishing the procedures for converting the hardcopy documents to the storage-only imaging system must be maintained and made available on request. Such documentation shall, at a minimum, contain a sufficient description to allow an original document to be followed through the conversion system as well as internal procedures established for inspection and quality assurance.

(B) Procedures must be established for the effective identification, processing, storage, and preservation of the stored documents and for making them available for the period they are required to be retained under subdivision (i).

(C) Upon request by the ~~h~~Board, a taxpayer must provide facilities and equipment for reading, locating, and reproducing any documents maintained on storage-only imaging media.

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

(D) When displayed on such equipment or reproduced on paper, the documents must exhibit a high degree of legibility and readability. For this purpose, legibility is defined as the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. Readability is defined as the quality of a group of letters or numerals being recognizable as words or complete numbers.

(E) All data on storage-only imaging media must be maintained and arranged in a manner that permits the location of any particular record.

(F) There is no substantial evidence that the storage-only imaging medium lacks authenticity or integrity.

(i) **RECORD RETENTION—TIME PERIOD.** All records required to be retained under this regulation must be preserved for a period of not less than four years unless the State Board of Equalization authorizes in writing their destruction within a lesser period.

For example, if a taxpayer has a point of sale system that overwrites data after a period of time less than four years, the taxpayer should transfer, maintain, and have available, all data that would have been overwritten or otherwise removed from the system for the required time periods indicated above.

(j) RECORD RETENTION LIMITATION AGREEMENTS.

(1) The Board has the authority to enter into or revoke a record retention limitation agreement with the taxpayer to modify or waive any of the specific requirements in this regulation. A taxpayer's request for an agreement must specify which records (if any) the taxpayer proposes not to retain and provide the reasons for not retaining such records, as well as, proposing any other terms of the requested agreement. The taxpayer shall remain subject to all requirements of this regulation that are not modified, waived, or superseded by a duly approved record retention limitation agreement.

(A) If a taxpayer seeks to limit its retention of ~~machine-sensible~~ electronic records, the taxpayer may request a record retention limitation agreement, which shall;

1. document understandings reached with the Board, which may include, but is not limited to, any one or more of the following issues:
 - a. the conversion of files created on an obsolete computer system;
 - b. restoration of lost or damaged files and the actions to be taken;
 - c. use of taxpayer computer resources, and

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

2. specifically identify which of the taxpayer's records the ~~h~~Board determines are not necessary for retention and which the taxpayer may discard, and
3. authorize variances, if any, from the normal provisions of this regulation.

(B) The ~~h~~Board shall consider a taxpayer's request for a record retention limitation agreement and notify the taxpayer of the actions to be taken.

(C) The ~~h~~Board's decision to enter or not to enter into a record retention limitation agreement shall not relieve the taxpayer of the responsibility to keep adequate and complete records supporting entries shown on any tax or information return.

(2) A taxpayer's record retention practices shall be subject to evaluation by the ~~h~~Board when a record retention limitation agreement exists. The evaluation may include a review of the taxpayer's relevant data processing and accounting systems with respect to EDP systems, including systems using EDI technology.

(A) The ~~h~~Board shall notify the taxpayer of the results of any evaluation, including acceptance or disapproval of any proposals made by the taxpayer (e.g., to discard certain records) or any changes considered necessary to bring the taxpayer's practices into compliance with this regulation.

(B) Since the evaluation of a taxpayer's record retention practices is not directly related to the determination of tax reporting accuracy for a particular period or return, an evaluation made under this regulation is not an "examination of records" under the applicable tax law.

(C) Unless otherwise specified, an agreement shall not apply to accounting and tax systems added subsequent to the completion of the record evaluation. All ~~machine-sensible~~electronic records produced by a subsequently added accounting or tax system shall be retained by the taxpayer in accordance with this regulation until a new evaluation is conducted by the ~~h~~Board.

(D) Unless otherwise specified, an agreement made under this subdivision shall not apply to any person, company, corporation, or organization that, subsequent to the taxpayer's signing of a record retention limitation agreement, acquires or is acquired by the taxpayer. All ~~machine-sensible~~electronic records produced by the acquired or the acquiring person, company, corporation, or organization, shall be retained pursuant to this regulation

(3) In addition to the record retention evaluation under subdivision (j)(2), the ~~h~~Board may conduct tests to establish the authenticity, readability, completeness, and integrity of the ~~machine-sensible~~electronic records retained under a record retention limitation agreement. The state shall notify the taxpayer of the results of such tests. These tests may include the testing of

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

EDI and other procedures and a review of the internal controls and security procedures associated with the creation and storage of the records.

(k) FAILURE TO MAINTAIN RECORDS. Failure to maintain and keep complete and accurate records will be considered evidence of negligence or intent to evade the tax and may result in penalties or other appropriate administrative action.

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



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

1000 N STREET, SACRAMENTO, CALIFORNIA
P O BOX 942879, SACRAMENTO, CALIFORNIA 94279-0092
1-916-324-1825 • FAX 1-916-322-4530
www.boe.ca.gov

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

FIONA MA, CPA
Second District, San Francisco

JEROME E. HORTON
Third District, Los Angeles County

DIANE L. HARKEY
Fourth District, Orange County

BETTY T. YEE
State Controller

CYNTHIA BRIDGES
Executive Director

October 16, 2015

Dear Interested Party:

Enclosed are the Agenda, Issue Paper, and Revenue Estimate for proposed amendments to Regulation 1668, *Sales for Resale*, which will be presented at the Board's October 27, 2015 Business Taxes Committee meeting. The proposed amendments interpret, clarify and make specific the recent legislation regarding persons convicted of selling or purchasing counterfeit goods.

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

Thank you for your input on these issues and I look forward to seeing you at the Business Taxes Committee meeting at **10:00 a.m.** on **October 27, 2015** in Room 121 at the address shown above.

Sincerely,

Susanne Buehler, Chief
Tax Policy Division
Sale and Use Tax Department

SB:map

Enclosures

cc: (all with enclosures, via email and/or hardcopy as requested)

Honorable Jerome E. Horton, Chairman, Third District
Senator George Runner (Ret.), Vice Chair, First District
Honorable Fiona Ma, CPA, Member, Second District
Honorable Diane L. Harkey, Member, Fourth District
Honorable Betty T. Yee, State Controller, c/o Ms. Yvette Stowers (MIC 73)

Ms. Kari Hammond, Board Member's Office, Third District
Ms. Shellie Hughes, Board Member's Office, Third District
Mr. Sean Wallentine, Board Member's Office, First District
Mr. Lee Williams, Board Member's Office, First District
Mr. Brian Wiggins, Board Member's Office, First District
Mr. Cary Huxsoll, Board Member's Office, First District
Mr. Alfred Buck, Board Member's Office, First District
Mr. Jim Kuhl, Board Member's Office, Second District
Ms. Kathryn Asprey, Board Member's Office, Second District
Mr. John Vigna, Board Member's Office, Second District
Mr. Tim Morland, Board Member's Office, Second District
Ms. Lizette Mata, Board Member's Office, Second District
Mr. Russell Lowery, Board Member's Office, Fourth District
Mr. Ted Matthies, Board Member's Office, Fourth District
Ms. Lisa Renati, Board Member's Office, Fourth District
Mr. Clifford Oakes, Board Member's Office, Fourth District
Ms. Lynne Kinst, Board Member's Office, Fourth District
Mr. Ramon Salazar, State Controller's Office (MIC 73)
Ms. Cynthia Bridges (MIC 73)
Mr. Randy Ferris (MIC 83)
Mr. David Gau (MIC 101)
Ms. Lynn Bartolo (MIC 43)
Mr. Todd Gilman (MIC 70)
Mr. Wayne Mashihara (MIC 47)
Mr. Kevin Hanks (MIC 49)
Mr. Mark Durham (MIC 67)
Mr. Robert Tucker (MIC 82)
Mr. Jeff Vest (MIC 85)
Mr. Jeff Angeja (MIC 85)
Mr. David Levine (MIC 85)
Mr. Bradley Heller (MIC 82)
Mr. Lawrence Mendel (MIC 82)
Mr. John Thiella (MIC 73)
Ms. Pam Mash (MIC 82)
Ms. Kirsten Stark (MIC 50)
Mr. Marc Alviso (MIC 101)
Mr. Chris Lee (MIC 101)
Ms. Laureen Simpson (MIC 70)
Ms. Karina Magana (MIC 47)
Mr. Bradley Miller (MIC 92)
Mr. Bill Benson (MIC 67)
Mr. Joe Fitz (MIC 67)
Mr. Robert Wilke (MIC 50)
Mr. Michael Patno (MIC 50)

Agenda – October 27, 2015 Business Taxes Committee Meeting
Regulation 1668, Sales for Resale

<p>Action 1 – Agreed Upon Items</p> <p>Agenda, pages 2 - 9.</p>	<p>Alternative 1</p> <p>Approve and authorize publication of proposed amendments to Regulation 1668.</p> <p style="text-align: center;">OR</p> <p>Alternative 2</p> <p>Do not approve the proposed amendments to Regulation 1668.</p>
--	---

**Agenda – October 27, 2015 Business Taxes Committee Meeting
Regulation 1668, Sales for Resale**

Action Item	Staff and Industry's Proposed Regulatory Language
<p>Action 1 – Staff Recommendation</p>	<p>§ 1668. Sales for Resale.</p> <p>Note: Authority cited: Section 7051, Revenue and Taxation Code.</p> <p>Reference: Sections <u>6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485 and 7153</u>, Revenue and Taxation Code.</p> <p>(a) Resale Certificate.</p> <p>The burden of proving that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. If timely taken in proper form as set forth in subdivision (b) and in good faith from a person who is engaged in the business of selling tangible personal property and who holds a California seller's permit as required by Regulation 1699, "PermitsPermits," the certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser. A resale certificate remains in effect until revoked in writing.</p> <p>(b) Form of Certificate.</p> <p>(1) Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a resale certificate with respect to the sale of the property described in the document if it contains all of the following essential elements:</p> <p>(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.</p> <p>(B) The name and address of the purchaser.</p> <p>(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g.,</p>

**Agenda – October 27, 2015 Business Taxes Committee Meeting
Regulation 1668, Sales for Resale**

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>food products for human consumption, or because the purchaser makes no sales in this stateState, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.</p> <p>(D) A statement that the property described in the document is purchased for resale. The document must contain the phrase "for resale." The use of phrases such as "nontaxable," "exempt," or similar terminology is not acceptable. The property to be purchased under the certificate must be described either by an itemized list of the particular property to be purchased for resale, or by a general description of the kind of property to be purchased for resale.</p> <p>(E) Date of execution of document. (An otherwise valid resale certificate will not be considered invalid solely on the ground that it is undated.)</p> <p>(2) A document containing the essential elements described in subdivision (b)(1) is the minimum form which will be regarded as a resale certificate. However, in order to preclude potential controversy, the seller should timely obtain from the purchaser a certificate substantially in the form shown in Appendix A of this regulation. If a purchaser operates an auto body repair and/or paint business, a specific resale certificate in substantially the same form as shown in Appendix B of this regulation should be used, rather than the general resale certificate shown in Appendix A.</p> <p>(3) Blanket Resale Certificate. If a purchaser issues a general (blanket) resale certificate which provides a general description of the items to be purchased, and subsequently issues a purchase order which indicates that the transaction covered by the purchase order is taxable, the resale certificate does not apply with respect to that transaction. However, the purchaser will bear the burden of establishing either that the purchase order was sent to and received by the seller within the seller's billing cycle or prior to delivery of the property to the purchaser (whichever is the later), or that the tax or tax reimbursement was paid to the seller. The purchaser may avoid this burden by using the procedures described in subdivision (b)-(4) below.</p> <p>(4) Qualified Resale Certificate. If a purchaser wishes to designate on each purchase order whether the property being purchased is for resale, the seller should obtain a qualified resale certificate, i.e., one that states "see purchase order" in the space provided for a description of the property to be purchased. Each purchase order must then specify whether or not the property covered by the order is purchased</p>

**Agenda – October 27, 2015 Business Taxes Committee Meeting
Regulation 1668, Sales for Resale**

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>for resale. The use of the phrases “for resale,” “resale = yes,” “nontaxable,” “taxable = no,” or similar terminology on a purchase order, indicating that tax or tax reimbursement should not be added to the sales invoice will be regarded as designating that the property described is purchased for resale provided the combination of the purchase order and the qualified resale certificate contains all the essential elements provided in subdivision (b)(1). However, a purchase order where the applicable amount of tax is shown as \$0 or is left blank will not be accepted as designating that the property is purchased for resale, unless the purchase order also includes the phrase “for resale” or other terminology described above to specify that the property is purchased for resale. If each purchase order does not so specify, or is not issued timely within the meaning of subdivision (a), it will be presumed that the property covered by that purchase order was not purchased for resale and that sale or purchase is subject to tax. If the purchase order includes both items to be resold and items to be used, the purchase order must specify which items are purchased for resale and which items are purchased for use. For example, a purchase order issued for raw materials for resale and also for tooling used to process the raw materials should specify that the raw materials are purchased for resale and that the sale of the tooling is subject to tax.</p> <p>The seller shall retain copies of the purchase orders along with the qualified resale certificates in order to support the sales for resale.</p> <p>(5) If the seller does not timely obtain a resale certificate, the fact that the purchaser deletes the tax or tax reimbursement from the seller's billing, provides a seller's permit number to the seller, or informs the seller that the transaction is “not taxable” does not relieve the seller from liability for the tax nor from the burden of proving the sale was for resale.</p> <p>(c) Good Faith. In absence of evidence to the contrary, a seller will be presumed to have taken a resale certificate in good faith if the resale certificate contains the essential elements as described in subdivision (b)(1) and otherwise appears to be valid on its face. If the purchaser insists that the purchaser is buying for resale property of a kind not normally resold in the purchaser's business, the seller should require a resale certificate containing a statement that the specific property is being purchased for resale in the regular course of business.</p> <p>(d) Improper Use of Certificate. Except when a resale certificate is issued in accordance with subdivisions (h), or (i) or (j):</p>

**Agenda – October 27, 2015 Business Taxes Committee Meeting
Regulation 1668, Sales for Resale**

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>(1) A purchaser, including any officer or employee of a corporation, is guilty of a misdemeanor punishable as provided in section 7153 if the purchaser, for the purpose of evading payment to the seller of tax or tax reimbursement, gives a resale certificate for property which the purchaser knows at the time of purchase will be used rather than resold.</p> <p>(2) Any person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate. In addition to the tax, the person shall be liable to the state for a penalty of 10 percent of the tax or five hundred dollars (\$500), whichever is greater, for each purchase made for personal gain or to evade the payment of taxes, as provided in sections 6072 and 6094.5.</p> <p>(3) In addition to the penalty of 10 percent or five hundred dollars (\$500), whichever is greater, if the person fails to report and pay the use tax due on the use of the property purchased improperly with a resale certificate, the person may be liable for the 10 percent penalty for negligence or the 25 percent penalty for fraud, as provided in sections 6484 and 6485.</p> <p>(e) Other Evidence to Rebut Presumption of Taxability. A sale for resale is not subject to sales tax. A person who purchases property for resale and who subsequently uses the property owes tax on that use. A resale certificate which is not timely taken is not retroactive and will not relieve the seller of the liability for the tax. Consequently, if the seller does not timely obtain a resale certificate containing the essential elements as described in subdivision (b)(1), the seller will be relieved of liability for the tax only where the seller shows that the property:</p> <p>(1) Was in fact resold by the purchaser and was not used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business, or</p> <p>(2) Is being held for resale by the purchaser and has not been used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business, or</p> <p>(3) Was consumed by the purchaser and tax was reported directly to the Board by the purchaser on the purchaser's sales and use tax return, or</p>

**Agenda – October 27, 2015 Business Taxes Committee Meeting
Regulation 1668, Sales for Resale**

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>(4) Was consumed by the purchaser and tax was paid to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.</p> <p>(f) Use of XYZ Letters. A seller who does not timely obtain a resale certificate may use any verifiable method of establishing that it should be relieved of liability for tax under subdivision (e). One method that the Board authorizes to assist a seller in satisfying its burden that the sale was for resale or that tax was paid, is the use of "XYZ letters." XYZ letters are letters in a form approved by the Board which are sent to some or all of the seller's purchasers inquiring as to the purchaser's disposition of the property purchased from the seller. An XYZ letter will include certain information and request responses to certain questions, set forth below. The XYZ letter may also be further customized by agreement between the Board's staff and the seller to reflect the seller's particular circumstances.</p> <p>(1) An XYZ letter may include the following information: seller's name and permit number, date of invoice(s), invoice number(s), purchase order number(s), amount of purchase(s), and a description of the property purchased or other identifying information. A copy of the actual invoice(s) may be attached to the XYZ letter. The XYZ letter will request the purchaser to complete the statement and include the purchaser's name, seller's permit number and nature of the purchaser's business. The statement shall be signed by the purchaser, purchaser's employee or authorized representative, and include the printed name of <u>the</u> person signing the certificate, title, date, telephone number and city.</p> <p>(2) An XYZ letter will request that the purchaser, purchaser's employee or authorized representative check one of the boxes provided inquiring as to whether the property in question was:</p> <p>(A) Purchased for resale and resold in the form of tangible personal property, without any use other than retention, demonstration, or display while being held for sale in the regular course of business;</p> <p>(B) Purchased for resale and presently in resale inventory, without having been used for any purpose other than retention, demonstration, or display while being held for sale in the regular course of business;</p> <p>(C) Purchased solely for leasing and was so leased. Tax has been paid directly to the Board measured by the purchase price or rental receipts (-"tangible personal property"); or tax has been paid measured by the purchase price or fair rental value (-"mobile transportation equipment").</p> <p>(D) Purchased for resale but consumed or used (whether or not subsequently resold); or</p>

**Agenda – October 27, 2015 Business Taxes Committee Meeting
Regulation 1668, Sales for Resale**

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>(E) Purchased for use.</p> <p>(F) When the purchaser answers either (D) or (E) affirmatively (box checked), the XYZ letter will inquire further whether:</p> <ol style="list-style-type: none"> 1. The tax was paid directly to the Board on the purchaser's Sales and Use Tax Return, and if so, in what amount; 2. The tax was added to the billing of the seller and remitted to the seller, and if so, in what amount; 3. The tax was paid directly to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis; 4. The purchaser confirms that the purchase is a taxable transaction and that tax is applicable. <p>(3) A response to an XYZ letter is not equivalent to a timely and valid resale certificate. A purchaser responding affirmatively to questions reflected in paragraphs (A), (B), (C), or (D) of subdivision (f)(2) will be regarded as confirming the seller's belief that a sale was for resale for purposes of subdivision (g). However, the Board is not required to relieve a seller from liability for sales tax or use tax collection based on a response to an XYZ letter. The Board may, in its discretion, {verify the information provided in the response to the XYZ letter,} including making additional contact with the purchaser or other persons to determine whether the purchase was for resale or for use {or whether tax was paid by the purchaser.} When the Board accepts the purchaser's response to an XYZ letter as a valid response, the Board shall relieve the seller of liability for sales tax or use tax collection.</p> <p>(4) When there is no response to an XYZ letter, the Board staff should consider whether it is appropriate to use an alternative method to ascertain whether the seller should be relieved of tax under subdivision (e) with respect to the questioned or unsupported transaction(s).</p> <p>(g) Purchaser's Liability for Tax. A purchaser who issues a resale certificate containing the essential elements as described in subdivision (b)(1) and that otherwise appears valid on its face, or who otherwise purchases tangible personal property that is accepted by the Board as purchased for resale pursuant to subdivision (f) and who thereafter makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business is liable for use tax on the cost of the property. The tax is due at the time the property is first stored or used and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the</p>

