



*California State Board of Equalization,
Legislative and Research Division*

LEGISLATIVE BULLETIN



State Capitol Building (from the East) c.1945
Photo courtesy of California State Archives

SPECIAL TAXES AND FEES LEGISLATION 2012

SPECIAL TAXES AND FEES LEGISLATION
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Assembly Bill 1301 (Hill) Chapter 335

Cigarette & Tobacco Products Licensing Act - Tobacco Sales to Minors

Effective January 1, 2013. Amends Section 22958 of, and repeals and adds 22974.8 of, the Business and Professions Code, and amends Section 308 of the Penal Code.

BILL SUMMARY

Relative to the Cigarette and Tobacco Products Licensing Act of 2003¹ (Licensing Act), this bill changes provisions that require the Board of Equalization (BOE) to take action against a retailer who violates laws related to sales of cigarettes or tobacco products to a person under the age of 18, as specified.

Sponsor: Assembly Member Hill

LAW PRIOR TO AMENDMENT

Business and Professions Code Section 22974.8 of the Licensing Act requires the BOE to take action against a retailer convicted of a violation of either the Stop Tobacco Access to Kids Enforcement (STAKE) Act² or Penal Code Section 308, according to the following schedule:

- Upon the first conviction of a violation, the retailer receives a warning letter from the BOE that delineates the circumstances under which a retailer's license may be suspended or revoked and the amount of time the license may be suspended or revoked. The retailer and its employees are required to receive training on tobacco control laws from the California Department of Public Health (CDPH) upon a first conviction.
- Upon the second conviction of a violation within 12 months, the retailer is subject to a fine of five hundred dollars (\$500).
- Upon the third conviction of a violation within 12 months, the retailer is subject to a fine of one thousand dollars (\$1,000).
- Upon the fourth to the seventh conviction of a violation within 12 months, the BOE is required to suspend the retailer's license to sell cigarette and tobacco products for 90 days.
- Upon the eighth conviction of a violation within 24 months, the BOE is required to revoke the retailer's license to sell cigarette and tobacco products. Convictions of violations by a retailer at one retail location are not accumulated against other locations of that same retailer. Furthermore, convictions of violations accumulated against a prior retail owner at a licensed location are not accumulated against a new retail owner at the same retail location.

STAKE Act. The STAKE Act (Division 8.5 (commencing with Section 22950) of the Business and Professions Code) established a statewide enforcement program to take action against businesses that illegally sell tobacco to minors. In general, the STAKE Act

¹ Division 8.6 (commencing with Section 22970) of the Business and Professions Code.

² Division 8.5 (commencing with Section 22950) of the Business and Professions Code.

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requires the CDPH to:

- Implement an enforcement program to reduce the availability of tobacco products to minors and to conduct sting operations using 15 and 16 year old minors granted immunity;
- Establish requirements for tobacco product retailers to conspicuously post a notice stating that selling tobacco products to a person under 18 years of age is illegal and subject to penalties;
- Assess civil penalties ranging from \$200 to \$6,000 against the store owner for violations; and
- Comply with the Synar Amendment (Section 1926 of Title XIX of the federal Public Health Service Act) and prepare an annual report regarding enforcement activities and their effectiveness for the federal government, Legislature, and Governor.

Furthermore, the STAKE Act:

- Requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers if the purchaser reasonably appears to be under 18 years of age.
- Prohibits any person, firm, or corporation from selling, giving, or in any way furnishing to another person who is under the age of 18 years any tobacco, cigarette, cigarette papers, any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance.
- Prohibits the selling, offering for sale, or distributing tobacco products from a cigarette or tobacco products vending machine unless such vending machines or appliances are located at least 15 feet away from the entrance of a premise issued an on-sale public premise license, as defined.
- Prohibits advertising of any tobacco product on any outdoor billboard, as specified.
- Prohibits a person engaged in the retail sale of (1) tobacco products to sell, offer for sale, or display for sale any tobacco product or tobacco paraphernalia by self-service display, except as permitted, or (2) blunt wraps to place or maintain, or to cause to be placed or maintained, any blunt wraps advertising display within two feet of candy, snack, or nonalcoholic beverage displayed inside any store or business or that is less than four feet above the floor.
- Prohibits the distributing or selling of tobacco products directly or indirectly to any person under the age of 18 years through the United State Postal Service or through any other public or private postal or package delivery service, as described.

AMENDMENT

This bill amends Section 22958 of the STAKE Act to require, upon notification by the CDPH, the BOE to suspend or revoke a license issued to a retailer under the Licensing Act for any person, firm, or corporation that is assessed a civil penalty for the third, fourth, or fifth violation for selling, giving, or in any way furnishing to another person who is under the age of 18 years, any tobacco, cigarette, cigarette papers, any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, in accordance with the following schedule:

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- 45-day suspension of the license for a third violation at the same location within a five-year period.
- 90-day suspension of a license for a fourth violation at the same location within a five-year period.
- Revocation of the license for a fifth violation at the same location within a five-year period.

The BOE is also required to assess a two hundred fifty dollar (\$250) civil penalty that would be deposited in the Cigarette and Tobacco Products Compliance Fund to be made available to the BOE, upon appropriation by the Legislature, for suspending or revoking a license as described. The provisions of Chapter 4 (commencing with Section 55121) of Part 30 of Division 2 of the Revenue and Taxation Code (Fee Collection Procedures Law) apply with respect to the BOE's collection of the penalty imposed.

This bill also repeals and adds Section 22974.8 to the Business and Professions Code to require the BOE to suspend or revoke the license of a retailer upon notification by the CDPH pursuant to Section 22958. The licensee would be provided with at least 10 days written notice of a pending suspension or revocation, and an opportunity to appeal the suspension or revocation and two hundred fifty dollar (\$250) penalty, but only to correct a mistake or clerical error. The BOE is prohibited from accepting or considering an appeal founded upon the grounds of whether a retailer violated the STAKE Act, as described. The BOE may modify its action on its own only to correct a mistake or clerical error.

This bill becomes effective January 1, 2013.

IN GENERAL

In 1992, Congress passed Section 1926 of Title XIX of the federal Public Health Service Act, commonly called the "Synar Amendment." The Synar Amendment requires each state to:

- Have in effect a law prohibiting any manufacturer, retailer or distributor of tobacco products from selling or distributing such products to any individual under the age of 18.
- Enforce such laws in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18.
- Conduct annual random, unannounced inspections to ensure compliance with the law. These inspections are to be conducted in such a way as to provide a valid sample of outlets accessible to youth.
- Develop a strategy and timeframe for achieving an inspection failure rate of less than 20 percent of outlets accessible to youth.
- Failure to meet the terms and conditions of the Synar Amendment could result in reductions (up to 40 percent) in the amount of Substance Abuse Prevention and Treatment (SAPT) block grant funds allocated to California for alcohol and other drug prevention and treatment programs.

To comply with the Synar Amendment, the Legislature passed Senate Bill 1927 (Stats. 1994, Ch. 1009) which established the STAKE Act. The STAKE Act created a new statewide enforcement program to take regulating action against businesses that illegally

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sell tobacco products to minors. Authority for enforcement and responsibility for implementation of the program was delegated to the CDPH, Food and Drug Branch.

BACKGROUND

In 2003, Assembly Bill 71 (J. Horton, Ch. 890) enacted the Licensing Act, which established a statewide licensure program administered by the BOE to help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products. Currently, the BOE has approximately 37,000 retailers and 1,000 distributors and wholesalers licensed to engage in the sale of cigarettes and tobacco products in California.

In 2004, Senate Bill 433 (Ortiz), and in 2005, Senate Bill 400 (Kuehl), would have repealed and added Business and Professions Code Section 22974.8 to make various changes to the penalties imposed for a conviction of a violation by a retailer for sales to persons under 18 years of age. Both bills were held under submission in the Senate Appropriations Committee.

In 2009, Senate Bill 602 (Padilla) and Senate Bill 603 (Padilla) would have, among other things, allowed the BOE to take action relating to the licensure of retailers who have violated the STAKE Act and made changes to the penalty provisions and the reporting requirements by enforcing agencies for any conviction of furnishing cigarettes or tobacco products to a person under 18 years of age, as specified. SB 602 was amended on July 1, 2009 to remove these provisions, and SB 603 was referred to the Assembly Governmental Organization Committee, but was never heard.

COMMENTS

1. **Purpose.** This bill is intended to hold retailers accountable for repeated violations of the STAKE Act by requiring the BOE to take action against a retailer's license to engage in the sale of cigarettes or tobacco products in this state.
2. **Civil penalty collection by the BOE most efficient?** The current version of the bill requires the BOE to assess a two hundred fifty dollar (\$250) civil penalty from a retailer upon notification by the CDPH of a third, fourth, and fifth STAKE Act violation. This civil penalty would be deposited into the Cigarette and Tobacco Products Compliance Fund to offset the BOE's administrative costs to suspend or revoke a license for STAKE Act violations. An earlier version of the bill required the CDPH to collect this civil penalty at the same time the existing STAKE Act penalty is assessed and collected to take advantage of an existing penalty collection process so as not to incur any new administrative costs. However, by shifting the penalty assessment and collection responsibility to the BOE, some new minor computer programming and resources would be required to implement and administer the new billing and collection function.
3. **Penalty collection.** This bill provides that the provisions of Chapter 4 (commencing with Section 55121) of Part 30 of Division 2 of the Revenue and Taxation Code (Fee Collections Procedures Law) would apply with respect to the BOE's collection of the two hundred fifty dollar (\$250) civil penalty, imposed pursuant to Section 22958(b).

The Fee Collection Procedures Law contains "generic" administrative provisions for the administration and collection of fee programs to be administered by the BOE. Chapter 4 (commencing with Section 55121) specifically provides administrative provisions for the collection of amounts due and payable, including, but not limited to

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judgment for fee amounts, warrant for collection and levies.

4. **Due process.** This bill would require the BOE to suspend or revoke the license of a retailer, as directed by the CDPH. The BOE would be required to provide the licensee with at least a 10 day written notice of that action, and allow the licensee to appeal the suspension or revocation and penalty, but only to correct a mistake or clerical error. The BOE would be prohibited from accepting or considering an appeal related to whether the retailer, or any employee or agent of the retailer, violated the STAKE Act for which a civil penalty was assessed under that Act that triggered the CDPH to direct the BOE to suspend or revoke the license.

The licensee's appeal rights under the Licensing Act would be limited since that person has the right to appeal the STAKE Act violation with the CDPH, which is processed through an administrative hearing with an administrative law judge making a ruling on that violation. It would be only after final administrative adjudication, or payment of the civil penalty for an uncontested violation, that the CDPH would direct the BOE to suspend or revoke a license.

Assembly Bill 1492 (Committee on Budget) Chapter 289

Lumber Products Assessment

Effective September 11, 2012, but operative January 1, 2013. Among its provisions, adds Article 9.5 (commencing with Section 4629) to Chapter 8 of Part 2 of Division 4 of, and repeals Section 4629.10 of, the Public Resources Code.

