GAVIN NEWSOM, GOVERNOR

OFFICE OF ADMINISTRATIVE LAW

California Regulatory Notice Register

REGISTER 2020, NUMBER 50-Z PUBLISHED WEEKLY BY THE OFFICE OF ADMINISTRATIVE LAW DECEMBER 11, 2020

PROPOSED ACTION ON REGULATIONS

TITLE 2. FAIR POLITICAL PRACTICES COMMISSION
Conflict–of–Interest Code — Notice File Number Z2020–1201–01 1541

Adoption
Multi–County: Truckee–Tahoe Workforce Housing Agency

TITLE 18. DEPARTMENT OF TAX AND FEE ADMINISTRATION
California Cannabis Track–and–Trace — Notice File Number Z2020–1130–01 1542

TITLE 18. DEPARTMENT OF TAX AND FEE ADMINISTRATION
Federal Areas — Notice File Number Z2020–1130–02 1547

SUMMARY OF REGULATORY ACTIONS

Regulations filed with Secretary of State 1559

Time-Dated Material

The *California Regulatory Notice Register* is an official state publication of the Office of Administrative Law containing notices of proposed regulatory actions by state regulatory agencies to adopt, amend or repeal regulations contained in the California Code of Regulations. The effective period of a notice of proposed regulatory action by a state agency in the *California Regulatory Notice Register* shall not exceed one year [Government Code § 11346.4(b)]. It is suggested, therefore, that issues of the *California Regulatory Notice Register* be retained for a minimum of 18 months.

CALIFORNIA REGULATORY NOTICE REGISTER is published weekly by the Office of Administrative Law, 300 Capitol Mall, Suite 1250, Sacramento, CA 95814-4339. The Register is printed by Barclays, a subsidiary of West, a Thomson Reuters Business, and is offered by subscription for $205.00 (annual price). To order or make changes to current subscriptions, please call (800) 328−4880. The Register can also be accessed at **http://www.oal.ca.gov.**

PROPOSED ACTION ON REGULATIONS

Information contained in this document is published as received from agencies and is not edited by Thomson Reuters.

TITLE 2. FAIR POLITICAL PRACTICES COMMISSION

NOTICE IS HEREBY GIVEN that the Fair Political Practices Commission, pursuant to the authority vested in it by Sections 82011, 87303, and 87304 of the Government Code to review proposed conflict–of–interest codes, will review the proposed/amended conflict–of–interest codes of the following:

CONFLICT–OF–INTEREST CODES

ADOPTION

MULTI–COUNTY: Truckee–Tahoe Workforce Housing Agency

A written comment period has been established commencing on December 11, 2020 and closing on January 25, 2021. Written comments should be directed to the Fair Political Practices Commission, Attention Amanda Apostol, 1102 Q Street, Suite 3000, Sacramento, California 95811.

At the end of the 45–day comment period, the proposed conflict–of–interest code(s) will be submitted to the Commission's Executive Director for his review, unless any interested person or his or her duly authorized representative requests, no later than 15 days prior to the close of the written comment period, a public hearing before the full Commission. If a public hearing is requested, the proposed code(s) will be submitted to the Commission for review.

The Executive Director of the Commission will review the above–referenced conflict–of–interest code(s), proposed pursuant to Government Code Section 87300, which designate, pursuant to Government Code Section 87302, employees who must disclose certain investments, interests in real property and income.

The Executive Director of the Commission, upon his or its own motion or at the request of any interested person, will approve, or revise and approve, or return the proposed code(s) to the agency for revision and re–submission within 60 days without further notice.

Any interested person may present statements, arguments or comments, in writing to the Executive Director of the Commission, relative to review of the proposed conflict–of–interest code(s). Any written comments must be received no later than January 25, 2021. If a public hearing is to be held, oral comments may be presented to the Commission at the hearing.

COST TO LOCAL AGENCIES

There shall be no reimbursement for any new or increased costs to local government which may result from compliance with these codes because these are not new programs mandated on local agencies by the codes since the requirements described herein were mandated by the Political Reform Act of 1974. Therefore, they are not "costs mandated by the state" as defined in Government Code Section 17514.

EFFECT ON HOUSING COSTS AND BUSINESSES

Compliance with the codes has no potential effect on housing costs or on private persons, businesses or small businesses.

AUTHORITY

Government Code Sections 82011, 87303 and 87304 provide that the Fair Political Practices Commission as the code–reviewing body for the above conflict–of–interest codes shall approve codes as submitted, revise the proposed code and approve it as revised, or return the proposed code for revision and re–submission.

REFERENCE

Government Code Sections 87300 and 87306 provide that agencies shall adopt and promulgate conflict–of–interest codes pursuant to the Political Reform Act and amend their codes when change is necessitated by changed circumstances.

CONTACT

Any inquiries concerning the proposed conflict–of–interest code(s) should be made to Amanda Apostol, Fair Political Practices Commission, 1102 Q Street, Suite 3000, Sacramento, California 95811, telephone (916) 322–5660.

AVAILABILITY OF PROPOSED CONFLICT–OF–INTEREST CODES

Copies of the proposed conflict–of–interest codes may be obtained from the Commission offices or the respective agency. Requests for copies from the

Commission should be made to Amanda Apostol, Fair Political Practices Commission, 1102 Q Street, Suite 3000, Sacramento, California 95811, telephone (916) 322–5660.

TITLE 18. DEPARTMENT OF TAX AND FEE ADMINISTRATION

SECTION 3702, CALIFORNIA CANNABIS TRACK–AND–TRACE

NOTICE IS HEREBY GIVEN that the California Department of Tax and Fee Administration (CDTFA), pursuant to its authority under Revenue and Taxation Code (RTC) section 34013, proposes to adopt California Code of Regulations, title 18, section (Regulation) 3702, *California Cannabis Track–and–Trace*. Regulation 3702 implements, interprets, and makes specific RTC sections 34010, 34011, and 34015 and Business and Professions Code (BPC) sections 26067 and 26068 by requiring cannabis distributors and retailers that are already required to record commercial cannabis activity in the California Cannabis Track–and–Trace (CCTT) system to also input the wholesale cost and retail selling price of cannabis and cannabis products into the CCTT system.

The CDTFA previously adopted Regulation 3702 as an emergency regulation in accordance with Government Code (GC) section 11346.1, and is now proposing to adopt Regulation 3702 through the regular rulemaking process. The CDTFA is also proposing to amend Regulation 3702 to remove the citation to GC section 15570.40 from the regulation's authority note because the section authorized the CDTFA to adopt emergency regulations until January 1, 2019, and the citation is no longer necessary now that Regulation 3702 is being adopted through the regular rulemaking process.

AUTHORITY

RTC section 34013

REFERENCE

RTC sections 34010, 34011 and 34015; BPC sections 26067 and 26068

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations

On November 5, 1996, California voters approved Proposition 215, which added section 11362.5, the Compassionate Use Act of 1996, to the Health and Safety Code (HSC) to exempt certain patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana for medical purposes. In 2003, the Legislature added chapter 2.5, Medical Marijuana Program, (commencing with section 11362.7) to chapter 6 of division 10 of the HSC. (Senate Bill No. (SB) 420 (Stats. 2003, chapter 875).) As relevant here, the Medical Marijuana Program statutes defined certain terms, set possession guidelines for medical marijuana, recognized a qualified right to collectively or cooperatively cultivate marijuana for medical purposes, and required the Attorney General to adopt guidelines to ensure the security and non–diversion of marijuana grown for medical use, which the Attorney General released in August of 2008. (HSC, §§ 11362.7, 11362.77, 11362.775, 11362.81.)

In 2015, the Legislature added chapter 3.5 (commencing with section 19300) to division 8 of the BPC, the Medical Marijuana Regulation and Safety Act (MMRSA), through the enactment of a package of three bills (Assembly Bill Number (AB) 243 (Stats. 2015, chapter 688), AB 266 (Stats. 2015, chapter 689), and SB 643 (Stats. 2015, chapter 719)). As relevant here, the MMRSA established a comprehensive licensing and regulatory framework for the cultivation, manufacturing, transportation, distribution, and sale of medical marijuana and established the Bureau of Medical Marijuana Regulation in the Department of Consumer Affairs to administer the provisions of the MMRSA. Also, as relevant here, the Legislature subsequently changed the name of the MMRSA to the Medical Cannabis Regulation and Safety Act (MCRSA) and changed the name of the Bureau of Medical Marijuana Regulation to the Bureau of Medical Cannabis Regulation, effective June 27, 2016. (SB 837 (Stats. 2016, chapter 32).)

On November 8, 2016, California voters approved Proposition 64 (Prop. 64), "the Control, Regulate and Tax Adult Use of Marijuana Act ('the Adult Use of Marijuana Act')" (AUMA). (Prop. 64, § 1.) As relevant here, the AUMA added division 10, Marijuana, (commencing with section 26000) to the BPC (Division 10) to establish a comprehensive system to control and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale of nonmedical marijuana and marijuana products. (Prop. 64, § 6.1.) And, Division 10 required the California Department of Food and Agriculture (CDFA), in consultation with the Bureau of Marijuana Control (previously the Bureau of Medical Marijuana Regulation) and the CDTFA, to establish a track and trace program for reporting the movement of marijuana products throughout the distribution chain

that utilizes unique identifiers. (BPC, §§ 26067, 26170, as added by the AUMA.)