**Agenda – October 27, 2015 Business Taxes Committee Meeting
Regulation 1668, Sales for Resale**

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>property is first so stored or used. A purchaser cannot retroactively rescind or revoke a resale certificate and thereby cause the transaction to be subject to sales tax rather than use tax.</p> <p>A purchaser who issues a resale certificate for property which the purchaser knows at the time of purchase is not to be resold in the regular course of business is liable for the sales tax on that purchase measured by the gross receipts from the sale to that purchaser. The tax is due as of the time the property was sold to the purchaser and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property was sold to the purchaser.</p> <p>(h) Mobilehomes. A mobilehome retailer who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to Section<u>section</u> 18551 of the Health and Safety Code, or for installation for occupancy as a residence pursuant to Section<u>section</u> 18613 of the Health and Safety Code, and which mobilehome is thereafter subject to property taxation, may issue a resale certificate to the mobilehome vendor even though the retailer is classified as a consumer of the mobilehome by Sections<u>sections</u> 6012.8 and 6012.9 of the Revenue and Taxation Code. Also, effective September 19, 1985, a mobilehome retailer, licensed as a mobilehome dealer under Section<u>section</u> 18002.6 of the Health and Safety Code, who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to Section<u>section</u> 18551 of the Health and Safety Code, may issue a resale certificate to the mobilehome vendor even though the mobilehome retailer may have the mobilehome installed on a foundation system as an improvement to realty prior to the retailer's sale of the mobilehome to the customer for occupancy as a residence.</p> <p>Where the mobilehome is acquired by a mobilehome retailer, who is not licensed as a dealer pursuant to Section<u>section</u> 18002.6 of the Health and Safety Code, for affixation by the retailer to a permanent foundation, or for other use or consumption (except demonstration or display while holding for sale in the regular course of business), prior to sale, the mobilehome retailer may not issue a resale certificate. The mobilehome retailer shall notify the vendor that the purchase is for consumption and not for resale. When a mobilehome manufacturer or other vendor is informed or has knowledge that the purchaser will install the mobilehome on a permanent foundation prior to its resale, the manufacturer or other vendor is not making a sale for resale. Such vendor is making a taxable retail sale and cannot accept a resale certificate in good faith.</p>

**Agenda – October 27, 2015 Business Taxes Committee Meeting
Regulation 1668, Sales for Resale**

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>(i) Mobile Transportation Equipment. Any person, other than a person exempt from use tax, such as under Revenue and Taxation Code section 6352, who purchases mobile transportation equipment for the sole purpose of leasing that equipment, may issue a resale certificate for the limited purpose of reporting use tax based on fair rental value as provided in Regulation 1661.</p> <p><u>(j) Counterfeit Goods. A sale of tangible personal property with a counterfeit mark on, or in connection with, that sale by a convicted seller is included in the definition of “retail sale” per Revenue and Taxation Code section 6007, and therefore taxable. “Storage” and “use” as defined in Revenue and Taxation Code section 6009.2, includes any purchase of tangible personal property with a counterfeit mark on, or in connection with, that purchase by a convicted purchaser and is subject to tax. This is regardless of whether the counterfeit goods were sold for resale or held with the intent to be resold. A “counterfeit mark” is a spurious mark that is used in a manner described in section 2320 of Title 18 of the United States Code.</u></p>

Issue Paper Number 15-008



BOARD OF EQUALIZATION
KEY AGENCY ISSUE

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

Regulation 1668, *Sales for Resale*

I. Issue

Whether the Board should amend Regulation 1668, *Sales for Resale*, to interpret, clarify and make specific the recent legislation regarding persons convicted of selling or purchasing counterfeit goods.

II. Alternative 1 - Staff Recommendation

Staff recommends approval and authorization to publish the proposed amendments to Regulation 1668, as set forth in Exhibit 2, to clarify Revenue and Taxation Code (RTC) §6009.2 and amended RTC §6007.

III. Alternative 2

Do not approve the proposed amendments to Regulation 1668.

Issue Paper Number 15-008

IV. Background

Assembly Bill (AB) 2681 (Stats. 2014, Ch. 477), establishes that any sale by a convicted seller or purchase by a convicted purchaser of counterfeit goods is subject to tax. This paper provides a general overview of the new legislation and includes staff's recommended regulatory language for proposed rulemaking.

General

The RTC provides that sales tax is imposed on the gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. The sales tax is imposed upon the retailer for the privilege of selling tangible personal property at retail in California. When sales tax does not apply, use tax is imposed on the storage, use, or other consumption of tangible personal property purchased from a retailer unless specifically exempted or excluded by statute. The obligation to pay the use tax is on the consumer.

RTC §6007 defines the terms "retail sale" or "sale at retail" to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. RTC §6008 and §6009 define "storage" and "use," respectively. "Storage" includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. "Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

Regulation 1668, Sales for Resale

A seller can overcome the presumption of taxability by timely taking a resale certificate in good faith from a purchaser as provided in Regulation 1668. A resale certificate, if taken timely and in good faith, will relieve the seller of the liability for the sales tax. A seller is presumed to have taken a resale certificate in good faith in the absence of evidence to the contrary. Regulation 1668 also provides that the seller should obtain a resale certificate in substantially the same form as that provided in Regulation 1668.

Assembly Bill 2681

Effective September 19, 2014, AB 2681 amended RTC §6007 and enacted RTC §6009.2. The statutory changes took effect immediately as AB 2681 was passed as a tax levy. It adds to the definition of "retail sale" any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business. Similarly, the bill adds to the definition of "storage" and "use" any purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale. Therefore, sales and purchases of counterfeit goods by a convicted person are subject to tax, including claimed resale transactions.

V. Discussion

Staff drafted proposed revisions to Regulation 1668 to clarify the changes that AB 2681 enacted. One interested parties meeting was held to discuss the proposed regulatory amendments. At the meeting, staff's recommendations were well received and no submissions from interested parties with alternative language were received.

Sales and Purchases Involving Counterfeit Goods

Prior to the passage of AB 2681, a person found guilty of selling counterfeit merchandise would be able to claim qualified transactions as sales for resale for sales and use tax purposes. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could claim the products were purchased for resale and thus not subject to sales or use tax.

AB 2681 makes a sale or purchase of counterfeit goods by a convicted seller or purchaser subject to tax. The transactions are taxable regardless of whether the sale or purchase was for resale. In addition, it does not matter if the person convicted is the manufacturer, wholesaler, distributor, or retailer of the counterfeit goods. A “convicted seller” or “convicted purchaser” is a person convicted of a violation under §2320 of Title 18 of United States Code (USC) or under §350 or §653w of the Penal Code. The term “counterfeit mark” is used for both state and federal convictions when defining a convicted seller or purchaser. AB 2681 states a counterfeit mark has the same meaning as found in §2320 of Title 18 of the USC.

Staff proposes to add a new subdivision (j), *Counterfeit Goods*, to Regulation 1668. The language will clarify that convicted sellers are no longer able to claim their sales of counterfeit goods as nontaxable sales for resale. It also states that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax. (See Exhibit 2).

Improper Use of a Resale Certificate

Regulation 1668 imposes a penalty of ten percent or five hundred dollars, whichever is greater, for each misuse of a resale certificate by a person who, at the time it is issued, knows the inventory will not be resold in the regular course of business. Staff considered whether this penalty could apply in instances where a seller provided a resale certificate for purchases of counterfeit inventory and was subsequently convicted of purchasing counterfeit goods. It was determined that this penalty is duplicative of the penalty imposed by AB 2681 (i.e., the disallowance of a resale exemption) and would not apply. Therefore, staff has inserted a reference to counterfeit goods in subdivision (d), *Improper Use of Certificate*, that provides an exception from the penalties described in that part of the regulation. The proposed reference is in keeping with the existing exceptions for mobilehomes and mobile transportation equipment which are referenced in subdivisions (h) and (i), respectively.

VI. Alternative 1 - Staff Recommendation

A. Description of Alternative 1

Staff recommends approval and authorization to publish the proposed amendments to Regulation 1668, as set forth in Exhibit 2, to clarify RTC §6009.2 and amended RTC §6007.

B. Pros of Alternative 1

The proposed language is concise and leaves no room for ambiguity by stating sales or purchases of counterfeit goods by a convicted seller or purchaser are subject to tax regardless if their intentions were to resell them. In addition, the proposed revisions clarify that convicted sellers or purchasers will not be assessed penalties related to resale misuse involving the counterfeit goods on which their convictions were based.

C. Cons of Alternative 1

None.

D. Statutory or Regulatory Change for Alternative 1

Staff's recommendation requires a regulatory change. No statutory change is required.

E. Operational Impact of Alternative 1

Staff will publish the proposed amendments to Regulation 1668 and thereby begin the formal rulemaking process.

F. Administrative Impact of Alternative 1

1. Cost Impact

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

2. Revenue Impact

None. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact of Alternative 1

Convicted sellers and purchasers can no longer claim a sale or purchase of a counterfeit good as a resale transaction and their counterfeit inventory sold or purchased would now be subject to tax. Staff advised taxpayers of the change of the law by publishing a Special Notice and articles in the Tax Information Bulletin and the News for Tax Practitioners.

H. Critical Time Frames of Alternative 1

The provisions enacted by AB 2681 became operative upon its passage and approval by the governor. Staff anticipates the Office of Administrative Law will complete its review and approval of the regulation revisions by April 2016.

VII. Alternative 2

A. Description of Alternative 2

Do not approve the revisions to Regulation 1668.

B. Pros of Alternative 2

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

C. Cons of Alternative 2

There will be no specific guidance available to the public indicating that sales of counterfeit goods resold or the counterfeit inventory of a convicted seller or purchaser are taxable. In addition, there will be no clarification that additional penalties for misuse of a resale certificate involving counterfeit goods are not to be assessed.

D. Statutory or Regulatory Change for Alternative 2

None.

E. Operational Impact of Alternative 2

None.

F. Administrative Impact of Alternative 2

1. Cost Impact

None.

2. Revenue Impact

None. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact of Alternative 2

Without the proposed regulation revisions, there would be no clarification of AB 2681 and the fact that all counterfeit sales and inventory of convicted sellers and purchasers are now subject to tax.

H. Critical Time Frames of Alternative 2

None.

Preparer/Reviewer Information

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

Current as of: October 15, 2015

REVENUE ESTIMATE

STATE OF CALIFORNIA
BOARD OF EQUALIZATIONBOARD OF EQUALIZATION
REVENUE ESTIMATE

Proposed Amendments to Regulation 1668, *Sales for Resale*

I. Issue

Whether the Board should amend Regulation 1668, *Sales for Resale*, to interpret, clarify and make specific the recent legislation regarding persons convicted of selling or purchasing counterfeit goods.

The passage of AB 2681 on September 19, 2014, amends Revenue and Taxation Code (RTC) §6007 and creates §6009.2. It adds to the definition of “retail sale” any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business. Similarly, the bill adds to the definition of “storage” and “use” any purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale. Therefore, sales and purchases of counterfeit goods by a convicted person are subject to tax, including claimed resale transactions.

II. Alternative 1 - Staff Recommendation

Staff recommends approval and authorization to publish the proposed amendments to Regulation 1668, as set forth in Exhibit 2, to clarify Revenue and Taxation Code (RTC) §6009.2 and amended RTC §6007.

III. Other Alternative(s) Considered

Do not approve the proposed amendments to Regulation 1668.

Background, Methodology, and Assumptions

Alternative 1 – Staff Recommendation

There is nothing in the staff recommendation that would impact revenue. The proposed amendments clarify existing law by stating sales or purchases of counterfeit goods by a convicted seller or purchaser are subject to tax regardless if their intentions were to resell them.

Other Alternatives Considered

There is nothing in Alternative 2 that would impact revenue. However, there would be no specific guidance available to the public indicating that sales of counterfeit goods resold or the counterfeit inventory of a convicted seller or purchaser are taxable.

Revenue Summary

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

Other alternatives considered – alternative 2 does not have a revenue impact.

Preparation

Mr. Joe Fitz, Research and Statistics Section, Legislative and Research Division, prepared this revenue estimate. This estimate has been reviewed by Mr. Mark Durham, Manager, Research and Statistics Section, Legislative and Research Division, and by Ms. Susanne Buehler, Chief, Tax Policy Division, Sales and Use Tax Department. For additional information, please contact Mr. Fitz at (916) 445-0840.

Current as of October 15, 2015.

§ 1668. Sales for Resale.

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

Reference: Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485 and 7153, Revenue and Taxation Code.

(a) Resale Certificate.

The burden of proving that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. If timely taken in proper form as set forth in subdivision (b) and in good faith from a person who is engaged in the business of selling tangible personal property and who holds a California seller's permit as required by Regulation 1699, "~~Permits~~Permits," the certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser. A resale certificate remains in effect until revoked in writing.

(b) Form of Certificate.

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

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name and address of the purchaser.

(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this ~~State~~state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement that the property described in the document is purchased for resale. The document must contain the phrase "for resale." The use of phrases such as "nontaxable," "exempt," or similar terminology is not acceptable. The property to be purchased under the certificate must be described either by an itemized list of the particular property to be purchased for resale, or by a general description of the kind of property to be purchased for resale.

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

(2) A document containing the essential elements described in subdivision (b)(1) is the minimum form which will be regarded as a resale certificate. However, in order to preclude potential controversy, the seller should timely obtain from the purchaser a certificate substantially in the form shown in Appendix A of this regulation. If a purchaser operates an auto body repair and/or paint business, a specific resale certificate in substantially the same form as shown in Appendix B of this regulation should be used, rather than the general resale certificate shown in Appendix A.

(3) Blanket Resale Certificate. If a purchaser issues a general (blanket) resale certificate which provides a general description of the items to be purchased, and subsequently issues a purchase order which indicates that the transaction covered by the purchase order is taxable, the resale certificate does not apply with respect to that transaction. However, the purchaser will bear the burden of establishing either that the purchase order was sent to and received by the seller within the seller's billing cycle or prior to delivery of the property to the purchaser (whichever is the later), or that the tax or tax reimbursement was paid to the seller. The purchaser may avoid this burden by using the procedures described in subdivision (b)-(4) below.

(4) Qualified Resale Certificate. If a purchaser wishes to designate on each purchase order whether the property being purchased is for resale, the seller should obtain a qualified resale certificate, i.e., one that states "see purchase order" in the space provided for a description of the property to be purchased. Each purchase order must then specify whether or not the property covered by the order is purchased for resale. The use of the phrases "for resale," "resale = yes," "nontaxable," "taxable = no," or similar terminology on a purchase order, indicating that tax or tax reimbursement should not be added to the sales invoice will be regarded as designating that the property described is purchased for resale provided the combination of the purchase order and the qualified resale certificate contains all the essential elements provided in subdivision (b)(1). However, a purchase order where the applicable amount of tax is shown as \$0 or is left blank will not be accepted as designating that the property is purchased for resale, unless the purchase order also includes the phrase "for resale" or other terminology described above to specify that the property is purchased for resale. If each purchase order does not so specify, or is not issued timely within the meaning of subdivision (a), it will be presumed that the property covered by that purchase order was not purchased for resale and that sale or purchase is subject to tax. If the purchase order includes both items to be resold and items to be used, the purchase order must specify which items are purchased for resale and which items are purchased for use. For example, a purchase order issued for raw materials for resale and also for tooling used to process the raw materials should specify that the raw materials are purchased for resale and that the sale of the tooling is subject to tax.

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

(5) If the seller does not timely obtain a resale certificate, the fact that the purchaser deletes the tax or tax reimbursement from the seller's billing, provides a seller's permit number to the seller, or informs the seller that the transaction is "not taxable" does not relieve the seller from liability for the tax nor from the burden of proving the sale was for resale.

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

(d) Improper Use of Certificate. Except when a resale certificate is issued in accordance with subdivisions (h), ~~or~~ (i) or (j):

(1) A purchaser, including any officer or employee of a corporation, is guilty of a misdemeanor punishable as provided in section 7153 if the purchaser, for the purpose of evading payment to the seller of tax or tax reimbursement, gives a resale certificate for property which the purchaser knows at the time of purchase will be used rather than resold.

(2) Any person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate. In addition to the tax, the person shall be liable to the state for a penalty of 10 percent of the tax or five hundred dollars (\$500), whichever is greater, for each purchase made for personal gain or to evade the payment of taxes, as provided in sections 6072 and 6094.5.

(3) In addition to the penalty of 10 percent or five hundred dollars (\$500), whichever is greater, if the person fails to report and pay the use tax due on the use of the property purchased improperly with a resale certificate, the person may be liable for the 10 percent penalty for negligence or the 25 percent penalty for fraud, as provided in sections 6484 and 6485.

(e) Other Evidence to Rebut Presumption of Taxability. A sale for resale is not subject to sales tax. A person who purchases property for resale and who subsequently uses the property owes tax on that use. A resale certificate which is not timely taken is not retroactive and will not relieve the seller of the liability for the tax. Consequently, if the seller does not timely obtain a resale certificate containing the essential elements as described in subdivision (b)(1), the seller will be relieved of liability for the tax only where the seller shows that the property:

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

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

(3) Was consumed by the purchaser and tax was reported directly to the Board by the purchaser on the purchaser's sales and use tax return, or

(4) Was consumed by the purchaser and tax was paid to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.

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

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

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

(A) Purchased for resale and resold in the form of tangible personal property, without any use other than retention, demonstration, or display while being held for sale in the regular course of business;

(B) Purchased for resale and presently in resale inventory, without having been used for any purpose other than retention, demonstration, or display while being held for sale in the regular course of business;

(C) Purchased solely for leasing and was so leased. Tax has been paid directly to the Board measured by the purchase price or rental receipts (“tangible personal property”); or tax has been paid measured by the purchase price or fair rental value (“mobile transportation equipment”).

(D) Purchased for resale but consumed or used (whether or not subsequently resold); or

(E) Purchased for use.

(F) When the purchaser answers either (D) or (E) affirmatively (box checked), the XYZ letter will inquire further whether:

1. The tax was paid directly to the Board on the purchaser's Sales and Use Tax Return, and if so, in what amount;
2. The tax was added to the billing of the seller and remitted to the seller, and if so, in what amount;
3. The tax was paid directly to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis;
4. The purchaser confirms that the purchase is a taxable transaction and that tax is applicable.

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

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

(g) Purchaser's Liability for Tax. A purchaser who issues a resale certificate containing the essential elements as described in subdivision (b)(1) and that otherwise appears valid on its face, or who otherwise purchases tangible personal property that is accepted by the Board as purchased for resale pursuant to subdivision (f) and who thereafter makes any storage or use of

the property other than retention, demonstration, or display while holding it for sale in the regular course of business is liable for use tax on the cost of the property. The tax is due at the time the property is first stored or used and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property is first so stored or used. A purchaser cannot retroactively rescind or revoke a resale certificate and thereby cause the transaction to be subject to sales tax rather than use tax.

A purchaser who issues a resale certificate for property which the purchaser knows at the time of purchase is not to be resold in the regular course of business is liable for the sales tax on that purchase measured by the gross receipts from the sale to that purchaser. The tax is due as of the time the property was sold to the purchaser and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property was sold to the purchaser.

(h) Mobilehomes. A mobilehome retailer who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, or for installation for occupancy as a residence pursuant to ~~Section~~section 18613 of the Health and Safety Code, and which mobilehome is thereafter subject to property taxation, may issue a resale certificate to the mobilehome vendor even though the retailer is classified as a consumer of the mobilehome by ~~Sections~~sections 6012.8 and 6012.9 of the Revenue and Taxation Code. Also, ~~effective September 19, 1985,~~ a mobilehome retailer, licensed as a mobilehome dealer under ~~Section~~section 18002.6 of the Health and Safety Code, who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, may issue a resale certificate to the mobilehome vendor even though the mobilehome retailer may have the mobilehome installed on a foundation system as an improvement to realty prior to the retailer's sale of the mobilehome to the customer for occupancy as a residence.