BILL SUMMARY

Among other things, this bill imposes a 1% assessment on purchasers of lumber products or engineered wood products to be collected by a retailer at the time of the sale, to be administered and collected by the Board of Equalization (BOE).

Sponsor: Committee on Budget

LAW PRIOR TO AMENDMENT

Timber Tax. Under existing law, Revenue and Taxation Code Section 38115 of the Timber Yield Tax Law imposes a tax on the following:

- Every timber owner who harvests his or her timber or causes it to be harvested, and
- Every timber owner of felled or downed timber who acquires title to such felled or downed timber in this state from an exempt person or agency, as described, and
- Every person who, without authorization, intentionally or unintentionally harvests or causes to be harvested timber owned by another.

The timber yield tax rate is currently set at 2.9 percent. The amount of tax is calculated according to the volume of timber harvested, the established value for the species harvested, and the tax rate.

The timber yield tax is collected by the BOE and deposited in the Timber Tax Fund. After administrative costs are deducted, remaining revenues are returned to local agencies, as specified.

Sales and Use Tax. Under existing law, a state and local sales and use tax is imposed on the sale or use of tangible personal property in this state, including lumber products, unless specifically exempted in the law. Currently, the total combined sales and use tax rate is between 7.25 and 9.75 percent, depending on the location in which the merchandise is sold. The statewide sales and use tax rate (7.25%) imposed on taxable sales and purchases of tangible personal property is made up of the following components (the additional transactions and use taxes, also known as district taxes, levied by various local jurisdictions are not reflected in this chart):

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Rate	Jurisdiction	Purpose/Authority
3.9375%	State (General Fund)	For general state purposes (Revenue and Taxation Code (RTC) Sections 6051, 6051.3, 6201, and 6201.3)
0.25%	State (Fiscal Recovery Fund)	For repayment of the Economic Recovery Bonds (RTC Sections 6051.5 and 6201.5, operative 7/1/04)
1.0625%	State (Local Revenue Fund 2011)	For counties to fund public safety programs (RTC Sections 6051.15 and 6201.15)
0.50%	State (Local Revenue Fund)	For local governments to fund health and welfare programs (RTC Sections 6051.2 and 6201.2)
0.50%	State (Local Public Safety Fund)	Local governments to fund public safety services (Section 35, Article XIII, State Constitution)
1.00%	Local (City/County) 0.75% City and County 0.25% County	For county transportation purposes For general city and county operations (RTC Section 7203.1, operative 7/1/04)
7.25%	Total Statewide Rate	

AMENDMENT

This bill adds Article 9.5 (commencing with Section 4629) to Chapter 8 of Part 2 of Division 4 of the Public Resources Code to impose, on and after January 1, 2013, an assessment on a person who purchases a lumber product or an engineered wood product for the storage, use, or other consumption in this state, at the rate of 1 percent of the sales price.

Assessment Liability. A retailer is required to charge and collect the assessment from the purchaser at the time of sale as a charge that is separate from, and not included in, any other fee, charge, or other amount paid by the purchaser. The retailer is required to separately state the amount of the assessment imposed on the sales receipt given by the retailer to the person at the time of sale.

Any excess assessment collected by the retailer under the representation that it was owed as an assessment that is unreturned to the purchaser constitutes debts owed to the state.

Every person who purchases a lumber product or an engineered wood product for storage, use, or other consumption in this state is liable for the assessment until it has been paid, except that payment to a retailer relieves the person from further liability for the assessment.

The retailer is authorized to retain an amount of the assessment equal to the amount of reimbursement, as determined by the BOE pursuant to emergency regulations, for any costs associated with the collection of the assessment, to be taken on the first return or next consecutive returns until the entire reimbursement amount is retained.

Definitions. The bill defines the following key terms:

- “Lumber product” means a product in which wood or wood fiber is a principal component part, including, but not limited to, a solid wood product, or an engineered wood product, as defined in regulations adopted by the State Board of Forestry and Fire Protection (Fire Board). Specifically excluded from the definition of “lumber product” is furniture, paper products, indoor flooring products such as hardwood or laminated flooring, bark or cork products, firewood, or other products not typically regarded as lumber products.
- “Principal component part” means 10 percent of the total content by volume.
- “Engineered wood product” means a building product, including, but not limited to, veneer-based sheeting material, plywood, laminated veneer lumber (LVL), parallel-laminated veneer (PLV), laminated beams, I-joists, edge-glued material, or composite material such as cellulosic fiberboard, hardboard, decking, particleboard, waferboard, flakeboard, oriented strand board (OSB), or any other panel or composite product where wood is a component part, that is identified in regulations by the Fire Board. An engineered wood product would only include products that consist of at least 10 percent wood.

The regulations to interpret and make specific the lumber products and engineered wood products subject to the lumber products assessment will be adopted by the Fire Board on or before October 1, 2012. The Fire Board is required to annually update the regulations, and products identified in the annually updated regulations would become subject to the assessment on the first day of the calendar quarter commencing more than 60 days after adoption of the updated regulation.

The bill also defines the terms “purchase,” “retailer,” “sales price,” “storage,” and “use” to have the same meaning as those terms are defined under the Sales and Use Tax Law.

Administration. The BOE is to administer and collect the assessment pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code). The references in the Fee Collection Procedures Law to “fee” includes the assessment imposed by this bill.

The Fee Collection Procedures Law contains "generic" administrative provisions for the administration and collection of fee programs to be administered by the BOE. It was added to the Revenue and Taxation Code to allow bills establishing a new fee to reference this law, thereby only requiring a minimal number of sections within the bill to provide the necessary administrative provisions. Among other things, the Fee Collection Procedures Law includes collection, reporting, refund, and appeals provisions, and it provides the BOE the authority to adopt regulations relating to the administration and enforcement of the Fee Collection Procedures Law.

The BOE is authorized to prescribe, adopt, and enforce regulations relating to the administration and enforcement of the assessment, including, but not limited to, collections, reporting, refunds, and appeals.

Registration, Reporting, and Payment. Persons required to pay the lumber products assessment are required to register with the BOE on a form prescribed by the BOE.

The assessment is due and payable to the BOE quarterly on or before the last day of the month next succeeding each quarterly period. In addition, a return for the preceding

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quarterly period is required to be filed with the BOE using electronic media. The return is due on or before the last day of the month following each quarterly period.

The electronic application for registration and returns must be authenticated in a form or pursuant to a method as may be prescribed by the BOE.

The BOE must deposit all assessment revenues received, less refunds and reimbursements, into the Timber Regulation and Forest Restoration Fund (Fund). Moneys in the Fund shall, upon appropriation by the Legislature, only be expended for the following purposes:

- To reimburse the BOE for its administrative costs associated with the administration, collection, audit, and issuance of refunds related to the lumber products and engineered wood assessment.
- To pay refunds issued pursuant to Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code.
- To support the activities and costs of the Department of Forestry and Fire Protection (CAL FIRE), the Department of Conservation, the Department of Fish and Game, the State Water Resources Control Board, and regional water quality control boards associated with the review of projects or permits necessary to conduct timber operations.
- For transfer to CAL FIRE's Forest Improvement Program for forest resources improvement grants and projects administered by the department, as described.
- To fund existing restoration grant programs.
- To CAL FIRE for fuel treatment grants and projects pursuant to authorities under the Wildland Fire Protection and Resources Management Act of 1978.
- To CAL FIRE to provide grants to local agencies responsible for fire protection, qualified nonprofits, recognized tribes, local and state governments, and resources conservation districts, undertaken on a state responsibility area (SRA) or on wildlands not in an SRA that pose a threat to the SRA, to reduce the costs of wildland fire suppression, reduce greenhouse gas emissions, promote adaptation of forested landscapes to changing climate, improve forest health, and protect homes and communities.

Implementation Costs. The bill authorizes the Director of Finance to authorize a loan from the General Fund to the Fund to implement the administration and collection of the assessment. Any loan made is to be repaid, with interest at the pooled money investment rate, from assessment revenues.

As an urgency bill, these provisions take effect September 11, 2012, but the assessment becomes operative January 1, 2013.

BACKGROUND

During the 2003-04 Legislative Session, Senate Bill 557 (Kuehl) would have imposed an excise tax at a rate of one-cent per board foot on distributors or purchasers of timber products. Among other things, the tax would have provided funding for the administration and review of timber harvest plans. That bill was held under submission in the Assembly Appropriations Committee.

COMMENTS

1. **Purpose.** The intent of this bill is, among other things, to ensure continued sustainable funding for the state's forest practice program to protect the state's forest resources and replace the current piecemeal funding structure with a single funding source.
2. **What is subject to the assessment?** The bill would impose an assessment on the purchase of a lumber product or an engineered wood product. Although the definition for the terms "lumber product" and "engineered wood product" are defined in the bill, the definitions themselves create some uncertainty as to how far reaching the specific products are that are subject to the assessment. To address this uncertainty, the bill provides clarification that lumber product "does not include furniture, paper products, indoor flooring products such as hardwood or laminated flooring, bark or cork products, firewood, **or other products not typically regarded as lumber products.**" The bill also provides certainty by requiring the Fire Board to adopt a regulation that interprets and makes specific the lumber products and engineered wood products subject to the assessment.
3. **Retailer cost reimbursement provision is for start-up costs only.** The bill allows retailers to retain an amount equal to the amount of reimbursement for any costs associated with the collection of the assessment, as determined by the BOE pursuant to emergency regulations authorized by the bill. According to the Governor's office, the intent of this provision is to allow reimbursement to retailers for start-up costs associated with implementation of the assessment only, and not for reimbursement to retailers with respect to their ongoing costs. And, while the language is not perfectly clear to reflect that intent, it is our understanding that a clarifying letter to the file will be prepared by the author. Of the 34 tax and fee programs currently administered by the BOE, reimbursement is only allowed under the California Tire Fee Law, Covered Electronic Waste Recycling Fee, and the Cigarette and Tobacco Products Tax Law. The California Tire Fee Law and Covered Electronic Waste Recycling Fee Law authorize a retail seller to retain 3 percent and 1.5 percent of the fee, respectively, as reimbursement of collection costs. The Cigarette and Tobacco Products Tax Law provides that cigarette tax stamps are to be sold to licensed distributors at a specified discount, which is intended to help defray the cost (leasing of equipment/labor cost) to the distributor for affixing the stamps.
4. **Petitions for redetermination.** The bill authorizes the Fire Board to adopt an emergency regulation by October 1, 2012, to make specific the lumber products and engineered wood products subject to the assessment. However, the BOE would retain the authority to hear appeals for disputed underpayments by retailers required to collect the assessment. It is imperative that the regulation adopted describe the products subject to the assessment in a very detailed, comprehensive manner in order to achieve compliance by affected retailers. At a minimum, it is suggested that the Fire Board work with the BOE in addressing this concern. Otherwise, significant confusion, underpayments or overpayments, tax disputes, and appeals could result.
5. **This bill could complicate lumber product retailers' records and reporting.** Lumber product retailers already must collect and remit sales and use tax on the retail sale of lumber products in California. Lumber product retailers most likely sell other tangible personal property subject to sales and use tax. Adding an additional assessment that would be collected from lumber product purchasers would require

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retailers to keep track of lumber product sales separately from other sales of tangible personal property.

