STANDARDIZED REGULATORY IMPACT ASSESSMENT

Economic Impact Analysis of Proposed Regulation Section 25136-2 Market Based Rules for Sales Other than Sales of Tangible Personal Property

Franchise Tax Board

Prepared by the Economic and Statistical Research Bureau

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STANDARDIZED REGULATORY IMPACT ANALYSIS

1. Introduction

California Revenue and Taxation Code section (RTC) 25136 and California Code of Regulations, title 18, section (Regulation) 25136-2 apply to taxpayers that conduct business within and without California and sell something other than tangible personal property. The statute and regulation refer to such sales as: “sales other than sales of tangible personal property.” The net income of such taxpayers includes both business income and non-business income. The amount of business income treated as California source income is determined by apportionment formula. For most taxpayers, the apportionment formula is based entirely on sales. Regulation 25136-2 provides rules for determining the correct amount of sales to be included in the sales factor numerator for sales other than sales of tangible personal property, which includes: sales from services; sales from intangible property; sales derived from marketable securities; sales from the sale, lease, rental, or license of real property; and sales from the rental, lease, or license of tangible personal property.

Regulation 25136-2 was initially promulgated in 2012 and amended in 2016. In the course of administering the regulation, Franchise Tax Board (FTB) staff has learned that simplifying the rules, and creating specific rules for certain industries, is in the interest of both taxpayers and the department as it increases both compliance and administrability.

2. Reasons for the Proposed Amendments to the Regulations

The purpose of amending Regulation 25136-2 is to seek to improve compliance with and administrability of the regulation by providing specific sourcing rules for certain industries and through simplifying amendments to the regulation.

3. Major Regulation Determination

Senate Bill 617 (Stats. 2011, Ch. 496) establishes regulatory impact assessment standards for major regulations. State agencies must conduct a Standardized Regulatory Impact Assessment (SRIA) when they estimate that a proposed regulation has an economic impact exceeding $50 million.

Because the economic impact of the proposed amendments to this regulation may produce an impact greater than $50 million in a 12-month period (taxable year 2024) following the proposed full implementation of the regulation, the Department of Finance has instructed the FTB that it is proper to treat this regulation as a major regulation.

The FTB estimates that for the first 12-month period in which the economic impact could exceed $50 million would be in fiscal year 2024-25. The estimate revenue impact could be a gain of up to $55 million or a loss of up to $55 million. The estimate economic impact could be a gain of up to $116 million or a loss of up to $117 million.

4. Public Input

The FTB's process for drafting the proposed amendments to the regulations included six interested party meetings (IPMs).

The first IPM was held on January 20, 2017, to provide the public with an opportunity to discuss and provide comments on potential amendments to the regulation. Staff explained the purpose of the regulation and the public responded positively to receiving additional guidance by way of amendments to the regulation. Numerous topics were discussed, including whether the regulation should address asset management services, government services contracts, reasonable approximation as a sourcing methodology, as well as a discussion of proper sourcing methodology for several other service industries.

The second IPM was held on June 16, 2017. Staff presented draft language after consideration of comments received from the first IPM. A number of comments were offered with regard to government services, asset management services, as well various other topics including long term contracts, research and development services, and reasonable approximation as a sourcing methodology. Based on input received at the second IPM, staff determined to propose simplifying rules for the sourcing of services.

The third IPM was held on May 18, 2018, to further elicit public input regarding potential amendments to the regulation. Staff presented new draft language. Staff and the interested parties in attendance discussed in detail the simplifying rules staff had proposed which simplified the rules for sourcing services. Staff proposed to modify the cascading rules for sourcing business services with a simpler set of rules that was based on presumptions. Based on input received at the third IPM, staff determined to extensively modify the proposed asset management services rule.