Where the mobilehome is acquired by a mobilehome retailer, who is not licensed as a dealer pursuant to ~~Section~~section 18002.6 of the Health and Safety Code, for affixation by the retailer to a permanent foundation, or for other use or consumption (except demonstration or display while holding for sale in the regular course of business), prior to sale, the mobilehome retailer may not issue a resale certificate. The mobilehome retailer shall notify the vendor that the purchase is for consumption and not for resale. When a mobilehome manufacturer or other vendor is informed or has knowledge that the purchaser will install the mobilehome on a permanent foundation prior to its resale, the manufacturer or other vendor is not making a sale for resale. Such vendor is making a taxable retail sale and cannot accept a resale certificate in good faith.

(i) Mobile Transportation Equipment. Any person, other than a person exempt from use tax, such as under Revenue and Taxation Code section 6352, who purchases mobile transportation

equipment for the sole purpose of leasing that equipment, may issue a resale certificate for the limited purpose of reporting use tax based on fair rental value as provided in Regulation 1661.

(j) Counterfeit Goods. A sale of tangible personal property with a counterfeit mark on, or in connection with, that sale by a convicted seller is included in the definition of “retail sale” per Revenue and Taxation Code section 6007, and therefore taxable. “Storage” and “use” as defined in Revenue and Taxation Code section 6009.2, includes any purchase of tangible personal property with a counterfeit mark on, or in connection with, that purchase by a convicted purchaser and is subject to tax. This is regardless of whether the counterfeit goods were sold for resale or held with the intent to be resold. A “counterfeit mark” is a spurious mark that is used in a manner described in section 2320 of Title 18 of the United States Code.

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

450 N STREET
SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT

OCTOBER 27, 2015

BUSINESS TAXES COMMITTEE

REPORTED BY: Kathleen Skidgel

CSR NO. 9039

1 P R E S E N T

2
3 P R E S E N T

4
5 For the Board
of Equalization:

Diane L. Harkey
Chair

7 Jerome E. Horton
Member

8
9 Sen. George Runner (Ret.)
Member

10 Fiona Ma, CPA
Member

11 Yvette Stowers
12 Appearing for Betty T.
13 Yee, State Controller
(per Government Code
Section 7.9)

14
15 Joann Richmond
16 Chief
Board Proceedings
Division

17
18 For the Department:

Susanne Buehler
Chief
Tax Policy Division
Sales and Use Tax
Department

21 Pamela Mash
22 Tax Counsel
Legal Department

23 ---oOo---

1 450 N STREET
2 SACRAMENTO, CALIFORNIA
3 OCTOBER 27, 2015

4 ---oOo---

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

7 MS. RICHMOND: Good morning, Mr. Chairman
8 and Members. Our first item on this morning's
9 agenda is the Business Taxes Committee. Ms. Harkey
10 is the Chair of that committee.

11 Ms. Harkey.

12 MS. HARKEY: Woops. Thank you.

13 Our first item -- I believe we have two.
14 Excuse me.

15 Okay. Our first item is Proposed
16 Amendments to Sales and Use Tax Regulation 1668,
17 Sales for Resale.

18 I think this is long past due and it was --
19 it's -- it's with regard to convicted sellers or
20 purchasers of counterfeit goods.

21 Thank you. Would you like to start, Ms.
22 Buehler?

23 MS. BUEHLER: Certainly. Good morning. I
24 am Susanne Buehler with the Sales and Use Tax
25 Department.

26 We have two agenda items for your
27 consideration today. With me is Miss Pam Mash from
28 our Legal Department. We will take each agenda

1 items and their respective action item separately
2 before moving to the next.

3 For agenda item one, staff requests your
4 approval and authorization to publish proposed
5 amendments to Sales and Use Tax Regulation 1668,
6 Sales for Resale.

7 You received a revised copy of the proposed
8 regulation yesterday that corrected minor
9 grammatical errors.

10 The proposed amendments are the result of
11 the passage of Board-sponsored Assembly Bill 2681
12 and state that sales or purchases of counterfeit
13 goods by a convicted seller or purchaser are subject
14 to tax, regardless of whether it was their intention
15 to resell them.

16 We'd be happy to answer any questions you
17 may have.

18 MS. HARKEY: Any questions, Members?

19 MR. RUNNER: Move adoption.

20 MS. STOWERS: Second.

21 MR. HORTON: Second.

22 MS. HARKEY: I have a motion and a second.

23 MR. HORTON: Quick comment, Madam Chair, if
24 I may.

25 Just wanted to commend staff and Madam
26 Chair for bringing this forward. I think it's
27 fundamentally important for the Board to be in
28 position to be able to participate in retrieving

1 sales tax and potential funds when there's a
2 criminal investigation that results in prosecution
3 and so forth.

4 Without this measure, the items could be
5 very well treated as an exempt sale and, therefore,
6 the Board of Equalization would not be able to
7 protect the interest of the State of California.

8 To that end, thank you, Madam Chair and
9 staff, for your efforts in that regard.

10 MS. BUEHLER: Thank you.

11 MS. HARKEY: I'd just like to add, not
12 only the State of California, but all those
13 legitimately out trying to earn a living in
14 California. So thank you very much for this.

15 The next item is proposed amendments to
16 Sales and Use Tax Regulation 1698 and proposed
17 amendments to Special Taxes Regulation 4901.

18 Ms. Buehler.

19 MS. BUEHLER: Before I start that, did we
20 have a vote on the first item?

21 MS. HARKEY: Oh, excuse me. We had a
22 motion from Senator Runner and a second from Ms. Ma.

23 Any objection?

24 Okay.

25 MS. BUEHLER: Thank you.

26 MS. HARKEY: Thank you.

27 MS. BUEHLER: For agenda item two, staff
28 requests your approval and authorization to publish

1 proposed amendments to Sales and Use Tax Regulation
2 1698, Records, and Special Taxes and Fees Regulation
3 4901, Records.

4 The proposed amendments include and define
5 electronic cash registers, computerized point of
6 sale systems and electronic records.

7 We'd be happy to answer any questions you
8 may have on this topic.

9 MS. HARKEY: Any questions from the Board?

10 MR. HORTON: Move approval and authorize
11 staff to propose -- publish both proposed amendments
12 to clarify.

13 MS. HARKEY: Thank you. I have a motion to
14 approve.

15 I have a second?

16 MS. STOWERS: Second.

17 MS. HARKEY: Second by Ms. Stowers.

18 Any objection?

19 So be it. Thank you.

20 MS. BUEHLER: Thank you.

21 MS. HARKEY: This ends the Business Taxes
22 Committee.

23 ----oOo----

24

25

26

27

28

REPORTER'S CERTIFICATE

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

State of California)
) ss
County of Sacramento)

I, KATHLEEN SKIDGEL, Hearing Reporter for the California State Board of Equalization certify that on October 27, 2015 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled hearing; that I transcribed the shorthand writing into typewriting; and that the preceding pages 1 through 6 constitute a complete and accurate transcription of the shorthand writing.

Dated: October 30, 2015

Kathleen Skidgel

KATHLEEN SKIDGEL, CSR #9039

Hearing Reporter



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

Proposed Amendment of Sales and Use Tax Regulation 1668, Sales for Resale

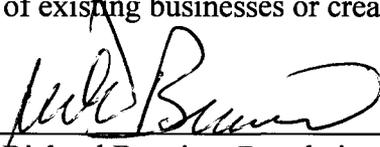
STATEMENT OF COST OR SAVINGS FOR NOTICE OF PUBLIC HEARING

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 12-23-15
Richard Bennion, Regulations Coordinator

Approved by  Date 12/24/15
Randy Ferris, Chief Counsel

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

Approved by _____ Date _____
Chief, Financial Management Division

Approved by _____ Date _____
Chief, Board Proceedings Division

NOTE: SAM Section 6615 requires that estimates resulting in cost or savings be submitted for Department of Finance concurrence before the notice of proposed regulatory action is released.

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

STD. 399 (REV. 12/2013)

ECONOMIC IMPACT STATEMENT

DEPARTMENT NAME The Board of Equalization	CONTACT PERSON Richard E. Bennion	EMAIL ADDRESS rbennion@boe.ca.gov	TELEPHONE NUMBER 916-445-2130
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400 Title 18, Section 1668, Sales for Resale			NOTICE FILE NUMBER Z

A. ESTIMATED PRIVATE SECTOR COST IMPACTS *Include calculations and assumptions in the rulemaking record.*

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

- a. Impacts business and/or employees
- b. Impacts small businesses
- c. Impacts jobs or occupations
- d. Impacts California competitiveness
- e. Imposes reporting requirements
- f. Imposes prescriptive instead of performance
- g. Impacts individuals
- h. None of the above (Explain below):

Please see the attached .

***If any box in Items 1 a through g is checked, complete this Economic Impact Statement.
 If box in Item 1.h. is checked, complete the Fiscal Impact Statement as appropriate.***

2. The _____ estimates that the economic impact of this regulation (which includes the fiscal impact) is:
 (Agency/Department)

- Below \$10 million
- Between \$10 and \$25 million
- Between \$25 and \$50 million
- Over \$50 million *[If the economic impact is over \$50 million, agencies are required to submit a Standardized Regulatory Impact Assessment as specified in Government Code Section 11346.3(c)]*

3. Enter the total number of businesses impacted: _____

Describe the types of businesses (Include nonprofits): _____

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

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

Explain: _____

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

6. Enter the number of jobs created: _____ and eliminated: _____

Describe the types of jobs or occupations impacted: _____

7. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here? YES NO

If YES, explain briefly: _____

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

STD. 399 (REV. 12/2013)

ECONOMIC IMPACT STATEMENT (CONTINUED)

B. ESTIMATED COSTS *Include calculations and assumptions in the rulemaking record.*

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

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

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

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

d. Describe other economic costs that may occur: _____

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

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

4. Will this regulation directly impact housing costs? YES NO

If YES, enter the annual dollar cost per housing unit: \$ _____

Number of units: _____

5. Are there comparable Federal regulations? YES NO

Explain the need for State regulation given the existence or absence of Federal regulations: _____

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

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

1. Briefly summarize the benefits of the regulation, which may include among others, the health and welfare of California residents, worker safety and the State's environment: _____

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

Explain: _____

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

4. Briefly describe any expansion of businesses currently doing business within the State of California that would result from this regulation: _____

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

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

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

STD. 399 (REV. 12/2013)

ECONOMIC IMPACT STATEMENT (CONTINUED)

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.*

California Environmental Protection Agency (Cal/EPA) boards, offices and departments are required to submit the following (per Health and Safety Code section 57005). Otherwise, skip to E4.

1. Will the estimated costs of this regulation to California business enterprises exceed \$10 million? YES NO

***If YES, complete E2. and E3
If NO, skip to E4***

Briefly describe each alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

(Attach additional pages for other alternatives)

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

Regulation: Total Cost \$ _____ Cost-effectiveness ratio: \$ _____

Alternative 1: Total Cost \$ _____ Cost-effectiveness ratio: \$ _____

Alternative 2: Total Cost \$ _____ Cost-effectiveness ratio: \$ _____

4. Will the regulation subject to OAL review have an estimated economic impact to business enterprises and individuals located in or doing business in California exceeding \$50 million in any 12-month period between the date the major regulation is estimated to be filed with the Secretary of State through 12 months after the major regulation is estimated to be fully implemented?

YES NO

If YES, agencies are required to submit a Standardized Regulatory Impact Assessment (SRIA) as specified in Government Code Section 11346.3(c) and to include the SRIA in the Initial Statement of Reasons.

5. Briefly describe the following:

The increase or decrease of investment in the State: _____

The incentive for innovation in products, materials or processes: _____

The benefits of the regulations, including, but not limited to, benefits to the health, safety, and welfare of California residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency: _____

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

STD 399 (REV. 12/2013)

FISCAL IMPACT STATEMENT

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

- 1. Additional expenditures in the current State Fiscal Year which are reimbursable by the State. (Approximate)
(Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

\$ _____

- a. Funding provided in _____

Budget Act of _____ or Chapter _____, Statutes of _____

- b. Funding will be requested in the Governor's Budget Act of _____

Fiscal Year: _____

- 2. Additional expenditures in the current State Fiscal Year which are NOT reimbursable by the State. (Approximate)
(Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

\$ _____

Check reason(s) this regulation is not reimbursable and provide the appropriate information:

- a. Implements the Federal mandate contained in _____

- b. Implements the court mandate set forth by the _____ Court.

Case of: _____ vs. _____

- c. Implements a mandate of the people of this State expressed in their approval of Proposition No. _____

Date of Election: _____

- d. Issued only in response to a specific request from affected local entity(s).

Local entity(s) affected: _____

- e. Will be fully financed from the fees, revenue, etc. from: _____

Authorized by Section: _____ of the _____ Code:

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

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

- 3. Annual Savings. (approximate)

\$ _____

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

- 5. No fiscal impact exists. This regulation does not affect any local entity or program.

- 6. Other. Explain _____

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

STD. 399 (REV. 12/2013)

FISCAL IMPACT STATEMENT (CONTINUED)

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

1. Additional expenditures in the current State Fiscal Year. (Approximate)

\$ _____

It is anticipated that State agencies will:

a. Absorb these additional costs within their existing budgets and resources.

b. Increase the currently authorized budget level for the _____ Fiscal Year

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

\$ _____

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

4. Other. Explain _____

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

1. Additional expenditures in the current State Fiscal Year. (Approximate)

\$ _____

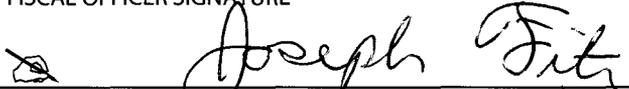
2. Savings in the current State Fiscal Year. (Approximate)

\$ _____

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

4. Other. Explain _____

FISCAL OFFICER SIGNATURE



DATE

December 23, 2015

The signature attests that the agency has completed the STD. 399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization.

AGENCY SECRETARY



DATE

December 23, 2015

Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD. 399.

DEPARTMENT OF FINANCE PROGRAM BUDGET MANAGER

Exempt under SAM section 6615

DATE

Attachment to Economic and Fiscal Impact
Statement (STD. 399 (Rev. 12/2013)) for the Proposed Amendments to
California Code of Regulations, Title 18, Section 1668,
Sales for Resale

Prior to the passage of Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477), counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

As explained in more detail in the initial statement of reasons, AB 2681 made specific amendments to Revenue and Taxation Code (RTC) section 6007 and added RTC section 6009.2, effective September 19, 2014. The new statutory provisions now make a sale or purchase of counterfeit goods by a convicted seller or purchaser subject to tax. The State Board of Equalization's (Board's) proposed substantive amendments to California Code of Regulations, title 18, section (Regulation) 1668, *Sales for Resale*, clarify that convicted sellers' sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale, under RTC section 6007, and clarify that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, under RTC section 6009.2, regardless of whether the goods are purchased for resale.

As a result, the proposed substantive amendments make Regulation 1668 consistent with the amendments made to the RTC by AB 2681, the proposed amendments do not mandate that individuals or businesses do anything that is not already required by the RTC, and there is nothing in the proposed amendments that would significantly change how individuals and businesses would generally behave, in the absence of the proposed regulatory action, or that would impose any costs on any persons, including businesses, or impact revenue. Therefore, the Board estimates that the proposed amendments will not have a measurable economic impact on individuals and business that is in addition to whatever economic impact the amendments made to the RTC by AB 2681 have had and will have on individuals and businesses. The Board has determined that the proposed amendments to Regulation 1668 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed amendments will not have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period. And, the Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, including manufacturers, Board staff, and the Board by providing additional notice regarding and implementing, interpreting, and making specific the amendments made to the RTC by AB 2681.

Therefore, based upon the foregoing information and all of the information in the rulemaking file, the Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulatory action, and the Board has determined that the proposed amendments to Regulation 1668:

- Will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states;
- Will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California;
- Will not have a significant effect on housing costs;
- Will result in no direct or indirect cost or savings to any state agency, and will result in no cost or savings in federal funding to the State of California;
- Will result in no direct or indirect cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, and will result in no other non-discretionary cost or savings imposed on local agencies; and
- Will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

In addition, Regulation 1668 does not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of the proposed amendments to Regulation 1668 will not affect the benefits of Regulation 1668 to the health and welfare of California residents, worker safety, or the state's environment.

The forgoing information also provides the factual basis for the Board's initial determination that the adoption of the proposed amendments to Regulation 1668 will not have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1668 may affect small businesses.

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2015-1223-01	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
-------------------------	---	--------------------------	------------------

For use by Office of Administrative Law (OAL) only

<p>RECEIVED FOR PUBLIC PUBLICATION DATE</p> <p>DEC 23 '15 JUN 08 '16</p> <p>Office of Administrative Law</p> <p style="text-align: center;">NOTICE</p>	<p style="text-align: center;">REGULATIONS</p>
---	--

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 Sales for Resale		TITLE(S) 18	FIRST SECTION AFFECTED 1668	2. REQUESTED PUBLICATION DATE January 8, 2016	
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 <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn			NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

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

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 January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____
---	--	--	--

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

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

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
-------------------	------------------	-----------------------	---------------------------

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

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

TYPED NAME AND TITLE OF SIGNATORY

For use by Office of Administrative Law (OAL) only

Notice of Proposed Regulatory Action
The State Board of Equalization Proposes to Adopt Amendments to
California Code of Regulations, Title 18,
Section 1668, *Sales for Resale*

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation or Reg.) 1668, *Sales for Resale*, which incorporate and implement, interpret, and make specific RTC sections 6007 and 6009.2, as amended and added by Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477). The new statutory provisions now make a sale or purchase of counterfeit goods by a convicted seller or purchaser subject to sales and use tax, including sales and purchased for resale in the regular course of business. The proposed amendments add subdivision (j) to Regulation 1668 to incorporate the new provisions of RTC sections 6007 and 6009.2 by specifying that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, and that the transactions are taxable regardless of whether the sale or purchase was for resale.

PUBLIC HEARING

The Board will conduct a meeting in Room 207 at 5901 Green Valley Circle, Culver City, California, on February 23-25, 2016. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at www.boe.ca.gov 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 February 23, 24, or 25, 2016. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1668.

AUTHORITY

RTC section 7051

REFERENCE

RTC Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485, and 7153

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

The Sales and Use Tax Law (RTC, § 6001 et seq.) imposes sales tax on retailers for the privilege of selling tangible personal property at retail in California and provides that sales tax is measured by the gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Reg. 1700, subd. (a)(1).)

When sales tax does not apply, the Sales and Use Tax Law imposes use tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer, unless specifically exempted or excluded by statute. The obligation to pay the use tax is on the consumer. However, every retailer “engaged in business” in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the Board, and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (Reg. 1684.)

RTC section 6007 defines the terms “retail sale” or “sale at retail” to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. RTC sections 6008 and 6009 define “storage” and “use,” respectively. “Storage” includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. “Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

RTC sections 6091 through 6095 (sales tax) and 6241 through 6245 (use tax) generally establish the presumption that the sale or storage, use or other consumption of tangible personal property is subject to sales or use tax, place the burden on the retailer to establish that tax does not apply, unless the retailer takes a certificate from the purchaser to the effect that the property is purchased for resale, and impose liability on persons who purchase tangible personal property with a resale certificate and subsequently make any use of the property other than retention, demonstration, or display while holding it for resale in the regular course of business. The Board previously adopted Regulation 1668 to implement, interpret, and make specific the RTC provisions regarding sales for resale, including prescribing the form of resale certificates, prescribing the circumstances under which a retailer can overcome the presumption of taxability by timely taking a resale certificate from a purchaser in good faith, and establishing the presumption that a resale certificate is taken in good faith in the absence of evidence to the contrary.

In addition, RTC section 6094.5 generally provides that “[a]ny person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation

in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate,” and “a penalty of 10 percent of the tax or five hundred dollars (\$500) whichever is greater, for each purchase made [with a resale certificate] for personal gain or to evade the payment of taxes,” and is guilty of a misdemeanor for each purchase made with a resale certificate for the purpose of evading payment to the seller of the amount of the tax applicable to the transaction. RTC sections 6484 and 6485 alternatively provide for the imposition of a 10 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to negligence or the intentional disregard of the Sales and Use Tax Law or the Board’s regulations or a 25 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to fraud or an intent to evade the Sales and Use Tax Law or the Board’s regulations. And, Regulation 1668, subdivision (d), clarifies that all of these statutory provisions providing for civil and criminal penalties may apply to a person who makes an improper use of a resale certificate and thereafter fails to report the tax due as a result of such misuse.