Additionally, smaller lumber product retailers may find collecting the assessment burdensome. Larger retailers would have the ability to program into their computer system the various products subject to the assessment. Therefore, the assessment would be automatically added to the purchase price once the product code or UPC is entered at the register. Cashiers at smaller supply stores, which are typically not computerized, would have to determine if the product is identified in the Fire Board's regulation for each product sold, which could likely lead to collection and reporting errors.

6. **Bill could set a precedent.** Imposing varying taxes or fees on specific commodities complicates tax administration and could set a precedent for establishing multiple taxes or fees on other classes of tangible personal property. This results in increasing administrative costs to the BOE, and increased costs and a record-keeping burden on retailers.

Assembly Bill 2323 (Perea) Chapter 788

Publication of BOE Decisions

Effective January 1, 2013. Adds Section 40 to the Revenue and Taxation Code.

BILL SUMMARY

This bill requires the Board of Equalization (BOE) to publish on its Internet website, a formal written opinion, a written memorandum opinion, or a written summary decision for each decision, as specified, of the BOE in which the amount in controversy is \$500,000 or more, within 120 days from date of the decision, and include with that published opinion, specified information.

Sponsor: Assembly Member Perea

LAW PRIOR TO AMENDMENT

The BOE administers the sales and use tax and various excise taxes; sets values for property for state-assessees; monitors the property tax assessment practices of county assessors; reviews, equalizes and adjusts assessments of certain land owned by local government entities; and hears appeals of personal income and corporation taxes administered by the Franchise Tax Board (FTB). The California Constitution establishes that the BOE consists of 5 voting members: the Controller and four members elected at gubernatorial elections from districts for 4-year terms.

Under Government Code Section 15606, the BOE is required to keep a record of all its proceedings. Consistent with that provision, the BOE makes available the minutes of all BOE hearings and publishes the minutes on the BOE's website.

The BOE's Rules for Tax Appeals (California Code of Regulations, Title 18, § (Rule) 5000 et seq.), promulgated through the rulemaking process, provides rules for drafting and adopting written opinions. These rules are based on the California Rules of Court for publishing appellate court decisions.

Under the BOE's Rule 5573, the filing of an appeal with the BOE for income or corporation taxes constitutes a waiver of the taxpayer's right to confidentiality with regard to information provided to the BOE by the appellant or the FTB, including information contained in the Hearing Summary prepared to assist the BOE in its consideration and decision of an appeal at an oral hearing. Additionally, the filing of a written request for an oral hearing before the members of the BOE for BOE-administered taxes and fees constitutes a waiver of the taxpayer's right to confidentiality with regard to information provided to or obtained by the BOE that is actually disclosed on the transcript of the taxpayer's oral hearing before the BOE or included in the Hearing Summary prepared for the taxpayer's oral hearing before the BOE.

However, this waiver does not apply to any person's address, telephone number, social security number, federal identification number, or other account number, and such information is not made publicly available.

AMENDMENT

This bill adds Section 40 to the Revenue and Taxation Code to require the BOE to publish on its Internet website, a formal written opinion, a written memorandum opinion, or a written summary decision for each decision of the BOE in which the amount in controversy is \$500,000 or more, within 120 days of the date upon which the BOE rendered its decision. The bill specifies that a decision of the BOE shall not include consent calendar actions taken by the BOE.

The bill requires that each published opinion and decision include:

- (1) Findings of fact
- (2) The legal issue or issues presented.
- (3) Applicable law.
- (4) Analysis.
- (5) Disposition.
- (6) Names of adopting BOE members.

The bill allows a Member of the BOE to submit a dissenting opinion setting forth his or her rationale for disagreeing with the memorandum opinion or formal opinion, and allows a BOE Member to submit a concurring opinion setting forth his or her rationale for agreeing with the result reached in the opinion, if different than the rationale set forth in the opinion.

The bill provides that a dissenting and concurring opinion shall be published in the same manner as the bill requires for a formal or memorandum opinion.

The bill also provides that a formal opinion or memorandum opinion adopted by the BOE may be cited as precedent in any matter or proceeding before the BOE, unless the opinion has been depublished, overruled, or superseded. The bill specifies, however, that a summary decision may not be cited as precedent in any matter or proceeding before the BOE.

The bill becomes effective on January 1, 2013.

IN GENERAL

The BOE strives to offer transparency to all taxpayers and stakeholders. In an effort to be a more transparent agency, the BOE uses a variety of means to make information more easily accessible to taxpayers and interested parties. In recent years, the BOE has made significant strides in these efforts and will continue to do so. Taxpayer information that is public is now more readily available. For example, since the updated [Rules of Tax Appeals](#) were adopted in 2008, the hearing summaries have been attached to the public agenda when it is posted to the website 10 days prior to the hearings. Also, in 2008, video streaming of all meetings of the BOE in Sacramento and Culver City began, allowing access through the Internet to live, real time broadcasts for any interested party to watch and review all presentations, discussions, and decisions of the BOE. In addition, these meetings of the BOE are archived for anyone to watch afterward.

Corporate and individual taxpayers who dispute a final determination by the FTB may appeal that determination to the BOE. When an appeal from an FTB determination is resolved by the BOE, taxpayers typically receive either a Summary Decision or a Hearing Summary (which is followed by a Letter Decision) after an oral hearing. So far this fiscal year, the BOE has provided over 250 Hearing Summaries, Decisions on Petition for Rehearing or Summary Decisions to appealing taxpayers. These documents provide

taxpayers with helpful guidance as to the factual and legal issues and relevant statutes, regulations, court decisions, and other authorities. However, as discussed below, not all these documents can or should be published, due in part to rules restricting the disclosure of documents containing federal tax information. In addition, in selected cases involving important legal issues, the BOE issues [Formal Opinions](#) as a means of providing guidance that can be cited as precedent in other cases. Taxpayers may look to Formal Opinions for guidance as to the BOE's position on the legal issues discussed in those opinions. If a Formal Opinion presents facts and/or legal issues similar to those in a pending appeal, the BOE will generally rely on the Formal Opinion to make its determination in the pending appeal. These Formal Opinions are available on the BOE's website, and date as far back as 1930.

In addition, the BOE publishes franchise and income tax ("FIT") decisions by distributing them to legal publishers and other interested parties such as practitioners (except some decisions are required to be withheld to the extent they include federal tax information).

Taxpayers and feepayers who disagree with denials of claims for refund or determinations issued by the Sales and Use Tax Department or the Special Taxes Department of the BOE may appeal such actions to the elected members of the BOE. The BOE may issue [Memorandum Opinions](#) in connection with such an appeal. Taxpayers and feepayers may look to the Memorandum Opinions for guidance as to the BOE's position on the legal issues discussed in those opinions. If a Memorandum Opinion presents the same legal issue as those in a pending appeal in the same factual context, the BOE will generally resolve the legal issue in the same way as specified in the Memorandum Opinion. These opinions are available on the BOE's website, and date as far back as 1967.

In addition to the Formal Opinions and Memorandum Opinions, the BOE has for several years publicized on the BOE's website the minutes of every BOE hearing it holds.

COMMENTS

1. **Purpose.** This bill is intended to promote taxpayer confidence by requiring the BOE to publish written opinions for each case in which the amount in controversy is \$500,000 or more. The author believes these opinions would provide a formal record of the legal analysis applied to resolve significant cases for both the taxpayers involved and other interested parties. The author recognizes that the BOE does publish certain decisions, but notes that the number of decisions published on the BOE's website (i.e., Formal Opinions and Memorandum Opinions) has decreased dramatically in recent years. Thus, the author believes this bill is needed to restore a useful BOE practice that will, in turn, promote the twin goals of transparency and sound governance.
2. **Amendments.** The May 25, 2012 amendments excluded from the publishing requirements consent calendar actions taken by the BOE and increased the publishing deadline from 90 days to 120 days.
3. **Publishing all decisions could create confusion.** The BOE currently publishes its Formal Legal Opinions and Memorandum Opinions on its website and, pursuant to the Rules for Tax Appeals, those opinions are the only opinions that may be cited as precedent for other cases. Publishing non-precedential opinions *on the BOE's website* would create significant confusion, because it would suggest that the opinions

are authoritative guidance like the Formal Opinions which are currently provided on the website. The BOE does in fact distribute its FIT decisions and Hearing Summaries to legal publishers and interested practitioners, unless, as discussed below under Comment 6, federal restrictions on the disclosure of federal tax information apply. Under this existing practice, the BOE distributes a substantial number (over 150) of Summary Decisions and Decisions on Petition for Rehearing, as well as Hearing Summaries, each year to interested practitioners and other parties, and also to legal publishers for publication and inclusion in online legal research service sites, such as Lexis and Westlaw. However, publishing such decisions on the BOE's website, alongside precedential Formal Opinions, could create confusion rather than increase transparency.

4. **Bill would delay resolution of affected appeals.** For **FIT appeals** on the “non-appearance” calendar (meaning the taxpayer has waived his or her right to appear before the BOE Members at an oral hearing), the BOE distributes its Summary Decisions (written decisions that contain the findings of fact and conclusions of law that form the basis of the BOE's decision on an appeal) to legal publishers and other interested parties. Therefore, to the extent these decisions are already made publicly available, the bill is consistent with existing practice. However, the BOE generally does not include all the information the bill requires for “Letter Decisions” which are typically issued after an oral hearing in which the taxpayer appears in FIT cases. In the majority of these FIT appeals, the BOE makes its decision on the day of the hearing and, within days of the hearing, BOE staff notifies the parties of the BOE's determination through a brief Letter Decision. Because the Letter Decision is prepared by staff and sent immediately following the BOE's decision at the hearing, the Letter Decision does not provide a detailed legal analysis. Summary Decisions and Letter Decisions are important because they allow the BOE and its staff to consider and decide FIT appeals as expeditiously as possible, a benefit for both the taxpayer and the FTB.

It appears the bill would require the BOE to replace these Letter Decisions in applicable FIT cases that are typically issued after hearings, and require the staff to (1) prepare a more detailed analysis similar to that provided in Summary Decisions, (2) schedule these decisions for a later public meeting for discussion, review, and adoption or modification by the BOE, and (3) post the decisions on its website. This would delay resolution of these appeals, since these longer decisions would require prior BOE review and approval to ensure that the BOE agrees with the reasoning and language set forth in the decision (i.e., to ensure that the reasoning and analysis actually reflects that of the adopting BOE Members). Consequently, the appeal item would need to be held open after a BOE hearing for the BOE Appeals staff to prepare a decision that reflects the hearing testimony and discussion as well as BOE direction. It would then have to be submitted for the BOE's approval on a later calendar. This would appear to require significant changes to current procedures for qualifying appeals (e.g., more staff time will be needed to prepare these decisions, more discussion and debate at meetings when these decisions are presented for a vote, and there would be a delay in resolution of these appeals by at least a few months).

