



CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION

450 N STREET, SACRAMENTO, CA
PO BOX 942879, SACRAMENTO, CA 94279-0092
1-916-324-2373 • FAX 1-916-322-4530
www.cdtfa.ca.gov

GAVIN NEWSOM
Governor

MARYBEL BATJER
Secretary, Government Operations Agency

NICOLAS MADUROS
Director

Dear Interested Party:

Enclosed is the Discussion Paper on Regulation 1684, *Collection of Use Tax by Retailers*, and Regulation 1827, *Collection of Use Tax by Retailers*. Staff would like to invite you to discuss the issue and present any additional suggestions or comments. Accordingly, an interested parties meeting is scheduled as follows:

May 23, 2019
Room 121 (Boardroom) at 10:00 a.m.
450 N Street, Sacramento, CA

The event will be webcast for those unable to attend in person. The webcast will be available on our website: www.cdtfa.ca.gov. During and after the webcast, you may submit comments or questions via email to BTFD-BTC.InformationRequests@cdtfa.ca.gov. You are also welcome to submit your comments to me at the address or fax number in this letterhead or via email at Trista.Gonzalez@cdtfa.ca.gov by June 7, 2019. You should submit written comments including proposed language if you have suggestions you would like considered during this process. Copies of the materials you submit may be provided to other interested parties, therefore, ensure your comments do not contain confidential information. Please feel free to publish this information on your website or distribute it to others that may be interested in attending the meeting or presenting their comments.

If you are interested in other Business Taxes Committee topics refer to the CDTFA webpage at (<http://www.cdtfa.ca.gov/taxes-and-fees/business-taxes-committee.htm>) for copies of discussion papers and calendars of current and prior issues.

Thank you for your consideration. Staff looks forward to your comments and suggestions. Should you have any questions, please feel free to contact Business Taxes Committee staff member Paul Camky at 1-916-323-0536, who will be leading the meeting.

Sincerely,

Trista Gonzalez, Chief
Tax Policy Bureau
Business Tax and Fee Division

TG:PC

Enclosures

cc: (all with enclosures)

Mr. Nicolas Maduros (MIC 104)
Ms. Katie Hagen (MIC 104)
Ms. Gayle Miller (MIC 104)
Mr. Robert Tucker (MIC 83)
Ms. Susanne Buehler (MIC 43)
Ms. Michele Pielsticker (MIC 105)
Mr. Jason Mallet (MIC 25)
Mr. Wayne Mashihara (MIC 47)
Mr. Alfred Buck (MIC 70)
Mr. Randy Silva (MIC 100)
Mr. Kevin Hanks (MIC 49)
Mr. Jeff Vest (MIC 85)
Mr. Bradley Heller (MIC 82)
Mr. Scott Claremon (MIC 82)
Mr. David Levine (MIC 85)
Ms. Dana Brown (MIC 85)
Ms. Casey Tichy (MIC 85)
Ms. Kirsten Stark (MIC 50)
Ms. Lynn Whitaker (MIC 50)
Mr. Gention Droboniku (MIC 67)
Mr. Joe Fitz (MIC 67)
Mr. Marc Alviso (MIC 104)
Ms. Claudette Yang (MIC 104)
Ms. Karina Magana (MIC 47)
Mr. Bradley Miller (MIC 92)
Mr. Robert Wilke (MIC 50)
Mr. Paul Camky (MIC 50)

INITIAL DISCUSSION PAPER

Amendments to Regulation 1684, “Collection of Use Tax by Retailers”, and Regulation 1827, “Collection of Use Tax by Retailers”

Issue

Whether the California Department of Tax and Fee Administration (CDTFA) should amend Sales and Use Tax Regulation 1684, Collection of Use Tax by Retailers, to clarify when a retailer is engaged in business in this state and required to collect state use tax from their customers and amend Transactions and Use Tax Regulation 1827, Collection of Use Tax by Retailers, to clarify when a retailer is engaged in business in a special taxing district and required to collect district use tax from their customers.

Background

Under the California Sales and Use Tax Law, sales tax is imposed on retailers, and applies to retailers’ gross receipts from their retail sales of tangible personal property made within California, unless specifically exempted or excluded from the tax. When sales tax does not apply, use tax generally applies to the sales price of tangible personal property that was purchased from a retailer for storage, use, or other consumption in California and actually stored, used, or otherwise consumed in the state. Use tax applies to taxable purchases from retailers, whether, for example, the purchase is made by mail order, telephone, or internet. The state’s sales tax and use tax are mutually exclusive meaning either sales tax or use tax applies to a single transaction, but not both. (See Regulation 1620 for a detailed explanation of when sales and use tax applies to sales of good being shipped into and out of California.)

California consumers are required to report and pay to the state the use tax on their taxable purchases. However, pursuant to Revenue and Taxation Code (RTC) section 6203, retailers that are “engaged in business” in this state are required to collect the use tax on their taxable sales to California consumers, and give the consumers a receipt for the tax. Consumers remain liable for the use tax, unless they obtain a receipt from a retailer that is registered with the CDTFA.

Additionally, retailers who are not engaged in business in California may voluntarily apply for a Certificate of Registration – Use Tax. A holder of this certificate is required to collect use tax from purchasers, give receipts therefore, and pay the tax to the CDTFA in the same manner as a retailer engaged in business in California.¹

Under the California Transactions and Use Tax Law, cities, counties, and other governmental entities (districts) may impose transactions (sales) taxes on the retail sale of tangible personal property in the district and use taxes on the purchase of tangible personal property from a retailer for storage, use, or other consumption in the district. Districts are required to contract with the CDTFA to administer and collect district taxes and district tax ordinances are required to contain provisions identical to those contained in the Sales and Use Tax Law except that the name of the taxing district is substituted for that of the state.² Specifically, subject to certain additional provisions, RTC section 7262, subdivision (a), requires district use tax ordinances to incorporate

¹ Regulation 1684, subdivision (e)

² See RTC sections 7261, subd. (b), 7262, subd. (a).

INITIAL DISCUSSION PAPER

Amendments to Regulation 1684, “Collection of Use Tax by Retailers”, and Regulation 1827, “Collection of Use Tax by Retailers”

the provisions of RTC section 6203 requiring retailers engaged in business in the state to collect the use tax, except that the name of the taxing district is substituted for the word "state" in the phrase "retailer engaged in business in this state" and in the definition of that phrase. As such, only retailers engaged in business in a taxing district are required to collect that district's use tax on their sales for delivery into the district and remit it to the CDTFA.

Subdivision (c) of RTC section 6203 defines the term “retailer engaged in business in this state.” However, the authority of a state to impose taxes on out of state retailers is limited by the Commerce Clause of the United States Constitution.