Also, RTC sections 6012.8 and 6012.9 specify that mobilehome retailers are consumers of mobilehomes under specified circumstances. RTC sections 6012.8 and 6012.9 permit mobilehome retailers to give resale certificates for the purchase of mobilehomes under such circumstances to facilitate the reporting of their tax liabilities when they ultimately sell the mobilehomes to their customers for installation for occupancy as a residence. RTC section 6012.8 was also amended, effective September 19, 1985, to provide that a mobilehome retailer can issue a resale certificate for the purchase of a mobilehome regardless of whether the retailer installs the mobilehome on a foundation system as an improvement to realty prior to selling the mobilehome to its customer. And, the provisions of RTC sections 6012.8 and 6012.9 providing for the issuance of resale certificates by mobilehome retailers, including the effective date of the 1985 amendments to RTC section 6012.8, are implemented, interpreted, and made specific by Regulation 1668, subdivision (h).

Further, Regulation 1661, *Leases of Mobile Transportation Equipment*, explains that, under RTC sections 6006, 6010, 6094, and 6244, lessors are consumers of mobile transportation equipment (MTE) and if they purchase MTE without the payment of tax or tax reimbursement, they may elect to pay use tax measured by the “fair rental value” of the MTE. Regulations 1661 and 1668, subdivision (i), also both specify that, under RTC sections 6092.1 and 6243.1, a lessor of MTE, other than a lessor exempt from use tax, may issue a resale certificate for the purchase of MTE for the limited purpose of reporting use tax based on fair rental value in accordance with RTC sections 6094 and 6244. And, Regulation 1668, subdivision (d), clarifies that its civil and criminal penalty provisions do not apply in the narrow circumstances where a resale certificate is issued in accordance with subdivision (h) or (i).

Furthermore, prior to September 19, 2014, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in

inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

Effective September 19, 2014, Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477) amended RTC section 6007 and enacted RTC section 6009.2 to establish that any sale by a convicted seller or purchase by a convicted purchaser of counterfeit goods is subject to tax. Specifically, it added a new subdivision (b) to RTC section 6007 to further define “retail sale” to include “any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business.” Similarly, the bill added new RTC section 6009.2 to further define “storage” and “use” to include any “purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale.” RTC section 6007 defines “convicted seller” and RTC section 6009.2 defines “convicted purchaser” to mean a person convicted of a violation under section 2320 of title 18 of the United States Code or under sections 350 or 653w of the Penal Code on or after the date of the sale or purchase, respectively. Both statutes provide that “[c]ounterfeit mark” has the same meaning as that term is defined in Section 2320 of Title 18 of the United States Code” and both statutes require that a notice of deficiency determination, issued to a convicted seller or purchaser, “shall be mailed within one year after the last day of the calendar month following the date of conviction.” Therefore, AB 2681 now makes sales and purchases of counterfeit goods by a convicted seller or convicted purchaser subject to tax, including resale transactions. In addition, it does not matter if the person convicted is the manufacturer, wholesaler, distributor, or retailer of the counterfeit goods.

Effects, Objectives, and Benefits of the Proposed Amendments to Regulation 1668

Need for Clarification

Regulation 1668 was last amended in 2009, which was prior to the passage of AB 2681. Therefore, the Board’s Business Taxes Committee (BTC) staff determined that there is an issue (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) because Regulation 1668 does not currently indicate that AB 2681 made amendments to RTC section 6007 and add RTC section 6009.2 to change the application of sales and use tax to sales and purchases of counterfeit goods for resale. BTC staff also determined that amendments to Regulation 1668 are needed in order to have the effect and accomplish the objective of addressing the issue (or problem) by making Regulation 1668 consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2 regarding persons convicted of selling or purchasing counterfeit goods (discussed above).

Interested Parties Process

As a result of AB 2681, BTC staff drafted amendments to add a new subdivision (j), entitled “Counterfeit Goods,” to Regulation 1668 and add references to RTC sections 6007 and 6009.2 to Regulation 1668’s reference note. The new subdivision clarifies that

convicted sellers' sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale. It also clarifies that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

Staff also considered whether the civil and criminal penalty provisions of Regulation 1668, subdivision (d) (discussed above), apply in instances where a seller provides a resale certificate for the purchase of counterfeit goods for resale in the regular course of business without the payment of sales tax reimbursement or use tax and the seller is subsequently convicted of purchasing counterfeit goods. It was determined that the provisions of AB 2681 effectively impose a specific penalty on such a seller by making the seller liable for tax on such purchase, and it would be inconsistent with the provisions of AB 2681 to also impose the civil and criminal penalties provided by RTC sections 6094.5, 6484, and 6485 on such a seller with regard to such a purchase. Therefore, BTC staff also drafted amendments to clarify that Regulation 1668, subdivision (d), does not apply in the narrow circumstances where a resale certificate is issued in accordance with new subdivision (j), and the exception from subdivision (d) is consistent with the existing exceptions from subdivision (d) for resale certificates issued in accordance with subdivisions (h) and (i) (discussed above).

In addition to the proposed amendments regarding convicted sellers and purchasers of counterfeit goods, staff drafted amendments that deleted the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed. Staff also drafted non-substantive amendments to italicize the name of Regulation 1699, *Permits*, in subdivision (a), replace "State" with "state" in subdivision (b)(1)(C), delete an inadvertent space in the reference to subdivision "(b) (4)" in subdivision (b)(3), add a comma after "(\$500)" in subdivision (d)(2), insert "the" before "person" in the last sentence in subdivision (f)(1), delete an inadvertent space from before the parenthetical reference to "mobile transportation equipment" in subdivision (f)(2)(C), replace the period with a semicolon at the end of subdivision (f)(2)(F)3, delete inadvertent brackets from subdivision (f)(3), and replace "Section" and "Sections" with "section" and "sections" throughout subdivision (h).

BTC staff subsequently made its draft amendments to Regulation 1668 available to the interested parties and one interested parties meeting was held to discuss staff's draft amendments. At the meeting, staff's recommendations were well received and no submissions from interested parties with alternative language were received. Because BTC staff did not receive any other inquiries or comments regarding the draft amendments during or subsequent to the first interested parties meeting and staff had no changes to its recommendation to amend Regulation 1668, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff's draft amendments.

October 27, 2015, BTC Meeting

Subsequently, staff prepared Formal Issue Paper 15-008 and distributed it to the Board Members for consideration at the Board's October 27, 2015, BTC meeting. Formal Issue Paper 15-008 recommended that the Board propose to adopt the draft amendments to Regulation 1668 (discussed above) in order to incorporate the provisions of RTC sections 6007 and 6009.2, as amended and enacted by AB 2681, by:

- Adding a new subdivision (j).
- Amending subdivision (d) so that it does not apply where a resale certificate is issued in accordance with new subdivision (j).
- Adding references to RTC sections 6007 and 6009.2 to the regulation's reference note.

Formal Issue Paper 15-008 also recommended that the Board delete the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed, and that the Board make the non-substantive amendments to the regulation (discussed above). During the October 27, 2015, BTC meeting, the Board Members unanimously voted to propose the amendments to Regulation 1668 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1668 are reasonably necessary to have the effect and accomplish the objective of making the regulation consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2, and addressing the issue (or problem) that Regulation 1668 does not currently indicate that AB 2681 added RTC section 6007, subdivision (b), and section 6009.2. The Board also determined that the proposed amendments are reasonably necessary to have the effect and accomplish the objective of updating Regulation 1668, subdivision (h), and making the regulation grammatically correct and internally consistent.

The Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and implementing, interpreting, and making specific the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1668 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1668 is the only state regulation that provides specific guidance regarding the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1668 or the proposed amendments to Regulation 1668.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1668 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 1668 will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1668 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 1668 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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

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

The Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1668 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1668 will not affect the benefits of Regulation 1668 to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulation 1668 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

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

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Pamela Mash, Tax Counsel, by telephone at (916) 323-3248, by e-mail at Pamela.Mash@boe.ca.gov, or by mail at State Board of Equalization, Attn: Pamela Mash, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

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

WRITTEN COMMENT PERIOD

The written comment period ends at 9:30 a.m. on February 23, 2016, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1668 during the February 23-25, 2016, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1668. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1668 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1668, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public

upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at www.boe.ca.gov.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1668 with changes that are non-substantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1668, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

Bennion, Richard

From: State Board of Equalization - Announcement of Regulatory Change
<Legal.Regulations@BOE.CA.GOV>
Sent: Friday, January 08, 2016 8:54 AM
To: BOE_REGULATIONS@LISTSERV.STATE.CA.GOV
Subject: State Board of Equalization - Announcement of Regulatory Change 1668

The State Board of Equalization proposes to adopt amendments to Sales and Use Tax Regulation 1668, *Sales for Resale*, to clarify that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, regardless of whether the sale or purchase was for resale. A public hearing regarding the proposed amendments will be held in Room 207 at 5901 Green Valley Circle, Culver City, at 09:30 a.m., or as soon thereafter as the matter may be heard, on February 23-25, 2016.

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_1668_2016.htm.

Questions regarding the substance of the proposed amendments should be directed to Ms. Pamela Mash, Tax Counsel III, at 450 N Street, MIC:82, Sacramento, CA 94279-0082, email Pamela.Mash@boe.ca.gov, telephone (916) 323-3248, or FAX (916) 323-3387.

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

Please DO NOT REPLY to this message, as it was sent from an "announcement list."

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

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

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

Bennion, Richard

From: BOE-Board Meeting Material
Sent: Friday, January 08, 2016 7:52 AM
To: Alonzo, Mary Ann (Legal); Anderson, Eboney; Angeja, Jeff (Legal); Armenta, Christopher; Asprey, Kathryn E; Bartolo, Lynn; Bennion, Richard; Benson, Bill; Bisauta, Christine (Legal); Blake, Sue; Block, Susan; BOE-Board Meeting Material; Bridges, Cynthia; Brown, Michele C; Buck, Alfred; Chung, Sophia (Legal); Cruz, Giovan; Davis, Toya P.; Dixon, Camille; Duran, David; Durham, Mark; Epolite, Anthony (Legal); Ferris, Randy (Legal); Folchi, Gino; Ford, Ladeena L; Garcia, Laura; Gau, David; Gilman, Todd; Grant, Micah; Hamilton, Tabitha; Harrison, Michelle; Harvill, Mai; Heller, Bradley (Legal); Hellmuth, Leila; Herrera, Cristina; Hite, Jay; Holmes, Dana; Hughes, Shellie L; Huxsoll, Cary; Jacobson, Andrew; Kinkle, Sherrie L; Kinst, Lynne; Kuhl, James; Lambert, Gary; Lambert, Robert (Legal); Lee, Chris; Levine, David H. (Legal); Lopez, Claudia; Lowery, Russell; Manuel, Charlene; Matsumoto, Sid; Matthies, Ted; McElhinney, Andrew; McGuire, Jeff; Miller, Brad; Moon, Richard (Legal); Nienow, Trecia (Legal); Oakes, Clifford; Pielsticker, Michele; Ralston Ratcliff, Natasha; Renati, Lisa; Richmond, Joann; Riley, Denise (Legal); Romano, Dario; Salazar, Ramon; Sarcos, Eric; Schultz, Glenna; Silva, Monica (Legal); Singh, Sam; Smith, Kevin (Legal); Smith, Rose; Stowers, Yvette; Tran, Mai (Legal); Treichelt, Tim; Tucker, Robert (Legal); Vandrick, Tanya; Vena, Emily (Legal); Wallentine, Sean; Whitaker, Lynn; Wiggins, Brian; Williams, Lee; Wilson, David; Zivkovich, Robert; Zumaeta, Jaclyn
Subject: State Board of Equalization - Announcement of Regulatory Change 1668

The State Board of Equalization proposes to adopt amendments to Sales and Use Tax Regulation 1668, *Sales for Resale*, to clarify that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, regardless of whether the sale or purchase was for resale. A public hearing regarding the proposed amendments will be held in Room 207 at 5901 Green Valley Circle, Culver City, at 09:30 a.m., or as soon thereafter as the matter may be heard, on February 23-25, 2016.

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_1668_2016.htm.

Questions regarding the substance of the proposed amendments should be directed to Ms. Pamela Mash, Tax Counsel III, at 450 N Street, MIC:82, Sacramento, CA 94279-0082, email Pamela.Mash@boe.ca.gov, telephone (916) 323-3248, or FAX (916) 323-3387.

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

Please do not reply to this message.

Board Proceedings Division, MIC:80
Rick Bennion
Regulations Coordinator
Phone (916) 445-2130
Fax (916) 324-3984
Richard.Bennion@boe.ca.gov

EFFECT ON SMALL BUSINESS

The Board has determined that the proposed regulations would not affect small businesses. The proposed regulations only pertain to applicants for an Instructor's license. In the foreseeable past, all applicants have been employees of Guide Dog Schools either located or operating in California.

RESULTS OF ECONOMIC IMPACT ASSESSMENT/ANALYSIS

Impact on Jobs/Businesses:

The Board has determined that this regulatory proposal will not have any impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

Benefits of Regulation:

The Board has determined that this regulatory proposal will benefit the health and welfare of California residents by improving the clarity of the examination process for applicants for an Instructor's license.

CONSIDERATION OF ALTERNATIVES

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

Any interested person may submit comments to the Board in writing relevant to the above determinations at 1625 North Market Blvd., Suite N112, Sacramento, California 95834.

INITIAL STATEMENT OF REASONS AND INFORMATION

The Board has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations, and any document incorporated by reference, and of the initial statement of reasons, and all of the in-

formation upon which the proposal is based, may be obtained upon request from the Board at 1625 North Market Blvd., Suite N112, Sacramento, California 95834.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

CONTACT PERSON

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name: Brian Skewis, Executive Officer
 Address: California State Board of Guide Dogs for the Blind
 1625 North Market Blvd.,
 Suite N112
 Sacramento, California 95834
 Telephone No.: 916-574-7825
 Fax No.: 916-574-7829
 E-Mail
 Address: Brian.Skewis@dca.ca.gov

BACKUP PERSON

Name: Katherine Demos,
 Regulations Coordinator
 Address: Department of Consumer Affairs
 1625 North Market Blvd.,
 Suite S204
 Sacramento, California 95834
 Telephone No.: 916-574-7804
 Fax No.: 916-574-8655
 E-Mail
 Address: Katherine.Demos@dca.ca.gov

Website Access: Materials regarding this proposal can be found at www.guidedogboard.ca.gov.

TITLE 18. BOARD OF EQUALIZATION

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California

Code of Regulations, title 18, section (Regulation or Reg.) 1668, *Sales for Resale*, which incorporate and implement, interpret, and make specific RTC sections 6007 and 6009.2, as amended and added by Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477). The new statutory provisions now make a sale or purchase of counterfeit goods by a convicted seller or purchaser subject to sales and use tax, including sales and purchased for resale in the regular course of business. The proposed amendments add subdivision (j) to Regulation 1668 to incorporate the new provisions of RTC sections 6007 and 6009.2 by specifying that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, and that the transactions are taxable regardless of whether the sale or purchase was for resale.

PUBLIC HEARING

The Board will conduct a meeting in Room 207 at 5901 Green Valley Circle, Culver City, California, on February 23–25, 2016. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board’s Website at www.boe.ca.gov 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 February 23, 24, or 25, 2016. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1668.

AUTHORITY

RTC section 7051

REFERENCE

RTC Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091–6095, 6241–6245, 6484, 6485, and 7153

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

The Sales and Use Tax Law (RTC, § 6001 et seq.) imposes sales tax on retailers for the privilege of selling tangible personal property at retail in California and provides that sales tax is measured by the gross receipts

from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Reg. 1700, subd. (a)(1).)

When sales tax does not apply, the Sales and Use Tax Law imposes use tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer, unless specifically exempted or excluded by statute. The obligation to pay the use tax is on the consumer. However, every retailer “engaged in business” in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the Board, and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (Reg. 1684.)

RTC section 6007 defines the terms “retail sale” or “sale at retail” to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. RTC sections 6008 and 6009 define “storage” and “use,” respectively. “Storage” includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. “Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

RTC sections 6091 through 6095 (sales tax) and 6241 through 6245 (use tax) generally establish the presumption that the sale or storage, use or other consumption of tangible personal property is subject to sales or use tax, place the burden on the retailer to establish that tax does not apply, unless the retailer takes a certificate from the purchaser to the effect that the property is purchased for resale, and impose liability on persons who purchase tangible personal property with a resale certificate and subsequently make any use of the property other than retention, demonstration, or display while holding it for resale in the regular course of business. The Board previously adopted Regulation 1668 to implement, interpret, and make specific the RTC provisions regarding sales for resale, including prescribing the form of resale certificates, prescribing the circumstances under which a retailer can overcome the presumption of taxability by timely taking a resale certificate from a purchaser in good faith, and establishing the presumption that a re-

sale certificate is taken in good faith in the absence of evidence to the contrary.

In addition, RTC section 6094.5 generally provides that “[a]ny person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate,” and “a penalty of 10 percent of the tax or five hundred dollars (\$500) whichever is greater, for each purchase made [with a resale certificate] for personal gain or to evade the payment of taxes,” and is guilty of a misdemeanor for each purchase made with a resale certificate for the purpose of evading payment to the seller of the amount of the tax applicable to the transaction. RTC sections 6484 and 6485 alternatively provide for the imposition of a 10 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to negligence or the intentional disregard of the Sales and Use Tax Law or the Board’s regulations or a 25 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to fraud or an intent to evade the Sales and Use Tax Law or the Board’s regulations. And, Regulation 1668, subdivision (d), clarifies that all of these statutory provisions providing for civil and criminal penalties may apply to a person who makes an improper use of a resale certificate and thereafter fails to report the tax due as a result of such misuse.

Also, RTC sections 6012.8 and 6012.9 specify that mobilehome retailers are consumers of mobilehomes under specified circumstances. RTC sections 6012.8 and 6012.9 permit mobilehome retailers to give resale certificates for the purchase of mobilehomes under such circumstances to facilitate the reporting of their tax liabilities when they ultimately sell the mobilehomes to their customers for installation for occupancy as a residence. RTC section 6012.8 was also amended, effective September 19, 1985, to provide that a mobilehome retailer can issue a resale certificate for the purchase of a mobilehome regardless of whether the retailer installs the mobilehome on a foundation system as an improvement to realty prior to selling the mobilehome to its customer. And, the provisions of RTC sections 6012.8 and 6012.9 providing for the issuance of resale certificates by mobilehome retailers, including the effective date of the 1985 amendments to RTC section 6012.8, are implemented, interpreted, and made specific by Regulation 1668, subdivision (h).

Further, Regulation 1661, *Leases of Mobile Transportation Equipment*, explains that, under RTC sections 6006, 6010, 6094, and 6244, lessors are consumers of mobile transportation equipment (MTE) and if they purchase MTE without the payment of tax or tax reim-

bursement, they may elect to pay use tax measured by the “fair rental value” of the MTE. Regulations 1661 and 1668, subdivision (i), also both specify that, under RTC sections 6092.1 and 6243.1, a lessor of MTE, other than a lessor exempt from use tax, may issue a resale certificate for the purchase of MTE for the limited purpose of reporting use tax based on fair rental value in accordance with RTC sections 6094 and 6244. And, Regulation 1668, subdivision (d), clarifies that its civil and criminal penalty provisions do not apply in the narrow circumstances where a resale certificate is issued in accordance with subdivision (h) or (i).