For **business tax appeals** (appeals of determinations issued for tax and fees administered by the BOE and claims for refund), there would also be a delay in resolution of some of the appeals. Prior to a hearing before the BOE, Appeals staff of

the BOE hold an appeals conference and issues a written report called a Decision and Recommendation (D&R) which contains the disputed issues, the facts relevant to those issues, and an analysis, leading to a recommended resolution of the appeal. Where the taxpayer does not agree, it may proceed to a hearing before the Members of the BOE. If the BOE must publish a decision for the appeal and the BOE completely agrees with the D&R, it might choose to simply adopt the D&R. However, even where the BOE agrees with the ultimate recommendation of a D&R, it may not agree with its content to the extent that it can adopt the D&R as its own decision. This is particularly true when new evidence is presented or new arguments made at the hearing which were not addressed in the D&R. Furthermore, there may have also been a Supplemental D&R issued before the matter is heard by the BOE, and for those cases, it would virtually never be appropriate for the BOE to adopt the D&R, or the Supplemental D&R, or both as its decision. Rather, we anticipate that if this bill were to become law, for the significant majority of BOE hearings coming within its provisions, the BOE would have to use the same process it does now for issuance of Memorandum Opinions. That is, after hearing and deciding the case, the BOE would generally direct Appeals staff to draft a decision specific to the matters heard and discussed by the Members of the BOE, and to bring that decision back to the BOE for adoption at a later BOE meeting. If the BOE was not satisfied with the draft and could not satisfactorily address the issues at that meeting, it would then have to give further directions to staff and consider the re-drafted decision at a later meeting.

Also, under the BOE's Rule 5561 for sales and use tax matters, taxpayers may file a Petition for Rehearing within 30 days of the date on which notice of the BOE's decision is mailed to the taxpayer. As explained in the previous paragraph, since some of these longer decisions may need prior BOE review and approval, the 30 day deadline with which to request a rehearing would put taxpayers at a disadvantage, since they would essentially be required to file a petition before knowing the particular facts and reasoning behind the BOE's decision.

Any delay in resolution of appeals would result in a corresponding delay in the collection of revenues.

5. **Bill would increase workload and delay the processing of cases awaiting a BOE hearing.** In FIT cases, because a detailed summary as described above would typically require significantly more time to prepare than the "Letter Decisions," the workload of the Appeals staff will certainly increase. Also, there will be an increased workload for business taxes cases for every appeal with over \$500,000 in dispute, except in cases where the BOE adopts the D&R as the formal decision, which is something the BOE has not done in the past.

In addition, there would be a workload increase attributable to redacting confidential information in both FIT and business tax cases (see comment 6). And, without additional staff to handle this workload, there would be a delay in preparing existing cases that are awaiting BOE hearings. Any delay would unfairly cause the accrual of additional interest on the unpaid tax in dispute, resulting in additional liability against taxpayers through no fault of their own.

6. **The bill raises concerns with confidentiality issues in many cases.** This bill does not address the potential privacy infringement that could occur if it becomes law.

For **FIT cases**, when the BOE or the FTB obtains federal tax information from the Internal Revenue Service (IRS), the BOE does not publish that information, as that data is proprietary to the IRS. The confidentiality requirement cannot be waived by the taxpayer pursuant to federal income tax law and impacts a large number of appeals. For example, due to this requirement, the BOE withheld publication of over 100 decisions and Hearing Summaries this fiscal year. Under this bill, the information about these cases would be required to be posted to the BOE's website. Should this bill become law, it appears there would be a potential conflict with the statutes regarding the confidentiality of federal tax information. If the BOE were to violate such statutes, or was viewed by the IRS as violating such statutes, the BOE could be prevented from obtaining IRS audit and account information with regard to appeals before the BOE, with a severe effect on the BOE's ability to fairly resolve tax appeals.

For **business tax cases**, the items on the D&R prepared by BOE staff are, on average, ten pages long, and often contain very personal information not only about the taxpayer appealing the determination, but also about customers, family members, and other parties that may be directly or indirectly associated with the taxpayer. Personal information such as medical conditions, financial difficulties, marital issues, family conflicts, and a variety of private matters concerning the taxpayer or related parties are discussed in these D&Rs.

Under the BOE's rules, the filing of a written request for an oral hearing before the members of the BOE on an appeal of a BOE-administered tax or fee, constitutes a waiver of the taxpayer's right to confidentiality with regard to information provided to or obtained by the BOE that is actually disclosed on the transcript of the taxpayer's oral hearing before the BOE or included in the Hearing Summary prepared for the taxpayer's oral hearing before the BOE.

Since the information disclosed on the transcript of a BOE hearing, or in the Hearing Summary, may not necessarily be duplicative in all respects with the D&R prepared by BOE staff subsequent to the appeals conference with the taxpayer or his or her representative, enactment of this bill would have the potential of divulging information about a taxpayer that he or she may not necessarily want disclosed. While the staff would be diligent in redacting confidential information, this could have the unintended consequence of discouraging taxpayers from requesting oral hearings before the BOE in situations where they believe such personal information could be published on the Internet.

7. **The \$500,000 threshold is arbitrary.** The amount at issue in an appeal does not determine the precedential importance of the issues considered, and limiting the bill to \$500,000 cases only seems arbitrary and capricious. Also, the bill should clarify whether the \$500,000 amount represents only the tax in dispute, or whether it includes tax, interest and/or penalty amounts, or whether it is referring to a valuation of property for property tax assessment purposes.

Assembly Bill 2679 (Committee on Transportation) Chapter 769
Rate Setting Dates

Effective January 1, 2013. Among its provisions, amends Sections 6480.1 and 60116 of the Revenue and Taxation Code.

BILL SUMMARY

Among other things, this bill contains Board of Equalization (BOE)-sponsored provisions that make technical and administrative changes related to the fuel tax swap legislation. Both the sales tax prepayment rates and the Interstate User rate for diesel fuel have adjustment dates that are changed to coincide with the date the BOE is required to annually adjust the diesel and motor vehicle fuel (gasoline) excise tax rates, as specified in the fuel tax swap bills. Specifically this bill:

- Amends Revenue and Taxation Code (RTC) Section 6480.1 to align the dates for setting the sales tax prepayment rates on the gasoline, aircraft jet fuel, and diesel fuel with the date of the excise tax rate adjustments for both gasoline and diesel fuel as required by the fuel tax swap, and allow the BOE to notify fuel vendors of a new prepayment rate by means other than "mail."
- Amends Section 60116 to align the date the BOE sets the Interstate User rate for diesel fuel with the date of the excise tax rate adjustment for diesel fuel, as required by the fuel tax swap.

Sponsor: Board of Equalization

**Align the date for sales tax prepayment rate setting with the
date for excise tax rate adjustment, as required by the fuel tax swap**
Revenue and Taxation Code Section 6480.1

LAW PRIOR TO AMENDMENT

Under existing law, RTC Section 6480.1 of the Sales and Use Tax Law provides that a supplier of gasoline, diesel fuel, or aircraft jet fuel is required to collect a prepayment of retail sales tax from the person to whom the gasoline, aircraft jet fuel, or diesel fuel is sold or distributed. The BOE is required to determine and set the rates for prepayment of the sales tax by November 1 of the year prior to the effective date of the rates and mail notification to every supplier, wholesaler, and retailer of gasoline, diesel fuel, and aircraft jet fuel by January 1. The adjusted prepayment rates are generally effective from April 1 through March 31 of the following year.

In late March 2010, two "fuel tax swap" measures were enacted (ABx8 6, Ch. 11, and SB 70, Ch. 9) that made several changes to the imposition and rates of state taxes on transactions involving transfers of gasoline and diesel fuel. Minor revisions were made to the fuel tax swap provisions with the passage of AB 105 (Ch. 6, Stats. 2011). This fuel tax swap is intended to be revenue neutral, so that the state's tax revenues would not be increased or decreased, nor would taxpayers' share of the tax burden be affected. To maintain revenue neutrality, these "swap" provisions require the BOE, beginning on July 1, 2011, for gasoline, and July 1, 2012, for diesel fuel, to adjust the excise tax rates –

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either upwards or downwards - so that the total revenues derived from the imposition of state excise tax and sales or use tax on sales of motor vehicle fuel and diesel fuel remain the same. The BOE is required to determine the adjusted excise tax rates by March 1 of the fiscal year immediately preceding the applicable fiscal year.

AMENDMENT

This bill amends RTC Section 6480.1 to change the prepaid sales tax rate-setting date from November 1 to March 1, and changes the effective date of the new rate from April 1 to July 1. The amendments also allow the BOE to notify fuel vendors of a new prepayment rate by means other than "mail" and make a clarifying reference to the additional sales tax on diesel fuel that took effect July 1, 2011.

BACKGROUND

The prepayment of retail sales tax on gasoline was added by the passage of Senate Bill 1610 (Ch. 214, Stats. 1986) and on diesel fuel by SB 1302 (Ch. 865, Stats. 1999). Prior to the passage of these bills, sales tax on gasoline and diesel fuel was only collected on the final retail sale. Before the requirement for prepayment of retail sales tax on these fuels, tax evasion by service station operators was a problem. Due to the number of retail service stations in the state, and the nature of operations, many service stations would either fail to obtain the necessary seller's permit, or they would obtain the permit but fail to report the entire tax liability from their retail sales. By requiring the prepayment of the retail sales tax on the fuel, 80 percent of the retail sales tax is collected in advance. Since the retailer is required to prepay a large portion of its sales tax liability, each retailer has an incentive to report the correct sales amount and recoup the tax already paid to its supplier. Also, the BOE collects information on how many gallons of fuel are sold to each vendor, including retailers. BOE staff uses this information to trace the flow of fuel from seller to seller and ultimately reconcile those numbers with the final retail sale.

Align the date BOE sets the diesel fuel Interstate User rate with the date for excise tax rate adjustment, as required by the fuel tax swap
Revenue and Taxation Code Section 60116

LAW PRIOR TO AMENDMENT

RTC Section 60115 of the Diesel Fuel Tax Law requires interstate users of diesel fuel in a qualified motor vehicle to pay a tax that is comprised of the existing excise tax imposed by Section 60050 and the tax prescribed by Section 60116, known as the component b rate. The component b rate is established by determining the average retail price of diesel fuel for a twelve month period, removing the state excise tax and the average overall sales or use tax included in that amount, and then multiplying the remainder by the current state and local sales and use tax rate. The interstate user tax rate is the total of the excise tax rate and the component b rate and is meant to be equivalent to the state's excise tax and sales or use tax on a gallon of diesel fuel purchased in this state. Interstate users report the interstate user tax rate on their net taxable gallons of diesel fuel consumed in California.