In *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274 (*Complete Auto Transit*), the U.S. Supreme Court held that a tax challenged under the Commerce Clause will be sustained when the tax: (1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State. In *Quill Corp. v. North Dakota* (1992) 504 U.S. 298 (*Quill*), the U.S. Supreme Court held that a retailer does not have a substantial nexus with a state for purposes of the U.S. Constitution's Commerce Clause, unless it has a physical presence in the state. In *Quill*, the Court also affirmed the “sharp distinction,” established in *National Bellas Hess, Inc. v. Department of Revenue of Illinois* (1967) 386 U.S. 753 (*Bellas Hess*), “between mail-order sellers with retail outlets, solicitors, or property within a State” that can be required to collect the state’s sales or use tax, “and those who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business” that cannot be required to collect the state’s sales or use tax.

Pursuant to these authorities, historically, only retailers with a physical presence in this state have been required to collect and remit California use tax under RTC section 6203. Prior to September 15, 2012, subdivision (c) of RTC section 6203 set forth specific definitions of a retailer engaged in business in the state, which included, for example, retailers having a warehouse, an office, or a sample room in California, or any agent, representative or salesperson operating in California under the retailers' authority to sell, deliver, or install tangible personal property. Operative September 15, 2012, subdivision (c) of RTC section 6203 was amended to include a “long arm statute” providing that a retailer engaged in business in this state is “any retailer that has a substantial nexus with this state for purposes of the commerce clause of the United States Constitution,” and the specific definitions were reclassified as a list of nonexhaustive examples. The amendments also added commonly controlled group nexus and affiliate nexus provisions to the nonexhaustive list. Regulation 1684 was also amended, operative September 15, 2012, to implement, interpret, and make specific the amendments to RTC section 6203.

As stated above, subject to certain additional provisions, RTC section 7262 requires district use tax ordinances to incorporate the provisions of RTC section 6203 requiring retailers engaged in business in the state to collect the use tax, but also requires the name of the taxing district to be substituted for the word "state" in the phrase "retailer engaged in business in this state" and in the definition of that phrase. As such, historically, a retailer was also only engaged in business in a district if its business was located in the district or if it had some other form of physical presence in the district. The September 15, 2012, amendments to RTC section 6203 are incorporated into the definition of “retailer engaged in business in the district” pursuant to RTC section 7262.

INITIAL DISCUSSION PAPER

Amendments to Regulation 1684, “Collection of Use Tax by Retailers”, and Regulation 1827, “Collection of Use Tax by Retailers”

However, Regulation 1827, which implements, interprets and makes specific the provisions of RTC section 7262, was not amended to reflect those changes.

Wayfair Decision

In order to challenge *Quill*, South Dakota enacted a law requiring a seller that does not have a physical presence in South Dakota to collect South Dakota’s sales tax if during the previous or current calendar year the seller’s gross revenue from sales into South Dakota exceeded \$100,000 or the seller made sales into South Dakota in 200 or more separate transaction. On June 21, 2018, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair, Inc., et al (Wayfair)*. In *Wayfair*, the Court held that South Dakota’s law satisfied the substantial nexus requirement from *Complete Auto Transit* and overruled the holdings in *Quill* and *Bellas Hess*.

Special Notices - Wayfair

Pursuant to the “long arm provision” set forth in RTC 6203, subdivision (c), and Regulation 1684, subdivision (b)(1), the CDTFA determined that any retailer whose sales into California created a substantial nexus with California based on the sales thresholds upheld in the *Wayfair* decision was a retailer engaged in business in the state for purposes of RTC section 6203. The CDTFA issued a special notice in December 2018, which required such retailers to register and collect California state use tax on their taxable sales on and after April 1, 2019, regardless of whether they had a physical presence in California (see [Special Notice L-565, “New Use Tax Collection Requirements for Out-of-State Retailers Based on Sales into California Effective April 1, 2019”](#)).

In addition, the CDTFA determined that any retailer whose sales into a taxing district exceeded the sales thresholds upheld in the *Wayfair* decision was a retailer engaged in business in the district for purposes of RTC section 7262. The CDTFA issued a special notice in December 2018, which required retailers engaged in business in a taxing district based on the sales thresholds upheld in the *Wayfair* decision to collect that district’s use tax on their sales on and after April 1, 2019, regardless of whether they had a physical presence in the district (see [Special Notice L-591, “New District Use Tax Collection Requirements for All Retailers Effective April 1, 2019”](#)).

Assembly Bill No. 147

On April 25, 2019, the Legislature enacted Assembly Bill No. (AB) 147 (Stats. 2019, ch. 5) in order to modernize California law to make it consistent with the *Wayfair* decision. AB 147 added a new subdivision (c)(4) to RTC section 6203, operative April 1, 2019, to provide that the term retailer engaged in business in this state includes “Any retailer that, in the preceding calendar year or the current calendar year, has total combined sales of tangible personal property for delivery in this state by the retailer and all persons related to the retailer that exceed five hundred thousand dollars (\$500,000).” It also provides that a person is related to another person if both persons are related to each other pursuant to Section 267(b) of the Internal Revenue Code and the regulations thereunder. The sales threshold added to section 6203 is substantially higher than the sales threshold provided in the South Dakota law and retroactively supersedes the guidance provided in the CDTFA’s special notice regarding section 6203. Also, AB 147 repealed the commonly controlled group nexus and affiliate nexus provisions that were previously in RTC section 6203, subdivision (c)(4) and (5), operative April 1, 2019, but provided that the prior un-amended version of RTC section 6203 would become operative, again, on the date of a final decision of a court of

INITIAL DISCUSSION PAPER

Amendments to Regulation 1684, “Collection of Use Tax by Retailers”, and Regulation 1827, “Collection of Use Tax by Retailers”

competent jurisdiction holding that the amendments to RTC section 6203 violate the substantial nexus standard of the Commerce Clause.

Additionally, AB 147 amended RTC section 7262, operative April 1, 2019, to provide that “‘A retailer engaged in business in the district’ shall also include any retailer that, in the preceding calendar year or the current calendar year, has total combined sales of tangible personal property in this state or for delivery in the state by the retailer and all persons related to the retailer that exceeds five hundred thousand dollars (\$500,000).” It also provides that “a person is related to another person if both persons are related to each other pursuant to Section 267(b) of Title 26 of the United States Code [(Internal Revenue Code or IRC)] and the regulations thereunder.” The sales threshold added to section 7262 is different from the sales threshold provided in the South Dakota law and retroactively supersedes the guidance provided in the CDTFA’s special notice regarding section 7262.

AB 147 also added chapter 1.7 to part 1 of division 2 of the RTC, which is entitled the Marketplace Facilitator Act, to address sales of tangible personal property through marketplaces. The Marketplace Facilitator Act is operative October 1, 2019, and the CDTFA is planning to create a separate regulation to implement the Marketplace Facilitator Act. Staff welcomes input from interested parties as to how to implement, interpret, and make specific the provision of the Marketplace Facilitator Act in the future.