Furthermore, prior to September 19, 2014, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

Effective September 19, 2014, Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477) amended RTC section 6007 and enacted RTC section 6009.2 to establish that any sale by a convicted seller or purchase by a convicted purchaser of counterfeit goods is subject to tax. Specifically, it added a new subdivision (b) to RTC section 6007 to further define “retail sale” to include “any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business.” Similarly, the bill added new RTC section 6009.2 to further define “storage” and “use” to include any “purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale.” RTC section 6007 defines “convicted seller” and RTC section 6009.2 defines “convicted purchaser” to mean a person convicted of a violation under section 2320 of title 18 of the United States Code or under sections 350 or 653w of the Penal Code on or after the date of the sale or purchase, respectively. Both statutes provide that “[c]ounterfeit mark” has the same meaning as that term is defined in Section 2320 of Title 18 of the United States Code” and both statutes require that a notice of deficiency determination, issued to a convicted seller or purchaser, “shall be mailed within one year after the last day of the calendar month following the date of conviction.” Therefore, AB 2681 now makes sales and purchases of counterfeit goods by a convicted seller or convicted purchaser subject to tax, including resale transactions. In addition, it does not matter if the person convicted is the manufacturer, wholesaler, distributor, or retailer of the counterfeit goods.

Effects, Objectives, and Benefits of the Proposed Amendments to Regulation 1668

Need for Clarification

Regulation 1668 was last amended in 2009, which was prior to the passage of AB 2681. Therefore, the Board's Business Taxes Committee (BTC) staff determined that there is an issue (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) because Regulation 1668 does not currently indicate that AB 2681 made amendments to RTC section 6007 and add RTC section 6009.2 to change the application of sales and use tax to sales and purchases of counterfeit goods for resale. BTC staff also determined that amendments to Regulation 1668 are needed in order to have the effect and accomplish the objective of addressing the issue (or problem) by making Regulation 1668 consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2 regarding persons convicted of selling or purchasing counterfeit goods (discussed above).

Interested Parties Process

As a result of AB 2681, BTC staff drafted amendments to add a new subdivision (j), entitled "Counterfeit Goods," to Regulation 1668 and add references to RTC sections 6007 and 6009.2 to Regulation 1668's reference note. The new subdivision clarifies that convicted sellers' sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale. It also clarifies that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

Staff also considered whether the civil and criminal penalty provisions of Regulation 1668, subdivision (d) (discussed above), apply in instances where a seller provides a resale certificate for the purchase of counterfeit goods for resale in the regular course of business without the payment of sales tax reimbursement or use tax and the seller is subsequently convicted of purchasing counterfeit goods. It was determined that the provisions of AB 2681 effectively impose a specific penalty on such a seller by making the seller liable for tax on such purchase, and it would be inconsistent with the provisions of AB 2681 to also impose the civil and criminal penalties provided by RTC sections 6094.5, 6484, and 6485 on such a seller with regard to such a purchase. Therefore, BTC staff also drafted amendments to clarify that Regulation 1668, subdivision (d), does not apply in the narrow circumstances where a resale certificate is issued in accordance with new subdivision (j), and the exception from subdivision (d) is consistent with the existing exceptions from subdivision (d) for resale cer-

tificates issued in accordance with subdivisions (h) and (i) (discussed above).

In addition to the proposed amendments regarding convicted sellers and purchasers of counterfeit goods, staff drafted amendments that deleted the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed. Staff also drafted non-substantive amendments to italicize the name of Regulation 1699, *Permits*, in subdivision (a), replace "State" with "state" in subdivision (b)(1)(C), delete an inadvertent space in the reference to subdivision "(b)(4)" in subdivision (b)(3), add a comma after "\$500" in subdivision (d)(2), insert "the" before "person" in the last sentence in subdivision (f)(1), delete an inadvertent space from before the parenthetical reference to "mobile transportation equipment" in subdivision (f)(2)(C), replace the period with a semicolon at the end of subdivision (f)(2)(F)3, delete inadvertent brackets from subdivision (f)(3), and replace "Section" and "Sections" with "section" and "sections" throughout subdivision (h).

BTC staff subsequently made its draft amendments to Regulation 1668 available to the interested parties and one interested parties meeting was held to discuss staff's draft amendments. At the meeting, staff's recommendations were well received and no submissions from interested parties with alternative language were received. Because BTC staff did not receive any other inquiries or comments regarding the draft amendments during or subsequent to the first interested parties meeting and staff had no changes to its recommendation to amend Regulation 1668, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff's draft amendments.

October 27, 2015, BTC Meeting

Subsequently, staff prepared Formal Issue Paper 15-008 and distributed it to the Board Members for consideration at the Board's October 27, 2015, BTC meeting. Formal Issue Paper 15-008 recommended that the Board propose to adopt the draft amendments to Regulation 1668 (discussed above) in order to incorporate the provisions of RTC sections 6007 and 6009.2, as amended and enacted by AB 2681, by:

- Adding a new subdivision (j).
- Amending subdivision (d) so that it does not apply where a resale certificate is issued in accordance with new subdivision (j).
- Adding references to RTC sections 6007 and 6009.2 to the regulation's reference note.

Formal Issue Paper 15-008 also recommended that the Board delete the reference to the September 19,

1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed, and that the Board make the non-substantive amendments to the regulation (discussed above). During the October 27, 2015, BTC meeting, the Board Members unanimously voted to propose the amendments to Regulation 1668 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1668 are reasonably necessary to have the effect and accomplish the objective of making the regulation consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2, and addressing the issue (or problem) that Regulation 1668 does not currently indicate that AB 2681 added RTC section 6007, subdivision (b), and section 6009.2. The Board also determined that the proposed amendments are reasonably necessary to have the effect and accomplish the objective of updating Regulation 1668, subdivision (h), and making the regulation grammatically correct and internally consistent.

The Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and implementing, interpreting, and making specific the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1668 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1668 is the only state regulation that provides specific guidance regarding the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1668 or the proposed amendments to Regulation 1668.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1668 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 1668 will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1668 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 1668 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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

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

The Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1668 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1668 will not affect the benefits of Regulation 1668 to the health and welfare of California residents, worker safety, or the state's environment.

**NO SIGNIFICANT EFFECT ON
HOUSING COSTS**

The adoption of the proposed amendments to Regulation 1668 will not have a significant effect on housing costs.

**DETERMINATION REGARDING
ALTERNATIVES**

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

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Pamela Mash, Tax Counsel, by telephone at (916) 323-3248, by e-mail at Pamela.Mash@boe.ca.gov, or by mail at State Board of Equalization, Attn: Pamela Mash, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

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

WRITTEN COMMENT PERIOD

The written comment period ends at 9:30 a.m. on February 23, 2016, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1668 during the February 23-25, 2016, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides

whether to adopt the proposed amendments to Regulation 1668. The Board will only consider written comments received by that time.

**AVAILABILITY OF INITIAL STATEMENT OF
REASONS AND TEXT OF
PROPOSED REGULATION**

The Board has prepared an underscored and strikethrough version of the text of Regulation 1668 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1668, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at www.boe.ca.gov.

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

The Board may adopt the proposed amendments to Regulation 1668 with changes that are non-substantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

**AVAILABILITY OF FINAL STATEMENT
OF REASONS**

If the Board adopts the proposed amendments to Regulation 1668, 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.



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

50 N STREET, SACRAMENTO, CALIFORNIA
P BOX 942879, SACRAMENTO, CALIFORNIA 94279-80
916-445-2130 • FAX 916-324-3984
www.boe.ca.gov

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

FIONA MA, CPA
Second District, San Francisco

JEROME E. HORTON
Third District, Los Angeles County

DIANE L. HARKEY
Fourth District, Orange County

BETTY T. YEE
State Controller

CYNTHIA BRIDGES
Executive Director

January 8, 2016

To Interested Parties:

Notice of Proposed Regulatory Action
The State Board of Equalization Proposes to Adopt
Amendments to California Code of Regulations,
Title 18,
Section 1668, *Sales for Resale*

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation or Reg.) 1668, *Sales for Resale*, which incorporate and implement, interpret, and make specific RTC sections 6007 and 6009.2, as amended and added by Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477). The new statutory provisions now make a sale or purchase of counterfeit goods by a convicted seller or purchaser subject to sales and use tax, including sales and purchased for resale in the regular course of business. The proposed amendments add subdivision (j) to Regulation 1668 to incorporate the new provisions of RTC sections 6007 and 6009.2 by specifying that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, and that the transactions are taxable regardless of whether the sale or purchase was for resale.

PUBLIC HEARING

The Board will conduct a meeting in Room 207 at 5901 Green Valley Circle, Culver City, California, on February 23-25, 2016. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at www.boe.ca.gov 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 February 23, 24, or 25, 2016. At the hearing, any

interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1668.

AUTHORITY

RTC section 7051

REFERENCE

RTC Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485, and 7153

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

The Sales and Use Tax Law (RTC, § 6001 et seq.) imposes sales tax on retailers for the privilege of selling tangible personal property at retail in California and provides that sales tax is measured by the gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Reg. 1700, subd. (a)(1).)

When sales tax does not apply, the Sales and Use Tax Law imposes use tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer, unless specifically exempted or excluded by statute. The obligation to pay the use tax is on the consumer. However, every retailer “engaged in business” in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the Board, and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (Reg. 1684.)

RTC section 6007 defines the terms “retail sale” or “sale at retail” to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. RTC sections 6008 and 6009 define “storage” and “use,” respectively. “Storage” includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. “Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

RTC sections 6091 through 6095 (sales tax) and 6241 through 6245 (use tax) generally establish the presumption that the sale or storage, use or other consumption of tangible personal property is subject to sales or use tax, place the burden on the retailer to establish that tax does not apply,

unless the retailer takes a certificate from the purchaser to the effect that the property is purchased for resale, and impose liability on persons who purchase tangible personal property with a resale certificate and subsequently make any use of the property other than retention, demonstration, or display while holding it for resale in the regular course of business. The Board previously adopted Regulation 1668 to implement, interpret, and make specific the RTC provisions regarding sales for resale, including prescribing the form of resale certificates, prescribing the circumstances under which a retailer can overcome the presumption of taxability by timely taking a resale certificate from a purchaser in good faith, and establishing the presumption that a resale certificate is taken in good faith in the absence of evidence to the contrary.

In addition, RTC section 6094.5 generally provides that “[a]ny person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate,” and “a penalty of 10 percent of the tax or five hundred dollars (\$500) whichever is greater, for each purchase made [with a resale certificate] for personal gain or to evade the payment of taxes,” and is guilty of a misdemeanor for each purchase made with a resale certificate for the purpose of evading payment to the seller of the amount of the tax applicable to the transaction. RTC sections 6484 and 6485 alternatively provide for the imposition of a 10 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to negligence or the intentional disregard of the Sales and Use Tax Law or the Board’s regulations or a 25 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to fraud or an intent to evade the Sales and Use Tax Law or the Board’s regulations. And, Regulation 1668, subdivision (d), clarifies that all of these statutory provisions providing for civil and criminal penalties may apply to a person who makes an improper use of a resale certificate and thereafter fails to report the tax due as a result of such misuse.

Also, RTC sections 6012.8 and 6012.9 specify that mobilehome retailers are consumers of mobilehomes under specified circumstances. RTC sections 6012.8 and 6012.9 permit mobilehome retailers to give resale certificates for the purchase of mobilehomes under such circumstances to facilitate the reporting of their tax liabilities when they ultimately sell the mobilehomes to their customers for installation for occupancy as a residence. RTC section 6012.8 was also amended, effective September 19, 1985, to provide that a mobilehome retailer can issue a resale certificate for the purchase of a mobilehome regardless of whether the retailer installs the mobilehome on a foundation system as an improvement to realty prior to selling the mobilehome to its customer. And, the provisions of RTC sections 6012.8 and 6012.9 providing for the issuance of resale certificates by mobilehome retailers, including the effective date of the 1985 amendments to RTC section 6012.8, are implemented, interpreted, and made specific by Regulation 1668, subdivision (h).

Further, Regulation 1661, *Leases of Mobile Transportation Equipment*, explains that, under RTC sections 6006, 6010, 6094, and 6244, lessors are consumers of mobile transportation equipment

(MTE) and if they purchase MTE without the payment of tax or tax reimbursement, they may elect to pay use tax measured by the “fair rental value” of the MTE. Regulations 1661 and 1668, subdivision (i), also both specify that, under RTC sections 6092.1 and 6243.1, a lessor of MTE, other than a lessor exempt from use tax, may issue a resale certificate for the purchase of MTE for the limited purpose of reporting use tax based on fair rental value in accordance with RTC sections 6094 and 6244. And, Regulation 1668, subdivision (d), clarifies that its civil and criminal penalty provisions do not apply in the narrow circumstances where a resale certificate is issued in accordance with subdivision (h) or (i).

Furthermore, prior to September 19, 2014, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

Effective September 19, 2014, Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477) amended RTC section 6007 and enacted RTC section 6009.2 to establish that any sale by a convicted seller or purchase by a convicted purchaser of counterfeit goods is subject to tax. Specifically, it added a new subdivision (b) to RTC section 6007 to further define “retail sale” to include “any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business.” Similarly, the bill added new RTC section 6009.2 to further define “storage” and “use” to include any “purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale.” RTC section 6007 defines “convicted seller” and RTC section 6009.2 defines “convicted purchaser” to mean a person convicted of a violation under section 2320 of title 18 of the United States Code or under sections 350 or 653w of the Penal Code on or after the date of the sale or purchase, respectively. Both statutes provide that “[c]ounterfeit mark” has the same meaning as that term is defined in Section 2320 of Title 18 of the United States Code” and both statutes require that a notice of deficiency determination, issued to a convicted seller or purchaser, “shall be mailed within one year after the last day of the calendar month following the date of conviction.” Therefore, AB 2681 now makes sales and purchases of counterfeit goods by a convicted seller or convicted purchaser subject to tax, including resale transactions. In addition, it does not matter if the person convicted is the manufacturer, wholesaler, distributor, or retailer of the counterfeit goods.

Effects, Objectives, and Benefits of the Proposed Amendments to Regulation 1668

Need for Clarification

Regulation 1668 was last amended in 2009, which was prior to the passage of AB 2681. Therefore, the Board’s Business Taxes Committee (BTC) staff determined that there is an issue (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) because Regulation 1668

does not currently indicate that AB 2681 made amendments to RTC section 6007 and add RTC section 6009.2 to change the application of sales and use tax to sales and purchases of counterfeit goods for resale. BTC staff also determined that amendments to Regulation 1668 are needed in order to have the effect and accomplish the objective of addressing the issue (or problem) by making Regulation 1668 consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2 regarding persons convicted of selling or purchasing counterfeit goods (discussed above).

Interested Parties Process

As a result of AB 2681, BTC staff drafted amendments to add a new subdivision (j), entitled “Counterfeit Goods,” to Regulation 1668 and add references to RTC sections 6007 and 6009.2 to Regulation 1668’s reference note. The new subdivision clarifies that convicted sellers’ sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale. It also clarifies that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

Staff also considered whether the civil and criminal penalty provisions of Regulation 1668, subdivision (d) (discussed above), apply in instances where a seller provides a resale certificate for the purchase of counterfeit goods for resale in the regular course of business without the payment of sales tax reimbursement or use tax and the seller is subsequently convicted of purchasing counterfeit goods. It was determined that the provisions of AB 2681 effectively impose a specific penalty on such a seller by making the seller liable for tax on such purchase, and it would be inconsistent with the provisions of AB 2681 to also impose the civil and criminal penalties provided by RTC sections 6094.5, 6484, and 6485 on such a seller with regard to such a purchase. Therefore, BTC staff also drafted amendments to clarify that Regulation 1668, subdivision (d), does not apply in the narrow circumstances where a resale certificate is issued in accordance with new subdivision (j), and the exception from subdivision (d) is consistent with the existing exceptions from subdivision (d) for resale certificates issued in accordance with subdivisions (h) and (i) (discussed above).

In addition to the proposed amendments regarding convicted sellers and purchasers of counterfeit goods, staff drafted amendments that deleted the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed. Staff also drafted non-substantive amendments to italicize the name of Regulation 1699, *Permits*, in subdivision (a), replace “State” with “state” in subdivision (b)(1)(C), delete an inadvertent space in the reference to subdivision “(b) (4)” in subdivision (b)(3), add a comma after “(\$500)” in subdivision (d)(2), insert “the” before “person” in the last sentence in subdivision (f)(1), delete an inadvertent space from before the parenthetical reference to “mobile transportation equipment” in subdivision (f)(2)(C), replace the period with a semicolon at the end of subdivision (f)(2)(F)3, delete inadvertent brackets from

subdivision (f)(3), and replace “Section” and “Sections” with “section” and “sections” throughout subdivision (h).

BTC staff subsequently made its draft amendments to Regulation 1668 available to the interested parties and one interested parties meeting was held to discuss staff’s draft amendments. At the meeting, staff’s recommendations were well received and no submissions from interested parties with alternative language were received. Because BTC staff did not receive any other inquiries or comments regarding the draft amendments during or subsequent to the first interested parties meeting and staff had no changes to its recommendation to amend Regulation 1668, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff’s draft amendments.

October 27, 2015, BTC Meeting

Subsequently, staff prepared Formal Issue Paper 15-008 and distributed it to the Board Members for consideration at the Board’s October 27, 2015, BTC meeting. Formal Issue Paper 15-008 recommended that the Board propose to adopt the draft amendments to Regulation 1668 (discussed above) in order to incorporate the provisions of RTC sections 6007 and 6009.2, as amended and enacted by AB 2681, by:

- Adding a new subdivision (j).
- Amending subdivision (d) so that it does not apply where a resale certificate is issued in accordance with new subdivision (j).
- Adding references to RTC sections 6007 and 6009.2 to the regulation’s reference note.

Formal Issue Paper 15-008 also recommended that the Board delete the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed, and that the Board make the non-substantive amendments to the regulation (discussed above). During the October 27, 2015, BTC meeting, the Board Members unanimously voted to propose the amendments to Regulation 1668 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1668 are reasonably necessary to have the effect and accomplish the objective of making the regulation consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2, and addressing the issue (or problem) that Regulation 1668 does not currently indicate that AB 2681 added RTC section 6007, subdivision (b), and section 6009.2. The Board also determined that the proposed amendments are reasonably necessary to have the effect and accomplish the objective of updating Regulation 1668, subdivision (h), and making the regulation grammatically correct and internally consistent.

The Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and

implementing, interpreting, and making specific the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1668 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1668 is the only state regulation that provides specific guidance regarding the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681. **In addition**, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1668 or the proposed amendments to Regulation 1668.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1668 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 1668 will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1668 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 1668 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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

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

The Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1668 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1668 will not affect the benefits of Regulation 1668 to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulation 1668 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

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

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Pamela Mash, Tax Counsel, by telephone at (916) 323-3248, by e-mail at Pamela.Mash@boe.ca.gov, or by mail at State Board of Equalization, Attn: Pamela Mash, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

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

WRITTEN COMMENT PERIOD

The written comment period ends at 9:30 a.m. on February 23, 2016, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1668 during the February 23-25, 2016, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1668. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1668 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1668, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at www.boe.ca.gov.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1668 with changes that are non-substantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available

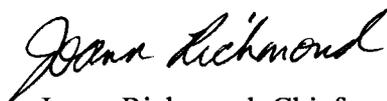
January 8, 2016

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 1668, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

Sincerely,



Joann Richmond, Chief
Board Proceedings Division

JR:reb

STATE BOARD OF EQUALIZATION



BOARD APPROVED

At the February 23, 2016 Board Meeting



Joann Richmond, Chief
Board Proceedings Division

**Initial Statement of Reasons for
Proposed Amendments to California Code of Regulations,
Title 18, Section 1668, *Sales for Resale***

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

General Background

The Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) imposes sales tax on retailers for the privilege of selling tangible personal property at retail in California and provides that sales tax is measured by the gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Cal. Code Regs., tit. 18, § (Regulation or Reg.) 1700, subd. (a)(1).)