The AUMA also added part 14.5, Cannabis Taxes, (commencing with section 34010) to division 2 of the RTC (commonly referred to as the Cannabis Tax Law (CTL)) to impose marijuana excise and cultivation taxes, effective January 1, 2018. (Prop. 64, § 7.1.) As relevant here, the CTL, as added by the AUMA, provided that the CDTFA may require every person engaged in the distribution or retail sale of marijuana or marijuana products to file a report using electronic media respecting the person's inventory, purchases, and sales during the preceding month, and any other information as the CDTFA may require to carry out the purposes of this part, and for reports to be authenticated in a form or pursuant to methods prescribed by the CDTFA. (RTC, § 34015, subdivision (b).) The CTL specifically authorized the CDTFA to adopt regulations to administer the marijuana excise and cultivation taxes, authorized the CDTFA to adopt emergency regulations to implement, administer, and enforce its duties under the CTL until January 1, 2019, and provided for the emergency regulations to remain in effect for two years from adoption. (RTC, § 34013.) GC section 15570.40 also generally authorized the CDTFA to adopt emergency regulations that are necessary to perform its duties until January 1, 2019. Also, Division 10, as enacted by the AUMA, expressly required the track and trace program to require the reporting of the amount of cultivation tax due under the CTL. (BPC, § 26170, as added by the AUMA.)

In 2017, the Legislature enacted SB 94 (Stats. 2017, chapter 27). As relevant here, SB 94 repealed the MCRSA, included certain provisions from the MCRSA in Division 10, changed the title of Division 10 to "Cannabis," changed the name of the Bureau of Marijuana Control to the Bureau of Cannabis Control (BCC), and named Division 10 the "Medicinal and Adult–Use Cannabis Regulation and Safety Act" (MAUCRSA). With respect to taxes, SB 94 amended the CTL to ease and streamline tax collection and remittance to the CDTFA. As relevant here, SB 94: (1) replaced the references to "marijuana" with references to "cannabis" throughout the CTL; (2) revised the cannabis excise tax so that it is imposed upon purchasers at a rate of 15 percent of the average market price, instead of the retail selling price, and is collected by a cannabis retailer, then collected by a distributor from the cannabis retailer and paid to the CDTFA by the distributor, instead of being paid to the CDTFA by the retailer (RTC, § 34011); (3) defined average market price in an arm's length transaction to mean the average retail price determined by the wholesale cost of the cannabis or cannabis products sold or transferred to a cannabis retailer, plus a mark–up (RTC, § 34010, subdivision (b)(1)); (4) defined arm's length transaction to mean a sale entered into in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither under any compulsion to participate in the transaction (RTC, § 34010, subdivision (a)); and (5) required the CDTFA to determine the mark–up to be added to the retailer's wholesale cost of the cannabis or cannabis products sold or transferred to a cannabis retailer for purposes of calculating the average retail price (RTC, § 34010, subdivision (b)(1)). The mark–up is to be determined by the CDTFA every six months. As a result, effective January 1, 2018, the CTL imposed a cannabis excise tax upon purchasers of cannabis or cannabis products sold in this state at the rate of 15 percent of the average market price of any retail sale by a cannabis retailer. (RTC, § 34011, subdivision (a).)

Previous Adoption of Emergency Regulation 3702

RTC section 34010, subdivision (b)(1), requires the CDTFA to determine, every six months, a mark–up to be added to the retailer's wholesale cost of cannabis or cannabis products sold or transferred to a cannabis retailer for purposes of calculating the average market price to which the 15 percent cannabis excise tax applies in an arm's length transaction (required mark–up). In general, a mark–up is an amount added to the cost of an item to determine its selling price and a mark–up percentage is the increase in the cost of an item to arrive at the selling price of the item expressed as a percentage of the cost. For example, if an item costs $100 and it is sold for $125 the mark–up is $25 and the mark–up percentage is 25 percent (25/100).

As required by Division 10, the CDFA established the CCTT system for statewide use to record the inventory and movement of cannabis and cannabis products through the commercial cannabis supply chain from cultivation to retail sale and adopted regulations prescribing the information required to be recorded in the system. (Cal. Code Regs., title 3, §§ 8402–8407.). All licensees with a state–issued annual cannabis license are required to use the CCTT system to record, track, and maintain information about their cannabis and cannabis product inventories and activities. (Cal. Code Regs., title 3, §§ 8402–8407 (CDFA regulations), title 16, §§ 5048–5052 (BCC regulations), title 17, § 40100, subdivision (kk), §§ 40510–40517 (California Department of Public Health (CDPH) regulations).) The CDTFA has ready access to the electronic database for the purpose of taxation and regulation of cannabis and cannabis products. (BPC, § 26067, subdivision (b)(4).)

The CDTFA previously determined there was an issue (or problem within the meaning of GC, § 11346.2, subdivision (b)(1)) related to the required mark–up. This is because the CDTFA needed market data for retailers' wholesale costs and retail sales prices

for cannabis and cannabis products to determine the required mark–up and there was no readily available source for the market data. The CDTFA previously determined that it was necessary to address the issue (or problem) by requiring licensees to report the wholesale cost data for transactions between distributors and cannabis retailers and the retail sales price data for retail transactions to the CDTFA. The CDTFA also previously determined that the CCTT system could be utilized to collect the market data on transactions that are required to be recorded in the system, and utilizing the CCTT system to require licensees to report that data would be more efficient for both the CDTFA and the licensees than requiring the licensees to file informational reports. Therefore, the CDTFA worked with CDFA to confirm that the CCTT system can accommodate the input of these amounts. In addition, the CDTFA anticipated that distributors and retailers could have issues (or problems within the meaning of GC, § 11346.2, subdivision (b)(1)) complying with the cannabis excise tax and that the market data reported in the CCTT system would help address those issues (or problems) by providing the CDTFA information it could use to verify that distributors and retailers are complying with their tax collection and reporting requirements.

The CDTFA subsequently prepared a draft of emergency Regulation 3702, which required: (1) a distributor with an annual distributor's license to record the retailer's wholesale cost in the CCTT system when cannabis or cannabis products are sold or transferred to a retailer; and (2) a retailer with an annual license to record the wholesale cost and retail selling price of cannabis or cannabis products in the CCTT system when sold in a retail sale. CDTFA staff prepared and issued a Discussion Paper dated July 20, 2018, regarding draft emergency Regulation 3702, and included a draft of Regulation 3702 as an exhibit. Staff conducted an interested parties' meeting on August 2, 2018, to discuss the draft emergency regulation. Staff also accepted written comments regarding the draft emergency regulation and received written comments from multiple interested parties. Multiple interested parties questioned whether it would make more sense to wait until temporary licenses are no longer issued, or until January 1, 2020, before bringing the CCTT system online. The CDTFA considered these comments and noted that the CDTFA does not have the authority to determine when licensees are required to start using or recording information in the CCTT system and does not otherwise determine when the CCTT system will be available. However, the CDTFA determined that it was necessary to adopt emergency Regulation 3702 at the time so that when licensees are required to utilize the CCTT system, the regulation would be in place to require them to input the information the CDTFA needs to determine the required mark–up. The CDTFA also received comments from the Southern California Coalition (SCC) in a letter dated August 13, 2018. SCC stated that the reporting of wholesale costs and retail selling prices is expensive and problematic. SCC also stated that "because the tax is applied before the taxed item is sold," the CDTFA should only require a cannabis retailer to submit information when the retailer "sells something at a discount," so the selling price is less than the amount on which the cannabis excise tax was calculated. The CDTFA considered SCC's comments, noted that distributors and cannabis retailers are already required to record certain information in the CCTT system pursuant to rules and regulations established by the BCC, and determined that the adoption of emergency Regulation 3702 was necessary for the CDTFA to obtain the market data needed to determine the required mark–up. The CDTFA also determined that Regulation 3702 provides the most efficient means to obtain the necessary data and its adoption would eliminate the need for the CDTFA to require distributors and retailers to file additional reports to obtain the necessary data. The CDTFA also received a written comment from the United Cannabis Business Association Trade Association dated August 17, 2018, that explained that changes to the RTC are warranted and the entry of wholesale costs and retail selling prices in the CCTT system will provide valid information to justify future legislative changes.

After discussing the draft emergency regulation with the interested parties and reviewing the interested parties' written comments, the CDTFA made revisions to draft emergency Regulation 3702 that was included with the July 20, 2018, Discussion Paper to have the effect and accomplish the objective of ensuring that the new regulation only required the recording of the market data necessary to determine the required mark–up. These revisions eliminated the provisions requiring the input of data that is already required by MAUCRSA and clarified that the requirement to input a retailer's wholesale cost in the CCTT system only applies with respect to arm's length transactions. The CDTFA also made revisions to clarify that the regulation's recording requirements only apply to those licensees who are already required to record information in CCTT system pursuant to MAUCRSA, to ensure that the new regulation did not increase the number of distributors and retailers required to record information in the CCTT system.

The CDTFA adopted revised Regulation 3702, as an emergency regulation, pursuant to its emergency rulemaking authority in Government Code section 15570.40 and the CTL, because the CDTFA determined that the adoption of Regulation 3702 was necessary to have the effect and accomplish the

objective of addressing the critical issues (or problems) discussed above, by requiring distributors and retailers that are already required to record commercial cannabis activity in the CCTT system to also input the wholesale cost and retail selling price of cannabis and cannabis products into the CCTT system. The adoption of emergency Regulation 3702 was effective on December 27, 2018, and without further action the emergency regulation will expire by operation of law on December 28, 2020.

Effect, Objective, and Benefits of the Proposed Adoption of Regulation 3702

The CDTFA's Tax Policy Bureau recommended that the CDTFA propose to adopt emergency Regulation 3702 through the regular rulemaking process, as provided by GC section 11346.1, subdivision (e), so that it will not expire by operation of law, in a memorandum to the Director dated February 26, 2020. Therefore, the CDTFA now proposes to adopt emergency Regulation 3702 through the regular rulemaking process because the CDTFA determined that its adoption is reasonably necessary to have the effect and accomplish the objective of addressing the same issues (or problems) as its initial adoption as an emergency regulation.