The fourth IPM was held on July 19, 2019. Staff presented draft regulation language along with an explanation of the draft regulation language and received input from the public. Staff discussed the asset management services rule with members of the public as well as several other proposals from members of the public pertaining to specific industries. After additional review, the sourcing rules for services through the merger of the sourcing rules for businesses and the sourcing rules for individuals were further simplified.

The fifth IPM was held on July 21, 2020. Staff presented draft regulation language along with an explanation of the draft regulation language and received input from the public. Staff discussed the proposed merging of the sourcing rules for services of individual and business customers. Public comments received after the meeting stressed the importance of retaining an example for accounting services. After consideration of public comments staff proposed a professional services rule.

The sixth IPM was held on June 4, 2021. Staff presented draft regulation language along with an explanation of the draft regulation language and received input from the public. Staff discussed the proposed professional services rule with participants. During the IPM and from subsequent written comments during the comment period, staff received comments that were broadly supportive of the proposed professional services rule.

Taxpayers and the public had opportunities to discuss the proposed amendments to the regulations and voice their concerns.

5. Economic Impact Assessment

The direct impact of the proposed amendments to Regulation 25136-2 falls on taxpayers that do business both in and out of the state. Therefore, the economic impact to California for the proposed amendments depends on changes to state revenues resulting from its implementation. This section describes the anticipated changes to state revenues. The analysis assumes that additional revenues would be spent and uses the Bureau of Economic Analysis' Regional Input-Output Modeling System type II (RIMS II) multipliers to estimate the general economic impact of the increase in state spending.
This analysis assumes that the proposed amendments to the regulation would become effective January 1, 2024. The proposed regulation would impact tax payments starting with the first estimated payment due date of April 15, 2024. The full impact of the proposed regulation would not be realized until after affected businesses file their tax returns, which would occur during calendar year 2025, or 2026 if the taxpayer is a fiscal year filer, for the 2024 taxable year. The proposed regulation could increase tax for some taxpayers and decrease tax for others. As a result, the change in state revenue is uncertain but is expected to be within the boundaries provided. The FTB estimates revenue impact for fiscal year 2024-25 could be a gain of up to $55 million or a loss of up to $55 million. The total output generated (economic impact) from this proposal in fiscal year 2024-25 could be an approximate gain of up to $116 million or a loss of up to $117 million.

5.1 Number of Impacted Taxpayers

The taxpayers affected by this regulation are apportioning taxpayers with sales, other than sales of tangible personal property. Regulation 25136-2 is the default rule for apportionment of such sales and applies to taxpayers, including corporations, pass-through entities, and sole proprietorships that do business both within and without California. The amendments proposed in Regulation 25136-2 would also impact taxpayers whose tax liability is determined in reference to RTC 25136 and Regulation 25136-2, such as non-resident partners of an apportioning partnership doing business in California or other nonresident individuals with California source income engaged in a multistate business. The apportionment rules do not change for sales of tangible personal property.

The FTB expects the majority of the economic impact from the proposed amendments to this regulation to affect taxpayers that offer professional services, as defined. This would generally be taxpayers that provide management services, tax services, payroll/accounting services, audit/attest services, legal services, business advisory consulting services, technology consulting services, and certain services related to brokering securities or investment advisory services (hereinafter collectively referred to as "professional services"). The new rule applies to taxpayers that provide professional services to more than 250 customers and the benefit of the service crosses state lines. The FTB also expects the proposed changes to impact taxpayers that offer asset management services, as defined. In addition, the proposed clarifying changes to the regulation may also impact taxpayers that derive sales from intangible property, mixed property, marketable securities, and services in general.

Pass-through businesses, sole proprietorships, and nonresident individuals with California source income engaged in a multistate business that have sales other than sales of tangible personal property would be affected by the proposed amendments to this regulation, but almost all the effect would be on nonresidents. This is because California residents who have an ownership interest in such businesses subject to apportionment are already subject to tax on 100 percent of their worldwide income (RTC 17041). Accordingly, aside from marginal impacts on the other state tax credit, changes in the apportionment rules would not directly impact California residents paying taxes on their personal income tax returns.