When sales tax does not apply, the Sales and Use Tax Law imposes use tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer, unless specifically exempted or excluded by statute. The obligation to pay the use tax is on the consumer. However, every retailer “engaged in business” in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the State Board of Equalization (Board), and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (Reg. 1684.)

Revenue and Taxation Code (RTC) section 6007 defines the terms “retail sale” or “sale at retail” to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. RTC sections 6008 and 6009 define “storage” and “use,” respectively. “Storage” includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. “Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

RTC sections 6091 through 6095 (sales tax) and 6241 through 6245 (use tax) generally establish the presumption that the sale or storage, use or other consumption of tangible personal property is subject to sales or use tax, place the burden on the retailer to establish that tax does not apply, unless the retailer takes a certificate from the purchaser to the effect that the property is purchased for resale, and impose liability on persons who purchase tangible personal property with a resale certificate and subsequently make any use of the property other than retention, demonstration, or display while holding it for resale in the regular course of business. The Board previously adopted Regulation 1668, *Sales for Resale*, to implement, interpret, and make specific

the RTC provisions regarding sales for resale, including prescribing the form of resale certificates, prescribing the circumstances under which a retailer can overcome the presumption of taxability by timely taking a resale certificate from a purchaser in good faith, and establishing the presumption that a resale certificate is taken in good faith in the absence of evidence to the contrary.

In addition, RTC section 6094.5 generally provides that “[a]ny person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate,” and “a penalty of 10 percent of the tax or five hundred dollars (\$500) whichever is greater, for each purchase made [with a resale certificate] for personal gain or to evade the payment of taxes,” and is guilty of a misdemeanor for each purchase made with a resale certificate for the purpose of evading payment to the seller of the amount of the tax applicable to the transaction. RTC sections 6484 and 6485 alternatively provide for the imposition of a 10 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to negligence or the intentional disregard of the Sales and Use Tax Law or the Board’s regulations or a 25 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to fraud or an intent to evade the Sales and Use Tax Law or the Board’s regulations. And, Regulation 1668, subdivision (d), clarifies that all of these statutory provisions providing for civil and criminal penalties may apply to a person who makes an improper use of a resale certificate and thereafter fails to report the tax due as a result of such misuse.

Also, RTC sections 6012.8 and 6012.9 specify that mobilehome retailers are consumers of mobilehomes under specified circumstances. RTC sections 6012.8 and 6012.9 permit mobilehome retailers to give resale certificates for the purchase of mobilehomes under such circumstances to facilitate the reporting of their tax liabilities when they ultimately sell the mobilehomes to their customers for installation for occupancy as a residence. RTC section 6012.8 was also amended, effective September 19, 1985, to provide that a mobilehome retailer can issue a resale certificate for the purchase of a mobilehome regardless of whether the retailer installs the mobilehome on a foundation system as an improvement to realty prior to selling the mobilehome to its customer. And, the provisions of RTC sections 6012.8 and 6012.9 providing for the issuance of resale certificates by mobilehome retailers, including the effective date of the 1985 amendments to RTC section 6012.8, are implemented, interpreted, and made specific by Regulation 1668, subdivision (h).

Further, Regulation 1661, *Leases of Mobile Transportation Equipment*, explains that, under RTC sections 6006, 6010, 6094, and 6244, lessors are consumers of mobile transportation equipment (MTE) and if they purchase MTE without the payment of tax or tax reimbursement, they may elect to pay use tax measured by the “fair rental value” of the MTE. Regulations 1661 and 1668, subdivision (i), also both specify that, under RTC sections 6092.1 and 6243.1, a lessor of MTE, other than a lessor exempt from use tax, may issue a resale certificate for the purchase of MTE for the limited purpose of reporting use tax based on fair rental value in accordance with RTC sections 6094 and 6244. And, Regulation 1668, subdivision (d), clarifies that its civil and

criminal penalty provisions do not apply in the narrow circumstances where a resale certificate is issued in accordance with subdivision (h) or (i).

Furthermore, prior to September 19, 2014, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

Effective September 19, 2014, Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477) amended RTC section 6007 and enacted RTC section 6009.2 to establish that any sale by a convicted seller or purchase by a convicted purchaser of counterfeit goods is subject to tax. Specifically, it added a new subdivision (b) to RTC section 6007 to further define “retail sale” to include “any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business.” Similarly, the bill added new RTC section 6009.2 to further define “storage” and “use” to include any “purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale.” RTC section 6007 defines “convicted seller” and RTC section 6009.2 defines “convicted purchaser” to mean a person convicted of a violation under section 2320 of title 18 of the United States Code or under sections 350 or 653w of the Penal Code on or after the date of the sale or purchase, respectively. Both statutes provide that “[c]ounterfeit mark” has the same meaning as that term is defined in Section 2320 of Title 18 of the United States Code” and both statutes require that a notice of deficiency determination, issued to a convicted seller or purchaser, “shall be mailed within one year after the last day of the calendar month following the date of conviction.” Therefore, AB 2681 now makes sales and purchases of counterfeit goods by a convicted seller or convicted purchaser subject to tax, including resale transactions. In addition, it does not matter if the person convicted is the manufacturer, wholesaler, distributor, or retailer of the counterfeit goods.

Proposed Amendments

Need for Clarification

Regulation 1668 was last amended in 2009, which was prior to the passage of AB 2681. Therefore, the Board’s Business Taxes Committee (BTC) staff determined that there is an issue (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) because Regulation 1668 does not currently indicate that AB 2681 made amendments to RTC section 6007 and add RTC section 6009.2 to change the application of sales and use tax to sales and purchases of counterfeit goods for resale. BTC staff also determined that amendments to Regulation 1668 are needed in order to specifically address the issue and make Regulation 1668 consistent with and implement, interpret, and make specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2 regarding persons convicted of selling or purchasing counterfeit goods (discussed above).

Interested Parties Process

As a result of AB 2681, BTC staff drafted amendments to add a new subdivision (j), entitled “Counterfeit Goods,” to Regulation 1668 and add references to RTC sections 6007 and 6009.2 to Regulation 1668’s reference note. The new subdivision clarifies that convicted sellers’ sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale. It also clarifies that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

Staff also considered whether the civil and criminal penalty provisions of Regulation 1668, subdivision (d) (discussed above), apply in instances where a seller provides a resale certificate for the purchase of counterfeit goods for resale in the regular course of business without the payment of sales tax reimbursement or use tax and the seller is subsequently convicted of purchasing counterfeit goods. It was determined that the provisions of AB 2681 effectively impose a specific penalty on such a seller by making the seller liable for tax on such purchase, and it would be inconsistent with the provisions of AB 2681 to also impose the civil and criminal penalties provided by RTC sections 6094.5, 6484, and 6485 on such a seller with regard to such a purchase. Therefore, BTC staff also drafted amendments to clarify that Regulation 1668, subdivision (d), does not apply in the narrow circumstances where a resale certificate is issued in accordance with new subdivision (j), and the exception from subdivision (d) is consistent with the existing exceptions from subdivision (d) for resale certificates issued in accordance with subdivisions (h) and (i) (discussed above).

In addition to the proposed amendments regarding convicted sellers and purchasers of counterfeit goods, staff drafted amendments that deleted the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed. Staff also drafted non-substantive amendments to italicize the name of Regulation 1699, *Permits*, in subdivision (a), replace “State” with “state” in subdivision (b)(1)(C), delete an inadvertent space in the reference to subdivision “(b) (4)” in subdivision (b)(3), add a comma after “(\$500)” in subdivision (d)(2), insert “the” before “person” in the last sentence in subdivision (f)(1), delete an inadvertent space from before the parenthetical reference to “mobile transportation equipment” in subdivision (f)(2)(C), replace the period with a semicolon at the end of subdivision (f)(2)(F)3, delete inadvertent brackets from subdivision (f)(3), and replace “Section” and “Sections” with “section” and “sections” throughout subdivision (h).

BTC staff subsequently made its draft amendments to Regulation 1668 available to the interested parties and one interested parties meeting was held to discuss staff’s draft amendments. At the meeting, staff’s recommendations were well received and no submissions from interested parties with alternative language were received. Because BTC staff did not receive any other inquiries or comments regarding the draft amendments during or subsequent to the first interested parties meeting and staff had no changes to its recommendation to amend Regulation 1668, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff’s draft amendments.

October 27, 2015, BTC Meeting

Subsequently, staff prepared Formal Issue Paper 15-008 and distributed it to the Board Members for consideration at the Board's October 27, 2015, BTC meeting. Formal Issue Paper 15-008 recommended that the Board propose to adopt the draft amendments to Regulation 1668 (discussed above) in order to incorporate the provisions of RTC sections 6007 and 6009.2, as amended and enacted by AB 2681, by:

- Adding a new subdivision (j).
- Amending subdivision (d) so that it does not apply where a resale certificate is issued in accordance with new subdivision (j).
- Adding references to RTC sections 6007 and 6009.2 to the regulation's reference note.

Formal Issue Paper 15-008 also recommended that the Board delete the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed, and that the Board make the non-substantive amendments to the regulation (discussed above). During the October 27, 2015, BTC meeting, the Board Members unanimously voted to propose the amendments to Regulation 1668 recommended in the formal issue paper.¹ The Board determined that the proposed amendments to Regulation 1668 are reasonably necessary for the specific purpose of making the regulation consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2, and addressing the issue (or problem) that Regulation 1668 does not currently indicate that AB 2681 added RTC section 6007, subdivision (b), and section 6009.2. The Board also determined that the proposed amendments are reasonably necessary for the specific purpose of updating Regulation 1668, subdivision (h), and making the regulation grammatically correct and internally consistent.

The Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and implementing, interpreting, and making specific the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681.

The adoption of the proposed amendments to Regulation 1668 is not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to Regulation 1668 or the proposed amendments to Regulation 1668.

¹ The Board also added "show that" to subdivision (f) to fix an incomplete sentence, deleted the extra space in the first parenthetical in subdivision (f)(2)(C), changed the period to a semicolon at the end of subdivision (f)(2)(C), added "or" after the semicolon following subdivision (f)(2)(F)3, and changed "Title" to "title" in new subdivision (j) of the text of the amendments shown in exhibit 2 to Formal Issue Paper 15-008.

DOCUMENTS RELIED UPON

The Board relied upon Formal Issue Paper 15-008, the exhibits to the issue paper, and the comments made during the Board's discussion of the issue paper during its October 27, 2015, BTC meeting in deciding to propose the amendments to Regulation 1668 described above.

ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1668 at this time or, alternatively, whether to take no action at this time. The Board decided to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1668 at this time because the Board determined that the proposed amendments are reasonably necessary for the reasons set forth above.

The Board did not reject any reasonable alternative to the proposed amendments to Regulation 1668 that would lessen any adverse impact the proposed action may have on small business or that would be less burdensome and equally effective in achieving the purposes of the proposed action. No reasonable alternative has been identified and brought to the Board's attention that would lessen any adverse impact the proposed action may have on small business, be more effective in carrying out the purposes for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

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

Prior to the passage of AB 2681, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

As previously explained in more detail above, AB 2681 made specific amendments to RTC section 6007 and added RTC section 6009.2. The new statutory provisions now make a sale or purchase of counterfeit goods by a convicted seller or purchaser subject to tax. The substantive amendments to Regulation 1668 (discussed above) clarify that convicted sellers' sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale and clarify that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

As a result, the proposed substantive amendments make Regulation 1668 consistent with the amendments made to the RTC by AB 2681, the proposed amendments do not mandate that individuals or businesses do anything that is not already required by the RTC, and there is nothing in the proposed amendments that would significantly change how individuals and

businesses would generally behave, in the absence of the proposed regulatory action, or that would impact revenue. Therefore, the Board estimates that the proposed amendments will not have a measurable economic impact on individuals and business that is in addition to whatever economic impact the amendments made to the RTC by AB 2681 have had and will have on individuals and businesses. The Board has determined that the proposed amendments to Regulation 1668 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed amendments will not have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period. And, the Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and implementing, interpreting, and making specific the amendments made to the RTC by AB 2681.

In addition, based on these facts and all of the information in the rulemaking file, the Board has determined that the adoption of the proposed amendments to Regulation 1668 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California.

Furthermore, Regulation 1668 does not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of the proposed amendments to Regulation 1668 will not affect the benefits of Regulation 1668 to the health and welfare of California residents, worker safety, or the state's environment.

The forgoing information also provides the factual basis for the Board's initial determination that the adoption of the proposed amendments to Regulation 1668 will not have a significant adverse economic impact on business.

The proposed amendments to Regulation 1668 may affect small businesses.

**Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1668**

1668. Sales for Resale.

(a) Resale Certificate.

The burden of proving that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. If timely taken in proper form as set forth in subdivision (b) and in good faith from a person who is engaged in the business of selling tangible personal property and who holds a California seller's permit as required by Regulation 1699, "~~Permits~~Permits," the certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser. A resale certificate remains in effect until revoked in writing.

(b) Form of Certificate.

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

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name and address of the purchaser.

(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this ~~State~~state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement that the property described in the document is purchased for resale. The document must contain the phrase "for resale." The use of phrases such as "nontaxable," "exempt," or similar terminology is not acceptable. The property to be purchased under the certificate must be described either by an itemized list of the particular property to be purchased for resale, or by a general description of the kind of property to be purchased for resale.

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

(2) A document containing the essential elements described in subdivision (b)(1) is the minimum form which will be regarded as a resale certificate. However, in order to preclude

potential controversy, the seller should timely obtain from the purchaser a certificate substantially in the form shown in Appendix A of this regulation. If a purchaser operates an auto body repair and/or paint business, a specific resale certificate in substantially the same form as shown in Appendix B of this regulation should be used, rather than the general resale certificate shown in Appendix A.

(3) Blanket Resale Certificate. If a purchaser issues a general (blanket) resale certificate which provides a general description of the items to be purchased, and subsequently issues a purchase order which indicates that the transaction covered by the purchase order is taxable, the resale certificate does not apply with respect to that transaction. However, the purchaser will bear the burden of establishing either that the purchase order was sent to and received by the seller within the seller's billing cycle or prior to delivery of the property to the purchaser (whichever is the later), or that the tax or tax reimbursement was paid to the seller. The purchaser may avoid this burden by using the procedures described in subdivision (b)-(4) below.

(4) Qualified Resale Certificate. If a purchaser wishes to designate on each purchase order whether the property being purchased is for resale, the seller should obtain a qualified resale certificate, i.e., one that states "see purchase order" in the space provided for a description of the property to be purchased. Each purchase order must then specify whether or not the property covered by the order is purchased for resale. The use of the phrases "for resale," "resale = yes," "nontaxable," "taxable = no," or similar terminology on a purchase order, indicating that tax or tax reimbursement should not be added to the sales invoice will be regarded as designating that the property described is purchased for resale provided the combination of the purchase order and the qualified resale certificate contains all the essential elements provided in subdivision (b)(1). However, a purchase order where the applicable amount of tax is shown as \$0 or is left blank will not be accepted as designating that the property is purchased for resale, unless the purchase order also includes the phrase "for resale" or other terminology described above to specify that the property is purchased for resale. If each purchase order does not so specify, or is not issued timely within the meaning of subdivision (a), it will be presumed that the property covered by that purchase order was not purchased for resale and that sale or purchase is subject to tax. If the purchase order includes both items to be resold and items to be used, the purchase order must specify which items are purchased for resale and which items are purchased for use. For example, a purchase order issued for raw materials for resale and also for tooling used to process the raw materials should specify that the raw materials are purchased for resale and that the sale of the tooling is subject to tax.

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

(5) If the seller does not timely obtain a resale certificate, the fact that the purchaser deletes the tax or tax reimbursement from the seller's billing, provides a seller's permit number to the seller, or informs the seller that the transaction is "not taxable" does not relieve the seller from liability for the tax nor from the burden of proving the sale was for resale.

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

(d) Improper Use of Certificate. Except when a resale certificate is issued in accordance with subdivisions (h), ~~or (i) or (j)~~:

(1) A purchaser, including any officer or employee of a corporation, is guilty of a misdemeanor punishable as provided in section 7153 if the purchaser, for the purpose of evading payment to the seller of tax or tax reimbursement, gives a resale certificate for property which the purchaser knows at the time of purchase will be used rather than resold.

(2) Any person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate. In addition to the tax, the person shall be liable to the state for a penalty of 10 percent of the tax or five hundred dollars (\$500), whichever is greater, for each purchase made for personal gain or to evade the payment of taxes, as provided in sections 6072 and 6094.5.

(3) In addition to the penalty of 10 percent or five hundred dollars (\$500), whichever is greater, if the person fails to report and pay the use tax due on the use of the property purchased improperly with a resale certificate, the person may be liable for the 10 percent penalty for negligence or the 25 percent penalty for fraud, as provided in sections 6484 and 6485.

(e) Other Evidence to Rebut Presumption of Taxability. A sale for resale is not subject to sales tax. A person who purchases property for resale and who subsequently uses the property owes tax on that use. A resale certificate which is not timely taken is not retroactive and will not relieve the seller of the liability for the tax. Consequently, if the seller does not timely obtain a resale certificate containing the essential elements as described in subdivision (b)(1), the seller will be relieved of liability for the tax only where the seller shows that the property:

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

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

(3) Was consumed by the purchaser and tax was reported directly to the Board by the purchaser on the purchaser's sales and use tax return, or

(4) Was consumed by the purchaser and tax was paid to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.

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

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

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

(A) Purchased for resale and resold in the form of tangible personal property, without any use other than retention, demonstration, or display while being held for sale in the regular course of business;

(B) Purchased for resale and presently in resale inventory, without having been used for any purpose other than retention, demonstration, or display while being held for sale in the regular course of business;

(C) Purchased solely for leasing and was so leased. Tax has been paid directly to the Board measured by the purchase price or rental receipts (-"tangible personal property"); or tax has been paid measured by the purchase price or fair rental value (-"mobile transportation equipment");

(D) Purchased for resale but consumed or used (whether or not subsequently resold); or

(E) Purchased for use.

(F) When the purchaser answers either (D) or (E) affirmatively (box checked), the XYZ letter will inquire further whether:

1. The tax was paid directly to the Board on the purchaser's Sales and Use Tax Return, and if so, in what amount;
2. The tax was added to the billing of the seller and remitted to the seller, and if so, in what amount;
3. The tax was paid directly to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis; or
4. The purchaser confirms that the purchase is a taxable transaction and that tax is applicable.

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

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

(g) Purchaser's Liability for Tax. A purchaser who issues a resale certificate containing the essential elements as described in subdivision (b)(1) and that otherwise appears valid on its face, or who otherwise purchases tangible personal property that is accepted by the Board as purchased for resale pursuant to subdivision (f) and who thereafter makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business is liable for use tax on the cost of the property. The tax is due at the time the property is first stored or used and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property is first so stored or used. A purchaser cannot retroactively rescind or revoke a resale certificate and thereby cause the transaction to be subject to sales tax rather than use tax.

A purchaser who issues a resale certificate for property which the purchaser knows at the time of purchase is not to be resold in the regular course of business is liable for the sales tax on that purchase measured by the gross receipts from the sale to that purchaser. The tax is due as of the time the property was sold to the purchaser and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property was sold to the purchaser.

(h) Mobilehomes. A mobilehome retailer who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, or for installation for occupancy as a residence pursuant to ~~Section~~section 18613 of the Health and Safety Code, and which mobilehome is thereafter subject to property taxation, may issue a resale certificate to the mobilehome vendor even though the retailer is classified as a consumer of the mobilehome by ~~Sections~~sections 6012.8 and 6012.9 of the Revenue and Taxation Code. Also, ~~effective September 19, 1985,~~ a mobilehome retailer, licensed as a mobilehome dealer under ~~Section~~section 18002.6 of the Health and Safety Code, who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, may issue a resale certificate to the mobilehome vendor even though the mobilehome retailer may have the mobilehome installed on a foundation system as an improvement to realty prior to the retailer's sale of the mobilehome to the customer for occupancy as a residence.