The component b rate is set once each year by October 1 and is effective on January 1 of the succeeding year.

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As described previously, the fuel tax swap bills affected taxes on diesel fuel in the following ways:

- Beginning July 1, 2011, by increasing the sales and use tax rate by 1.87%³ on sales of diesel fuel and exempting from the sales and use tax rate increase purchases by diesel fuel users currently exempt from the excise tax on diesel fuel, if they furnish the seller with an exemption certificate completed in accordance with BOE guidelines. This includes train operators, exempt bus operators, and other users who may file claims for refund of diesel fuel tax paid on fuel used off-highway or in any other exempt manner.
- Also, beginning July 1, 2011, by decreasing the excise tax rate on diesel fuel by 5.0 cents per gallon.
- By making the BOE responsible for balancing excise tax revenue losses against sales and use tax revenue gains. For diesel fuel, the BOE will adjust the excise tax rate, up or down, so that the revenue loss from the reduced excise tax rate equals the amount of revenue gain from the sales and use tax increase of 1.87% on diesel fuel.
- By setting the date by which the excise tax rate will be adjusted as March 1, with the adjusted rate to be effective during the state's next fiscal year, beginning July 1.

AMENDMENT

This bill amends RTC Section 60116 to change the date for setting the interstate user rate from October 1 to March 1 and changes the effective date of the new rate from January 1 to July 1. The amendments also reference a new source of information to be used to compute the rate.

BACKGROUND

In general, interstate truckers must report all fuel used in California on either their quarterly International Fuel Tax Agreement return or their Interstate User Diesel Fuel Tax Return and pay their tax liability at that time. The interstate user diesel fuel tax is comprised of the current \$0.13 per gallon tax stated under Section 60050 (component "a") and the rate prescribed by Section 60116 (component "b").

The component b rate is set annually by the BOE at a cents-per-gallon rate equivalent to the statewide sales tax imposed on the retail sale of diesel fuel in this state. The component b rate is a sales tax equivalency formula which is intended to level the playing field between California truck stops and out-of-state truck stops. Prior to enactment of the component b rate, the general premise was that California's imposition of a sales tax on diesel fuel provided an incentive for interstate truckers to "tank up" before entering California. While the interstate truckers still had to pay the excise tax, which is a per-gallon tax due on the use of diesel fuel on California highways, by purchasing their diesel fuel before entering California they were able to avoid the sales tax imposed on the retail purchase of diesel fuel in this state. The inclusion of the component b rate along with the excise tax rate that make up the interstate user diesel fuel tax was intended to impose a per-gallon surcharge, equivalent to the sales tax, which interstate truckers would only have to pay on diesel fuel purchased outside California.

³ The sales and use tax rate increase changes to 2.17% effective July 1, 2012; to 1.94% effective July 1, 2013; and to 1.75% effective July 1, 2014, and thereafter. (Legislation enacted in 2010 increased the sales and use tax rate on sales of diesel fuel by 1.75%, effective July 1, 2011, but AB 105 replaced that legislation and increased the rate further to 1.87%).

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AB 105, among other things, amended RTC Section 60050 and added Sections 6051.8 and 6201.8 to the RTC, to reduce the excise tax rate to \$0.13 and increase the sales and use tax rate by 1.87 percent on diesel fuel effective July 1, 2011. Each year, on or before March 1, the BOE will adjust the excise tax rate, either up or down, to account for any increases or decreases that may have occurred in the total revenue realized from these taxes on the sale of diesel fuel in the prior year. The new excise tax rate would take effect on July 1 and be in effect for that fiscal year.

The current process of adjusting the Interstate User component b rate by October 1, to be effective on January 1, will, when combined with the “fuel tax swap” adjustment process, result in additional time and costs associated with adjusting the rates a second time and sending special notices to approximately 23,000 motor carriers who use diesel fuel in interstate operations. In addition, the motor carriers would also be affected, as they would have to account for the rate change at different times, which could result in additional costs or errors.

COMMENTS

1. **Purpose.** This bill is a housekeeping measure that simply aligns the adjustment dates of the gasoline and diesel fuel sales tax prepayment rates and the diesel fuel Interstate User rate with the dates of the excise tax rate adjustments for both gasoline and diesel fuel as required by the fuel tax swap.
2. **Amendments.** The July 6, August 6, August 21, and August 23, 2012 amendments were unrelated to the BOE provisions. The June 25, 2012 amendments made technical, non-substantive corrections. Section 6480.1 amendment was a grammatical correction to refer to sales and state excise taxes, as opposed to sales and state excise tax. Section 60116 was amended to refer to the rounding to the nearest *one-tenth* of a cent (\$0.001), as opposed to being rounded to the nearest tenth of a cent. The May 31, 2012 amendments were unrelated to the BOE provisions.
3. **This bill is about a change in dates, not rates.** The following table depicts the proposed date changes:

Summary Chart of Deadlines and Dates

Tax	Rate Setting Date		Effective Date of Rate Change	
	Current Law	Proposed Law	Current Law	Proposed Law
Sales Tax Prepayment	November 1st	March 1st	April 1st	July 1st
Interstate User component b Diesel Fuel Tax Rate	October 1st	March 1st	January 1st	July 1st
Fuel Tax Swap - Excise Tax	March 1st	No change	July 1st	No change

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4. **This bill should benefit both the BOE and industry.** This bill will reduce the time and costs associated with adjusting the rates at least two different times during the year, for both the BOE and the affected industry. And because of the annual adjustment to the excise tax rate on July 1, it would be administratively expedient for the BOE, and convenient for the interstate user, to also set the component b rate at the same time. The excise tax rate combined with the component b rate comprises the interstate user tax rate.

Senate Bill 1015 (Committee on Budget & Fiscal Review) Chapter 37
Financial Institutions Records Matching
Multistate Tax Compact

Effective June 27, 2012. Among its provision, amends Section 19266 of, and repeals Part 18 (commencing with Section 38001) of Division 2 of, the Revenue and Taxation Code.

BILL SUMMARY

Among other things, this 2012-13 Budget trailer bill does the following:

- Authorizes the Board of Equalization (BOE) and the Employment Development Department to provide the Franchise Tax Board (FTB) with information relating to delinquent tax debtors, and allows that information to be used in the collection of delinquent amounts under the Financial Institution Record Match (FIRM) program administered by the FTB.
- Repeals existing law that adopted the Multistate Tax Compact. Enactment of the Multistate Tax Compact is required for full membership (referred to as "Compact" membership) in the Multistate Tax Commission.

Sponsor: Board of Equalization (FIRM)
Committee on Budget (MTC)

Financial Institutions Record Match
Revenue and Taxation Code Section 19266

LAW PRIOR TO AMENDMENT

Current federal law (Sections 666 and 669A of Title 42 of the United States Code and Sections 466 and 469A of the Social Security Act) mandates the Financial Institution Data Match (FIDM) for the collection of delinquent child support debts. This process involves the matching of child support obligors with financial institution customer records in order to identify and levy the obligor's funds. The FTB is the agency in California responsible for collecting child support debts, as well as corporate franchise and state income taxes. Federal law currently prohibits the information received through FIDM to be used for any purpose other than child support collection, thereby making this potentially valuable collection resource unavailable for use in franchise and income tax collections by the FTB.

To allow use of this type of data in the collection of franchise and income tax debts, the Legislature recently passed a budget trailer bill, which the Governor signed on March 24, 2011 (SB 86, Ch. 14, Budget and Fiscal Review Committee). This bill, among other things, added Section 19266 to the Revenue and Taxation Code to require the FTB to coordinate with financial institutions doing business in this state to establish a financial institution record match system (FIRM) using automated data exchanges to the maximum extent feasible. The process will be very similar to the federal FIDM process described previously. However, since FIRM is a separate program, its use will not be restricted to child support collections but, rather, will apply to FTB's delinquent franchise and income taxes.

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Section 19266 requires that, on a quarterly basis, financial institutions must provide the FTB with the name, record address and other addresses, social security number or other taxpayer identification number, and identifying information for each delinquent tax debtor as identified by the FTB who maintains an account at the financial institution as defined. Financial institutions may not disclose to the account holder, depositor, co-account holder, or co-depositor that their identifying information has been received and furnished to the FTB.

AMENDMENT

This bill amends Revenue and Taxation Code Section 19266 to require the BOE (as well as the Employment Development Department) to provide the FTB with information relating to delinquent tax debtors and to allow that information to be used in the collection of delinquent amounts under the FIRM program administered by the FTB.

Under this provision, the bill requires the BOE, on and after January 1, 2013, and on a quarterly basis thereafter, to provide its tax debtor information to the FTB in the format and manner specified by the FTB for inclusion in the FIRM.

The bill requires the FTB to include the delinquent tax debtor information provided by the BOE in its data file used to match delinquent tax debtor records to financial institution accountholder records, and it requires the FTB to provide the BOE with any matched record information.

The bill requires the BOE to reimburse the FTB for its costs related to implementation and administration of these provisions.

BACKGROUND

The FIRM record match for FTB will begin in Fiscal Year 12/13 and will be an automated process that will allow FTB to identify assets and issue levies in greater numbers than in prior years. This next fiscal year, FTB expects to issue more than 475,000 levies, an increase of approximately 75% over last year.

California's tax system is one based on the principal of voluntary compliance. Most taxpayers that report their tax and fee liabilities to the BOE are honest and generally comply with the tax laws. However, the BOE's number of taxpayers with overdue accounts receivables, as well as the overall balance, continues to increase - further complicating the state's budget woes. The BOE's accounts receivable balances for unpaid *final* liabilities (liabilities that are due and not under appeal) amount to over \$1.6 billion.

Recent economic turmoil is one factor contributing to this increase. However, other reasons include the fact that some businesses purposefully fail to remit the tax, such as when a taxpayer diverts the sales tax reimbursement collected from a customer for his or her own purposes instead of remitting the tax to the State. Those businesses that fail to pay their tax liabilities have in many cases an unfair competitive advantage over taxpayers who comply with the law and pay their fair share.

In general, the tools the BOE has in current law to provide incentives for taxpayers to timely pay their tax and fee liabilities and to assist the BOE in collecting delinquent tax or fee liabilities include:

- The imposition of penalties and interest on the amount of the late tax or fee payment.