Related Persons

IRC 267(b) list the following relationships:

- (1) Members of a family, defined as a person’s brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants;
- (2) An individual and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual;
- (3) Two corporations which are members of the same controlled group;
- (4) A grantor and a fiduciary of any trust;
- (5) A fiduciary of a trust and a fiduciary of another trust, if the same person is a grantor of both trusts;
- (6) A fiduciary of a trust and a beneficiary of such trust;
- (7) A fiduciary of a trust and a beneficiary of another trust, if the same person is a grantor of both trusts;
- (8) A fiduciary of a trust and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for the trust or by or for a person who is the grantor of the trust;
- (9) A person and an organization to which section 501 (relating to certain educational and charitable organizations which are exempt from tax) applies and which is controlled directly or indirectly by such person or (if such person is an individual) by members of the family of such individual;

INITIAL DISCUSSION PAPER

Amendments to Regulation 1684, “Collection of Use Tax by Retailers”, and Regulation 1827, “Collection of Use Tax by Retailers”

- (10) A corporation and a partnership if the same persons own-
 - (A) More than 50 percent in value of the outstanding stock of the corporation, and
 - (B) More than 50 of the capital interest, or the profits interest, in the partnership;
- (11) An S corporation and another S corporation if the same persons own more than 50 percent in value of the outstanding stock of each corporation;
- (12) An S corporation and a C corporation, if the same persons own more than 50 percent in value of the outstanding stock of each corporation; or
- (13) Except in the case of a sale or exchange in satisfaction of a pecuniary bequest, an executor of an estate and a beneficiary of such estate.

So, for example, if corporation A and corporation B both make sales of tangible personal property for delivery in California, and are both members of the same control group, then their sales for delivery in California would be aggregated to determine if they have exceeded the \$500,000 sales threshold in RTC section 6203, subdivision (c)(4), and are engaged in business in California. Also, if corporation A and corporation B make sales of tangible personal property in California or for delivery in California and they are both members of the same control group, then their sales of tangible personal property in California or for delivery in California would be aggregated to determine if they have exceeded the \$500,000 sales threshold in RTC section 7262.

As a result of the changes to RTC sections 6203 and 7262 enacted by the passage of AB 147, staff recommends making the revisions to Regulations 1684 and 1827, discussed below and shown in Exhibits 1 and 2.

Regulation 1684

Staff recommends making the following amendments to Regulation 1684:

- Adding subdivisions (b)(1) and (2), and adding new subparagraphs (b)(1)(A) and (b)(1)(B) to clarify that the regulation’s current provisions regarding substantial nexus and physical presence are operative on and after September 15, 2012.
- Adding a new subdivision (b)(3) to incorporate the new economic nexus provisions added to RTC section 6203, subdivision (c)(4), by AB 147.
- Adding provisions, including examples, to new subdivision (b)(3) to help retailers determine if they are required to register with the CDTFA on or after April 1, 2019, based on their sales for delivery in California.
- Amending subdivision (c)(1), to clarify that the physical presence nexus provisions in that subdivision are operative on and after September 15, 2012, and are not effected by AB 147.
- Making minor amendments to update the terminology used in the exception in subdivision (d)(1) for webpages and internet service providers.
- Renaming subdivision (e), as “Registration.”

INITIAL DISCUSSION PAPER

Amendments to Regulation 1684, “Collection of Use Tax by Retailers”, and Regulation 1827, “Collection of Use Tax by Retailers”

- Adding a new subdivision (e)(1) to explain that retailers required to register with the CDTFA pursuant to Regulation 1684 must register for a Certificate of Registration – Use Tax.
- Reformatting the current text of subdivision (e) as subdivision (e)(2), clarifying that the current text permits retailers who are not engaged in business in this state to “voluntarily” register with the CDTFA to collect use tax, and delete the last sentence from the current text regarding certificates issued prior to September 11, 1957.
- Adding a new subdivision (e)(3) to clarify how long retailers are required to stay registered with the CDTFA after the addition of subdivision (c)(4) to RTC section 6203.
- Adding a new subdivision (e)(4) to clarify a retailer’s options when the retailer is no longer required to be registered with the CDTFA pursuant to Regulation 1684 and provide examples.
- Reformatting subdivision (i), regarding the 2012 amendments to Regulation 1684, as subdivision (i)(1), and revising the language in that subdivision to make it more concise.
- Adding a new subdivision (i)(2) to clarify that the current amendments are not retroactive.
- Adding a new subdivision (i)(3) to clarify that if the amendments made to RTC section 6203 by AB 147 are held in a final decision of a court of competent jurisdiction to violate the substantial nexus standard of the commerce clause of the U.S. Constitution, then the economic nexus provisions being added to subdivision (b)(3) of Regulation 1684 will become inoperative as of the date of that court’s decision.

Commonly Controlled Group Nexus and Affiliate Nexus

As previously discussed, AB 147 repealed the commonly controlled group nexus provisions in RTC section 6203, subdivision (c)(4), operative April 1, 2019, which are currently implemented, interpreted, and made specific by Regulation 1684, subdivision (c)(2). AB 147 also repealed the affiliate nexus provisions in RTC section 6203, subdivision (c)(5), operative April 1, 2019, which is currently implemented, interpreted, and made specific by Regulation 1684, subdivision (c)(3), and clarified by the provisions in Regulation 1684, subdivision (c)(4) through (9), which apply to subdivision (c)(3). As a result, staff has recommended amending Regulation 1684 to clarify that subdivision (c)(2) and (3) of the regulation are operative from September 15, 2012, when they first became effective, until March 31, 2019, the day before they were repealed. Additionally, staff recommends adding provisions to Regulation 1684, subdivision (i) to specify that if the amendments made to RTC section 6203 by AB 147 are held in a final decision of a court of competent jurisdiction to violate the substantial nexus standard of the commerce clause of the U.S. Constitution, then subdivision (c)(2) and (3) will become operative again as of the date of that court’s decision.

Regulation 1827

Staff recommends making the following amendments to Regulation 1827:

INITIAL DISCUSSION PAPER

Amendments to Regulation 1684, “Collection of Use Tax by Retailers”, and Regulation 1827, “Collection of Use Tax by Retailers”

- Amending subdivision (a) to make the provision regarding retailers not required to collect district use tax consistent with the recommended amendments to subdivision (e) of Regulation 1684.
- Adding new subdivision (b)(4) to clarify how long retailers engaged in business in a district are required to collect district use tax after the addition of subdivision (c)(4) to RTC section 6203 and to be consistent with the recommended new subdivision (e)(3) of Regulation 1684.
- Deleting subdivisions (c)(1) through (3), which set forth specific examples of a retailer engaged in business in a district, and replacing them with new subdivision (c)(1), which incorporates by reference the following provisions of Regulation 1684:
 - The definition of retailer engaged in business in the state set forth in subdivision (b)(1)(A),
 - The rebuttable presumption set forth in subdivision (b)(2),
 - The nonexhaustive list of examples listed in subdivision (c), and;
 - The exceptions set forth in subdivision (d).