The CDTFA also determined that it was no longer necessary for Regulation 3702's authority note to include a citation to GC section 15570.40, which authorized the CDTFA to adopt emergency regulations until January 1, 2019, now that the regulation is being adopted through the regular rulemaking process. Therefore, the CDTFA also proposes to amend Regulation 3702's authority note to delete the citation to GC section 15570.40 as part of the adoption of the regulation through the regular rulemaking process.

The CDTFA anticipates that the adoption of proposed Regulation 3702 through the regular rulemaking process will promote fairness and generally benefit distributors, cannabis retailers, and the CDTFA by addressing the critical issues discussed above by providing the market data the CDTFA needs to accurately determine the required mark–up in the most efficient manner.

The CDTFA has performed an evaluation of whether proposed Regulation 3702 is inconsistent or incompatible with existing state regulations and determined that the proposed regulation is not inconsistent or incompatible with existing state regulations. Regulation 3702 is the only regulation requiring the input of the retail sales prices of cannabis and cannabis products into the CCTT system, and it is not inconsistent or incompatible with the other state regulations requiring cannabis businesses to record information in the CCTT system. In addition, the CDTFA has determined that there are no comparable federal regulations or statutes to the provisions in proposed Regulation 3702.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The CDTFA has determined that the proposed adoption of Regulation 3702 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the GC.

ONE–TIME COST TO THE CDTFA, BUT NO OTHER COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The CDTFA has determined that the adoption of proposed Regulation 3702 will result in an absorbable $436 one–time cost for the CDTFA to update its website after the rulemaking process is completed (assuming that average hourly compensation costs are $54.54 per hour and that it will take approximately eight hours). The CDTFA has determined that the adoption of proposed Regulation 3702 will result in no other direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the GC, no other non–discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The CTDFA has made an initial determination that the adoption of proposed Regulation 3702 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of proposed Regulation 3702 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS AND MINIMAL COST IMPACTS TO BUSINESSES

Proposed Regulation 3702 only applies to cannabis businesses. The CDTFA is not aware of any cost impacts that a representative private person would necessarily incur in reasonable compliance with the proposed action. The CDTFA is aware that some

cannabis businesses will incur costs to adjust the settings in their point–of–sale systems to comply with the requirements of proposed Regulation 3702. However, the CDTFA believes the costs for the initial adjustment will be minimal and the businesses will not incur any ongoing compliance costs.

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

The CDTFA assessed the economic impact of the adoption of proposed Regulation 3702 on California businesses and individuals and determined that the proposed regulatory action is not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the CDTFA has prepared the economic impact assessment (EIA) required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. In the EIA, the CDTFA determined that the adoption of proposed Regulation 3702 will neither create nor eliminate jobs in the State of California nor result in the creation of new businesses or the elimination of existing businesses within the state and will not affect the expansion of businesses currently doing business within the State of California. Furthermore, the CDTFA determined that the adoption of proposed Regulation 3702 will not affect the benefits of the regulation to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of proposed Regulation 3702 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

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

CONTACT PERSONS

Questions regarding the substance of the proposed regulation should be directed to Robert Wilke, Program Policy Specialist, by telephone at (916) 309–5302, by e–mail at BTFD–BTC.InformationRequests@cdtfa.ca.gov, or by mail to: California Department of Tax and Fee Administration, Attention: Robert Wilke, MIC:50, 450 N Street, P.O. Box 942879, Sacramento, CA 94279–0082.

Written comments for the CDTFA's consideration, written requests to hold a public hearing, notices of intent to present testimony or witnesses at the public hearing, and other inquiries concerning the proposed regulatory action should be directed to Kim DeArte, Regulations Coordinator, by telephone at (916) 309–5227, by fax at (916) 322–2958, by e–mail at CDTFARegulations@cdtfa.ca.gov, or by mail to: California Department of Tax and Fee Administration, Attention: Kim DeArte, MIC:50, 450 N Street, P.O. Box 942879, Sacramento, CA 94279–0050. Ms. DeArte is the designated backup contact person to Mr. Wilke.

WRITTEN COMMENT PERIOD

The written comment period ends at 11:59 p.m. (PDT) on January 25, 2021. The CDTFA will consider the statements, arguments, and/or contentions contained in written comments received by Ms. DeArte at the postal address, email address, or fax number provided above, prior to the close of the written comment period, before the CDTFA decides whether to adopt the proposed regulatory action. The CDTFA will only consider written comments received by that time.

However, if a public hearing is held, written comments may also be submitted at the public hearing and the CDTFA will consider the statements, arguments, and/or contentions contained in written comments submitted at the public hearing before the CDTFA decides whether to adopt the proposed regulatory action.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The CDTFA has prepared copies of the text of proposed Regulation 3702, as well as an initial statement of reasons for the adoption of proposed Regulation 3702. These documents and all the information on which the proposed regulatory action is based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The text of

proposed Regulation 3702 is also available on the CDTFA's website at www.cdtfa.ca.gov.

PUBLIC HEARING

The CDTFA has not scheduled a public hearing to discuss the proposed regulatory action. However, any interested person or his or her authorized representative may submit a written request for a public hearing no later than 15 days before the close of the written comment period, and the CDTFA will hold a public hearing if it receives a timely written request.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GC SECTION 11346.8

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

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the CDTFA adopts the proposed regulatory action, the CDTFA will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the CDTFA's website at www.cdtfa.ca.gov.

TITLE 18. DEPARTMENT OF TAX AND FEE ADMINISTRATION

SECTION 1616, FEDERAL AREAS

NOTICE IS HEREBY GIVEN that the California Department of Tax and Fee Administration (Department), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to amend California Code of Regulations, title 18, section (Regulation or Reg.) 1616, *Federal Areas*. The proposed amendments clarify that the term "reservation," as used in the regulation, means Indian country as defined in section 1151 of title 18 of the United States Code. The proposed amendments make the regulation consistent with the State Board of Equalization's (Board's) Legal Department's analysis based on the U.S. Supreme Court's holding in *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136 (*Bracker*), which concluded that federal law preempts the imposition of state use tax on non–Indians' purchases of meals, food, and beverages from on–reservation Indian retailers solely for consumption on the reservation where the purchases are made. The proposed amendments make the regulation consistent with the Board's Legal Department's *Bracker* analyses, which concluded that federal law preempts the imposition of California's sales and use taxes on sales and purchases of meals, food, and beverages, when sold by a non–Indian operating an eating or drinking establishment, such as a restaurant or bar, on an Indian reservation, pursuant to a lease or sublease, the sales are subject to an Indian tribe's sales or use tax, and the meals, food, and beverages are sold for consumption on the Indian reservation. The proposed amendments establish the presumption that all meals, food, and beverages sold or purchased from an eating or drinking establishment on an Indian reservation are for consumption on the reservation, except meals, food, and beverages sold or purchased from a drive–through counter or window or for delivery off the reservation, and the presumption that meals, food, and beverages sold or purchased from an eating or drinking establishment's drive–through counter or window are for consumption off the Indian reservation. The proposed amendments clarify that federal preemption does not apply to meals, food, and beverages sold or purchased for delivery off an Indian reservation and permit on–reservation retailers making off–reservation deliveries to report their taxable sales for delivery off reservation using a percentage developed from a test period, which is subject to audit. The proposed amendments also refer readers to Regulation 1603, *Taxable Sales of Food Products*, because it prescribes the application of state sales and use tax to meals, food, and beverages when they are sold or purchased for consumption off an Indian reservation.

In addition, the proposed amendments to Regulation 1616 replace "Board" with "Department" due to the changes in state government made by Assembly Bill Number (AB) 102 (Stats. 2017, chapter 16). The proposed amendments also make a minor non–substantive clarification, make a minor grammatical change, fix a minor typographical error, update the name of Regulation 1668, delete the quotation marks

from around the names of Regulations 1521, 1667 and 1668, and delete outdated language from the regulation's reference note.

AUTHORITY

RTC section 7051

REFERENCE

RTC sections 6017, 6021, and 6352, and Public Law Number 817–76th Congress (Buck Act)

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations

Federal Law

In *Bracker*, *supra*, 448 U.S. 136, the United States Supreme Court explained that federally recognized Indian tribes retain attributes of sovereignty over both their members and their territory, as a separate people, with the power of regulating their internal and social relations, and thus far are not brought under the laws of the United States or the states in which the tribes reside. The Court also held that:

- Federal law preempts a state's authority to tax an activity undertaken on a "reservation or by tribal members" (*id.* at page 143) in circumstances where the tax unlawfully infringes on the right of federally recognized Indian tribes "to make their own laws and be ruled by them" (*id.* at page 142 [quoting from *Williams v. Lee* (1959) 358 U.S. 217, 220]); and
- "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members" (*id.* at page 142), and state taxation is preempted when "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" indicates that, in a "specific context, the exercise of state authority would violate federal law" (*id.* at page 145) because it unlawfully infringes on the right of federally recognized Indian tribes "to make their own laws and be ruled by them." (*Id.* at page 142.)

Therefore, the Department must review the facts and circumstances applicable to the imposition of California's sales and use taxes on activities conducted on Indian reservations or by tribal members to determine whether the state, federal, and tribal interests at stake require federal preemption of the taxes under a *Bracker* analysis.