Using the FTB's data for taxable years 2018 and 2019, FTB determined that an average of 90,000 apportioning tax returns were filed in each year. Upon review of tax returns filed using identified Principal Business Activity (PBA) codes, FTB estimated that approximately 15 percent, or 13,500, taxpayers would sell professional services to their customers and approximately 35 percent of those, or about 4,700 businesses would be directly impacted by the clarifications proposed to this regulation. In addition, staff familiar with these taxpayers expect that about 10 percent of these businesses, or 473, would be small businesses.

Number of Entities Impacted

Average number of apportioning returns filed	90,000
Percent of taxpayers within the PBA Codes	15%
	13,500
Percent of taxpayers within PBA codes that would be directly impacted by this regulation	35%
	4,725
Percent of taxpayers that would be small business	10%
	473

Furthermore, the proposed amendments to this regulation also modify the sourcing rules for asset management services to be the domicile of the investor, or the domicile of the beneficial owner of the assets should the investor be holding the title. It also defines the term “customer” for purposes of assigning sales derived from marketable securities. The FTB estimates that these changes will have little to no impact on the operational activities for the majority of these taxpayers. All other changes made in the proposed amendments to this regulation are clarifying in nature.

Of the 90,000 returns evaluated, it is estimated that approximately 6,000 include asset management services and/or sales from marketable securities. Of those, approximately 600 would be small businesses. Some taxpayers with sales of professional services, as defined, may also be affected by the modifications made for asset management and marketable securities.

5.2 Types of Business and Industries Impacted

This regulation would primarily affect large corporations, but some small businesses and individuals doing business within and without of California could be affected by the regulation. However, the clarifications proposed by this regulation are expected to ease the burden of determining whether a taxpayer's market for a sale is in California, making compliance easier for taxpayers and tax practitioners. Additionally, the FTB expects the majority of revenue impact from the proposed amendments to be from taxpayers within the professional services industry, as defined. This would generally be corporations with sales of technology consulting services, business support and advisory services, accounting/payroll services, legal services, and some financial services when the benefit of the service crosses state lines. As noted in Section 5.1 above, the FTB identified 4,700 businesses directly impacted by the rule for professional services. The below table shows the relative percent of impacted businesses, by professional services subcategory.

Industry	Percent of Impacted Taxpayers
Technology Consulting Services	58%
Financial Services	18%
Legal Services	12%
Accounting/Payroll Services	8%
Business Support and Advisory Services	4%
Total	100%

In addition to taxpayers that provide professional services, as defined, the proposed amendments to this regulation would also affect taxpayers with asset management services and sales of marketable securities.

5.3 Change in Tax Revenue

Beginning in 2013, in general, multistate taxpayers are required to utilize the single-sales factor apportionment formula (RTC 25128.7) and market-based sourcing rules for sales other than sales of tangible personal property (RTC 25136). Before this change, most apportioning taxpayers used a three-factor apportionment formula based on property, payroll, and double-weighted sales. Sales other than sales of tangible personal property were sourced based on the cost of performance rules. This change from cost of performance to market-based sourcing led to the promulgation of the first two iterations of Regulation 25136-2. Nevertheless, taxpayers still struggle to source certain sales, other than sales of tangible personal property.

The methodology taxpayers currently use to determine the source of sales, other than sales of tangible personal property cannot be determined from the state tax return information reported. As a result, it is uncertain whether the proposed amendments would cause the taxpayer's apportionment factor to increase, decrease, or remain unchanged.