Staff recommends this amendment in order to clarify that RTC section 7262, subdivision (a), incorporates the definition of a “retailer engaged in business in this state” into the definition of a “retailer engaged in business in the district” including those amendments that became operative on September 15, 2012, as well as any future amendments. Staff believes that replacing the current provisions with references to Regulation 1684 eliminates any ambiguity as to the definition of “retailer engaged in business in the district” without requiring further amendment to Regulation 1827 in the event of future changes to the definition of “retailer engaged in business in the state.”

- Renumbering existing subdivision (c)(4) as subdivision (c)(2), and making minor amendments.
- Adding a new subdivision (c)(3) to incorporate the new economic nexus provisions added to RTC section 6203, subdivision (c)(4), by AB 147.
- Adding provisions to new subdivision (c)(3) to help retailers determine if they are required to collect district use tax on or after April 1, 2019, based on their sales for delivery in California.
- Adding new subdivisions (e) and (f), to clarify that RTC section 7262, subdivision (a), incorporates those provisions into the Transactions and Use Tax Law as well

Summary

Staff proposes amendments to Regulation 1684, Collection of Use Tax by Retailers, as provided in Exhibit 1, and Regulation 1827, Collection of Use Tax by Retailers, as provided in Exhibit 2, to clarify what constitutes nexus as well as when retailers are required to collect use tax from their customers. Staff also plans to draft a separate regulation for marketplace facilitators.

INITIAL DISCUSSION PAPER

Amendments to Regulation 1684, “Collection of Use Tax by Retailers”, and Regulation 1827, “Collection of Use Tax by Retailers”

Staff welcomes any comments, suggestions, or other input on this issue. Staff invites interested parties to participate in the May 23, 2019 interested parties meeting. The deadline to provide written responses regarding this discussion paper is June 7, 2019.

Prepared by the Tax Policy Bureau, Business Tax and Fee Division

Current as of 5/10/2019

[Staff Note – Additions to the regulation are in blue with bold font. Deletions are in red with strikethrough.]

Regulation 1684. Collection of Use Tax by Retailers.

Reference: Sections 6203, 6204, 6226, and 7051.3, Revenue and Taxation Code.

Section 513(d)(3)(A), Internal Revenue Code (26 USC).

(a) **COLLECTION OF USE TAX BY RETAILERS ENGAGED IN BUSINESS IN THIS STATE.** Retailers engaged in business in this state as defined in section 6203 of the Revenue and Taxation Code and making sales of tangible personal property, the storage, use, or other consumption of which is subject to ~~the use~~ tax must register with the ~~Board~~**Department** and, at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable, at the time it becomes taxable, collect the **use** tax from the purchaser and give the purchaser a receipt therefor.

(b) ~~GENERAL DEFINITIONS AND REBUTTABLE PRESUMPTION.~~

(1)

(A) **On and after September 15, 2012, A** retailer is engaged in business in this state as defined in section 6203 of the Revenue and Taxation Code if the retailer has a substantial nexus with this state for purposes of the Commerce Clause (art. I, § 8, cl. 3) of the United States Constitution or federal law otherwise permits this state to impose a use tax collection duty on the retailer.

~~(A)~~**(B)** Retailers engaged in business in this state include, but are not limited to, **retailers described in subdivision (b)(3), on and after April 1, 2019, retailers described in subdivision (c)(1), on and after September 15, 2012, and retailers described in subdivision (c)(2) and (3), from September 15, 2012, through March 31, 2019.**

(2) Except as **otherwise** provided in **this regulation subdivisions (e) and (d), on and after September 15, 2012,** there is a presumption that a retailer is engaged in business in this state as defined in section 6203 of the Revenue and Taxation Code if the retailer has any physical presence in California.

(A) A retailer may rebut the presumption if the retailer can substantiate that its physical presence is so slight that the United States Constitution prohibits this state from imposing a use tax collection duty on the retailer.

(B) A retailer does not have a physical presence in California solely because the retailer engages in interstate communications with customers in California via common carrier, the United States mail, or interstate telecommunication, including, but not limited to, interstate telephone calls and emails. The rebuttable presumption ~~in subdivision (b)(2)~~ does not apply to a retailer that does not have a physical presence in California.

(3) **On and after April 1, 2019, a retailer is engaged in business in this state if the total combined sales of tangible personal property for delivery in California by the retailer and all persons related to the retailer exceed five hundred thousand dollars (\$500,000) in the preceding or current calendar year. For purposes of subdivision**

(b)(3), a person is related to another person if both persons are related to each other pursuant to section 267(b) of title 26 of the United States Code and the regulations thereunder.

(A) If the total combined sales of tangible personal property for delivery in California by a retailer and all persons related to the retailer exceeded five hundred thousand dollars (\$500,000) during calendar year 2018, or the first quarter of calendar year 2019, then the retailer was required to be registered with the Department and required to begin collecting use tax on April 1, 2019.

Example 1: Retailer A has no physical presence in California, and uses its own website to sell goods at retail. Retailer A's gross revenue from sales of goods for delivery in California during calendar year 2018 exceeded \$500,000. Therefore, on April 1, 2019, retailer A is a retailer engaged in business in this state. Retailer A is required to be registered with the Department on April 1, 2019, and is required to collect use tax on its retail sales to California customers on and after April 1, 2019.

Example 2: Retailer B has no physical presence in California, and uses its own website to sell goods at retail. Retailer B's gross revenue from sales of goods for delivery in California did not exceed \$500,000 during calendar year 2018, but did exceed \$500,000 during the period from January 1, 2019 through March 31, 2019. Therefore, on April 1, 2019, Retailer B is a retailer engaged in business in this state. Retailer B is required to be registered with the Department on April 1, 2019, and is required to collect use tax on its retail sales to California customers on and after April 1, 2019.

(B) If the total combined sales of tangible personal property for delivery in California by a retailer and all persons related to the retailer exceeded five hundred thousand dollars (\$500,000) during calendar year 2019, but after March 31, 2019, or during any subsequent calendar year, the retailer is required to register with the Department and begin collecting use tax immediately after the sale was made that exceeded the five hundred thousand dollar (\$500,000) threshold.