In addition, on February 25, 1987, the United States Supreme Court decided that neither the State of California nor Riverside County could regulate the bingo and card game operations of the Cabazon Band of Mission Indians and the Morongo Band of Cahuilla Mission Indians. (*California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202.) This Court ruling, known as the Cabazon decision, set in motion a series of federal and state actions, including two ballot measures, which dramatically expanded tribal casino operations in California as well as in other states.

In response to the Cabazon decision, Congress passed the Indian Gaming Regulatory Act (IGRA) (codified in 25 U.S.C. § 2701 et seq.) in 1988. The act makes specified types of gaming lawful on Indian lands only if the state in which the lands are located and the Indian tribe having jurisdiction over the Indian lands enter into a Tribal–State Compact governing gaming activities on the Indian lands of the Indian tribe with the approval of the Secretary of the Interior. (25 U.S.C. § 2710(d).) The act provides for a Tribal–State Gaming Compact to include provisions for "the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity" and "taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities." (*Ibid.*) The act authorizes Indian tribes to enter into management contracts for the operation and management of gaming activities with the approval of the Chairman of the National Indian Gaming Commission. (25 U.S.C. § 2711.) The act declares that its purpose is to advance three principal goals:

- Tribal economic development;
- Tribal self–sufficiency; and
- Strong tribal governments. (25 U.S.C. § 2702.)

The California Gambling Control Commission's (CGCC's) website at http://www.cgcc.ca.gov indicates that the "State of California has signed and ratified Tribal–State Gaming Compacts with 74 Tribes and there are Secretarial Procedures in effect with three Tribes." In addition, "[t]here are currently 64 casinos operated by 62 Tribes" in the state. The CGCC's website also contains links to California's current Tribal–State Gaming Compacts, which generally require tribes operating casinos to pay the state a portion of their gaming revenues and make specified payments to be shared with non–gaming or limited gaming tribes.

Further, federal law has generally provided for Indian tribes to enter into contracts, including leases, concerning restricted Indian lands with the approval of the Secretary of the Interior. (See, e.g., 25 U.S.C. §§ 81, 85, 415.) However, the passage of the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act) of 2012 amended the Indian Long–Term Leasing Act of 1955 (25 U.S.C. § 415) and created a voluntary alternative land leasing process for

restricted Indian lands under an Indian tribe's leasing regulations that have been submitted to, and approved by, the Secretary of the Interior. Also, the Bureau of Indian Affairs (BIA) issued its own leasing regulations that interpret and explain the HEARTH Act. These regulations are expressly intended to "promote leasing on Indian land for housing, economic development, and other purposes" (25 C.F.R. § 162.001(a)) and they state that:

> Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction. (25 C.F.R. § 162.017(b).)

The BIA has previously explained that this preemption provision does not preempt all state taxation on leased Indian land but expresses the BIA's view that when determining whether a state tax is preempted on leased Indian land, the federal and tribal interests to be weighed in a *Bracker* analysis are strong. Also, in *Seminole Tribe of Florida v. Stranburg* (11th Cir. 2015) 799 F.3d 1324 (*Stranburg*), the court of appeals explained that this preemption provision represents the BIA's conclusion regarding the ultimate application of *Bracker* and the court of appeals held that it would be inappropriate for a federal court to defer to this provision without performing its own "particularized inquiry" under *Bracker*. (*Id.* at page 1338; accord, *Desert Water Agency v. U.S. Department of the Interior* (9th Cir. 2017) 849 F.3d 1250.)

Furthermore, in *Wagnon v. Prairie Band Potawatomi Nation* (2005) 546 U.S. 95, 114 (*Wagnon*), the United States Supreme Court recognized that states and Indian tribes sometimes have concurrent jurisdiction to impose taxes and the Court held that a state tax is not preempted merely because it decreases a tribe's revenue. Also, in *Wagnon*, Justice Ruth Bader Ginsburg expressed her view, which was joined in by Justice Anthony Kennedy, that "as a practical matter" the two taxes cannot generally coexist because a double–taxed venture operates at a disadvantage and that double–taxation is an appropriate factor to consider in determining whether a state tax is preempted under a *Bracker* analysis. (*Id.* at pages 116–117.) In addition, in *Stranburg*, the court indicated that, while double–taxation is "insufficient to support preemption" alone, it may be a factor supporting preemption when there is "extensive and exclusive federal regulation of the activities at issue." (*Stranburg*, *supra*, at page 1340; see, e.g., *Agua Caliente Band of Cahuilla Indians v. Riverside County* (C.D. Cal. 2016) 181 F.Supp.3d 725 [comprehensive federal regulation of leases of Indian land and double–taxation factors supporting preemption under a *Bracker* analysis].)

Administration and Enforcement of California's Sales and Use Taxes

California's Sales and Use Tax Law (RTC, § 6001 et seq.) was administered and enforced by the Board. However, on June 27, 2017, the Governor approved AB 102, which added part 8.7 (commencing with section 15570) to division 3 of title 2 of the Government Code (part 8.7). Part 8.7 established the Department (Government Code, § 15570) and transferred most of the Board's former duties, powers and responsibilities to the Department, operative July 1, 2017, including the Board's former duties, powers, and responsibilities related to the administration and enforcement of the Sales and Use Tax Law. (Government Code, § 15570.22). Part 8.7 provides for the laws prescribing the powers, duties and responsibilities transferred to the Department, including the Sales and Use Tax Law, and the regulations adopted under those laws to continue in force on and after July 1, 2017. (*Ibid.*) Part 8.7 further provides that "whenever any reference to the [Board] appears in any statute, regulation, or contract, or in any other code, with respect to any of the functions transferred to the [Department], it shall be deemed to refer to the [Department]." (Government Code, § 15570.24).

California's Sales and Use Taxes

California's Sales and Use Tax Law imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (RTC, § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC, §§ 6012, 6051.) The sales tax is imposed on retailers, but retailers may collect reimbursement from their customers if their contracts of sale so provide. (Civil Code, § 1656.1; Reg. 1700, *Reimbursement for Sales Tax*.)

When sales tax does not apply, use tax applies to the sales price of tangible personal property purchased from a retailer for storage, use, or other consumption in California, unless a specific exemption or exclusion applies. (RTC, §§ 6201, 6401.) The use tax is imposed on the person actually storing, using, or otherwise consuming the property. (RTC, § 6202.) However, retailers that are engaged in business in this state are required to collect the use tax from their customers and report and pay it to the state. (RTC, § 6203.)

Taxation of Meals, Food, and Beverages

California's Sales and Use Tax Law provides an exemption from sales and use tax for sales and purchases of "food products" for human consumption, as defined in RTC section 6359. However, as relevant here, food products do not include carbonated or alcoholic beverages, meals served off or on the

retailer's premises, food products sold in a form suitable for consumption on the seller's premises when the 80–80 rule applies, and hot prepared food products, including combinations of hot and cold items sold for a single price. (RTC, § 6359, subdivisions (b)(3) and (d)(1), (6), (7).) Therefore, Regulation 1603, *Taxable Sales of Food Products*, implements, interprets, and makes specific RTC section 6359 by prescribing the application of California's sales and use taxes to sales and purchases of meals, food, and beverages.

Regulation 1616, Federal Areas

RTC section 6352 provides that California's sales and use taxes do not apply to transactions that the state is prohibited from taxing under federal law or the California Constitution. Regulation 1616, *Federal Areas*, was originally adopted in 1945 as a restatement of previous sales and use tax rulings regarding transactions that involved the United States military. In 1978, subdivision (d) was added to the regulation to prescribe the application of tax to the sale and use of tangible personal property on Indian reservations.

As relevant here, Regulation 1616, subdivision (d)(2), currently provides that the term reservation "includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian." And, the Department's Legal Division agrees with the August 26, 1996, memorandum supporting Sales and Use Tax Annotation 305.0024.250 (8/26/96), in which the Board's Legal Department concluded that even though Regulation 1616 uses the term "reservation," it is clear that its provisions that apply to reservations "should apply to all Indian country" as defined in section 1151 of title 18 of the United States Code. (Annotations are summaries of the conclusions reached in selected legal rulings of counsel and do not have the force and effect of law (Reg. 35101).)

Also, based upon past analyses of how federal law preempts California's sales and use taxes, Regulation 1616, subdivision (d)(3), currently provides that tax applies to on–reservation sales by non–Indian retailers to non–Indians and Indians not residing on the reservation. The subdivision provides that sales tax does not apply to non–Indian retailers' on–reservation sales to Indians residing on the reservation, and the Indian purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation. The subdivision further provides that sales tax does not apply to any on–reservation sales made by Indian retailers, whether to Indians who reside on the reservation, non–Indians, or Indians who do not reside on the reservation. However, an on–reservation Indian retailer is generally responsible for collecting use tax from non–Indians and Indians not residing on the reservation, unless the on–reservation retail sale is otherwise not subject to tax. Furthermore, the subdivision provides that on–reservation "Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation" because the Board previously "determined that, since [the] adoption of Regulation 1616(d) in 1978, federal court decisions [footnote omitted] preclude the imposition of state tax collection obligations upon on–reservation tribal retailers selling meals, food and beverages to non–Indians, when the meals, food and beverages are sold for consumption at eating and drinking establishments on the reservation." (Addendum to the final statement of reasons for the 2003 amendments to Regulation 1616.) Therefore, under the current provisions of Regulation 1616, subdivision (d)(3), California sales tax does not generally apply to and California use tax is not collected from purchasers on an Indian retailer's sales of meals, food, or beverages from an eating or drinking establishment on a reservation for consumption on the reservation. However, tax generally applies to such sales by non–Indian retailers, unless the sales are to Indians residing on the same reservation where the sales are made.