Where the mobilehome is acquired by a mobilehome retailer, who is not licensed as a dealer pursuant to ~~Section~~section 18002.6 of the Health and Safety Code, for affixation by the retailer to a permanent foundation, or for other use or consumption (except demonstration or display while holding for sale in the regular course of business), prior to sale, the mobilehome retailer may not issue a resale certificate. The mobilehome retailer shall notify the vendor that the purchase is for consumption and not for resale. When a mobilehome manufacturer or other vendor is informed or has knowledge that the purchaser will install the mobilehome on a permanent foundation prior to its resale, the manufacturer or other vendor is not making a sale for resale. Such vendor is making a taxable retail sale and cannot accept a resale certificate in good faith.

(i) Mobile Transportation Equipment. Any person, other than a person exempt from use tax, such as under Revenue and Taxation Code section 6352, who purchases mobile transportation equipment for the sole purpose of leasing that equipment, may issue a resale certificate for the limited purpose of reporting use tax based on fair rental value as provided in Regulation 1661.

(j) Counterfeit Goods. A sale of tangible personal property with a counterfeit mark on, or in connection with, that sale by a convicted seller is included in the definition of "retail sale" per Revenue and Taxation Code section 6007, and therefore taxable. "Storage" and "use" as defined in Revenue and Taxation Code section 6009.2, includes any purchase of tangible personal property with a counterfeit mark on, or in connection with, that purchase by a convicted purchaser and is subject to tax. This is regardless of whether the counterfeit goods were sold for resale or held with the intent to be resold. A "counterfeit mark" is a spurious mark that is used in a manner described in section 2320 of title 18 of the United States Code.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485 and 7153, Revenue and Taxation Code.

Regulation History

Type of Regulation: Sales and Use Tax

Regulation: 1668

Title: *Sales for Resale*

Preparation: Pamela Mash

Legal Contact: Pamela Mash

The State Board of Equalization proposes to clarify that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, regardless of whether the sale or purchase was for resale.

History of Proposed Regulation:

February 23-25, 2016	Public Hearing
January 8, 2016	OAL publication date; 45-day public comment period begins; Interested Parties mailing
December 23, 2015	Notice to OAL
October 27, 2015	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor:	NA
Support:	NA
Oppose:	NA

Statement of Compliance

The State Board of Equalization, in process of adopting Sales and Use Taxes Regulation 1668, *Sales For Resale*, did comply with the provision of Government Code section 11346.4(a)(1) through (4). A notice to interested parties was mailed on January 8, 2016, 46 days prior to the public hearing.

March 3, 2016



Richard Bennion
Regulations Coordinator
State Board of Equalization

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

5901 GREEN VALLEY CIRCLE

CULVER CITY, CALIFORNIA

REPORTER'S TRANSCRIPT

FEBRUARY 23, 2016

PUBLIC HEARINGS

F1 PROPOSED AMENDMENTS TO SALES AND USE TAX

REGULATION 1668, SALES FOR RESALE

REPORTED BY: Kathleen Skidgel

CSR NO. 9039

P R E S E N T

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

For the Board
of Equalization:

Jerome E. Horton
Chairman

Sen. George Runner (Ret.)
Vice Chair

Fiona Ma, CPA
Member

Diane L. Harkey
Member

Yvette Stowers
Appearing for Betty T.
Yee, State Controller
(per Government Code
Section 7.9)

Joann Richmond
Chief
Board Proceedings
Division

For Board of
Equalization Staff:

Bradley Heller
Legal Department

---oOo---

1 5901 GREEN VALLEY CIRCLE

2 CULVER CITY, CALIFORNIA

3 FEBRUARY 23, 2016

4 ---oOo---

5 MR. HORTON: Members and guests, let us
6 reconvene the meeting of the Board of Equalization.

7 Ms. Richmond, what is our next matter?

8 MS. RICHMOND: Our next matter is Item F,
9 Public Hearings; Item F1, Proposed Amendments to
10 Sales and Use Tax Regulation 1668, Sales for
11 Resale.

12 MR. HORTON: Thank you.

13 Welcome to the Board, Mr. Heller. Please
14 commence at your convenience.

15 MR. HELLER: Good afternoon, Chairman
16 Horton, Members of the Board. I'm Bradley Heller
17 from the Board's Legal Department.

18 I'm here to request that the Board vote to
19 adopt the proposed amendments to Sales and Use Tax
20 Regulation 1668, Sales for Resale.

21 The proposed amendments clarify that a sale
22 or purchase of counterfeit goods by a convicted
23 seller or purchaser is subject to tax regardless of
24 whether the sale or purchase was for resale.

25 MR. HORTON: Discussion, Members?

26 Member Runner moves to adopt staff
27 recommendation. Second by Member Ma.

28 Let me commend staff for bringing this

1 forward. I would also encourage staff to take a
2 look at the whole cannabis issue to ensure that when
3 there is a violation of the existing law that's
4 governed in the Legislature pass, when they're not
5 in line with the system, they are -- they are in
6 fact considered a retailer. Therefore, in
7 positioning the Board of Equalization to protect the
8 State of California and collect the revenue that
9 would have gone -- would have gone uncollected and
10 unreported to the Board, these individuals fall into
11 the category of those who are just violating the law
12 and don't want to comply. Encourage you to take a
13 look at that.

14 Otherwise, there's a motion and a second.
15 Without objection, such will be the order.

16 ---oOo---

17
18
19
20
21
22
23
24
25
26
27
28

REPORTER'S CERTIFICATE

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

State of California)
) ss
County of Sacramento)

I, Kathleen Skidgel, Hearing Reporter for the California State Board of Equalization certify that on February 23, 2016 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: March 1, 2016

Kathleen Skidgel

KATHLEEN SKIDGEL, CSR #9039

Hearing Reporter



2016 MINUTES OF THE STATE BOARD OF EQUALIZATION**Tuesday, February 23, 2016**

Action: Upon motion of Mr. Runner, seconded by Ms. Harkey and duly carried, Mr. Runner, Ms. Ma, Ms. Harkey and Ms. Stowers voting yes, the Board set the excise tax rate for the period of July 1, 2016 through June 30, 2017 on: motor vehicle fuel at \$0.278 per gallon; and, diesel fuel at \$0.16 per gallon, as recommended by staff.

P1.2 Mark Durham, Chief, Research and Statistics Section, Legislative and Research Division, who presented staff's recommendation for setting the Fiscal Year 2016-17 diesel fuel tax rate for interstate users Component b (Exhibit 2.3).

Action: Upon motion of Mr. Runner, seconded by Ms. Ma and unanimously carried, Mr. Horton, Mr. Runner, Ms. Ma, Ms. Harkey and Ms. Stowers voting yes, the Board adopted a diesel fuel tax rate for interstate users Component b of \$0.240.00 per gallon for Fiscal Year 2016-17 as recommended by staff.

P1.3 Mark Durham, Chief, Research and Statistics Section, Legislative and Research Division, presented staff's recommendation for the prepayment rate for sales tax on motor vehicle fuel, diesel fuel and jet fuel distributions for the period July 1, 2016 through June 30, 2017 (Exhibit 2.4).

Action: Upon motion of Mr. Runner, seconded by Ms. Stowers and unanimously carried, Mr. Horton, Mr. Runner, Ms. Ma, Ms. Harkey and Ms. Stowers voting yes, the Board set the rate of prepayment of sales tax on motor vehicle fuel, diesel fuel and jet fuel distributions, for the period July 1, 2016 through June 30, 2017 at \$0.05 per gallon, \$0.17 per gallon, and \$0.07 per gallon, respectively, as recommended by staff.

The Board recessed at 12:33 p.m. and reconvened at 1:38 p.m. with Mr. Horton, Mr. Runner, Ms. Ma, Ms. Harkey and Ms. Stowers present.

PUBLIC HEARINGS**F1 Proposed Amendments to Sales and Use Tax Regulation 1668, *Sales for Resale***

Bradley Heller, Tax Counsel, Tax and Fee Programs Division, Legal Department, made introductory remarks regarding proposed amendments to clarify that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, regardless of whether the sale or purchase was for resale (Exhibit 2.5).

Speakers were invited to address the Board, but there were none.

Action: Upon motion of Mr. Runner, seconded by Ms. Ma and unanimously carried, Mr. Horton, Mr. Runner, Ms. Ma, Ms. Harkey and Ms. Stowers voting yes, the Board adopted the amendments to Regulation 1668 as published.



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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

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

FIONA MA, CPA
Second District, San Francisco

JEROME E. HORTON
Third District, Los Angeles County

DIANE L. HARKEY
Fourth District, Orange County

BETTY T. YEE
State Controller

CYNTHIA BRIDGES
Executive Director

January 8, 2016

To Interested Parties:

Notice of Proposed Regulatory Action
The State Board of Equalization Proposes to Adopt
Amendments to California Code of Regulations,
Title 18,
Section 1668, *Sales for Resale*

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation or Reg.) 1668, *Sales for Resale*, which incorporate and implement, interpret, and make specific RTC sections 6007 and 6009.2, as amended and added by Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477). The new statutory provisions now make a sale or purchase of counterfeit goods by a convicted seller or purchaser subject to sales and use tax, including sales and purchased for resale in the regular course of business. The proposed amendments add subdivision (j) to Regulation 1668 to incorporate the new provisions of RTC sections 6007 and 6009.2 by specifying that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, and that the transactions are taxable regardless of whether the sale or purchase was for resale.

PUBLIC HEARING

The Board will conduct a meeting in Room 207 at 5901 Green Valley Circle, Culver City, California, on February 23-25, 2016. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at www.boe.ca.gov 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 February 23, 24, or 25, 2016. At the hearing, any

interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1668.

AUTHORITY

RTC section 7051

REFERENCE

RTC Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485, and 7153

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

The Sales and Use Tax Law (RTC, § 6001 et seq.) imposes sales tax on retailers for the privilege of selling tangible personal property at retail in California and provides that sales tax is measured by the gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Reg. 1700, subd. (a)(1).)

When sales tax does not apply, the Sales and Use Tax Law imposes use tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer, unless specifically exempted or excluded by statute. The obligation to pay the use tax is on the consumer. However, every retailer “engaged in business” in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the Board, and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (Reg. 1684.)

RTC section 6007 defines the terms “retail sale” or “sale at retail” to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. RTC sections 6008 and 6009 define “storage” and “use,” respectively. “Storage” includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. “Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

RTC sections 6091 through 6095 (sales tax) and 6241 through 6245 (use tax) generally establish the presumption that the sale or storage, use or other consumption of tangible personal property is subject to sales or use tax, place the burden on the retailer to establish that tax does not apply,

unless the retailer takes a certificate from the purchaser to the effect that the property is purchased for resale, and impose liability on persons who purchase tangible personal property with a resale certificate and subsequently make any use of the property other than retention, demonstration, or display while holding it for resale in the regular course of business. The Board previously adopted Regulation 1668 to implement, interpret, and make specific the RTC provisions regarding sales for resale, including prescribing the form of resale certificates, prescribing the circumstances under which a retailer can overcome the presumption of taxability by timely taking a resale certificate from a purchaser in good faith, and establishing the presumption that a resale certificate is taken in good faith in the absence of evidence to the contrary.

In addition, RTC section 6094.5 generally provides that “[a]ny person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate,” and “a penalty of 10 percent of the tax or five hundred dollars (\$500) whichever is greater, for each purchase made [with a resale certificate] for personal gain or to evade the payment of taxes,” and is guilty of a misdemeanor for each purchase made with a resale certificate for the purpose of evading payment to the seller of the amount of the tax applicable to the transaction. RTC sections 6484 and 6485 alternatively provide for the imposition of a 10 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to negligence or the intentional disregard of the Sales and Use Tax Law or the Board’s regulations or a 25 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to fraud or an intent to evade the Sales and Use Tax Law or the Board’s regulations. And, Regulation 1668, subdivision (d), clarifies that all of these statutory provisions providing for civil and criminal penalties may apply to a person who makes an improper use of a resale certificate and thereafter fails to report the tax due as a result of such misuse.

Also, RTC sections 6012.8 and 6012.9 specify that mobilehome retailers are consumers of mobilehomes under specified circumstances. RTC sections 6012.8 and 6012.9 permit mobilehome retailers to give resale certificates for the purchase of mobilehomes under such circumstances to facilitate the reporting of their tax liabilities when they ultimately sell the mobilehomes to their customers for installation for occupancy as a residence. RTC section 6012.8 was also amended, effective September 19, 1985, to provide that a mobilehome retailer can issue a resale certificate for the purchase of a mobilehome regardless of whether the retailer installs the mobilehome on a foundation system as an improvement to realty prior to selling the mobilehome to its customer. And, the provisions of RTC sections 6012.8 and 6012.9 providing for the issuance of resale certificates by mobilehome retailers, including the effective date of the 1985 amendments to RTC section 6012.8, are implemented, interpreted, and made specific by Regulation 1668, subdivision (h).

Further, Regulation 1661, *Leases of Mobile Transportation Equipment*, explains that, under RTC sections 6006, 6010, 6094, and 6244, lessors are consumers of mobile transportation equipment

(MTE) and if they purchase MTE without the payment of tax or tax reimbursement, they may elect to pay use tax measured by the “fair rental value” of the MTE. Regulations 1661 and 1668, subdivision (i), also both specify that, under RTC sections 6092.1 and 6243.1, a lessor of MTE, other than a lessor exempt from use tax, may issue a resale certificate for the purchase of MTE for the limited purpose of reporting use tax based on fair rental value in accordance with RTC sections 6094 and 6244. And, Regulation 1668, subdivision (d), clarifies that its civil and criminal penalty provisions do not apply in the narrow circumstances where a resale certificate is issued in accordance with subdivision (h) or (i).

Furthermore, prior to September 19, 2014, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

Effective September 19, 2014, Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477) amended RTC section 6007 and enacted RTC section 6009.2 to establish that any sale by a convicted seller or purchase by a convicted purchaser of counterfeit goods is subject to tax. Specifically, it added a new subdivision (b) to RTC section 6007 to further define “retail sale” to include “any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business.” Similarly, the bill added new RTC section 6009.2 to further define “storage” and “use” to include any “purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale.” RTC section 6007 defines “convicted seller” and RTC section 6009.2 defines “convicted purchaser” to mean a person convicted of a violation under section 2320 of title 18 of the United States Code or under sections 350 or 653w of the Penal Code on or after the date of the sale or purchase, respectively. Both statutes provide that “[c]ounterfeit mark” has the same meaning as that term is defined in Section 2320 of Title 18 of the United States Code” and both statutes require that a notice of deficiency determination, issued to a convicted seller or purchaser, “shall be mailed within one year after the last day of the calendar month following the date of conviction.” Therefore, AB 2681 now makes sales and purchases of counterfeit goods by a convicted seller or convicted purchaser subject to tax, including resale transactions. In addition, it does not matter if the person convicted is the manufacturer, wholesaler, distributor, or retailer of the counterfeit goods.

Effects, Objectives, and Benefits of the Proposed Amendments to Regulation 1668

Need for Clarification

Regulation 1668 was last amended in 2009, which was prior to the passage of AB 2681. Therefore, the Board’s Business Taxes Committee (BTC) staff determined that there is an issue (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) because Regulation 1668

does not currently indicate that AB 2681 made amendments to RTC section 6007 and add RTC section 6009.2 to change the application of sales and use tax to sales and purchases of counterfeit goods for resale. BTC staff also determined that amendments to Regulation 1668 are needed in order to have the effect and accomplish the objective of addressing the issue (or problem) by making Regulation 1668 consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2 regarding persons convicted of selling or purchasing counterfeit goods (discussed above).

Interested Parties Process

As a result of AB 2681, BTC staff drafted amendments to add a new subdivision (j), entitled “Counterfeit Goods,” to Regulation 1668 and add references to RTC sections 6007 and 6009.2 to Regulation 1668’s reference note. The new subdivision clarifies that convicted sellers’ sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale. It also clarifies that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

Staff also considered whether the civil and criminal penalty provisions of Regulation 1668, subdivision (d) (discussed above), apply in instances where a seller provides a resale certificate for the purchase of counterfeit goods for resale in the regular course of business without the payment of sales tax reimbursement or use tax and the seller is subsequently convicted of purchasing counterfeit goods. It was determined that the provisions of AB 2681 effectively impose a specific penalty on such a seller by making the seller liable for tax on such purchase, and it would be inconsistent with the provisions of AB 2681 to also impose the civil and criminal penalties provided by RTC sections 6094.5, 6484, and 6485 on such a seller with regard to such a purchase. Therefore, BTC staff also drafted amendments to clarify that Regulation 1668, subdivision (d), does not apply in the narrow circumstances where a resale certificate is issued in accordance with new subdivision (j), and the exception from subdivision (d) is consistent with the existing exceptions from subdivision (d) for resale certificates issued in accordance with subdivisions (h) and (i) (discussed above).

In addition to the proposed amendments regarding convicted sellers and purchasers of counterfeit goods, staff drafted amendments that deleted the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed. Staff also drafted non-substantive amendments to italicize the name of Regulation 1699, *Permits*, in subdivision (a), replace “State” with “state” in subdivision (b)(1)(C), delete an inadvertent space in the reference to subdivision “(b) (4)” in subdivision (b)(3), add a comma after “(\$500)” in subdivision (d)(2), insert “the” before “person” in the last sentence in subdivision (f)(1), delete an inadvertent space from before the parenthetical reference to “mobile transportation equipment” in subdivision (f)(2)(C), replace the period with a semicolon at the end of subdivision (f)(2)(F)3, delete inadvertent brackets from

subdivision (f)(3), and replace “Section” and “Sections” with “section” and “sections” throughout subdivision (h).

BTC staff subsequently made its draft amendments to Regulation 1668 available to the interested parties and one interested parties meeting was held to discuss staff’s draft amendments. At the meeting, staff’s recommendations were well received and no submissions from interested parties with alternative language were received. Because BTC staff did not receive any other inquiries or comments regarding the draft amendments during or subsequent to the first interested parties meeting and staff had no changes to its recommendation to amend Regulation 1668, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff’s draft amendments.

October 27, 2015, BTC Meeting

Subsequently, staff prepared Formal Issue Paper 15-008 and distributed it to the Board Members for consideration at the Board’s October 27, 2015, BTC meeting. Formal Issue Paper 15-008 recommended that the Board propose to adopt the draft amendments to Regulation 1668 (discussed above) in order to incorporate the provisions of RTC sections 6007 and 6009.2, as amended and enacted by AB 2681, by:

- Adding a new subdivision (j).
- Amending subdivision (d) so that it does not apply where a resale certificate is issued in accordance with new subdivision (j).
- Adding references to RTC sections 6007 and 6009.2 to the regulation’s reference note.

Formal Issue Paper 15-008 also recommended that the Board delete the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed, and that the Board make the non-substantive amendments to the regulation (discussed above). During the October 27, 2015, BTC meeting, the Board Members unanimously voted to propose the amendments to Regulation 1668 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1668 are reasonably necessary to have the effect and accomplish the objective of making the regulation consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2, and addressing the issue (or problem) that Regulation 1668 does not currently indicate that AB 2681 added RTC section 6007, subdivision (b), and section 6009.2. The Board also determined that the proposed amendments are reasonably necessary to have the effect and accomplish the objective of updating Regulation 1668, subdivision (h), and making the regulation grammatically correct and internally consistent.

The Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and

implementing, interpreting, and making specific the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1668 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1668 is the only state regulation that provides specific guidance regarding the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681. **In addition**, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1668 or the proposed amendments to Regulation 1668.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1668 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 1668 will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1668 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 1668 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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

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

The Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1668 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1668 will not affect the benefits of Regulation 1668 to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulation 1668 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

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

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Pamela Mash, Tax Counsel, by telephone at (916) 323-3248, by e-mail at Pamela.Mash@boe.ca.gov, or by mail at State Board of Equalization, Attn: Pamela Mash, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

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

WRITTEN COMMENT PERIOD

The written comment period ends at 9:30 a.m. on February 23, 2016, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1668 during the February 23-25, 2016, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1668. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1668 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1668, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at www.boe.ca.gov.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1668 with changes that are non-substantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available

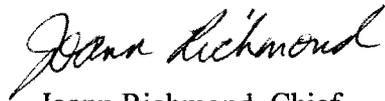
January 8, 2016

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 1668, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.