Example: Retailer C has no physical presence in California and uses their own website to sell goods at retail. Retailer C's gross revenue from sales for delivery in California were less than \$500,000 during calendar year 2018 and during the period from January 1 through March 30, 2019. Therefore, on April 1, 2019, Retailer C was not a retailer engaged in business in this state and was not required to be registered with the Department or to collect use tax. However, on August 1, 2019, Retailer C made a retail sale of jewelry for \$900 that brought their total sales for delivery in to California to \$500,400 for calendar year 2019. Therefore, Retailer C is a retailer engaged in business in this state immediately after the sale and is required to register with the Department and begin collecting use tax on its retail sales to California customers made after the \$900 sale of jewelry on August 1, 2019.

(c) NONEXHAUSTIVE EXAMPLES OF RETAILERS ENGAGED IN BUSINESS IN THIS STATE.

- (1) **On and after September 15, 2012, Aa** retailer is engaged in business in this state as defined in section 6203 of the Revenue and Taxation Code if:
 - (A) The retailer owns or leases real or tangible personal property, including, but not limited to, a computer server, in California; or
 - (B) The retailer derives rentals from a lease of tangible personal property situated in California (under such circumstances the retailer is required to collect the tax at the time rentals are paid by the lessee); or
 - (C) The retailer maintains, occupies, or uses, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business in California; or
 - (D) The retailer has a representative, agent, salesperson, canvasser, independent contractor, solicitor, or any other person operating in California on the retailer's behalf, including a person operating in California under the authority of the retailer or its subsidiary, for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property, or otherwise establishing or maintaining a market for the retailer's products.
- (2) **From September 15, 2012, through March 31, 2019, Aa** retailer is engaged in business in this state as defined in section 6203 of the Revenue and Taxation Code if:
 - (A) The retailer is a member of a commonly controlled group, as defined in Revenue and Taxation Code section 25105; and
 - (B) The retailer is a member of a combined reporting group, as defined in California Code of Regulations, title 18, section 25106.5, subdivision (b)(3), that includes another member of the retailer's commonly controlled group that, pursuant to an agreement with or in cooperation with the retailer, performs services in California in connection with tangible personal property to be sold by the retailer, including, but not limited to, design and development of tangible personal property sold by the retailer, or the solicitation of sales of tangible personal property on behalf of the retailer. For purposes of this paragraph:
 - i. Services are performed in connection with tangible personal property to be sold by a retailer if the services help the retailer establish or maintain a California market for sales of tangible personal property; and
 - ii. Services are performed in cooperation with a retailer if the retailer and the member of the retailer's commonly controlled group performing the services are working or acting together for a common purpose or benefit.
- (3) **From September 15, 2012, through March 31, 2019, Aa** retailer is engaged in business in this state as defined in section 6203 of the Revenue and Taxation Code if the retailer

enters into an agreement or agreements under which a person or persons in this state, for a consideration that is based upon completed sales of tangible personal property, whether referred to as a commission, fee for advertising services, or otherwise, directly or indirectly refer potential purchasers of tangible personal property to the retailer, whether by an Internet-based link or an Internet website, or otherwise, provided that:

- (A) The total cumulative sales price of all of the tangible personal property the retailer sold to purchasers in California that were referred to the retailer by a person or persons in California pursuant to an agreement or agreements described above, in the preceding 12 months, is in excess of ten thousand dollars (\$10,000); and
- (B) The retailer, within the preceding 12 months, has total cumulative sales of tangible personal property to purchasers in California in excess of one million dollars (\$1,000,000).

The determination as to whether a retailer has made the requisite amount of sales to purchasers in California during the preceding 12-month period shall be made at the end of each calendar quarter. A retailer is not engaged in business in this state pursuant to this paragraph if the total cumulative sales price of all of the tangible personal property the retailer sold to purchasers in California that were referred to the retailer by a person or persons in California pursuant to an agreement or agreements described above, in the preceding 12 months, is not in excess of ten thousand dollars (\$10,000), or if the retailer's total cumulative sales of tangible personal property to purchasers in California were not in excess of one million dollars (\$1,000,000) in the preceding 12 months.

For purposes of this paragraph, the term "retailer" includes an entity affiliated with a retailer within the meaning of Internal Revenue Code section 1504, which defines the term "affiliated group" for federal income tax purposes.

- (4) Paragraph (3) does not apply to an agreement under which a retailer purchases advertisements from a person in California, to be delivered on television, radio, in print, on the Internet, or by any other medium, unless:
 - (A) The advertisement revenue paid to the person in California consists of commissions or other consideration that is based upon completed sales of tangible personal property, and
 - (B) The person entering into the agreement with the retailer also directly or indirectly solicits potential customers in California through the use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation specifically targeted at potential customers in this state.
- (5) For purposes of paragraph (3):
 - (A) A person that is an individual is in this state when the person is physically present within the boundaries of California; and

- (B) A person other than an individual is in this state when there is at least one individual physically present in California on the person's behalf.
- (6) Paragraph (3) does not apply to a retailer's agreement with any person, unless an individual solicits potential customers under the agreement while the individual is physically present within the boundaries of California, including, but not limited to, an individual who entered into the agreement directly with the retailer, an individual, such as an employee, who is performing activities in California directly for a person that entered into the agreement with the retailer, and any individual who is performing activities in California indirectly for any person who entered into the agreement with the retailer, such as an independent contractor or subcontractor.
- (7) Paragraph (3) does not apply if a retailer can demonstrate that all of the persons with whom the retailer has agreements described in paragraph (3) did not directly or indirectly solicit potential customers for the retailer in California. A retailer can demonstrate that an agreement is not an agreement described in paragraph (3) if:
- (A) The retailer's agreement:
- i. Prohibits persons operating under the agreement from engaging in any solicitation activities in California that refer potential customers to the retailer including, but not limited to, distributing flyers, coupons, newsletters and other printed promotional materials or electronic equivalents, verbal soliciting (e.g., in-person referrals), initiating telephone calls, and sending e-mails; and
 - ii. If the person in California with whom the retailer has an agreement is an organization, such as a club or a non-profit group, the agreement provides that the organization will maintain on its website information alerting its members to the prohibition against each of the solicitation activities described above;
- (B) The person or persons operating under the agreement in California certify annually under penalty of perjury that they have not engaged in any prohibited solicitation activities in California at any time during the previous year, and, if the person in California with whom the retailer has an agreement is an organization, the annual certification shall also include a statement from the organization certifying that its website includes information directed at its members alerting them to the prohibition against the solicitation activities described above; and
- (C) The retailer accepts the certification or certifications in good faith and the retailer does not know or have reason to know that the certification or certifications are false or fraudulent.
- A retailer is excused from the requirement to obtain a certification if the person from whom the certification is required is dead, lacks the capacity to make such certification, or cannot reasonably be located by the retailer and there is no evidence to indicate that such person did in fact engage in any prohibited solicitation activities in California at any time during the previous year.
- (8) For purposes of this subdivision:

- (A) "Advertisement" means a written, verbal, pictorial, graphic, etc. announcement of goods or services for sale, employing purchased space or time in print or electronic media, which is given to communicate such information to the general public. Online advertising generated as a result of generic algorithmic functions that is anonymous and passive in nature, such as ads tied to Internet search engines, banner ads, click-through ads, Cost Per Action ads, links to retailers' websites, and similar online advertising services, are advertisements and not solicitations.
 - (B) "Individual" means a natural person.
 - (C) "Person" means and includes any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, assignee for the benefit of creditors, trustee, trustee in bankruptcy, syndicate, the United States, this state, any county, city and county, municipality, district, or other political subdivision of the state, or any other group or combination acting as a unit.
 - (D) "Solicit" means to communicate directly or indirectly to a specific person or specific persons in California in a manner that is intended to and calculated to incite the person or persons to purchase tangible personal property from a specific retailer or retailers.
 - (E) "Solicitation" means a direct or indirect communication to a specific person or specific persons done in a manner that is intended to and calculated to incite the person or persons to purchase tangible personal property from a specific retailer or retailers.
 - (F) "Solicit," "solicitation," "refer," and "referral" do not mean or include online advertising generated as a result of generic algorithmic functions that is anonymous and passive in nature, such as ads tied to Internet search engines, banner ads, click-through ads, Cost Per Action ads, links to retailers' websites, and similar online advertising services.
- (9) Examples:
- (A) Corporation X is physically located in California and maintains a website at www.corporationx.com. Corporation X enters into agreements with one or more hiking gear and accessories retailers under which Corporation X maintains click-through advertisements or links to each retailer's website on Corporation X's website at www.corporationx.com and Corporation X's webpage at www.socialnetwork.com/corporationx in return for commissions based upon the retailers' completed sales made to customers who click-through the ads or links on Corporation X's website and webpage. Corporation X also posts reviews at www.corporationx.com of the products sold through the click-through ads and links on its website and webpage. However, Corporation X does not engage in any solicitation activities in California that refer potential customers to the retailer or retailers who have click-through ads or links on its website or webpage. Therefore, paragraph (3) does not apply to the agreements between Corporation X and the retailer or retailers who have ads or links on Corporation X's website or webpage.

- (B) Same as (A) above, except that Corporation X also enters into an agreement under which Advertising Corporation places advertisements for www.corporationx.com on other businesses' websites and webpages, and mails or emails advertisements for www.corporationx.com to anyone who signs up to receive such advertisements. However, Corporation X does not engage in any solicitation activities in California that refer potential customers to the retailer or retailers who have click-through ads or links on its website or webpage and Advertising Corporation's mailers and emails are advertisements, not solicitations. Therefore, paragraph (3) does not apply to the agreements between Corporation X and the retailer or retailers who have ads or links on Corporation X's website or webpage.
- (C) Same as (B) above, except that an individual representative of Corporation X or any other individual acting on behalf of Corporation X, including, but not limited to, an employee or independent contractor of Corporation X or Advertising Corporation, engages in solicitation activities, such as soliciting customers in person, soliciting customers on the telephone, handing out flyers that are solicitations, or sending emails that are solicitations, while physically present in California that refer potential California customers to a retailer who has a click-through ad or link on Corporation X's website or webpage under Corporation X's agreement with that retailer. Therefore, paragraph (3) does apply to Corporation X's agreement with that retailer and that retailer will be required to register with the ~~Board~~ Department to collect use tax if:
- i. The total cumulative sales price of all of the tangible personal property the retailer sold to purchasers in California that were referred to the retailer by a person or persons in California pursuant to an agreement or agreements described in paragraph (3), in the preceding 12 months, is in excess of ten thousand dollars (\$10,000); and

(d) EXCEPTIONS.

- (1) Webpages and Internet Service Providers. The use of a computer server on the Internet to create or maintain a ~~World Wide Web~~ web page or site by a retailer will not be considered a factor in determining whether the retailer has a ~~substantial nexus~~ with physical presence in California, unless the computer server is located in California and the retailer owns or leases the computer server. No Internet Service Provider, On-line Service Provider, internet network communication service provider, or other Internet access service provider, or ~~World Wide Web~~ web hosting services shall be deemed the agent or representative of any out-of-state retailer as a result of the service provider maintaining or taking orders via a web page or site on a computer server that is physically located in this state.
- (2) Warranty and Repair Services. A retailer is not "engaged in business in this state" based solely on its use of a representative or independent contractor in this state for purposes of performing warranty or repair services with respect to tangible personal property sold by the retailer, provided that the ultimate ownership of the representative or independent contractor so used and the retailer is not substantially similar. For purposes of this

paragraph, "ultimate owner" means a stock holder, bond holder, partner, or other person holding an ownership interest.

- (3) Convention and Trade Show Activities. For purposes of this subdivision, the term "convention and trade show activity" means any activity of a kind traditionally conducted at conventions, annual meetings, or trade shows, including, but not limited to, any activity one of the purposes of which is to attract persons in an industry generally (without regard to membership in the sponsoring organization) as well as members of the public to the show for the purpose of displaying industry products or to stimulate interest in, and demand for, industry products or services, or to educate persons engaged in the industry in the development of new products and services or new rules and regulations affecting the industry.

Except as provided in this paragraph, a retailer is not "engaged in business in this state" based solely on the retailer's convention and trade show activities provided that:

- (A) For the period commencing on January 1, 1998 and ending on December 31, 2000, the retailer, including any of his or her representatives, agents, salespersons, canvassers, independent contractors, or solicitors, does not engage in those convention and trade show activities for more than seven days, in whole or in part, in this state during any 12-month period and did not derive more than ten thousand dollars (\$10,000) of gross income from those activities in this state during the prior calendar year;
- (B) For the period commencing on January 1, 2001, the retailer, including any of his or her representatives, agents, salespersons, canvassers, independent contractors, or solicitors, does not engage in those convention and trade show activities for more than fifteen days, in whole or in part, in this state during any 12-month period and did not derive more than one hundred thousand dollars (\$100,000) of net income from those activities in this state during the prior calendar year.

A retailer coming within the provisions of this subdivision is, however, "engaged in business in this state," and is liable for collection of the applicable use tax, with respect to any sale of tangible personal property occurring at the retailer's convention and trade show activities and with respect to any sale of tangible personal property made pursuant to an order taken at or during those convention and trade show activities.

(e) ~~RETAILERS NOT ENGAGED IN BUSINESS IN STATE~~REGISTRATION.