Effects, Objectives, and Benefits of the Proposed Amendments

Indian casinos located in California commonly offer food and beverage services to their customers, and the food and beverage services are sometimes operated by non–Indian retailers who are leasing space in the casinos, in accordance with federal law, including the HEARTH Act, and are required to pay a tribal sales tax with regard to their sales of meals, food, and beverages in the casinos. The Board's Legal Department performed a *Bracker* analysis to determine whether federal law preempts the imposition of California sales tax on sales of meals, food, and beverages by, and use tax on purchases of meals, food, and beverages from, such a non–Indian lessee operating an eating or drinking establishment within an Indian casino. The Board's Legal Department concluded that the federal and tribal interests in preempting California's sales and use taxes outweighed the state's interest in imposing such taxes when a Tribal casino, operated under a Tribal–State Gaming Compact entered into in accordance with the IGRA, leases an eating or drinking establishment, such as a restaurant or bar, to a non–Indian who makes sales of meals, food and beverages on site for consumption in the tribal casino, and the sales are subject to a tribal sales tax.

As a result, Board staff determined that there was an issue (or problem within the meaning of Government Code, § 11346.2, subdivision (b)(1)) because Regulation 1616 is not consistent with the Board's Legal Department's opinion regarding on–reservation sales of meals, food, and beverages by non–Indians

operating eating and drinking establishments, in leased space, in Indian casinos. Board staff determined that it was necessary to amend Regulation 1616 to make the regulation consistent with the Legal Department's opinion regarding on–reservation sales of meals, food, and beverages by non–Indians operating eating and drinking establishments, in leased space, in Indian casinos to have the effect and accomplish the objective of addressing the issue (or problem). Therefore, Board staff drafted proposed amendments to add new subdivision (d)(3)(B)3 to Regulation 1616 to make it consistent with the Legal Department's opinion and Board staff held interested parties meetings in January and March of 2016 and March of 2017 to discuss the proposed amendments.

Scope of Federal Preemption on Indian Reservations

Based on the interested parties' comments and discussions at the 2016 and 2017 interested parties meetings, the Board's Legal Department agreed that, under a *Bracker* analysis, federal preemption on Indian reservations goes beyond the boundaries of Indian casinos. The Board's Legal Department found that the facts that sales of meals, food, and beverages are made from leased space on a reservation and for consumption on the reservation where the sales take place are both factors supporting a finding of federal preemption of state sales and use tax on such sales. The Board's Legal Department also found that the facts that such sales are made from and for consumption in a casino operated under IGRA provides further support for federal preemption, but that the application of IGRA is not critical to federal preemption when the sales of meals, food, or beverages are made from leased space on an Indian reservation and the meals, food, or beverages are for consumption on the reservation. Therefore, Board staff determined that there was an issue (or problem within the meaning of Government Code, § 11346.2, subdivision (b)(1)) with the scope of the proposed amendments adding new subdivision (d)(3)(B)3 to Regulation 1616 and that it was necessary to revise the proposed amendments so that they apply to sales of meals, food, and beverages by a non–Indian operating an eating or drinking establishment, in leased space, on an Indian reservation, to have the effect and accomplish the objective of addressing the issue (or problem).

Types of Federally Authorized Leases on Indian Reservations

Based on the interested parties' comments and discussions at the 2016 and 2017 interested parties meetings, the Board's Legal Department concluded that it was not aware of any difference between HEARTH Act leases and other types of federally authorized Indian leases that would have a significant effect on a *Bracker* analysis. Therefore, Board staff agreed that the amendments should apply to any space leased under a written agreement authorized under federal law under which an Indian tribe grants a non–Indian the right to operate an establishment on the tribe's reservation, including leases approved by a tribe pursuant to tribal leasing regulations adopted under the HEARTH Act, leases approved by the BIA pursuant to 25 Code of Federal Regulations part 162, and contracts and agreements authorized under 25 United States Code section 81 et seq. (contracts generally) and section 2701 et seq. (gaming contracts).

In addition, Board staff received a question from the interested parties about whether Board staff intended for the proposed amendments adding subdivision (d)(3)(B)3 to apply to a non–Indian who leases property on a reservation, but does not necessarily lease an existing building or a space in an existing building, for example, where a non–Indian enters into a ground–lease and constructs a building on the leased land. The Board's Legal Department concluded that it was not aware of any difference between leases of a building, space in a building, or property on a reservation that would have a significant effect on a *Bracker* analysis. Therefore, Board staff determined that there was another issue (or problem within the meaning of Government Code, § 11346.2, subdivision (b)(1)) with the scope of the proposed amendments adding new subdivision (d)(3)(B)3 to Regulation 1616 and Board staff agreed that it was necessary to revise the proposed amendments adding subdivision (d)(3)(B)3 to clarify that they apply to a non–Indian operating an establishment in leased space or on leased property on a reservation, to have the effect and accomplish the objective of addressing the issue (or problem).

Furthermore, Board staff received a letter dated April 14, 2017, from Mr. Lester J. Marston who represents the Chemehuevi Indian Tribe and the Chicken Ranch Rancheria of Me–Wuk Indians of California, seeking further clarification about how to determine whether space or property is "on a reservation" and whether a sublease or revocable permit qualifies as a "lease" within the meaning of the proposed amendments. The Board's Legal Department discussed these issues (or problems within the meaning of Government Code, § 11346.2, subdivision (b)(1)) with Mr. Marston and agreed that it was necessary to make further amendments to Regulation 1616 to have the effect and accomplish the objective of addressing the issues (or problems). Therefore, to help clarify whether space or property is on a reservation, Board staff proposed to amend subdivision (d)(2) of Regulation 1616, which defines "reservation," to provide that the term "reservation" means "Indian country as defined in section 1151 of title 18 of the United States Code," so that the definition will now be consistent with the August 26, 1996, memorandum supporting Sales and

Use Tax Annotation 305.0024.250 (8/26/96) (discussed above). Board staff also proposed to add a sentence to subdivision (d)(2) to clarify that the phrases "on a reservation" and "on an Indian reservation" mean "within the boundaries of a reservation."

Also, to help clarify whether a sublease or revocable permit qualifies as a lease, Board staff revised the proposed amendments adding new subdivision (d)(3)(B)3 to Regulation 1616 to clarify that they apply to "a non–Indian operating an establishment … on a reservation, pursuant to a lease or sublease" because federally authorized leases and subleases both convey a legal interest in and the right to possess Indian land. (25 C.F.R. §§ 162.003 and 162.007.) However, Board staff did not add a reference to revocable permits to the proposed amendments. This is because the BIA's regulations concluded that federal law preempts the imposition of state taxes on "activities under a lease conducted on the leased premises" and the term "lease," as used in the BIA's regulations, does not include a revocable permit. (25 C.F.R. §§ 162.003 and 162.017.) This is also because the BIA's regulations indicate that revocable permits do not convey a legal interest in and the right to possess Indian land. (25 C.F.R. § 162.003.)

Indian Retailers

During the January 26, 2016, interested parties meeting, Mr. Craig Houghton of Baker Manock & Jensen indicated that the unnumbered paragraph at the end of subdivision (d)(3)(A) of Regulation 1616, regarding sales of meals, food, and beverages by Indian retailers, was inconsistent with Board staff's new proposed amendments regarding non–Indian retailers. Mr. Houghton stated that the proposed wording for new subdivision (d)(3)(B)3 indicated that both sales and use tax do not apply to non–Indian retailers' sales of meals, food, and beverages for consumption on an Indian reservation. However, when the unnumbered paragraph in subdivision (d)(3)(A) is read together with subdivision (d)(3)(A)2 of Regulation 1616, the paragraph indicates that use tax applies to non–Indians' purchases of meals, food, and beverages from on–reservation Indian retailers for consumption on the reservation, but the Indian retailers are not required to collect the use tax.

Due to Mr. Houghton's comments, the Board's Legal Department performed a *Bracker* analysis regarding on–reservation purchases of meals, food, and beverages from Indian retailers, and concluded that federal law preempts the imposition of use tax on non–Indians' purchases of meals, food, and beverages from on–reservation Indian retailers solely for consumption on the reservation where the purchases are made. Therefore, Board staff determined that there was another issue (or problem within the meaning of Government Code, § 11346.2, subdivision (b)(1)) because Regulation 1616 is not consistent with the Board's Legal Department's opinion regarding non–Indians' purchases of meals, food, and beverages from on–reservation Indian retailers solely for consumption on the reservation where the purchases are made. Board staff also proposed to replace the unnumbered paragraph at the end of subdivision (d)(3)(A) of Regulation 1616 with a new subdivision (d)(3)(A)3 to provide that "Use tax does not apply to meals, food, and beverages purchased from an Indian retailer at an eating or drinking establishment, such as a restaurant or bar, on an Indian reservation when the meals, food, and beverages are purchased for consumption on the Indian reservation," to have the effect and accomplish the objective of addressing the issue (or problem). The new language was based upon Board staff's proposed amendments adding new subdivision (d)(3)(B)3 to maintain consistency.

Reference to Regulation 1603

Board staff's proposed amendments adding new subdivision (d)(3)(B)3 to Regulation 1616 originally provided that "tax will apply if the meals, food and beverages are sold for consumption off" an Indian reservation. However, Board staff realized that there was an issue (or problem within the meaning of Government Code, § 11346.2, subdivision (b)(1)) regarding the accuracy of this statement because RTC section 6359 provides an exemption from sales and use tax for sales and purchases of food products for human consumption. Therefore, Board staff determined that it was necessary to add a new provision to subdivision (d)(3)(B) providing that "Regulation 1603, *Taxable Sales of Food Products*, prescribes the application of tax to meals, food, and beverages when they are sold or purchased for consumption off an Indian reservation," to have the effect and accomplish the objective of addressing the issue (or problem). This is because Regulation 1603 explains when the exemption in RTC section 6359 applies and there is no need to restate the applicable provisions of Regulation 1603 in Regulation 1616.