Should the proposed amendments to this regulation be adopted for professional services, as defined, it is likely that the sales factor would change for some taxpayers thus changing the amount of income apportioned to California. However, it is unknown whether the net impact from these adjustments would result in an increase, a decrease, or no change in state revenues. The existing regulation creates compliance concerns for multistate business taxpayers apportioning income and can make it difficult for taxpayers to identify the information needed to determine the location where the benefit of the sale for services is received across state borders. This is primarily due to the way taxpayers track sales. Frequently the only information readily available to the taxpayer is the customer's billing address, which can be different from where the benefit of the service is received by the customer. By modifying the cascading rules and providing new and clarified examples to illustrate the correct sourcing for sales, other than sales of tangible personal property, the proposed amendments to Regulation 25136-2 clarify these sourcing issues and clarify how to determine where the benefit of a service is received in California.

In addition, the proposed amendments define and add new rules for professional services and asset management services, thereby reducing confusion for the taxpayer. The proposed amendments also clarify the rules for marketable securities, intangible property, and mixed property, further reducing confusion for the taxpayer.

Although the exact impact of the proposed regulation is unknown, the FTB believes that it would fall within the range described below. The FTB's experts on apportionment believe that the various possible approaches to apportioning the type of income covered by the proposed regulation would change income apportioned to California by less than twenty (20) percent for most taxpayers. Therefore, to provide bounds on the possible revenue impact of the proposed regulation, the FTB analyzed the potential impact of this regulation by modeling a 20 percent increase and a 20 percent decrease in the apportionment factor for taxpayers in the industries most likely to be impacted by the regulation. To the extent that apportionment factor increases for some taxpayers and decreases for others, the net effect would likely be between the two bounds described below. This analysis used a sample of corporate returns, within the applicable PBA codes, for taxable year 2019. The 2019 taxable year was used because it was the last full year of normal business activity available for analysis that did not include the suspension of net operating losses (NOL), credits, and/or the fiscal impacts of the pandemic. For each taxpayer in the sample, their taxes were recalculated using a 20 percent increase or a 20 percent decrease in their apportionment factor. The results were then grown to reflect changes in the economy since 2019.

Applying a 20 percent increase in the sales factor resulted in an estimated revenue gain of $48 million in taxable year 2024. The revenue impact from the increase on the apportionment factor reflects, in part, the offsetting increase in the use of tax credits and NOL deductions (RTC 24416 to RTC 24416.23). In cases where the taxpayer was reporting a loss, the increased sales factor increased the amount of NOLs reported by the taxpayer for the year. A 20 percent decrease in the sales factor resulted in an estimated revenue loss of $55 million in taxable year 2024. Again, in cases where the taxpayer was using tax credits or NOL carryover losses to offset their tax liability, the sales factor decrease would result in the taxpayer using fewer offsetting tax credits or NOLs. The actual change in revenues from the proposed regulation would likely be between these two bounds.

In addition to clarifying the sourcing rules for professional services, as defined, the proposed amendments to this regulation also modify the sourcing rules for asset management services to be the domicile of the investor, or the domicile of the beneficial owner of the assets should the investor be holding the title. For sales from marketable securities, the proposal defines the term “customer” for purposes of assigning sales derived from marketable securities, thereby clarifying whose location is relevant when assigning the sale. For both, the FTB is currently using statutory and regulatory interpretation to issue assessments. The modifications proposed in this regulation are expected to result in less confusion for taxpayers and the FTB. The estimated impact from the clarified application of the sourcing rules for both the taxpayer and the FTB would result in a revenue gain of approximately $3 million dollars per year.

Revenue Impact Table by Taxable Year ($ in Millions)

Upper and Lower Bound	2024	2025	2026
20% Increase in the Apportionment Factor	+$48	+$50	+$53

20% Decrease in the Apportionment Factor	-$55	-$57	-$59
Modification for Marketable Securities and Asset Management	+$3	+$3	+$3

The Net Revenue Impact from Regulation 25136-2 by Taxable year ($ in Millions)

Upper and Lower Bound	**2024**	**2025**	**2026**
20% Increase in the Apportionment Factor and modifications to Market Securities & Asset Management	$51	$53	$55
20% Decrease in the Apportionment Factor and modifications to Market Securities & Asset Management	-$52	-$54	-$56