Sincerely,



Joann Richmond, Chief
Board Proceedings Division

JR:reb

**Initial Statement of Reasons for
Proposed Amendments to California Code of Regulations,
Title 18, Section 1668, *Sales for Resale***

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

General Background

The Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) imposes sales tax on retailers for the privilege of selling tangible personal property at retail in California and provides that sales tax is measured by the gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Cal. Code Regs., tit. 18, § (Regulation or Reg.) 1700, subd. (a)(1).)

When sales tax does not apply, the Sales and Use Tax Law imposes use tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer, unless specifically exempted or excluded by statute. The obligation to pay the use tax is on the consumer. However, every retailer “engaged in business” in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the State Board of Equalization (Board), and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (Reg. 1684.)

Revenue and Taxation Code (RTC) section 6007 defines the terms “retail sale” or “sale at retail” to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. RTC sections 6008 and 6009 define “storage” and “use,” respectively. “Storage” includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. “Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

RTC sections 6091 through 6095 (sales tax) and 6241 through 6245 (use tax) generally establish the presumption that the sale or storage, use or other consumption of tangible personal property is subject to sales or use tax, place the burden on the retailer to establish that tax does not apply, unless the retailer takes a certificate from the purchaser to the effect that the property is purchased for resale, and impose liability on persons who purchase tangible personal property with a resale certificate and subsequently make any use of the property other than retention, demonstration, or display while holding it for resale in the regular course of business. The Board previously adopted Regulation 1668, *Sales for Resale*, to implement, interpret, and make specific

the RTC provisions regarding sales for resale, including prescribing the form of resale certificates, prescribing the circumstances under which a retailer can overcome the presumption of taxability by timely taking a resale certificate from a purchaser in good faith, and establishing the presumption that a resale certificate is taken in good faith in the absence of evidence to the contrary.

In addition, RTC section 6094.5 generally provides that “[a]ny person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate,” and “a penalty of 10 percent of the tax or five hundred dollars (\$500) whichever is greater, for each purchase made [with a resale certificate] for personal gain or to evade the payment of taxes,” and is guilty of a misdemeanor for each purchase made with a resale certificate for the purpose of evading payment to the seller of the amount of the tax applicable to the transaction. RTC sections 6484 and 6485 alternatively provide for the imposition of a 10 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to negligence or the intentional disregard of the Sales and Use Tax Law or the Board’s regulations or a 25 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to fraud or an intent to evade the Sales and Use Tax Law or the Board’s regulations. And, Regulation 1668, subdivision (d), clarifies that all of these statutory provisions providing for civil and criminal penalties may apply to a person who makes an improper use of a resale certificate and thereafter fails to report the tax due as a result of such misuse.

Also, RTC sections 6012.8 and 6012.9 specify that mobilehome retailers are consumers of mobilehomes under specified circumstances. RTC sections 6012.8 and 6012.9 permit mobilehome retailers to give resale certificates for the purchase of mobilehomes under such circumstances to facilitate the reporting of their tax liabilities when they ultimately sell the mobilehomes to their customers for installation for occupancy as a residence. RTC section 6012.8 was also amended, effective September 19, 1985, to provide that a mobilehome retailer can issue a resale certificate for the purchase of a mobilehome regardless of whether the retailer installs the mobilehome on a foundation system as an improvement to realty prior to selling the mobilehome to its customer. And, the provisions of RTC sections 6012.8 and 6012.9 providing for the issuance of resale certificates by mobilehome retailers, including the effective date of the 1985 amendments to RTC section 6012.8, are implemented, interpreted, and made specific by Regulation 1668, subdivision (h).

Further, Regulation 1661, *Leases of Mobile Transportation Equipment*, explains that, under RTC sections 6006, 6010, 6094, and 6244, lessors are consumers of mobile transportation equipment (MTE) and if they purchase MTE without the payment of tax or tax reimbursement, they may elect to pay use tax measured by the “fair rental value” of the MTE. Regulations 1661 and 1668, subdivision (i), also both specify that, under RTC sections 6092.1 and 6243.1, a lessor of MTE, other than a lessor exempt from use tax, may issue a resale certificate for the purchase of MTE for the limited purpose of reporting use tax based on fair rental value in accordance with RTC sections 6094 and 6244. And, Regulation 1668, subdivision (d), clarifies that its civil and

criminal penalty provisions do not apply in the narrow circumstances where a resale certificate is issued in accordance with subdivision (h) or (i).

Furthermore, prior to September 19, 2014, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

Effective September 19, 2014, Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477) amended RTC section 6007 and enacted RTC section 6009.2 to establish that any sale by a convicted seller or purchase by a convicted purchaser of counterfeit goods is subject to tax. Specifically, it added a new subdivision (b) to RTC section 6007 to further define “retail sale” to include “any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business.” Similarly, the bill added new RTC section 6009.2 to further define “storage” and “use” to include any “purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale.” RTC section 6007 defines “convicted seller” and RTC section 6009.2 defines “convicted purchaser” to mean a person convicted of a violation under section 2320 of title 18 of the United States Code or under sections 350 or 653w of the Penal Code on or after the date of the sale or purchase, respectively. Both statutes provide that “[c]ounterfeit mark” has the same meaning as that term is defined in Section 2320 of Title 18 of the United States Code” and both statutes require that a notice of deficiency determination, issued to a convicted seller or purchaser, “shall be mailed within one year after the last day of the calendar month following the date of conviction.” Therefore, AB 2681 now makes sales and purchases of counterfeit goods by a convicted seller or convicted purchaser subject to tax, including resale transactions. In addition, it does not matter if the person convicted is the manufacturer, wholesaler, distributor, or retailer of the counterfeit goods.

Proposed Amendments

Need for Clarification

Regulation 1668 was last amended in 2009, which was prior to the passage of AB 2681. Therefore, the Board’s Business Taxes Committee (BTC) staff determined that there is an issue (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) because Regulation 1668 does not currently indicate that AB 2681 made amendments to RTC section 6007 and add RTC section 6009.2 to change the application of sales and use tax to sales and purchases of counterfeit goods for resale. BTC staff also determined that amendments to Regulation 1668 are needed in order to specifically address the issue and make Regulation 1668 consistent with and implement, interpret, and make specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2 regarding persons convicted of selling or purchasing counterfeit goods (discussed above).

Interested Parties Process

As a result of AB 2681, BTC staff drafted amendments to add a new subdivision (j), entitled "Counterfeit Goods," to Regulation 1668 and add references to RTC sections 6007 and 6009.2 to Regulation 1668's reference note. The new subdivision clarifies that convicted sellers' sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale. It also clarifies that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

Staff also considered whether the civil and criminal penalty provisions of Regulation 1668, subdivision (d) (discussed above), apply in instances where a seller provides a resale certificate for the purchase of counterfeit goods for resale in the regular course of business without the payment of sales tax reimbursement or use tax and the seller is subsequently convicted of purchasing counterfeit goods. It was determined that the provisions of AB 2681 effectively impose a specific penalty on such a seller by making the seller liable for tax on such purchase, and it would be inconsistent with the provisions of AB 2681 to also impose the civil and criminal penalties provided by RTC sections 6094.5, 6484, and 6485 on such a seller with regard to such a purchase. Therefore, BTC staff also drafted amendments to clarify that Regulation 1668, subdivision (d), does not apply in the narrow circumstances where a resale certificate is issued in accordance with new subdivision (j), and the exception from subdivision (d) is consistent with the existing exceptions from subdivision (d) for resale certificates issued in accordance with subdivisions (h) and (i) (discussed above).

In addition to the proposed amendments regarding convicted sellers and purchasers of counterfeit goods, staff drafted amendments that deleted the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed. Staff also drafted non-substantive amendments to italicize the name of Regulation 1699, *Permits*, in subdivision (a), replace "State" with "state" in subdivision (b)(1)(C), delete an inadvertent space in the reference to subdivision "(b) (4)" in subdivision (b)(3), add a comma after "\$500" in subdivision (d)(2), insert "the" before "person" in the last sentence in subdivision (f)(1), delete an inadvertent space from before the parenthetical reference to "mobile transportation equipment" in subdivision (f)(2)(C), replace the period with a semicolon at the end of subdivision (f)(2)(F)3, delete inadvertent brackets from subdivision (f)(3), and replace "Section" and "Sections" with "section" and "sections" throughout subdivision (h).

BTC staff subsequently made its draft amendments to Regulation 1668 available to the interested parties and one interested parties meeting was held to discuss staff's draft amendments. At the meeting, staff's recommendations were well received and no submissions from interested parties with alternative language were received. Because BTC staff did not receive any other inquiries or comments regarding the draft amendments during or subsequent to the first interested parties meeting and staff had no changes to its recommendation to amend Regulation 1668, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff's draft amendments.

businesses would generally behave, in the absence of the proposed regulatory action, or that would impact revenue. Therefore, the Board estimates that the proposed amendments will not have a measurable economic impact on individuals and business that is in addition to whatever economic impact the amendments made to the RTC by AB 2681 have had and will have on individuals and businesses. The Board has determined that the proposed amendments to Regulation 1668 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed amendments will not have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period. And, the Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and implementing, interpreting, and making specific the amendments made to the RTC by AB 2681.

In addition, based on these facts and all of the information in the rulemaking file, the Board has determined that the adoption of the proposed amendments to Regulation 1668 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California.

Furthermore, Regulation 1668 does not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of the proposed amendments to Regulation 1668 will not affect the benefits of Regulation 1668 to the health and welfare of California residents, worker safety, or the state's environment.

The forgoing information also provides the factual basis for the Board's initial determination that the adoption of the proposed amendments to Regulation 1668 will not have a significant adverse economic impact on business.

The proposed amendments to Regulation 1668 may affect small businesses.

**Text of Proposed Amendments to
California Code of Regulations, Title 18, Section 1668**

1668. Sales for Resale.

(a) Resale Certificate.

The burden of proving that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. If timely taken in proper form as set forth in subdivision (b) and in good faith from a person who is engaged in the business of selling tangible personal property and who holds a California seller's permit as required by Regulation 1699, "~~Permits~~Permits," the certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser. A resale certificate remains in effect until revoked in writing.

(b) Form of Certificate.

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

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name and address of the purchaser.

(C) The number of the seller's permit held by the purchaser. If the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this ~~State~~state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement that the property described in the document is purchased for resale. The document must contain the phrase "for resale." The use of phrases such as "nontaxable," "exempt," or similar terminology is not acceptable. The property to be purchased under the certificate must be described either by an itemized list of the particular property to be purchased for resale, or by a general description of the kind of property to be purchased for resale.

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

(2) A document containing the essential elements described in subdivision (b)(1) is the minimum form which will be regarded as a resale certificate. However, in order to preclude

potential controversy, the seller should timely obtain from the purchaser a certificate substantially in the form shown in Appendix A of this regulation. If a purchaser operates an auto body repair and/or paint business, a specific resale certificate in substantially the same form as shown in Appendix B of this regulation should be used, rather than the general resale certificate shown in Appendix A.

(3) Blanket Resale Certificate. If a purchaser issues a general (blanket) resale certificate which provides a general description of the items to be purchased, and subsequently issues a purchase order which indicates that the transaction covered by the purchase order is taxable, the resale certificate does not apply with respect to that transaction. However, the purchaser will bear the burden of establishing either that the purchase order was sent to and received by the seller within the seller's billing cycle or prior to delivery of the property to the purchaser (whichever is the later), or that the tax or tax reimbursement was paid to the seller. The purchaser may avoid this burden by using the procedures described in subdivision (b)-(4) below.

(4) Qualified Resale Certificate. If a purchaser wishes to designate on each purchase order whether the property being purchased is for resale, the seller should obtain a qualified resale certificate, i.e., one that states "see purchase order" in the space provided for a description of the property to be purchased. Each purchase order must then specify whether or not the property covered by the order is purchased for resale. The use of the phrases "for resale," "resale = yes," "nontaxable," "taxable = no," or similar terminology on a purchase order, indicating that tax or tax reimbursement should not be added to the sales invoice will be regarded as designating that the property described is purchased for resale provided the combination of the purchase order and the qualified resale certificate contains all the essential elements provided in subdivision (b)(1). However, a purchase order where the applicable amount of tax is shown as \$0 or is left blank will not be accepted as designating that the property is purchased for resale, unless the purchase order also includes the phrase "for resale" or other terminology described above to specify that the property is purchased for resale. If each purchase order does not so specify, or is not issued timely within the meaning of subdivision (a), it will be presumed that the property covered by that purchase order was not purchased for resale and that sale or purchase is subject to tax. If the purchase order includes both items to be resold and items to be used, the purchase order must specify which items are purchased for resale and which items are purchased for use. For example, a purchase order issued for raw materials for resale and also for tooling used to process the raw materials should specify that the raw materials are purchased for resale and that the sale of the tooling is subject to tax.

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

(5) If the seller does not timely obtain a resale certificate, the fact that the purchaser deletes the tax or tax reimbursement from the seller's billing, provides a seller's permit number to the seller, or informs the seller that the transaction is "not taxable" does not relieve the seller from liability for the tax nor from the burden of proving the sale was for resale.

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

(d) Improper Use of Certificate. Except when a resale certificate is issued in accordance with subdivisions (h), ~~(i)~~ or (j):

(1) A purchaser, including any officer or employee of a corporation, is guilty of a misdemeanor punishable as provided in section 7153 if the purchaser, for the purpose of evading payment to the seller of tax or tax reimbursement, gives a resale certificate for property which the purchaser knows at the time of purchase will be used rather than resold.

(2) Any person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate. In addition to the tax, the person shall be liable to the state for a penalty of 10 percent of the tax or five hundred dollars (\$500), whichever is greater, for each purchase made for personal gain or to evade the payment of taxes, as provided in sections 6072 and 6094.5.

(3) In addition to the penalty of 10 percent or five hundred dollars (\$500), whichever is greater, if the person fails to report and pay the use tax due on the use of the property purchased improperly with a resale certificate, the person may be liable for the 10 percent penalty for negligence or the 25 percent penalty for fraud, as provided in sections 6484 and 6485.

(e) Other Evidence to Rebut Presumption of Taxability. A sale for resale is not subject to sales tax. A person who purchases property for resale and who subsequently uses the property owes tax on that use. A resale certificate which is not timely taken is not retroactive and will not relieve the seller of the liability for the tax. Consequently, if the seller does not timely obtain a resale certificate containing the essential elements as described in subdivision (b)(1), the seller will be relieved of liability for the tax only where the seller shows that the property:

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

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

(3) Was consumed by the purchaser and tax was reported directly to the Board by the purchaser on the purchaser's sales and use tax return, or

(4) Was consumed by the purchaser and tax was paid to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.

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

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

(2) An XYZ letter will request that the purchaser, purchaser’s employee or authorized representative check one of the boxes provided inquiring as to whether the property in question was:

(A) Purchased for resale and resold in the form of tangible personal property, without any use other than retention, demonstration, or display while being held for sale in the regular course of business;

(B) Purchased for resale and presently in resale inventory, without having been used for any purpose other than retention, demonstration, or display while being held for sale in the regular course of business;

(C) Purchased solely for leasing and was so leased. Tax has been paid directly to the Board measured by the purchase price or rental receipts (-“tangible personal property”); or tax has been paid measured by the purchase price or fair rental value (-“mobile transportation equipment”);

(D) Purchased for resale but consumed or used (whether or not subsequently resold); or

(E) Purchased for use.

(F) When the purchaser answers either (D) or (E) affirmatively (box checked), the XYZ letter will inquire further whether:

1. The tax was paid directly to the Board on the purchaser's Sales and Use Tax Return, and if so, in what amount;
2. The tax was added to the billing of the seller and remitted to the seller, and if so, in what amount;
3. The tax was paid directly to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis; or
4. The purchaser confirms that the purchase is a taxable transaction and that tax is applicable.

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

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

(g) Purchaser's Liability for Tax. A purchaser who issues a resale certificate containing the essential elements as described in subdivision (b)(1) and that otherwise appears valid on its face, or who otherwise purchases tangible personal property that is accepted by the Board as purchased for resale pursuant to subdivision (f) and who thereafter makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business is liable for use tax on the cost of the property. The tax is due at the time the property is first stored or used and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property is first so stored or used. A purchaser cannot retroactively rescind or revoke a resale certificate and thereby cause the transaction to be subject to sales tax rather than use tax.

A purchaser who issues a resale certificate for property which the purchaser knows at the time of purchase is not to be resold in the regular course of business is liable for the sales tax on that purchase measured by the gross receipts from the sale to that purchaser. The tax is due as of the time the property was sold to the purchaser and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property was sold to the purchaser.

(h) Mobilehomes. A mobilehome retailer who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, or for installation for occupancy as a residence pursuant to ~~Section~~section 18613 of the Health and Safety Code, and which mobilehome is thereafter subject to property taxation, may issue a resale certificate to the mobilehome vendor even though the retailer is classified as a consumer of the mobilehome by ~~Sections~~sections 6012.8 and 6012.9 of the Revenue and Taxation Code. Also, ~~effective September 19, 1985,~~ a mobilehome retailer, licensed as a mobilehome dealer under ~~Section~~section 18002.6 of the Health and Safety Code, who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, may issue a resale certificate to the mobilehome vendor even though the mobilehome retailer may have the mobilehome installed on a foundation system as an improvement to realty prior to the retailer's sale of the mobilehome to the customer for occupancy as a residence.

Where the mobilehome is acquired by a mobilehome retailer, who is not licensed as a dealer pursuant to ~~Section~~section 18002.6 of the Health and Safety Code, for affixation by the retailer to a permanent foundation, or for other use or consumption (except demonstration or display while holding for sale in the regular course of business), prior to sale, the mobilehome retailer may not issue a resale certificate. The mobilehome retailer shall notify the vendor that the purchase is for consumption and not for resale. When a mobilehome manufacturer or other vendor is informed or has knowledge that the purchaser will install the mobilehome on a permanent foundation prior to its resale, the manufacturer or other vendor is not making a sale for resale. Such vendor is making a taxable retail sale and cannot accept a resale certificate in good faith.

(i) Mobile Transportation Equipment. Any person, other than a person exempt from use tax, such as under Revenue and Taxation Code section 6352, who purchases mobile transportation equipment for the sole purpose of leasing that equipment, may issue a resale certificate for the limited purpose of reporting use tax based on fair rental value as provided in Regulation 1661.

(j) Counterfeit Goods. A sale of tangible personal property with a counterfeit mark on, or in connection with, that sale by a convicted seller is included in the definition of "retail sale" per Revenue and Taxation Code section 6007, and therefore taxable. "Storage" and "use" as defined in Revenue and Taxation Code section 6009.2, includes any purchase of tangible personal property with a counterfeit mark on, or in connection with, that purchase by a convicted purchaser and is subject to tax. This is regardless of whether the counterfeit goods were sold for resale or held with the intent to be resold. A "counterfeit mark" is a spurious mark that is used in a manner described in section 2320 of title 18 of the United States Code.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485 and 7153, Revenue and Taxation Code.

Regulation History

Type of Regulation: Sales and Use Tax

Regulation: 1668

Title: *Sales for Resale*

Preparation: Pamela Mash

Legal Contact: Pamela Mash

The State Board of Equalization proposes to clarify that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, regardless of whether the sale or purchase was for resale.

History of Proposed Regulation:

February 23-25, 2016	Public Hearing
January 8, 2016	OAL publication date; 45-day public comment period begins; Interested Parties mailing
December 23, 2015	Notice to OAL
October 27, 2015	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA

Support: NA

Oppose: NA