- (1) A retailer that is required to register with the Department pursuant to subdivision (a) must register for a Certificate of Registration – Use Tax.
- (2) Retailers who are not engaged in business in this state may voluntarily apply for a Certificate of Registration-Use Tax. Holders of such certificates are required to collect use tax from purchasers, give receipts therefor, and pay the tax to the Board-Department in the same manner as retailers engaged in business in this state. ~~As used in this regulation, the term "Certificate of Registration-Use Tax"~~

~~shall include Certificates of Authority to Collect Use Tax issued prior to September 11, 1957.~~

- (3) A retailer required to be registered with the Department is required to remain registered with the Department during any calendar year that it has a physical presence in this state that is sufficient to establish a substantial nexus with this state for purposes of the Commerce Clause of the United States Constitution, including, but not limited to, a physical presence described in subdivision (c)(1), or it meets the threshold for total combined sales of tangible personal property for delivery in this state set forth in subdivision (b)(3), and during the following calendar year. A retailer is not required to remain registered on January 1 of any subsequent calendar year if:
- (A) On that date and at all times during the preceding calendar year, the retailer does not have a physical presence in this state sufficient to establish a substantial nexus with this state for purposes of the Commerce Clause of the United States Constitution; and
 - (B) During the preceding calendar year, the total combined sales of tangible personal property for delivery in California by the retailer and all persons related to the retailer did not exceed five hundred thousand dollars (\$500,000).
- (4) If a retailer is not required to remain registered pursuant to this regulation, then they may:
- (A) Voluntarily maintain their registration with the Department and continue to collect, report, and remit use tax in accordance with subdivision (e)(2); or
 - (B) Close their certificate of Registration with the Department, and stop collecting use tax after their certificate is closed.

However, the provisions of this regulation continue to apply to a retailer that closes its Certificate of Registration, and a retailer should not close its certificate if it anticipates that it will be required to re-register with the Department during the current calendar year.

Example 1: Retailer D has no physical presence in California in calendar years 2018 through 2021. Retailer D's total combined sales for delivery in California exceeded \$500,000 during calendar year 2018, but not in calendar years 2019, 2020, or 2021. Therefore, Retailer D registered with the Department during 2019 and must remain registered and collect use tax during the remainder of calendar year 2019. Retailer D may choose to voluntarily maintain its Certificate of Registration with the Department for calendar years 2020 and 2021 or may close its certificate on or after January 1, 2020, and stop collecting use tax after its certificate is closed.

Example 2: Retailer E has no physical presence in California in calendar years 2018 through 2021. Retailer E's total combined sales for delivery in California exceeded \$500,000 in calendar 2019, but not in calendar years 2018, 2020, or 2021. Therefore, Retailer E registered with the Department during 2019 and must remain registered and collect use tax during the remainder of calendar year 2019 and all of calendar year 2020. Retailer E may choose to voluntarily maintain its Certification of Registration with the Department for calendar year 2021 or may close its certificate on or after January 1, 2021, and stop collecting use tax after its certificate is closed.

Example 3: Retailer F has a place of business in California and uses its own website to make retail sales of camping equipment. On November 1, 2019, Retailer F closes its place of business in California, moves to a new place of business in Wyoming, and no longer has any physical presence in California. However, Retailer F continues to make retail sales for delivery in California using its own website, but has less than \$500,000 in total combined sales of tangible personal property for delivery in California during 2020 and 2021. Therefore, Retailer F must remain registered and collect use tax during the remainder calendar year 2019 and all of calendar year 2020. Retailer F may choose to voluntarily maintain its Certificate of Registration with the Department for calendar year 2021 or close its certificate on or after January 1, 2021, and stop collecting use tax after its certificate is closed.

Example 4: Retailer G has no physical presence in California in calendar years 2018 through 2021. Retailer G's total combined sales for delivery in California were \$450,000 in calendar year 2018, \$600,000 in calendar year 2019, and \$490,000 in calendar year 2020, and Retailer G is planning to increase its advertising in California and anticipates that the advertising will increase its sales for delivery in California. Therefore, Retailer G registered with the Department during calendar year 2019 and must remain registered and collect use tax during the remainder of calendar year 2019 and all of calendar year 2020. Retailer G may close its Certificate of Registration on or after January 1, 2021, and stop collecting use tax after its certificate is closed. However, Retailer G probably should not close its certificate because it anticipates that it will be required to re-register with the Department due to the total combined sales of tangible personal property for delivery in California by the retailer and all persons related to the retailer during calendar year 2021.

(f) USE TAX DIRECT PAYMENT PERMIT EXEMPTION CERTIFICATES.

Notwithstanding subdivisions (a) and (d)(3), a retailer who takes a use tax direct payment exemption certificate in good faith from a person holding a use tax direct payment permit is relieved from the duty of collecting use tax from the issuer on the sale for which the certificate is issued. Such certificate must comply with the requirements of Regulation 1699.6, Use Tax Direct Payment Permits.

- (g) **TAX AS DEBT.** The **use** tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation that it was tax constitute debts owed by the retailer to the state.
- (h) **REFUNDS OF EXCESS COLLECTIONS.** Whenever the **Board-Department** ascertains that a retailer has collected use tax from a customer in excess of the amount required to be collected or has collected from a customer an amount which was not tax but was represented by the retailer to the customer as being use tax, no refund of such amount shall be made to the retailer even though the retailer has paid the amounts so collected to the state. Section 6901 of the Revenue and Taxation Code requires that any overpayment of use tax be credited or refunded only to the purchaser who made the overpayment.
- (i) **AMENDMENTS.**
- (1) ~~Statutes 2011, chapter 313 (Assem. Bill No. 155), section 3 re-enacted section 6203 of the Revenue and Taxation Code and re-enacted section 6203 became operative on September 15, 2012, in accordance with chapter 313, section 6.~~ The 2012 amendments to this regulation adopted to implement, interpret, and make specific the provisions of section 6203 of the Revenue and Taxation Code as re-enacted by **Statutes 2011**, chapter 313 (**Assem. Bill No. 155**), section 3, ~~also~~ became operative on September 15, 2012. Any 2012 amendment that implements, interprets and makes specific a use tax collection obligation that did not exist on June 27, 2011, shall not have any retroactive effect.
 - (2) **The amendments to this regulation adopted to implement, interpret, and make specific the provisions of section 6203 of the Revenue and Taxation Code as amended by Statutes 2019, chapter 5 (Assem. Bill No. 147), section 3 shall be operative April 1, 2019, and any amendment that implements, interprets and makes specific a use tax collection obligation that did not exist on March 31, 2019, shall not have any retroactive effect.**
 - (3) **If the amendments to section 6203 made by statutes 2019, chapter 5, section 3 are held in a final decision of a court of competent jurisdiction to violate the substantial nexus standard of the commerce clause of the United States Constitution, then on the date of that final decision, subdivision (c)(2) and (3) of this regulation shall become operative and subdivision (b)(3) of this regulation and any provisions of this regulation implementing, interpreting, or making specific subdivision (b)(3) shall become inoperative, notwithstanding the operative dates set forth therein.**

[Staff Note – Additions to the regulation are in blue with bold font. Deletions are in red with strikethrough.]