Net Revenue Impact from Regulation 25136-2 by Fiscal Year ($ in Millions)

Upper and Lower Bound	**2023-24**	**2024-25**	**2025-26**
20% Increase in the Apportionment Factor and modifications to Market Securities & Asset Management	+21.0	-55.0	+55.0
20% Decrease in the Apportionment Factor and modifications to Market Securities & Asset Management	-22.0	-55.0	-56.0

5.4 Dynamic Impact on the State's Economy of the Change in State Tax Revenue

The RIMS II regional multipliers can be used to determine the economic impact of a project, or change in economic activity, in a particular region. The economic impact estimated by applying RIMS II multipliers to the direct impact of the regulation are presented in the tables below. Applying the multipliers for other government enterprises to the state revenue impacts described above, it is estimated that for taxable years beginning on or after January 1, 2024, the boundaries on the total revenue impact from the proposed amendments to this regulation could be a gain of up to $51 million or a revenue loss of up to $52 million in taxable year 2024, the first full taxable year of implementation. The total output generated from this would be an economic gain of approximately $108 million or an economic loss of $110. In terms of its impact on household earnings, this translates to a possible increase or decrease in household earnings of up to $30 million in the 2024 taxable year. An increase of this magnitude could result in the creation of up to 462 new part-time or full-time jobs or a loss of up to 469 existing part-time or full-time jobs in the year the proposed amendments to this regulation go into effect. The overall value added to state government enterprises would be approximately $1.1 for every additional dollar generated, or up to approximately a $55 million gain or a $56 million loss in the 2024 taxable year. It is unclear how likely the upper and lower bound estimates are, and it is also possible that there could be no change in part-time or full-time jobs or economic activity in the year the proposed amendments to this regulation go into effect.

Economic Impact by Taxable Year ($ in Millions)

Upper and Lower Bound	**2024**	**2025**	**2026**
20% Increase in the Apportionment Factor and modifications to Market Securities & Asset Management	$108	$113	$118
20% Decrease in the Apportionment Factor and modifications to Market Securities & Asset Management	-$110	-$114	-$119

Economic Impact by Fiscal Year ($ in Millions)

Upper and Lower Bound	**2023-24**	**2024-25**	**2025-26**
20% Increase in the Apportionment Factor and modifications to Market Securities & Asset Management	$45	$116	$117
20% Decrease in the Apportionment Factor and modifications to Market Securities & Asset Management	-$46	-$117	-$119

RIMS II Multipliers: Other Government Enterprises (Upper Bound)

20% Increase to Apportionment Factor and modifications to Market Securities & Asset Management	**2024 Final Demand**	**2025 Final Demand**	**2026 Final Demand**
Initial Increase in Revenue (Base)	$50,956,598	$53,135,350	$55,407,259
Output Multiplier per $1 change in Final Demand	2.1224	2.1224	2.1224
Total Industry Output	$108,150,283	$112,774,467	$117,596,367
Earnings Multiplier per $1 change in Final Demand	0.5728	0.5728	0.5728
Total Household Earnings	$29,187,939	$30,435,929	$31,737,278
Employment Multiplier per $1 Million change in Final Demand	9.0761	9.0761	9.0761
Total Jobs	462	482	503
Value Added Multiplier per $1 change in Final Demand	1.0794	1.0794	1.0794
Total Value Added	$55,002,552	$57,354,297	$59,806,596

RIMS II Multipliers: Other Government Enterprises (Lower Bound)