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- The authority for the BOE to revoke a taxpayer's seller's permit for failure to pay outstanding sales and use tax liabilities.
- The opportunity for taxpayers to enter into affordable installment payment plans.
- The authority for the BOE to issue a Notice of Levy (NOL) to any third-person in possession of funds or properties belonging to the debtor, such as bank accounts, rental income, or accounts receivables, which, in turn, requires that third person to submit to the BOE all the debtor's cash or cash equivalents that would satisfy the NOL.
- The authority for the BOE to use Earnings Withholding Orders (EWO) to collect delinquent tax liabilities for which a state tax lien is in effect. An EWO is a continuing wage garnishment based on a percentage of a debtor's earnings, not to exceed 25% of disposable income. The EWO remains in effect until the total amount owing has been paid, or the order has been withdrawn.
- The authority for the BOE to issue a warrant to seize property and convert it to cash to satisfy a debt. Warrants are enforced by a marshal. "Till-tap" or "keeper" warrants are warrants served by the California Highway Patrol or the local sheriff that allow them to enter a tax debtor's business and take possession of personal property or collect the contents of the cash registers.
- In addition to the preceding, a statutory tax lien automatically arises by operation of law, which is a claim upon real and personal property for the satisfaction of a tax debt. The lien is in force for 10 years, unless the liability becomes satisfied or a Notice of State Tax Lien is recorded with a county recorder's office or the Secretary of State. The recording of the notice provides notice to all parties of the debt against real and personal property belonging to the tax debtor and located in the California county where recorded.

COMMENT

This provision is sponsored by the BOE. Because of the budget crisis, key public services are facing potential cuts. The BOE is able to do a better job of collecting delinquent liabilities by employing modern collection techniques and information technology. Implementing FIRM would accomplish this by requiring financial institutions to match its customer records against the BOE's database of individuals with final liabilities. Most of the revenue collected by the BOE is remitted voluntarily; however, enforced collection actions, such as notices of levy sent to the tax debtors' banks, are required when efforts to gain voluntary compliance from taxpayers have been exhausted.

If the BOE were to be included in FTB's FIRM processes, the result would be more efficient collections of delinquent liabilities. BOE staff would have accurate "real-time" financial information, which would stop the BOE from sending levy notices to incorrect financial institutions. Also, BOE staff time spent in researching tax debtors' banking information would be reduced.

Multistate Tax Compact

Part 18 (commencing with Section 38001) of the Revenue and Taxation Code **LAW**
PRIOR TO AMENDMENT

Under existing law, the "Multistate Tax Compact" has been created for purposes of (1) facilitating proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes, (2) promoting uniformity or compatibility in significant components of tax systems, (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration, and (4) avoiding duplicative taxation.

Under the provisions of the Multistate Tax Compact, the Multistate Tax Commission is required to administer the Compact, and the executive officers of the FTB and the BOE are required to serve as California's representative on that Commission, alternating annually.

AMENDMENT

This bill repeals Part 18 (commencing with Section 38001) of the Revenue and Taxation Code that adopted the Multistate Tax Compact, thereby allowing California to withdraw its membership in the Multistate Tax Commission.

BACKGROUND

The Multistate Tax Commission was created by an interstate compact in 1967, and California became a member on January 1, 1976. The Multistate Tax Commission is an organization of state governments that is designed to work with taxpayers to administer, equitably and efficiently, tax laws that apply to multistate and multinational enterprises. The Commission is designed to:

- Encourage tax practices that reduce administrative costs for taxpayers and States alike,
- Develop and recommend uniform laws and regulations that promote proper state taxation of multistate and multinational enterprises,
- Encourage business compliance with state tax laws through education, negotiation and enforcement, and
- Protect state fiscal authority in Congress and the courts.

Twenty states, including California, participate as Compact members, six states participate as sovereignty members, and 22 states are associate or project members.

The Compact provides that the Multistate Tax Commission's budget be apportioned among the member States as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each member State and its subdivisions from income taxes, gross receipts taxes, and sales and use taxes. California's dues for both the BOE and the FTB are approximately \$540,000 annually.

COMMENT

This provision is sponsored by the author and is intended to address a concern related to a potential risk of state revenues of \$500 million related to a case soon to be decided by the California Court of Appeals. In that case, the taxpayer is arguing that the language adopted by the Legislature in 1993 (to bring about double-weighting of sales for California

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income tax purposes) was legally ineffective in regard to overcoming one particular aspect of the MTC. If the taxpayer is ultimately judged to be correct, the author believes that the correct way to overcome that aspect of the MTC is to repeal the Compact. Not adopting this legislation, in the case that the taxpayer wins in court, would cost the state about \$150 million per year ongoing, and more than \$500 million for open years.

This provision would have little impact on the BOE's tax administration. The primary benefit that the MTC offers to the BOE is the "nexus leads." These are MTC-generated inquiries that indicate that a particular out-of-state business may have California nexus and may be required to collect California use tax on their sales to California consumers. From 2009 through today, the BOE has received a total of 10 leads from MTC, 4 of which are currently under investigation. Of the MTC leads in 2009 and 2010, the BOE has received over \$90,000 in use tax revenue.

While the repeal of the Multistate Tax Compact would withdraw California from Compact membership, the BOE would continue having the option of engaging on a contractual basis in any of the MTC special programs, such as the nexus lead program described in the previous paragraph.

Senate Bill 1099 (Wright) Chapter 295

State Agency Regulations – Effective Dates

Effective January 1, 2013. Among its provisions, amends Sections 11343, 11343.4, and 11344 of the Government Code.

BILL SUMMARY

Among other things, this bill makes the following changes to the Administrative Procedure Act:

- Provides that regulations adopted by state agencies shall take effect on either January 1, April 1, July 1, or October 1, as specified (instead of 30 days from the date a regulation is filed with the Secretary of State as provided by existing law). (Government Code [GC] Section 11343.4.)
- Requires within 15 days of the Office of Administrative Law (OAL) filing a state agency's regulation with the Secretary of State (SOS), for the state agency to post the regulation on its Internet Web site in an easily marked and identifiable location. Requires the state agency to keep the regulation on its Internet Web site for at least six months from the date the regulation is filed with the SOS. (GC Section 11343.)

Requires the OAL to also make available on its Internet Web site a list of, and a link to the full text of, each regulation filed with the SOS for which the effective date is pending. (GC Section 11344.)

Sponsor: National Federation of Independent Business and Small Business California

LAW PRIOR TO AMENDMENT

Current law establishes detailed procedural requirements in the Administrative Procedure Act (APA) (Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code) that must be followed by state agencies when they propose to adopt, amend, or repeal regulations.

The OAL is charged with the review of regulations as provided in the APA. The OAL has 30 working days to review the regulation. If approved, the OAL sends the regulation to the SOS for filing.

Under the APA, a regulation or an order of repeal becomes effective 30 days after it is filed with the SOS, unless:

- Otherwise specifically provided by the statute under which the regulation or order of repeal was adopted, in which case the regulation or order of repeal becomes effective on the date prescribed by the statute.
- A later date is prescribed by the state agency in a written instrument filed with, or as part of, the regulation or order of repeal.
- The agency makes a written request to the OAL demonstrating good cause for an earlier effective date, in which case the OAL may prescribe an earlier date. (GC Section 11343.4)

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Under the APA, the OAL is required to make available on the Internet, free of charge, the full text of the California Code of Regulations <http://ccr.oal.ca.gov/> (GC Section 11344)

AMENDMENT

This bill amends GC Sections 11343, 11343.4, and 11344 to do the following:

- 1) Revises a requirement that a regulation or order of repeal becomes effective 30 days after it is filed with the SOS, with a requirement that the regulation or order of repeal instead becomes effective on either of the following days:
 - January 1 if the regulation or order of repeal is filed on September 1 to November 30.
 - April 1 if the regulation or order of repeal is filed on December 1 to February 29.
 - July 1 if the regulation or order of repeal is filed on March 1 to May 31.
 - October 1 if the regulation or order of repeal is filed on June 1 to August 31.
- 2) Requires within 15 days of the OAL filing a state agency's regulation with the SOS, for the state agency to post the regulation on the Internet Web site in an easily marked and identifiable location. Requires the state agency to keep the regulation on its Internet Web site for at least six months from the date the regulation is filed with the SOS. Within five days of posting, the state agency will be required to send to the OAL the Internet Web site link of each regulation the agency posts on its Web site.
- 3) Requires the OAL to provide on its Internet Web site a list of, and a link to the full text of, each regulation filed with the SOS for which the effective date is pending.

The provisions of the bill become operative on January 1, 2013.

COMMENTS

1. **Purpose.** According to the author's office, "every year businesses face a barrage of new regulations promulgated by state agencies. These regulations go into effect 30 days after being filed with the Secretary of State's office and this happens year round. It is difficult, if not impossible, for a small business with minimal staff to keep track of the regulatory process involving multiple departments and agencies. This often has the effect of guaranteeing that many businesses will be out of compliance with some of the new rules."
2. **Amendments.** The August 24, 2012 amendments, which are unrelated to the BOE, exempt certain regulations adopted by the Fish and Game Commission (FGC) and a regulation by FGC that require a different effective date in order to conform to a federal regulation.
3. **This bill provides that regulations become effective on quarterly fixed dates—January 1, April 1, July 1 or October 1.** A regulation takes effect on a quarterly basis as follows: January 1 if the regulation is filed with the SOS on September 1 to November 30; April 1 if the regulation is filed on December 1 to February 29; July 1 if the regulation is filed on March 1 to May 31; and October 1 if the regulation is filed on June 1 to August 31.

The same exceptions that exist in current law still apply. Those exceptions are: (1) if a regulation is adopted under a statute requiring a specific effective date, in that event the regulation is effective on the date prescribed by the statute, and (2) if a state

agency requests in writing to the OAL for an earlier or later effective date. The agency must show good cause for an earlier effective date.

4. **The BOE makes specific information on proposed rules and regulations available on its Web site.** The BOE maintains a rulemaking calendar of regulations currently in the process of adoption, amendment, or repeal. www.boe.ca.gov/regs/regscont.htm The calendar lists the number and title of the regulation, the date of the public hearing, the current status of the regulation, and links to the rulemaking documents. For example, the following provides a link to the proposed sales and use tax regulation 1684, *Collection of Use Tax by Retailers* www.boe.ca.gov/regs/reg_1684_2012.htm.

The BOE also maintains a numerical listing of all of the BOE's rulemaking files on an annual basis going back to 2009. The listing provides the title and description, BOE's adoption date, and the final effective date of the regulation. The rulemaking files includes such documents as the OAL Notice of Approval of Regulatory Action, OAL Form 400 Notice Publication/Regulation Submission, Final Statement of Reasons, Updated Informative Digest, final and proposed text of regulation, the Initial Statement of Reasons, the STD 399 Fiscal Impact Statement, the Notice of Proposed Regulatory Action, public comments, Board meeting transcripts and minutes, and the regulation history. The following provides a link to the BOE's 2012 Regulation Archive www.boe.ca.gov/regs/reg_archive.htm.

In addition, the BOE makes available notifications of proposed regulatory changes. Anyone can sign up to receive the Announcements of Proposed Regulatory Change and/or Announcement of Public Meeting Agenda's electronically, at no charge www.boe.ca.gov/aprc/index.htm.