Initial Presumption

Board staff's proposed amendments to Regulation 1616 were scheduled for discussion during the Board's June 2016 Business Taxes Committee (BTC) meeting. A corresponding 2016 Issue Paper was distributed which detailed staff's position on a number of issues raised by interested parties, including the issue (or problem within the meaning of Government Code, § 11346.2, subdivision (b)(1)) of how to determine whether meals, food, and beverages are sold or purchased for consumption on or off a reservation. The 2016 Issue Paper first proposed that the regulation establish a rebuttable presumption "that meals, food, and beverages sold or purchased from an eating or drinking establishment on an Indian reservation in a

form suitable for immediate consumption are sold or purchased for consumption on an Indian reservation," to have the effect and accomplish the objective of addressing the issue (or problem). The issue paper also noted differences of opinion by a number of Indian tribes and included suggested language from one tribe as an alternative to staff's proposal, which preempted state tax on all meals, food, and beverages "furnished for consumption" on a reservation, regardless of where they were consumed. However, just prior to the BTC meeting, the topic was postponed.

In addition, the 2016 Issue Paper noted that some tribes recommended changing "meals, food, and beverages" to "items" in the proposed amendments. However, Board staff opposed the change. Staff was not aware of any federal law or precedent (including 25 C.F.R. § 162.017(b) as interpreted in *Stranburg, supra*) that preempts the application of state tax to a non–Indian's sale of an item to a non–Indian for storage, use, or other consumption outside of an Indian reservation and concluded that replacing the phrase "meals, food, and beverages" with "items" would create confusion rather than provide clarity to the majority of retailers. Staff did not agree that current federal law preempts the imposition of state tax on all on–reservation sales by non–Indian lessees. Staff also determined that the proposed amendments were consistent with the regulation's current language clarifying the application of tax to sales of meals, food, and beverages by Indian retailers, which was unanimously approved by the Board and received a great deal of support from a number of Indian tribes and their representatives, with some tribes indicating that the reference to meals, food, and beverages was consistent with federal law.

Furthermore, the 2016 Issue Paper noted that some tribes contended that Board staff's proposed requirement that a tribal tax be imposed on sales by and purchases from non–Indian retailers for California sales and use tax to be preempted was unwarranted and that state tax is preempted in all cases, even when the tribal government elects not to impose a sales tax or to impose a "0%" tax. Citing *Bracker*, they asserted that federal preemption from state tax should apply regardless of whether a tribal government imposes its own tax on a sale. They also recommended that the reference to a tribal tax be deleted from the proposed amendments. However, the Board's Legal Department concluded that it is necessary for a tribe to impose a tax on transactions between non–Indian retailers and non–Indian consumers which occur on an Indian reservation, in order for the transactions to be preempted from state tax under a *Bracker* analysis. This is because when there is no tribal tax imposed, the imposition of a state tax does not result in double taxation and does not put on–reservation non–Indian retailers at a competitive disadvantage versus off–reservation retailers.

June 2017 BTC Meeting

In January 2017, Board staff received a letter from the Tribal Alliance of Sovereign Indian Nations (TASIN) that generally supported staff's efforts up to that point. TASIN is comprised of several tribes who had submitted comments that were noted in the 2016 Issue Paper. Discussions with TASIN at the time indicated that all TASIN tribes had withdrawn their previously suggested language noted in the 2016 Issue Paper.

Board staff held a third interested parties meeting on March 23, 2017, to discuss its proposed amendments which largely remained unchanged from those presented in the 2016 Issue Paper. Comments made by interested parties during the third interested parties meeting, like the TASIN letter previously discussed, appeared to support staff's proposed amendments, including the rebuttable presumption proposed in the 2016 Issue Paper.

The proposed amendments to Regulation 1616 were rescheduled to be discussed with the Board Members at the Board's June 20, 2017, BTC Meeting and staff prepared a 2017 Issue Paper. However, prior to posting the issue paper, a potential issue (or problem within the meaning of Government Code, § 11346.2, subdivision (b)(1)) was brought to Board staff's attention regarding how the rebuttable presumption could be misread by some non–Indian retailers as exempting all of their sales from drive–through windows and for off–reservation delivery. As a result, staff reevaluated their proposed language and determined that the presumption should be further clarified to eliminate any potential confusion and ensure retailers collect the taxes that they will be liable for in future audits of such sales. Therefore, Board staff added a second presumption, which provided that "meals, food, and beverages sold or purchased from a drive–through window or delivered off a reservation are presumed to be sold or purchased for consumption off an Indian reservation," to have the effect and accomplish the objective of addressing the potential issue (or problem) and presented the modified presumptions to the Board as Alternative 2, while the presumption quoted above, which staff no longer supported without the additional clarification, was presented as Alternative 1. However, the Board did not agree with Board staff's Alternative 2 and authorized the Alternative 1 amendments to Regulation 1616.

Department's Proposed Amendments

Department staff reevaluated the amendments authorized by the Board, but not yet formally proposed under the Administrative Procedure Act (Government Code, § 11340 et seq.), after the authority to administer and enforce the Sales and Use Tax Law was transferred

to the Department on July 1, 2017. Department staff determined that the rebuttable presumption the Board approved over its staff's objections at the Board's June 2017 BTC meeting is too broad and could confuse some readers. Therefore, the Department decided to postpone the formal rulemaking process and continue to work to clarify the proposed amendments, including the rebuttable presumption.

On July 10, 2018, the Department distributed the fourth discussion paper regarding the amendments to Regulation 1616 and held the last interested parties meeting to discuss the amendments on July 25, 2018. The paper indicated that Department staff did not support the Board–approved presumption. Staff recommended revising the presumption so sales or purchases of meals, food, and beverages for delivery off an Indian reservation are conclusively presumed to be for off reservation consumption. Additionally, staff recommended revising the presumption so that meals, food, and beverages sold or purchased on a "to go" basis from a drive–through window or counter are rebuttably presumed to be for consumption off an Indian reservation. Several responses to the 2018 discussion paper and comments made during the July 25, 2018, meeting indicated the varying degrees of disagreement the tribes had with the new revised presumptions.

Comments from the Federated Indians of the Graton Rancheria (FIGR), Dry Creek Rancheria, Band of Pomo Indians (DCR), and Santa Ynez Band of Chumash Indians (SYBCI) primarily disagreed with staff's proposed presumptions. They either wanted certain presumption language to be deleted or suggested alternate presumptions or language. FIGR recommended removing the presumption for "to go" counter sales or changing the presumption so "to go" counter sales are generally presumed to be for on–reservation consumption. DCR suggested that the location of delivery should determine where consumption occurs. Therefore, DCR recommended deleting the presumption for "to go" sales altogether and replacing it with a presumption that all meals, food and beverages sold for delivery on a reservation, whether to a customer seated in a restaurant or otherwise, are for on–reservation consumption. SYBCI argued that the presumption for "to go" sales was too broad and burdensome and therefore suggested that there be a presumption that all meals, food, and beverages sold on an Indian reservation in a form suitable for immediate consumption are for consumption on an Indian reservation.

Comments from TASIN, the Agua Caliente Band of Cahuilla Indians (ACBCI), and the Pechanga Band of Luiseño Indians (PBLI) were similar. These tribes were "troubled" by the revised presumptions staff proposed in comparison to the Board–approved presumption from the year before. They thought the presumptions ignored consumer behavior with regards to "to go" orders, would negatively impact businesses, and maximized State revenues.

Some tribes also disagreed with other aspects of the proposed amendments. A few tribes stated that the State essentially does not have the authority to assess tax on meals, food, and beverages sold within Indian territory and that the location of a business should control the determination of whether a state or tribal tax applies. Some, including DCR, disagreed with the requirement that a tribal tax be imposed on the sale of meals, food and beverages for state tax to be preempted. They saw it as the State encroaching upon tribal sovereignty. Also, PBLI disagreed with limiting the proposed amendments to sales of meals, food, and beverages, and argued that federal preemption applies to on–reservation sales of "items intended for local consumption and/or use."

In response to the interested parties' concerns, Department staff revised its 2018 presumptions, and reformatted the revised presumptions as subdivision (d)(3)(B)4 of the proposed amendments to Regulation 1616. In general, Department staff developed a bright–line approach that clarifies that the Department will presume that all meals, food, and beverages sold or purchased from an eating or drinking establishment on an Indian reservation are for consumption on the reservation, except meals, food, and beverages sold or purchased from a drive–through counter or window or for delivery off the reservation. The Department will also presume that meals, food, and beverages sold or purchased from an eating or drinking establishment's drive–through counter or window are for consumption off the Indian reservation.

Originally, it was Board staff's position that meals, food, and beverages sold at an eating and drinking establishment within a casino on an Indian reservation should be presumed to be sold for consumption on an Indian reservation. However, it eventually became clear that some casino resorts had restaurants that made "to go" sales, including to go sales from drive–through windows. Also, after the proposed amendments were expanded to apply to on–reservation sales of meals, food, and beverages at establishments outside of Indian casinos, it became clear the amendments would apply to several different types of establishments that make "to go" sales, including to go sales from drive–through windows, or make sales for delivery off reservation. However, staff continued to recognize that some eating and drinking establishments are located within a larger business on an Indian reservation, such as a casino, casino resort, zipline course, or golf course, and staff believes that customers of these establishments would more likely than not consume a portion of or their entire to go

orders within the larger business's food court/guest dining areas or within another on–premises location, such as a hotel pool or guest room.