20% Decrease to Apportionment Factor and modifications to Market Securities & Asset Management	**2024 Final Demand**	**2025 Final Demand**	**2026 Final Demand**
Initial Decrease in Revenue (Base)	($51,636,944)	($53,844,786)	($56,147,028)
Output Multiplier per $1 change in Final Demand	2.1224	2.1224	2.1224
Total Industry Output	($109,594,249)	($114,280,173)	($119,166,453)
Earnings Multiplier per $1 change in Final Demand	0.5728	0.5728	0.5728
Total Household Earnings	($29,577,641)	($30,842,293)	($32,161,018)
Employment Multiplier per $1 Million change in Final Demand	9.0761	9.0761	9.0761
Total Jobs	-469	-489	-510
Value Added Multiplier per $1 change in Final Demand	1.0794	1.0794	1.0794
Total Value Added	($55,736,917)	($58,120,062)	($60,605,102)

The changes in economic activity described above could lead to a change in the number of businesses in the state. To estimate the change in the number of businesses, this analysis assumes that half of the change in jobs takes place in existing or continuing businesses and the other half in new or disappearing businesses. It also assumes an average of 20 employees in newly created or disappearing businesses. Under those assumptions, the change in the number of businesses in the state would range from a gain of 12 to a loss of 12 depending on the actual change in tax revenues resulting from the adoption of the proposed amendment.

20% Increase to Apportionment Factor and modifications to Market Securities & Asset Management	**2024**	**2025**	**2026**
Total Jobs per $1 Million Change in Final Demand	462	482	503
Number of jobs absorbed by existing businesses	231	241	251
Number of jobs created by new businesses	231	241	251
Number of new businesses at 30 employees per entity	8	8	8
Number of new businesses at 20 employees per entity	12	12	13

20% Decrease to Apportionment Factor and modifications to Market Securities & Asset Management	**2024**	**2025**	**2026**
Total Jobs per $1 Million Change in Final Demand	(469)	(489)	(510)
Number of lost jobs absorbed by existing businesses	(234)	(244)	(255)
Number of lost jobs resulting from business closure	(234)	(244)	(255)
Number of business closures at 30 employees per entity	(8)	(8)	(8)
Number of business closures at 20 employees per entity	(12)	(12)	(13)

5.5 Sensitivity Analysis

As described above, the estimated impact of this proposal is based on our understanding of how taxpayers are assigning sales, other than sales of tangible personal property, such as sales of professional services, as defined, when the benefit of the service crosses state lines. There is some uncertainty in the magnitude of the change in sales factor that would result from adoption of the proposed amendments to this regulation. If the change is smaller, the revenue and economic impacts would be less than those described in the section above. If the changes are larger, the revenue and economic impacts would be larger. To illustrate how sensitive the results presented above are with respect to the key parameter of the change in sales factors, a 10 percent increase and then decrease in the sales factors for all impacted taxpayers was completed.

Applying a 10 percent increase to the sales factor resulted in an estimated revenue gain of up to $24 million in taxable year 2024. As with the estimate methodology described above in Section 5.3, the impact from the increase in the apportionment factor reflects, in part, an increase in the use of offsetting tax credits and carryover NOL deductions. A 10 percent decrease in the sales factor would result in an estimated revenue loss of up to $27 million in taxable year 2024. The estimated impact from the modifications to the sales from marketable securities and asset management services would still result in a revenue gain of approximately $3 million dollars per year for a total revenue gain of up to $27 million or a revenue loss of up to $24 million. After applying the RIMS II multiplier for other government enterprises to the state revenue impacts the estimated economic impact for the first taxable year, would be a gain of up to $58 million or a loss of up $52 million, it is assumed that any additional revenues would be spent.

