

# Hurricane Harvey Impact Upon Federal and Certain State Fleet/Fuel Taxes and Fuel Procurement

## Overview

In response to fuel shortages caused by Hurricane Harvey, the United States Environmental Protection Agency ("EPA"), the Internal Revenue Service ("IRS") and the State of Texas have issued fuel waivers related to the sale and use of dyed diesel fuel in highway vehicles. The waivers are intended to minimize disruption of diesel fuel supply in the provision of emergency response and disaster recovery services in areas affected by Hurricane Harvey. Under qualifying circumstances, entities will temporarily avoid federal and state penalties associated with using dyed diesel fuel in on-road vehicles. Additionally, certain state agencies have issued temporary waivers related to interstate motor carrier registration and tax reporting and remittance requirements under the International Fuel Tax Agreement.

In this Tax Alert, we summarize the temporary federal and Texas fuel waivers as well as the impact upon certain fleet and fuel tax registration requirements.

## Current Federal and Texas Law Regarding Sales of Dyed Diesel Fuel

The Internal Revenue Code ("IRC") exempts vendors from collecting and paying federal excise tax (except for Leaking Underground Storage Tank Trust Fund (LUST) tax) on dyed diesel fuel sold and used in a nontaxable manner (i.e., in units not registered for highway use).<sup>1</sup> If dyed diesel fuel is sold for or used in a taxable manner (i.e., on-road), the vendor is subject to a penalty of either \$1,000 or \$10 for each gallon of dyed diesel fuel, whichever is greater.<sup>2</sup>

Texas similarly exempts vendors from collecting and paying the state motor fuel tax on dyed diesel fuel used off-highway.<sup>3</sup> Unless permitted under the IRC and treasury regulations, Texas prohibits the use of dyed diesel fuel in the operation of a motor vehicle on a public highway.<sup>4</sup> A person is subject to criminal penalties for selling, delivering or using dyed diesel fuel in the operation of a motor vehicle on a public highway.<sup>5</sup>

## EPA and IRS Temporarily Allow Use of Dyed Diesel Fuel in Highway Vehicles

On August 29, 2017, in response to a shortage of undyed diesel fuel for use in emergency response and disaster recovery vehicles, the EPA issued a waiver allowing dyed diesel fuel with a sulfur level of 15 ppm or lower to be sold, distributed, and used in highway vehicles in Texas, effective through September 15, 2017.<sup>6</sup>

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<sup>1</sup> IRC § 4082(a).

<sup>2</sup> IRC § 6715(b)(1).

<sup>3</sup> Tex. Tax Code § 162.204(a)(8).

<sup>4</sup> Tex. Tax Code § 162.235.

<sup>5</sup> Tex. Tax Code §§ 162.403(6)-(7); Tex. Tax Code § 162.405.

<sup>6</sup> LETTER FROM U.S. ENVTL. PROT. AGENCY ADM'R E. SCOTT PRUITT TO TEX. GOVERNOR ABBOTT, 2017 FUEL WAIVER CONCERNING THE USE OF RED DYED 15 PPM NON-ROAD DIESEL LOCOMOTIVE AND MARINE FUEL IN THE STATE OF TEXAS, available at: <https://www.epa.gov/sites/production/files/2017-08/documents/texasdieselwaiver082917.pdf>.

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On August 30, 2017, the IRS announced that it will not impose a penalty when dyed diesel fuel is sold or used for highway use in Texas.<sup>7</sup> This IRS waiver is effective from August 25, 2017 through September 15, 2017. The IRS will require fuel vendors to collect the full amount of the federal excise tax of 24.3 cents per gallon normally applied to undyed diesel fuel, as well as the 0.1 cents per gallon LUST tax. The IRS will also waive any penalty for failure to make the semi-monthly excise tax deposit normally due on August 29, 2017,<sup>8</sup> so long as the deposits have been made by September 7, 2017.<sup>9</sup> In addition, excise tax returns normally due on October 31, 2017<sup>10</sup> will be granted additional time to file through January 31, 2018.<sup>11</sup>