Therefore, the revised presumptions in subdivision (d)(3)(B)4 of the proposed amendments to Regulation 1616 presume that most on–reservation sales of meals, food, and beverages, including most sales in larger business, such as Indian casinos, zipline courses, and golf courses, are for consumption on an Indian reservation.

Also, Department staff looked at aerial views and maps showing the boundaries of Indian reservations and the locations of on–reservation businesses that sell meals, food, and beverages, including Indian casinos. Staff noted that it is typical for a drive–through establishment to be located in close proximity to the boundary of a reservation and near city or county streets and roads and major highways which are located off–reservation. The review of existing businesses and the placement of establishments with drive–through windows or counters close to or near the boundaries of Indian reservations led staff to presume that meals, food, and beverages sold at establishments' drive–through windows or counters would be consumed off–reservation.

In addition, the Department's Legal Division determined that federal law, including *Bracker*, does not generally preempt the imposition of state tax on a sale of tangible personal property, including meals, food, and beverages, for delivery off–reservation. Therefore, Department staff did not include a presumption regarding off–reservation deliveries in the Department's presumptions subdivision. Instead, Department staff added language to new subdivision (d)(3)(B)5 of Regulation 1616 to clarify that the amendments to subdivisions (d)(3)(A)3 and (d)(3)(B)3 of the regulation do not apply to sales for delivery off an Indian reservation. Also, interested parties informed Department staff that it is difficult in some circumstances for retailers to determine if a delivery location is within Indian territory or not. To specifically address this issue (or problem within the meaning of Government Code, § 11346.2, subdivision (b)(1)) and ease the administrative burden in reporting tax on off–reservation deliveries, Department staff included provisions in new subdivision (d)(3)(B)5 that permit retailers to report their taxable sales for delivery off reservation using a percentage they developed from a test period, but also provide that the "test is subject to audit, and it is the retailer's responsibility to maintain records to support that their percentage accurately reflects the taxable percentage."

Memorandum to the Director

Department staff subsequently prepared an October 25, 2019, memorandum to the Department's Director. The Memorandum recommended that:

- The Department amend Regulation 1616, subdivision (d)(2), to clarify that the term "reservation" means Indian country as defined in section 1151 of title 18 of the United States Code and make the regulation consistent with the memorandum supporting Sales and Use Tax Annotation 305.0024.250;
- The Department add language to Regulation 1616, subdivision (d)(2), to clarify that "on a reservation" and "on an Indian reservation" mean within the boundaries of a reservation;
- The Department replace the unnumbered sentence at the end of Regulation 1616, subdivision (d)(3)(A), with new subdivision (d)(3)(A)3 to make the regulation consistent with the Board's Legal Department's *Bracker* analysis, which concluded that federal law preempts the imposition of state use tax on non–Indians' purchases of meals, food, and beverages from on–reservation Indian retailers solely for consumption on the reservation where the purchases are made;
- The Department amend Regulation 1616, subdivision (d)(3)(B)2, and add new subdivision (d)(3)(B)3 to Regulation 1616 to make the regulation consistent with the Board's Legal Department's *Bracker* analyses, which concluded that federal law preempts the imposition of state sales and use taxes on sales and purchases of meals, food, and beverages, when sold by a non–Indian operating an eating or drinking establishment, such as a restaurant or bar, on an Indian reservation, pursuant to a lease or sublease, the sales are subject to an Indian tribe's sales or use tax, and the meals, food, and beverages are sold for consumption on the Indian reservation;
- The Department add new subdivision (d)(3)(B)4 to Regulation 1616 to establish the presumption that all meals, food, and beverages sold or purchased from an eating or drinking establishment on an Indian reservation are for consumption on the reservation, except meals, food, and beverages sold or purchased from a drive–through counter or window or for delivery off the reservation, and the presumption that meals, food, and beverages sold or purchased from an eating or drinking establishment's drive–through counter or window are for consumption off the Indian reservation;
- The Department add new subdivision (d)(3)(B)5 to Regulation 1616 to clarify that new subdivisions (d)(3)(A)3 and (d)(3)(B)3 do not apply to meals, food, and beverages sold or purchased for delivery off an Indian reservation and permit on–reservation retailers making off–reservation deliveries to report their taxable sales for delivery off reservation using a percentage

developed from a test period, which is subject to audit; and

- The Department add new subdivision (d)(3)(B)6 to Regulation 1616 to refer readers to Regulation 1603 because it prescribes the application of state tax to meals, food, and beverages when they are sold or purchased for consumption off an Indian reservation.

The memorandum recommended that the Department change "a Indians" to "an Indian" in the first sentence in Regulation 1616, subdivision (d)(2), to make the sentence grammatically correct, replace "Board" with "Department" in the last sentence in Regulation 1616, subdivision (d)(3)(A)2, due to the changes in state government made by AB 102, and clarify that the first sentence in Regulation 1616, subdivision (d)(3)(B)1 currently refers to sales made to Indians "who reside on a reservation." The memorandum recommended that the Department update the name of Regulation 1668 and delete the quotation marks from around the name of Regulation 1668 in the second sentence in Regulation 1616, subdivision (d)(3)(C), delete the quotation marks from around the name of Regulation 1667 in the third sentence in Regulation 1616, subdivision (d)(4)(B), change "ales" to "sales" in the first sentence in Regulation 1616, subdivision (d)(4)(C)1 to correct a typographical error, and delete the quotation marks from around the name of Regulation 1521 in the third sentence in Regulation 1616, subdivision (d)(4)(C)1. The memorandum also recommended that the Department delete outdated language stating "Items dispensed for 10¢ or less, see Regulation 1574" from Regulation 1616's reference note.

Determinations

The Department subsequently decided to propose to adopt Department staff's recommended amendments to Regulation 1616. The Department determined that staff's recommended amendments to Regulation 1616, subdivision (d)(2), are reasonably necessary to have the effect and accomplish the objective of addressing the issue (or problem) about how to determine whether space or property is "on a reservation." The Department determined that staff's recommended amendments adding new subdivision (d)(3)(A)3 to Regulation 1616 are reasonably necessary to have the effect and accomplish the objective of addressing the issue (or problem) created by Regulation 1616 not being consistent with the Board's Legal Department's *Bracker* analysis, which concluded that federal law preempts the imposition of California's use tax on non–Indians' purchases of meals, food, and beverages from on–reservation Indian retailers solely for consumption on the reservation where the purchases are made. The Department determined that staff's recommended amendments adding new subdivision (d)(3)(B)3 to Regulation 1616 are reasonably necessary to have the effect and accomplish the objective of addressing the issue (or problem) created by Regulation 1616 not being consistent with the Board's Legal Department's *Bracker* analyses, which concluded that federal law preempts the imposition of California's sales and use taxes on sales and purchases of meals, food, and beverages, when sold by a non–Indian operating an eating or drinking establishment, such as a restaurant or bar, on an Indian reservation, pursuant to a lease or sublease, the sales are subject to an Indian tribe's sales or use tax, and the meals, food, and beverages are sold for consumption on the Indian reservation. The Department determined that staff's recommended amendments adding new subdivision (d)(3)(B)4 and 5 to Regulation 1616 are reasonably necessary to have the effect and accomplish the objective of addressing the issue (or problem) of how to determine whether meals, food, and beverages are sold or purchased for consumption on or off a reservation, and addressing the issue (or problem) of determining whether a delivery location is within Indian territory or not. The Department determined that staff's recommended amendments adding new subdivision (d)(3)(B)6 to Regulation 1616 are reasonably necessary to have the effect and accomplish the objective of addressing the issue (or problem) of determining whether California's sales or use taxes apply to meals, food, and beverages when they are sold or purchased for consumption on an Indian reservation. The Department also determined that staff's other recommended amendments to Regulation 1616 are reasonably necessary to have the effect and accomplish the objective of updating the regulation, clarifying the regulation's current provisions and making them grammatically correct, and correcting a typographical error.

The Department anticipates that the proposed amendments to Regulation 1616 will promote fairness and benefit Indian tribes, on–reservation retailers that sell meals, food, and beverages, non–Indians and Indians that do not reside on a reservation that purchase meals, food, and beverages from on–reservation retailers, and the Department by clarifying that:

- The term "reservation" means Indian country as defined in section 1151 of title 18 of the United States Code when used in Regulation 1616;
- Federal law preempts the imposition of state use tax on purchases of meals, food, and beverages from on–reservation eating and drinking establishments operated by Indian retailers solely for consumption on the reservation where the purchases are made; and
- Federal law preempts the imposition of state sales and use taxes on sales and purchases of meals,

food, and beverages, when sold by a non–Indian operating an eating or drinking establishment, such as a restaurant or bar, on an Indian reservation, pursuant to a lease or sublease, the sales are subject to an Indian tribe's sales or use tax, and the meals, food, and beverages are sold for consumption on the Indian reservation.

In addition, the Department anticipates that the proposed amendments to Regulation 1616 will benefit Indian tribes by providing opportunities for the Indian tribes to increase their sales and use tax revenue, and any additional revenue will likely benefit individual tribal members and other individuals that rely on Indian tribes for governmental services. The Department also anticipates that the proposed amendments may benefit non–Indian retailers and individual consumers that are non–Indians or Indians that do not reside on a reservation by reducing the overall tax burden on their on–reservation sales and purchases of meals, food, and beverages. However, the Department does not anticipate that the proposed amendments will substantially change the overall sales and use tax burden on most on–reservation sales and purchases of meals, food, and beverages and there is insufficient data to measure the benefits of the proposed amendments in dollars.