Revenue Impact Table by Taxable Year ($ in Millions)

Upper and Lower Bound	2024	2025	2026
10% Increase in the Apportionment Factor	$24	$25	$26
10% Decrease in the Apportionment Factor	-$27	-$29	-$30
Modification for Marketable Securities and Asset Management	$3	$3	$3

The Net Revenue Impact by Taxable Year ($ in Millions)

Upper and Lower Bound	2024	2025	2026
10% Increase in the Apportionment Factor and modifications to Market Securities & Asset Management	$27	$28	$30
10% Decrease in the Apportionment Factor and modifications to Market Securities & Asset Management	-$24	-$26	-$27

Economic Impact by Taxable Year ($ in Millions)

Upper and Lower Bound	2024	2025	2026
10% Increase in the Apportionment Factor and modifications to Market Securities & Asset Management	$58	$60	$63
10% Decrease in the Apportionment Factor and modifications to Market Securities & Asset Management	-$52	-$54	-$56

As discussed above, the proposed amendments for this regulation could cause the apportionment factors to increase for some taxpayers, decrease for others, and for some they could remain unchanged. As a result, the economic impact and the subsequent impact to jobs would likely be between the bounds described above.

6. Other Economic Impacts

Under California law, most taxpayers doing business both within and without California use the single sales factor apportionment formula (RTC 25128.7) to determine the portion of their income that is sourced to California. This method removes the link between taxes and business investment decisions. Moving employees or manufacturing facilities out of California would not change the location of the taxpayer's customers. As a result, any changes to property or payroll would not impact the sales factor or a taxpayer's California tax liability. It is, therefore, anticipated that the proposed amendments to this regulation would have a negligible impact on the actual economic activities of the affected taxpayers.

6.1 Creation or Elimination of Jobs within the State

As described above in section 5.4, the proposed amendments to this regulation could result in either the creation or elimination of jobs within California. The FTB estimates, should there be an increase or decrease in the apportionment factor in the year after the proposed amendments to this regulation go into effect it could result in the creation of up to 462 jobs or the elimination of up to 469 full-time or part-time jobs. The actual change in the number of jobs would likely be between these bounds.

6.2 Creation or Elimination of Businesses within the State

As described above in section 5.4, the proposed amendments to this regulation could result in the creation, elimination, or no changes in the number of businesses within California. The FTB estimates, should there be an increase or decrease in the apportionment factor in the year after this regulation goes into effect it could result in the creation of up to 12 new businesses or the elimination of up to 12 existing businesses. The actual change in the number of businesses would likely be between these bounds.

6.3 Competitive Advantages or Disadvantages for Businesses Currently Doing Business within the State

The proposed amendments to this regulation could result in changes to the income tax liability of some businesses currently doing business within this State. An increase or decrease in tax liability for any one business could create a disadvantage or advantage for that business and a corresponding advantage or disadvantage for its competitors currently doing business in the state. While there could be some shifting of business between firms, there should, in aggregate, be little to no impact on the competitiveness of this industry in the State.

6.4 Increase or Decrease of Investment in the State

The proposed amendments to this regulation could either increase or decrease investment in California. Because most multistate taxpayers use the single sales factor apportionment formula, any changes to a taxpayer's investment in property, in or out of the State, alone, should not impact the amount of income apportioned to California. So, any change in investment due to the proposed amendments to this regulation, if any, are likely to be small. However, if the proposed regulation does change the overall level of economic activity in the state, some portion of that change would likely be additional business-related investments in the state. As noted above, the range of change in economic activity from the proposed regulation is from an increase of up to $108 million per year to a decrease of up to $110 million per year. If 20 percent of this increase in economic activity was spent on business-related investments in this state, the change in investment would be between an increase of up to $22 million or a decrease of up to $22 million.

6.5 Incentives for Innovation in Products, Materials, or Processes

This regulation does not mandate, require, or provide incentives for additional innovation in products. The proposed amendments to this regulation are intended to provide clarity on how to assign sales, other than sales of tangible personal property, and is not expected to increase or decrease spending on innovation. Should there be an increase or decrease in state revenue it could result in an expansion or contraction in state spending on innovations. Any changes in spending for innovation would be consistent with the Governor's budgetary priorities.

7. Alternative Regulations

No alternative regulations were proposed during the six stakeholder meetings held over the prior five years. Therefore, the FTB analyzed two alternatives, which would be to do nothing and maintain the status quo or to nest the proposed amendments within the current structure of Regulation 25136-2.