### Texas Lifts Restrictions on Dyed Diesel Fuel Used Exclusively in Hurricane Harvey Relief Efforts

Pursuant to a disaster proclamation issued by Texas Governor Greg Abbott on August 28, 2017, the Texas Comptroller of Public Accounts ("Comptroller") announced that the state will temporarily permit the sale of dyed diesel fuel for use in a highway vehicle used "exclusively for hurricane relief."<sup>12</sup> Unlike the federal excise tax, the Comptroller will not impose or collect the state motor fuel tax on dyed diesel fuel sold or used on-highway between August 25, 2017 and September 15, 2017, in state-declared disaster areas.<sup>13</sup>

Further, Texas will provide a refund to any person who purchases and uses tax-paid undyed diesel fuel in off-highway equipment (i.e., units not registered for highway use) for hurricane relief and recovery efforts within the state-declared disaster areas.<sup>14</sup> A refund is permitted for diesel fuel consumed between August 25, 2017 and September 15, 2017. Refund claims must be filed using Form 06-106, *Texas Claim for Refund of Gasoline and Diesel Fuel Taxes* and postmarked on or before December 31, 2017.

### International Fuel Tax Agreement Temporary Waivers

The International Fuel Tax Agreement ("IFTA") enables a carrier to file a consolidated tax return in one state, which is based on an apportionment of miles traveled and gallons consumed in all states. Upon collection, this "base state" distributes the revenue to the other states in which the carriers operate.<sup>15</sup> Each vehicle that travels interstate is required to register the vehicle with its base state and obtain an IFTA decal.

On August 31, 2017, Texas Governor Abbott issued a temporary waiver suspending requirements for motor carriers to track and pay tax related to IFTA on the amount of fuel used in Texas when delivering needed relief supplies and fuel into the state.<sup>16</sup> In addition to the reporting and payment requirements, the waiver also covers licensing requirements (including trip permits). This temporary waiver is effective until September 30, 2017 (subject to extension by Governor Abbott).

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<sup>7</sup> I.R.S. News Release IR-2017-142 (Sept. 3, 2017), available at: <https://www.irs.gov/newsroom/update-irs-waives-diesel-fuel-penalty-for-all-of-texas-due-to-hurricane-harvey>.

<sup>8</sup> Treas. Reg. § 40.6302(c)-1(c)(1).

<sup>9</sup> I.R.S. News Release TX-2017-09 (Aug. 29, 2017), available at: <https://www.irs.gov/newsroom/tax-relief-for-victims-of-hurricane-harvey-in-texas>.

<sup>10</sup> Treas. Reg. § 40.6071(a)-1(a).

<sup>11</sup> I.R.S. News Release TX-2017-09 (Aug. 29, 2017), available at: <https://www.irs.gov/newsroom/tax-relief-for-victims-of-hurricane-harvey-in-texas>.

<sup>12</sup> TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, DECLARED NATURAL DISASTERS AND EMERGENCIES TAX HELP, <https://comptroller.texas.gov/taxes/resources/disaster-relief.php>.

<sup>13</sup> State-declared disaster areas include the following counties: Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bexar, Brazoria, Brazos, Burleson, Caldwell, Calhoun, Cameron, Chambers, Colorado, Comal, DeWitt, Fayette, Fort Bend, Galveston, Goliad, Gonzales, Grimes, Guadalupe, Hardin, Harris, Jackson, Jasper, Jefferson, Jim Wells, Karnes, Kerr, Kleberg, Lavaca, Lee, Leon, Liberty, Live Oak, Madison, Matagorda, Montgomery, Newton, Nueces, Orange, Polk, Refugio, Sabine, San Jacinto, San Patricio, Trinity, Tyler, Victoria, Walker, Waller, Washington, Wharton, Willacy and Wilson counties.

<sup>14</sup> TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, DECLARED NATURAL DISASTERS AND EMERGENCIES TAX HELP, <https://comptroller.texas.gov/taxes/resources/disaster-relief.php>.