5. **State agencies, including BOE, would be required to post the final version of the regulation on their website.** Within 15 days of the OAL filing the regulation with the SOS, the BOE would be required to post the regulation on its website in an easily marked and identifiable location. BOE must keep the regulation on its website for at least six months from the date the regulation is filed with the SOS. Further, within five days of posting the regulation, BOE must send to the OAL the Internet Web site link of the regulation.

The BOE staff does not see a problem in complying with this provision as it already maintains the entire rulemaking file on its website, which includes the final text of each regulation approved by the OAL and filed with the SOS.

6. **Delaying the operative date of a regulation.** Depending on when the OAL files a regulation with the SOS, a regulation could potentially be delayed in taking effect for up to 90 days. For example, the BOE's Sales and Use Tax Regulation 1616, *Federal Areas*, was approved by the OAL and filed with the SOS on January 11, 2012. The regulation was amended for purposes of clarifying the additional circumstances under which sales of tangible personal property to, and the use of property by, the governments of federally-recognized Indian tribes are exempt from California sales and use tax. The regulation took effect on February 10, 2012 (the 30th day after filing with the SOS). Under the provisions of this bill, the regulation would become effective on April 1, 2012, which would delay implementation of BOE's regulation for an additional 51 days. For tax purposes, delaying the effective date of a regulation can be somewhat problematic.

The BOE's regulatory actions are necessary to implement new legislation, a court decision, changes in interpretation of existing law, or the need to clarify the application of existing law. The sooner the BOE can implement a regulation, the better it is for BOE staff, taxpayers, and the public. As previously stated, current law provides that state agencies may make a written request to the OAL demonstrating good cause for an earlier effective date. BOE never uses this provision because it does not see a problem in waiting 30 days for a regulation to conform to existing law. BOE staff would, however, anticipate making requests for an earlier effective date should this bill become law.

7. **Related legislation.** Similar bills have been introduced this session that would have changed the effective dates of regulations.
- SB 553 (Fuller) would have provided that a regulation or an order of repeal of a regulation that is identified by a state agency as having, or as being reasonably likely to have, an adverse economic impact of \$10 million or more shall become effective 180 days after the date of filing with the SOS. The bill failed passage in the Senate Committee on Governmental Organization.
 - SB 688 (Wright), among its provisions, would have prohibited a regulation or an order of repeal of a regulation that has a cumulative statewide cost impact in excess of \$10 million from taking effect until the January 1 that is one year following the date that the regulation is filed with the SOS. The bill failed passage in the Senate Committee on Environmental Quality.
 - AB 127 (Logue) would have required that a regulation or an order of repeal of a regulation would become effective on January 1st of the next year following a 90-day period after the date it is filed with the SOS. The bill failed passage in the Assembly Committee on Business, Professions, and Consumer Protection.
 - AB 338 (Wagner), among other things, would have required a regulation or an order of repeal of a regulation that is required to be filed with the SOS to become effective 60 days, rather than 30 days, after the date of filing. The measure failed passage in the Senate Committee on Environmental Quality.

Senate Bill 1485 (Kehoe) Chapter 493

Blended Fuels - Refunds

Effective September 23, 2012. Amends Section 8101 of the Revenue and Taxation Code.

BILL SUMMARY

This bill authorizes a person who uses tax-paid motor vehicle fuel (gasoline) as a blending component of a fuel taxed under the Use Fuel Tax Law to receive a refund of the excise tax that was paid on that gasoline.

Sponsor: California Independent Oil Marketers Association

LAW PRIOR TO AMENDMENT

Under the Use Fuel Tax Law (UFTL) (Part 3 (commencing with Section 8601) of Division 2 of the Revenue and Taxation Code (RTC)), the state imposes an excise tax of \$0.18 per gallon for use of fuels. Section 8604 of the UFTL defines "fuel" to include any combustible gas or liquid used in an internal combustion engine for propulsion on the highway except fuel that is subject to the tax imposed by Part 2 (commencing with Section 7301) or Part 31 (commencing with Section 60001) of Division 2 of the RTC, the Motor Vehicle Fuel Tax Law (MVFTL) or Diesel Fuel Tax Law (DFTL), respectively. For liquefied petroleum gas (LPG), liquid natural gas (LNG), and compressed natural gas (CNG), which are types of use fuels, the excise tax rates are \$0.06 and \$0.06 per gallon, and \$0.07 per 100 cubic feet, respectively.

The UFTL defines ethanol and methanol as containing not more than 15 percent gasoline and also sets the rate at one half the \$0.18 rate specified in Section 8651, or \$0.09. Ethanol and methanol containing more than 15 percent gasoline is defined as gasohol under the MVFTL. Although the use fuel tax is imposed on the use of the fuel, pursuant to Section 8732 of the UFTL, the vendor who sells or delivers such fuel is required to collect the tax from the user and give the user a receipt.

Under the MVFTL, the state imposes an excise tax of \$0.357 per gallon (\$0.18 excise tax and \$0.177 surtax) on the removal of gasoline (except for aviation gasoline) at the refinery or terminal rack, upon entry into the state, and upon sale to an unlicensed person. Section 8101 of the MVFTL requires the refund of the excise tax paid on gasoline to certain persons under certain circumstances.

AMENDMENT

This bill amends Section 8101 to allow a refund of the gasoline excise tax to any person who buys gasoline for the purpose of producing a blended fuel that is used to operate a motor vehicle on the state's highways, when that blended fuel is taxed as a use fuel, but only to the extent that a refund claim has been filed on or after January 1, 2011.

The bill also adds uncodified language to clarify the legislative intent.

The provisions of this bill are effective September 23, 2012.

IN GENERAL

With respect to California excise tax on gasoline, the Board of Equalization (BOE) is responsible for registration, licensing, return processing, auditing functions, and appeals, while the State Controller's office (SCO) is responsible for the collection of delinquent gas taxes and the refund of excise taxes on gasoline not used on highway.

Under the UFTL, vendors are required to be licensed with the BOE, but the blenders (producers of blended use fuel) are not. As such, vendors are required to file returns and report the collection of the tax to the BOE, but there are no reports or returns that are required of the blenders.

No special permit is required from the BOE for a person producing an alcohol fuel containing 15 percent or less gasoline or diesel fuel, whether the alcohol fuel is produced within a petroleum terminal or below the rack. E85 fuel, an ethanol and gasoline blend, is the most predominant blended fuel under the UFTL. A use fuel vendor is responsible for reporting and paying the use fuel tax on E85 delivered into a fuel tank of a motor vehicle. The vendor is required to collect and remit to the BOE the \$0.09 per gallon use fuel tax on the full volume of E85 sold or dispensed from a retail pump. A "vendor" includes every person who sells fuel in this state and places, or causes to be placed, the fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion of the vehicle.

The point of collection of the gasoline tax is different from the use fuel tax; the gasoline tax is generally collected high up the distribution chain at the terminal "rack" level. The terminal rack level is a level in the distribution chain at a refinery or a storage and distribution facility at the end of a pipeline where gasoline is delivered through a mechanism (the "rack" as it leaves the refinery or storage facility) into ground transportation, such as a truck, trailer, or railroad car.

E85 fuel is a product of blending two components, ethanol fuel and gasoline. Where the blending takes place has an effect on the gasoline taxes paid. If the blended E85 is provided at the "rack" level, then the blended product is a use fuel and the total blended volume is subject to the use fuel tax, and the vendor is responsible for reporting and paying the tax. However, if the E85 is blended below-the-rack, where the two component fuels are purchased separately and blended elsewhere in the distribution chain, the gasoline tax has been paid and passed on by the supplier at the "rack" and, when the gasoline is blended with the ethanol, the resulting E85 fuel is then subject to the use fuel tax on the full volume.

In October 2011 the BOE issued a special notice for producers of E85 fuel,⁴ which explained that below-the-rack blenders are not entitled to a refund of the MVF tax paid on the gasoline fuel component of E85.

COMMENTS

1. **Purpose.** This bill is intended to provide that E85 blenders are entitled to a refund of the gasoline tax.
2. **Amendments.** The August 24, 2012 amendments added uncodified legislative intent language. The August 20, 2012 amendments clarified that *tax-paid* gasoline must have been used to make the blended fuel, and that a person must *submit* or have

⁴ State Board of Equalization, *Special Notice: Important Information for Producers of E85 Fuel*, October 2011. <http://www.boe.ca.gov/sptaxprog/pdf/1286.pdf>

submitted the refund application on or after January 1, 2011, as well as delete the requirement that the person seeking the refund can show the fuel tax was paid on the blended fuel. The August 7, 2012 amendments made technical, non-substantive corrections. The amendment is a technical correction to refer to the California fuel *tax*, and a grammatical correction to clarify that refund applications *must have* been submitted on or after January 1, 2011.

3. **The SCO administers the specific refund provisions of the MVFTL, including Section 8101.** The refund of the gasoline tax for purposes other than operating a motor vehicle on the public highway of the state and other exempt uses is administered by the SCO. The SCO has determined that below-the-rack E85 blenders are not entitled to a refund of the gasoline tax paid on the gasoline used in E85 because the blending of gasoline to create a different fuel product does not constitute a “use” for purposes other than operating motor vehicles upon the highways of the state within the meaning contained in the MVFTL.
4. **Below-the-rack blenders sell the E85 with the tax-paid gasoline included in the cost of the product.** As explained previously, the below-the-rack blenders may incorporate the cost of the gasoline component, including the gasoline tax, into the base selling price of the E85 fuel when it is sold to the vendor. The vendor that sells that E85 fuel must collect the use fuel tax on the full volume of the E85 fuel. The result is that the gasoline component has been taxed under both the MVFTL and the UFTL. The BOE has advised vendors that the gasoline tax should not be separately stated on an invoice to the customer since the gasoline tax is included in the cost of the E85 fuel and is not a tax on the use fuel that is the subject of the invoice.

Senate Bill 1548 (Wyland) Chapter 285
Offers in Compromise – Repeal Date Extension

Effective January 1, 2013. Among its provisions, amends Sections 9278, 30459.15, 41171.5, 46628, 50156.18, 55332.5, and 60637 of the Revenue and Taxation Code.

BILL SUMMARY

This Board of Equalization (BOE) sponsored bill allows the BOE to continue to compromise for another five years the final tax liabilities of (1) businesses that are not discontinued or transferred if the final tax liability arises from transactions in which the taxpayer did not collect tax or tax reimbursement, (2) persons liable as successors, and (3) consumers who incurred a use tax liability.

Sponsor: Board of Equalization

LAW PRIOR TO AMENDMENT

Under the existing Sales and Use Tax Law (7093.6), Use Fuel Tax Law (9278), Cigarette and Tobacco Products Tax Law (30459.15), Alcoholic Beverage Tax Law (32471.5), Emergency Telephone Users Surcharge Act (41171.5), Oil Spill Response, Prevention, and Administration Fees Law (46628), Underground Storage Tank Maintenance Fee Law (50156.18), Fee Collection Procedures Law (55332.5), and Diesel Fuel Tax Law (60637), the BOE is allowed to compromise a final tax liability if certain requirements are met.