7.1 Alternative: Retain Regulation 25136-2 as it reads today

Regulation 25136-2 (was proposed to address certain issues in connection with sales of services and sales from intangible property. Should the current language be retained, taxpayers' concerns with complying with the rules and requirements as currently drafted would persist.

Benefits

There is no benefit to the state from this alternative. Without the amendments to simplify the rules used to determine whether the benefit of a service is received in California, taxpayers and tax practitioners would continue to struggle to apply the cascading rules associated with the current regulation.

Costs

It is unclear if there would be a material change in administrative costs. The costs associated with the audit, protest, and hearings held by the Office of Tax Appeals would continue to be the same as they are today. However, if taxpayers take positions that are at odds with the FTB's current position, this could result in additional administrative costs.

Reason for Rejecting the Alternative

This alternative was rejected because it does not improve a taxpayer's ability to comply with the law nor does it improve the FTB's ability to administer the law. This is because it does not provide any additional clarity on how to assign sales from services and sales from intangible property. Consequently, should taxpayers take different positions on future tax returns, these positions would need to be processed through the FTB's normal audit and appeals process. As a result, this could maintain taxpayers' compliance costs and the FTB's administrative costs at current levels, instead of decreasing them as the proposed regulation may do. In addition, should the FTB's current position be challenged in court and not upheld this could result in additional taxes owed, by some taxpayers, or a decrease in taxes owed by others. Without the proposed guidance, some taxpayers may need to report larger amounts due to some uncertain tax positions. This could result in increased confusion and uncertainty. Thus, the FTB believes that the proposed amendments to the Regulation 25136-2 would be less burdensome to the taxpayer and the tax practitioner community.

7.2 Alternative: Nesting additional professional services rules under Regulation section 25136-2

Regulation 25136-2 (market-based sourcing rules for sales other than sales of tangible personal property), was proposed to address certain issues in connection with sales of services and sales from intangible property. Should nesting the proposed amendments within the existing cascading rules of Regulation 25136-2 have been proposed, this too would not have effectively addressed taxpayers concerns regarding compliance with current rules and requirements and may have made compliance more complicated.

Benefits

There is no benefit to the state from this alternative. Adding to the already complicated and complex rules for determining whether the benefit of a service is received in California would not simplify the process for taxpayers and tax practitioners. Without the amendments to simplify the rules used to determine whether the benefit of a service is received in California, taxpayers and tax practitioners would continue to struggle to apply the cascading rules associated with the current regulation.

Costs

It is unclear if this alternative would result in additional costs to the state or the taxpayer because nesting these changes under the current regulation structure may not provide the clarity needed for taxpayers to assign sales other than sales of personal property. It is possible that there would be no material change in administrative costs or there could be an increase in costs. The costs associated with the audit, protest, and hearings held by the Office of Tax Appeals could continue to be the same as they are today. However, if the proposed amendments further complicated the rules, taxpayers could end up taking positions that are at odds with the FTB's position and this could result in additional administrative costs.

Reason for Rejecting the Alternative

This alternative was rejected because it does not improve the taxpayer's ability to comply with the law nor does it improve the FTB's ability to administer the law. This is because it may not provide sufficient clarity on how to assign sales from services and sales from intangible property. This is particularly true for high volumes of certain professional services which are difficult to assign under the current regulation rules due to administrability issues. Nesting additional examples for assigning receipts for high volume taxpayers under subsection (c)(1) would likely introduce additional confusion and uncertainty as to the applicability of those examples to non-professional industries. Therefore, the FTB decided that nesting examples for large volume professional services under existing subsection (c)(1) would be less clear, would overly complicate the current rules and could lead to more confusion. Thus, the FTB believes that the reorganization and additions proposed to Regulation 25136-2 would be less burdensome to the taxpayer and the tax practitioner community.