<sup>15</sup> *Owner-Operator Indep. Drivers Ass'n v. Ind. Dep't of Revenue*, 725 N.E.2d 891, 892 (Ind. Ct. App. 2000)

<sup>16</sup> PRESS RELEASE, OFFICE OF THE TEXAS GOVERNOR, GOVERNOR ABBOTT EASES RESTRICTIONS ON TRUCKERS BRINGING FUEL AND SUPPLIES INTO THE STATE (Aug. 31, 2017), <https://gov.texas.gov/news/post/governor-abbott-eases-restrictions-on-truckers-bringing-fuel-and-supplies-i>.

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In addition to Texas, the states of Alabama,<sup>17</sup> Delaware,<sup>18</sup> Georgia,<sup>19</sup> Kansas,<sup>20</sup> Kentucky,<sup>21</sup> Missouri,<sup>22</sup> and Nevada<sup>23</sup> have also issued similar temporary IFTA waivers.<sup>24</sup>

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<sup>17</sup> STATE OF ALA. DEP'T OF REVENUE, EXECUTIVE ORDER – TEMPORARY SUSPENSION OF IRP AND IFTA REQUIREMENTS FOR VEHICLES ENGAGED IN DISASTER RELIEF EFFORTS (Aug. 31, 2017), <https://revenue.alabama.gov/2017/08/31/executive-order-temporary-suspension-of-irp-and-ifta-requirements-for-vehicles-engaged-in-disaster-relief-efforts/>.

<sup>18</sup> STATE OF DEL. DIV. OF MOTOR VEHICLES, WAIVER OF IRP AND IFTA REQUIREMENTS FOR DELAWARE (Sept. 2, 2017), [http://c.ymcdn.com/sites/www.irponline.org/resource/resmgr/notifications\\_2/DE\\_waiver\\_9\\_5\\_17.pdf](http://c.ymcdn.com/sites/www.irponline.org/resource/resmgr/notifications_2/DE_waiver_9_5_17.pdf).

<sup>19</sup> GA. DEP'T OF REVENUE, DEPARTMENT OF REVENUE TO WAIVE IRP/IFTA REQUIREMENTS DUE TO HURRICANE HARVEY (Sept. 4, 2017), <https://dor.georgia.gov/press-releases/2017-09-04/department-revenue-waive-irpifta-requirements-due-hurricane-harvey>.

<sup>20</sup> KAN. OFFICE OF THE GOVERNOR, EXECUTIVE ORDER 17-03 FOR REGIONAL EMERGENCY, CONDITIONAL AND TEMPORARY RELIEF FROM CERTAIN MOTOR CARRIER RULES AND REGULATIONS (Aug. 30, 2017), <https://kslib.info/DocumentCenter/View/6726>.

<sup>21</sup> COMMONWEALTH OF KY. TRANSP. CABINET, OFFICIAL ORDER NO. 110944, DECLARATION OF EMERGENCY FOR DAMAGE CAUSED BY HURRICANE HARVEY (Aug. 28, 2017), <https://drive.ky.gov/Docs/Executive%20order%20110944%20Hurricane%20Harvey%2028-29-17.pdf>.

<sup>22</sup> MO. DEP'T OF TRANSP., SUSPENSION OF IRP AND IFTA REQUIREMENTS DUE TO HURRICANE HARVEY (Sept. 5, 2017), [http://c.ymcdn.com/sites/www.irponline.org/resource/resmgr/notifications\\_2/mo\\_waiver\\_9\\_6\\_17.pdf](http://c.ymcdn.com/sites/www.irponline.org/resource/resmgr/notifications_2/mo_waiver_9_6_17.pdf).

<sup>23</sup> NEV. DEP'T OF MOTOR VEHICLES, EMERGENCY IRP WAIVER (Aug. 29, 2017), [http://c.ymcdn.com/sites/www.irponline.org/resource/resmgr/notifications\\_2/NV\\_waiver\\_8\\_30\\_17.pdf](http://c.ymcdn.com/sites/www.irponline.org/resource/resmgr/notifications_2/NV_waiver_8_30_17.pdf).

<sup>24</sup> For instance, Commissioner Barnett of Alabama Department of Revenue issued an executive order temporarily suspending IFTA requirements for any motor vehicle engaged in interstate disaster relief efforts in Texas or traveling through Alabama as part of the disaster relief.

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