Beginning January 1, 2009 and ending on January 1, 2013, the BOE has the authority to compromise certain final tax, fee, and surcharge (tax) liabilities of (1) businesses that are not discontinued or transferred if the final tax liability arises from transactions in which the taxpayer did not collect tax or tax reimbursement, (2) persons liable as successors, and (3) consumers who incurred a use tax liability. The tax law sections affected included those mentioned previously. The BOE is specifically authorized to do the following:

- 1) Allow a qualified final tax liability to be compromised regardless of whether the business has been discontinued or transferred or whether the taxpayer has a controlling interest or association with a similar type of business.
- 2) Define “qualified final tax liability” to mean that part of the final tax liability, including interest, additions to tax, penalties, or other amounts assessed, arising from a transaction or transactions in which the BOE finds no evidence that the taxpayer collected the tax from the purchaser or other person and which was determined against the person, or a final tax liability against a successor, or that part of a final use tax liability, as specified.
- 3) Specify that a qualified final tax liability may not be compromised with a taxpayer who previously received a compromise, as specified.
- 4) Allow the BOE to enter into a written installment payment agreement that permits a taxpayer to pay the compromise installments for a period not exceeding one year.
- 5) Allow the BOE to enter into any collateral agreement deemed necessary for the protection of the interests of the state, as specified.

- 6) Require a taxpayer that has received a compromise to file and pay by the due date all subsequently required returns and/or reports for a five-year period, as specified.

AMENDMENT

This bill amends Revenue and Taxation Code (RTC) Sections 7093.6, 9278, 30459.15, 32471.5, 41171.5, 46628, 50156.18, 55332.5, and 60637 to extend the repeal date of these provisions to January 1, 2018. These provisions allow the BOE to consider offers in compromise (OIC) from (1) open and active businesses that have not collected tax or tax reimbursement for the taxes owed, (2) successors of businesses that may have inherited tax liabilities of their predecessors, and (3) consumers that have incurred a use tax liability.

IN GENERAL

In general, an offer in compromise is a process whereby the taxpayer offers to pay an amount that he or she believes to be the maximum amount that he or she can pay within a reasonable time. If the parties agree to the amount offered, the debt is compromised (reduced) to that amount.

In the offer in compromise process, the BOE administers the program consistent with procedures followed by the Franchise Tax Board (FTB) and the Employment Development Department (EDD) with respect to:

- The terms of the offer;
- The process leading up to the acceptance of the offer, including high levels of review; and
- The refunding of rejected offers without interest, at the taxpayer's discretion.

The BOE has an OIC Section that is solely responsible for making compromises under the current provisions of law. Among other things, an OIC is processed depending on whether the business is closed and discontinued, or open and active.

Business Closed and Discontinued. Compromises are accepted when a tax liability is final and the OIC Section finds that the amount the taxpayer proposes to pay represents the maximum amount the BOE can expect to collect from that taxpayer in a reasonable period of time – typically five to seven years.

Prior to the passage of AB 2047 (Ch. 222, Stats. 2008), the OIC program only applied to businesses that had been discontinued or had transferred their operations, and only if the taxpayer making the offer no longer had a controlling interest or association with the transferred business or with a similar type of business.

Business Open and Active. In July 2007, the BOE adopted a legislative proposal to allow compromises with those taxpayers who may otherwise have to sell or discontinue their businesses because of their inability to pay in full a final tax liability that arose from transactions in which the taxpayers did not collect tax from the purchasers or other persons. These situations arose because taxpayers mistakenly believed that their transactions were not subject to the tax. Upon audit, the taxpayer first learned that the transactions were subject to tax, but the taxpayer cannot legally or realistically collect the tax from his or her customers. In addition, the proposal allowed compromises with

respect to successor liabilities where the successor is still in business,⁵ and from use tax assessed by the BOE against a consumer who is not required to hold a seller's permit. The BOE found that these liabilities often came as a surprise to the taxpayer and were financially crippling to otherwise law-abiding taxpayers.

The proposal and subsequent passage of the bill addressed those unique situations where the BOE believed that it would be in the best interest of the state to compromise a tax debt, when the taxpayer does not have the means to pay more than the amount offered now or in the near future. The OIC program continues to provide for a voluntary resolution that is agreeable to both taxpayers and the BOE.

BACKGROUND

The authorization for the BOE to accept OICs was added into law by AB 1458 (Stats. 2002, Ch. 152) and applied to final tax liabilities under the Sales and Use Tax Law, the Use Fuel Tax Law, and the Underground Storage Tank Maintenance Fee Law. In 2006, AB 3076 (Stats. 2006, Ch. 364) added similar provisions under the Cigarette and Tobacco Products Tax Law, Alcoholic Beverage Tax Law, Timber Yield Tax Law, Energy Resources Surcharge Law, Emergency Telephone Users Surcharge Law, Hazardous Substances Tax Law, Integrated Waste Management Fee Law, Oil Spill Response, Prevention, and Administration Fees Law, Fee Collection Procedures Law, and Diesel Fuel Tax Law.

In 2008, the Legislature passed AB 2047 (Horton, Ch. 222), which expanded the offer in compromise program to businesses that are not discontinued or transferred, under the following conditions: (1) if the final tax liability arises from transactions in which the taxpayer did not collect tax or tax reimbursement; (2) persons liable as successors; and (3) consumers who incurred a use tax liability.

COMMENTS

1. **Purpose.** This bill is intended to extend the BOE's ability to compromise certain final tax liabilities of (1) businesses that are not discontinued or transferred if the final tax liability arises from transactions in which the taxpayer did not collect tax or tax reimbursement, (2) persons liable as successors, and (3) consumers who incurred a use tax liability.
2. **Amendments.** The May 8, 2012 amendments provided a sunset date of January 1, 2018 instead of the indefinite extension provided by the introduced version of the bill.
3. **The sunset date was again accepted as a committee amendment.** As explained under "Background," AB 2047 originally expanded the OIC program to open and active businesses. At the time the bill was being considered by the Senate Revenue and Taxation Committee, the committee suggested a sunset date of January 1, 2013, so that the Legislature could evaluate the program and determine if any changes or improvements were necessary. The BOE originally estimated \$2.25 million in revenues for the open and active OIC provision.

This year the Senate Governance and Finance Committee suggested that the committee "consider whether the amounts forgiven are sufficiently consistent with

⁵ Current law holds a purchaser of a business personally liable for the unpaid sales and use tax liability of the seller up to the purchase price of the business, if the purchaser fails to withhold sufficient funds to cover the liability when purchasing the business.

sound tax collection practices to merit sunset removal, another five year sunset, or terminating the authority.” The BOE explained to the Senate committee that the BOE revenue estimate for AB 2047 was overstated because the BOE estimated the revenue based on our experience with OICs for closed and discontinued businesses – the assumptions we used led to an inflated revenue estimate.

The committee explained that, since the cost/benefit ratio was so much lower than originally anticipated, the committee felt that it would be good for the Legislature to provide the opportunity for BOE to prove that the program can be improved and show the Legislature a more positive result before eliminating the sunset outright.

4. **This bill will provide for the continuation of the OIC program for open and active businesses to January 1, 2018.** If the provisions authorizing the BOE to compromise tax liabilities of open and active businesses are allowed to expire on January 1, 2013, the OIC program will be limited to persons with businesses that have been closed and discontinued. In fiscal year (FY) 2009-10 and FY 2010-11, the BOE accepted offers from eight open and active businesses; the offer amounts totaled \$532,668. Of the eight, seven of the businesses have remained open.

One of the requirements of open and active businesses for which the BOE has accepted an OIC is that they must file and pay by the due date all subsequently required returns and/or reports for a five-year period, or until the business closes, whichever is earlier. Even though the offer amounts accepted totaled only \$532,668, the businesses that remained open continued to pay their sales and use taxes and, for the 2009-10 and 2010-11 FYs, paid over \$238,000, to the benefit of state and local governments.

TABLE OF SECTIONS AFFECTED

SECTIONS		BILL AND CHAPTER NUMBER		SUBJECT
Revenue & Taxation Code				
General Provisions				
§40	Add	AB 2323	Ch. 788	Publication of BOE Decisions
Motor Vehicle Fuel Tax Law				
§8101	Amend	SB 1485	Ch. 493	Refund for tax paid on gasoline used to produce a blended fuel taxed as a use fuel
Use Fuel Tax Law				
§9278	Amend	SB 1548	Ch. 285	Offers in compromise: extend repeal date
Franchise and Income Tax Laws: Miscellaneous Provisions				
§19266	Amend	SB 1015	Ch. 37	Financial Institution Record Match System
Cigarette and Tobacco Products Tax Law				
§30459.15	Amend	SB 1548	Ch. 285	Offers in compromise: extend repeal date
Alcoholic Beverage Tax Law				
§32471.5	Amend	SB 1548	Ch. 285	Offers in compromise: extend repeal date
Multistate Tax Commission				
Part 18 (§38001)	Repeal	SB 1015	Ch. 37	Multistate Tax Compact Repeal
Emergency Telephone Users Surcharge Law				
§41171.5	Amend	SB 1548	Ch. 285	Offers in compromise: extend repeal date
Oil Spill Response, Prevention, and Administration Fees Law				
§46628	Amend	SB 1548	Ch. 285	Offers in compromise: extend repeal date
Underground Storage Tank Maintenance Fee Law				
§50156.18	Amend	SB 1548	Ch. 285	Offers in compromise: extend repeal date
Diesel Fuel Tax Law				
§60116	Amend	AB 2679	Ch. 769	Interstate User rate alignment
§60637	Amend	AB 1548	Ch. 285	Offers in compromise: extend repeal date

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SECTIONS		BILL AND CHAPTER NUMBER		SUBJECT
Business and Professions Code				
<i>Stop Tobacco Access to Kids Enforcement Act</i>				
§22958	Amend	AB 1301	Ch. 335	Tobacco sales to minors: License suspension or revocation, and civil penalty
<i>Cigarette and Tobacco Products Licensing Act</i>				
§22974.8	Amend	AB 1301	Ch. 335	Tobacco sales to minors: License suspension or revocation
Government Code				
§11343	Amend	SB 1099	Ch. 295	State agencies post regulation filed on Internet website
§11343.4	Amend	SB 1099	Ch. 295	State agency regulations: effective dates
§11344	Amend	SB 1099	Ch. 295	Availability of regulations on Internet
Penal Code				
§308	Amend	AB 1301	Ch. 335	STAKE Act
Public Resources Code				
Article 9.5 (§4629)	Add	AB 1492	Ch. 289	Lumber Products Assessment
§4629.10	Repeal	AB 1492	Ch. 289	Budget report to Legislature for 2014-15 budget process