Furthermore, the Department has determined that there are no comparable federal regulations or statutes to the amendments to Regulation 1616. Also, the Department has performed an evaluation of whether the proposed amendments to Regulation 1616 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1616 is the only regulation that specifies the application of state sales and use tax to sales and purchases of tangible personal property on Indian reservations.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

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

ONE–TIME COST TO THE DEPARTMENT, BUT NO OTHER COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Department has determined that the adoption of the proposed amendments to Regulation 1616 will result in an absorbable $436 one–time cost for the Department to update its website after the proposed regulatory action is completed. The Department has also determined that the adoption of the proposed amendments to Regulation 1616 will result in no other direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non–discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the state.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made an initial determination that the adoption of the proposed amendments to Regulation 1616 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

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

NO QUANTIFIABLE COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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

The Department has determined that the proposed amendments to Regulation 1616 will have some cost impact on eating and drinking establishments, such as restaurants and bars, operated by non–Indian lessees that are located on Indian reservations. However, the Department could not reliably estimate the cost in dollars because the Department could not find any data regarding the number of on–reservation eating and drinking establishments that are operated by non–Indian lessees or the number of such establishments that are small businesses or data that segregates on–reservation sales of meals, food, and beverages made by Indians from sales made by non–Indians.

Under the proposed amendments, the state's sales and use taxes will continue to apply to these establishments' sales of taxable meals, food, or beverages to a non–Indian or an Indian that does not reside on a reservation from a drive–through counter or window or for delivery off reservation. Therefore, these establishments will be required to incur some costs to separately track such sales, but the costs should be minimal since the establishments should be tracking these sales already, although not necessarily

tracking them separately from the establishments' other sales.

Also, the Department was informed that in some situations it may be difficult for retailers to determine if a delivery location is on or off a reservation. To reduce the difficulty, the Department proposed that retailers may report their taxable sales for delivery off reservation using a percentage they developed from a test period without preapproval from the Department. Therefore, some of the impacted businesses that make deliveries may incur costs to develop a reporting percentage from a test period, but the Department does not believe the costs are material.

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

The Department assessed the economic impact of the proposed amendments to Regulation 1616 on California businesses and individuals and determined that the proposed regulatory action is not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Department has prepared the economic impact assessment (EIA) required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. In the EIA, the Department determined that the adoption of the proposed amendments to Regulation 1616 will neither create nor eliminate jobs in the state nor result in the creation of new businesses or the elimination of existing businesses in the state and will not affect the expansion of businesses currently doing business in the state.

Furthermore, the Department determined that the adoption of the proposed amendments to Regulation 1616 will not affect the benefits of the regulation to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulation 1616 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

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

CONTACT PERSONS

Questions regarding the substance of the proposed amendments to Regulation 1616 should be directed to Mr. Bradley Heller, Tax Counsel IV, by telephone at (916) 323–3091, by e–mail at Bradley.Heller@cdtfa.ca.gov, or by mail at California Department of Tax and Fee Administration, Attn: Bradley Heller, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279–0082.

Written comments for the Department's consideration, written requests to hold a public hearing, notices of intent to present testimony or witnesses at the public hearing, and other inquiries concerning the proposed administrative action should be directed to Ms. Kim DeArte, Regulations Coordinator, by telephone at (916) 309–5227, by fax at (916) 322–2958, by e–mail at CDTFARegulations@cdtfa.ca.gov, or by mail at California Department of Tax and Fee Administration, Attn: Kim DeArte, MIC:50, 450 N Street, P.O. Box 942879, Sacramento, CA 94279–0050. Ms. DeArte is the designated backup contact person to Mr. Heller.

WRITTEN COMMENT PERIOD

The written comment period ends at 11:59 pm (PDT) on January 25, 2021. The Department will consider the statements, arguments, and/or contentions contained in written comments received by Ms. DeArte at the postal address, email address, or fax number provided above, prior to the close of the written comment period, before the Department decides whether to adopt the proposed amendments to Regulation 1616. The Department will only consider written comments received by that time.

However, if a public hearing is held, written comments may also be submitted at the public hearing and the Department will consider the statements, arguments, and/or contentions contained in written comments submitted at the public hearing before the Department decides whether to adopt the proposed amendments to Regulation 1616.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED AMENDMENTS

The Department has prepared a copy of the text of the proposed amendments to Regulation 1616 illustrating its express terms in underline and strikeout format. The Department has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1616, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments to Regulation 1616 and the initial statement of reasons are also available on the Department's website at www.cdtfa.ca.gov.

PUBLIC HEARING

The Department has not scheduled a public hearing to discuss the proposed amendments to Regulation 1616. However, any interested person or his or her authorized representative may submit a written request for an oral hearing no later than 15 days before the close of the written comment period, and the Department will hold a public hearing if it receives a timely written request.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Department may adopt the proposed amendments to Regulation 1616 with changes that are non–substantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Department will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Ms. DeArte. The Department will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Department adopts the proposed amendments to Regulation 1616, the Department will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Department's website at www.cdtfa.ca.gov.

SUMMARY OF REGULATORY ACTIONS

REGULATIONS FILED WITH THE SECRETARY OF STATE

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

California Horse Racing Board
File # 2020–0928–03
Shock Wave Therapy Restricted

This rulemaking action by the California Horse Racing Board (Board) adopts procedures for the possession and use of Extracorporeal Shock Wave Therapy (ESWT) machines within Board racing or training inclosures.

Title 04
Adopt: 1866.2
Filed 12/02/2020
Effective 04/01/2021
Agency Contact: Zachary Voss (916) 263–6036

Department of Health Care Services
File # 2020–1019–03
Adult Residential Treatment Services Provider Requirements

This action by the Department of Health Care Services (Department) eliminates the requirement that Mental Health Rehabilitation Centers (MHRCs), that also provide Adult Residential Treatment Services, obtain and maintain Social Rehabilitation Program (SRP) certification in addition to their MHRC licenses, because SRP certification is duplicative of MHRC licensing requirements and, therefore, unnecessarily burdensome on MHRCs to obtain and maintain and on the Department to regulate.

Title 09
Amend: 1840.332
Filed 11/30/2020
Effective 01/01/2021
Agency Contact: David Kim (916) 345–8399

Department of Public Health
File # 2020–1022–01
Lead–Related Construction Certification Fee Increase

In this action, the Department of Public Health raises the fee to apply for Lead–Related Construction Certification, within the residential lead–based paint hazard reduction program, from $87 to $135. This action is exempt from the Administrative Procedure Act pursuant to Health and Safety Code section 105250.1(b) and is submitted to OAL only for filing with the Secretary of State and printing in the California Code of Regulations.

Title 17
Amend: 35095
Filed 11/30/2020
Effective 07/01/2020
Agency Contact:
Hannah Strom–Martin (916) 440–7371

Division of Workers' Compensation
File # 2020–1016–01
Workers' Compensation, Document Separator Sheet – Document Titles

This action by the Department of Industrial Relations, Division of Workers' Compensation makes changes without reuglatory effect to the Document Separator Sheet and the accompanying Comprehensive List of Document Product, Type, and Title forms which is incorporated by reference in section 10205.14.

Title 08
Amend: 10205.14
Filed 12/02/2020
Agency Contact: River J Sung (510) 286–0637

Occupational Safety and Health Standards Board
File # 2020–1120–01
COVID–19 Prevention

In this emergency rulemaking, the Occupational Safety and Health Standards Board (the "Board") is establishing requirements regarding COVID–19 prevention for employees and places of employment. Specifically, the Board is: (1) identifying which employees and places of employment the regulations apply to; (2) defining terms used throughout the proposed emergency regulations; and (3) adopting regulations for prevention and identification of COVID–19 exposure and hazards in places of employment, including in both employer–provided housing and transportation to and from work.

Title 08
Adopt: 3205, 3205.1, 3205.2, 3205.3, 3205.4
Filed 11/30/2020
Effective 11/30/2020
Agency Contact: Christina Shupe (916) 274–5721

Office of Environmental Health Hazard Assessment
File # 2020–1016–02
Proposition 65 NSRL p–chloro–a,a,a–trifluorotoluene (PPCBTF)

In this rulemaking action, the Office adds p–chloro–a,a,a–trifluorotoluene (PCBTF) to the list of chemicals causing cancer. And it specifies 23 micrograms per day as the amount with No Significant Risk Level (NSRL).

Title 27
Amend: 25705
Filed 12/02/2020
Effective 04/01/2021
Agency Contact: Monet Vela (916) 323–2517

State Lands Commission
File # 2020–1009–02
Amendment of Annual Vessel Reporting Form

This action by the State Lands Commission amends the submission method requirement for the Marine Invasive Species Program Vessel Reporting Form.

Title 02
Amend: 2298.5
Filed 11/30/2020
Effective 01/01/2021
Agency Contact: Patrick Huber (916) 574–0728

State Water Resources Control Board
File # 2020–1014–02
Policy on Use of Coastal and Estuarine Waters for Power Plant Cooling

On September 1, 2020, the State Water Resources Control Board amended the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling to extend the compliance dates for four stations and amend compliance dates for certain units under Resolution No. 2020–0029.

Title 23
Amend: 2922
Filed 11/30/2020
Effective 11/30/2020
Agency Contact: Katherine Walsh (916) 446–2317

PRIOR REGULATORY DECISIONS AND CCR CHANGES FILED WITH THE SECRETARY OF STATE

A quarterly index of regulatory decisions by the Office of Administrative Law (OAL) is provided in the California Regulatory Notice Register in the volume published by the second Friday in January, April, July, and October following the end of the preceding quarter. For additional information on actions taken by OAL, please visit www.oal.ca.gov.