Regulation 1827. Collection of Use Tax by Retailers.

Reference: Section 7262 and 7051.3, Revenue and Taxation Code.

- (a) IN GENERAL. Except as provided in subdivision (d) below, any retailer engaged in business in a district imposing transactions (sales) and use taxes and making sales of tangible personal property, the storage, use or other consumption of which is subject to the state-administered district use tax imposed by that district is required to register with the ~~board~~**Department**, collect the use tax from the purchaser, give receipts therefor, and pay the tax to the ~~board~~**Department**. Retailers to whom seller's permits have been or are issued under Section 6067 of the Revenue and Taxation Code and who are engaged in business in the district are registered to collect the district use tax.

Any retailer who is not engaged in business in the district imposing transactions (sales) and use taxes may voluntarily ~~apply for a Certificate of Registration—Use Tax. Holders of such certificates are required to~~ collect tax from purchasers, give receipts therefor, and pay tax to the ~~board~~**Department** in the same manner as retailers engaged in business in the district.

- (b) WHEN COLLECTION OF USE TAX IS REQUIRED.

(1) DELIVERIES INTO THE DISTRICT. A retailer engaged in business in ~~the a~~**a** district (except retailers of certain vehicles, aircraft and vessels as described in paragraph (c)(4) below) shall not be required to collect use tax from ~~the a~~**a** purchaser of tangible personal property unless the retailer ships or delivers the property into ~~the a~~**that** district or participates within ~~that e~~**that e** district in making the sale of the property, including, but not limited to soliciting or receiving the order, either directly or indirectly, at a place of business of the retailer in the district or through any representative, agent, canvasser, solicitor, subsidiary or person in the district under authority of the retailer.

(2) PRESUMPTION OF USE—OUT-OF-DISTRICT DELIVERIES. It shall be presumed that tangible personal property (except for certain vehicles, aircraft and vessels described in paragraph (c)(4) below) delivered outside a district imposing transactions (sales) and use taxes to a purchaser known by the retailer to be a resident of a district imposing such taxes was purchased from a retailer for storage, use or other consumption in the district in which the purchaser resides and was stored, used or otherwise consumed in that district. If the retailer is engaged in business in that district and participates within the district in making the sale of the property, he shall collect the district use tax and pay it to the ~~board~~**Department**.

The presumption may be controverted and the retailer relieved of the duty of collecting the use tax if the retailer, in good faith, accepts from the purchaser a statement in writing that the property was purchased for use at a designated point or points outside a district imposing a use tax. The presumption may also be controverted by other evidence satisfactory to the ~~board~~**Department** that the property was not purchased for storage, use or other consumption in a district imposing a use tax.

(3) VEHICLES, AIRCRAFT AND UNDOCUMENTED VESSELS. Retailers of vehicles, aircraft or undocumented vessels described in paragraph (c)(4) below are engaged in

business in any district imposing a state-administered transactions use tax and are required to collect the use tax from the purchaser and pay it to the ~~board~~ Department when such vehicles, aircraft or undocumented vessels are registered or licensed in that district.

- (4) **TRAILING NEXUS.** A retailer engaged in business in the district is required to collect use tax during any calendar year that it has a physical presence in the district that would be sufficient to establish a substantial nexus with this state for purposes of the Commerce Clause of the United States Constitution, including, but not limited to, a physical presence described in Regulation 1684, subdivision (c)(1), or it meets the threshold for total combined sales of tangible personal property in the district or for delivery in the district set forth in subdivision (c)(3), and during the following calendar year.

(c) DEFINITION—"RETAILER ENGAGED IN BUSINESS IN DISTRICT."

- (1) The definition of "~~R~~retailer engaged in business in the district" includes ~~any of~~ the following provisions of Regulation 1684, except that the name of the district shall be substituted for that of the state:

- (A) The definition set forth in Regulation 1684, subdivision (b)(1)(A);
- (B) The rebuttable presumption set forth in Regulation 1684, subdivision (b)(2);
- (C) The nonexhaustive examples listed in Regulation 1684, subdivision (c);
- (D) The exceptions set forth in Regulation 1684, subdivision (d).

~~(1) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in the district.~~

~~(2) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in the district under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.~~

~~(3) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in the district.~~

(2) On and after January 1, 1988, a "retailer engaged in business in the district" includes any retailer of vehicles subject to registration pursuant to Chapter 1 (commencing with Section 4000) of Division 3 of the Vehicle Code, aircraft licensed in compliance with Section 21411 of the Public Utilities Code, or undocumented vessels registered under Division 3.5 (commencing with Section 9840) of the Vehicle Code.

(3) On and after April 1, 2019, a retailer is engaged in business in a district if the total combined sales of tangible personal property in California or for delivery in California by the retailer and all persons related to the retailer exceeds five hundred thousand dollars (\$500,000) in the preceding or current calendar year. For purposes of subdivision (c)(3), a person is related to another person if both persons

are related to each other pursuant to Section 267(b) of title 26 of the United States Code and the regulations thereunder.

- (A) If the total combined sales of tangible personal property in California or for delivery in California by a retailer and all persons related to the retailer exceeded five hundred thousand dollars (\$500,000) during calendar year 2018 or the first quarter of calendar year 2019, then the retailer was required to begin collecting district use tax from all districts on April 1, 2019.
 - (B) If the total combined sales of tangible personal property in California or for delivery in California by a retailer and all persons related to the retailer exceeded five hundred thousand dollars (\$500,000) during calendar year 2019, but after March 31, 2019, or during any subsequent calendar year, the retailer is required to register with the Department and begin collecting district use tax from all districts immediately after the sale was made that exceeded the five hundred thousand dollar (\$500,000) threshold.
- (d) SALES TO PERSONS HOLDING USE TAX DIRECT PAYMENT PERMITS. Retailers selling tangible personal property, the storage, use or other consumption of which is subject to the use tax, who take in good faith use tax direct payment exemption certificates from persons holding use tax direct payment permits shall be relieved from the duty of collecting district use tax. Use tax direct payment permits and exemption certificates must comply with the requirements of Regulation 1699.6. This subdivision applies only to transfers that are subject to state and local use tax.
- (e) TAX AS DEBT. The use tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation that it was a tax constitute debts owed by the retailer to the district.
- (f) REFUNDS OF EXCESS COLLECTIONS. Whenever the Department ascertains that a retailer has collected use tax from a customer in excess of the amount required to be collected or has collected from a customer an amount which was not tax but was represented by the retailer to the customer as being use tax, no refund of such amount shall be made to the retailer, even though the retailer has paid the amounts so collected to the state. Section 6901 of the Revenue and Taxation Code requires that any overpayment of use tax be credited or refunded only to the purchaser who made the overpayment.