

TITLE 18. CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION

The California Department of Tax and Fee Administration Proposes to Amend and Adopt California Code of Regulations, Title 18, Section 1684.5, Marketplace Sales

NOTICE IS HEREBY GIVEN that the California Department of Tax and Fee Administration (Department), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to amend California Code of Regulations, title 18, section (Regulation or Reg.) 1684.5, Marketplaces Sales, and adopt the amended regulation through the regular rulemaking process. Regulation 1684.5 was originally adopted as an emergency regulation and it implements, interprets, and makes specific the sales and use tax provisions in the Marketplace Facilitator Act (MFA) (RTC, § 6040 et seq.) added to the Sales and Use Tax Law (RTC, § 6001 et seq.) by Assembly Bill No. (AB) 147 (Stats. 2019, ch. 5) and amended by Senate Bill No. (SB) 92 (Stats. 2019, ch. 34). The amendments clarify the MFA, but do not make anyone liable for tax as a marketplace facilitator that would not currently be liable.

AUTHORITY

RTC section 7051.

REFERENCE

RTC sections 6041, 6041.1, 6041.5, 6042, 6043, 6044, 6045, 6046, and 6203

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations

General Background

RTC section 6014 provides that the term “seller,” as used in the Sales and Use Tax Law, includes “every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax.” Subdivision (a) of RTC section 6015 provides that the term “retailer,” as used in the Sales and Use Tax Law, includes “[e]very seller who makes any retail sale or sales of tangible personal property,” “every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others,” “[e]very person engaged in the business of making sales for storage, use, or other consumption, and every person “in the business of making sales at auction of tangible personal property owned by the person or others for storage, use, or other consumption.” The terms “gross receipts” and “sales price,” as used in the Sales and Use Tax Law, generally mean the total amount for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction on account of the cost of the property sold or any other expenses. (RTC, §§ 6011, 6012.) Also, if property other than money is exchanged as all or part of the

consideration for a retail sale of tangible personal property, the value of the other property in money is generally the amount the buyer and seller agreed to as the allowance for the property, unless the Department finds that the amount stated in the agreement is less than the property's fair market value. (Reg. 1654, Barter, Exchange, "Trade-ins" and Foreign Currency Transactions.)

The Sales and Use Tax Law imposes sales tax on retailers and sales tax applies to retailers' gross receipts from their retail sales of tangible personal property made within California, unless specifically exempted or excluded from tax. (RTC, § 6051.) Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. (Civ. Code, § 1656.1; Reg. 1700, Reimbursement for Sales Tax.)

When sales tax does not apply, the Sales and Use Tax Law generally imposes use tax on tangible personal property purchased from a retailer for storage, use, or other consumption in California and stored, used, or otherwise consumed in the state, and use tax applies to the sales price of the property. (RTC, §§ 6201, 6401.) Use tax applies to taxable purchases from retailers regardless of how the purchases are made (e.g., mail order, telephone, or internet) and the person storing, using, or otherwise consuming the property purchased from a retailer is liable for the tax. (RTC, § 6202.) The state's sales tax and use taxes are mutually exclusive meaning either sales tax or use tax applies to a single transaction, but not both. (See Reg. 1620, Interstate and Foreign Commerce, for a detailed explanation of when sales and use tax applies to sales of goods being shipped into and out of California.)

California consumers are generally required to report and pay the use tax on their taxable purchases to the state. (RTC, § 6202.) However, every "retailer engaged in business in this state," as defined in RTC section 6203, is required to collect the use tax on their taxable sales to California consumers and give the consumers a receipt for the tax. (RTC, § 6203, subd. (a).) Consumers remain liable for the use tax, unless they obtain a receipt from a retailer that is registered with the Department. (RTC, § 6202.) Retailers are also liable for use taxes they are required to collect. (RTC, § 6204.)

In addition, every person engaged in the business of selling tangible personal property in this state of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax is generally required to register with the Department for a seller's permit for each of its places of business in this state under RTC section 6066 in chapter 2 of the Sales and Use Tax Law. (See Reg. 1699, Permits, for more information regarding seller's permits.) Retailers that are engaged in business in this state and selling tangible personal property for storage, use, or other consumption in California are required to register with the Department to collect use tax under RTC section 6226 in chapter 3 of the Sales and Use Tax Law and the Department requires such retailers to register for a Certificate of Registration – Use Tax, unless they are also required to hold a seller's permit. (Reg. 1684, Collection of Use Tax by Retailers.) Retailers who are not engaged in business in this state may also voluntarily apply for a Certificate of Registration – Use Tax. (Reg. 1684, subd. (e)(2).) A holder of this certificate is required to collect use tax from purchasers, give receipts therefore, and pay the tax to the Department in the same manner as a retailer engaged in business in this state. (*Ibid.*)

Retailer Engaged in Business in This State

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 U.S. Constitution's 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 taxing 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. California followed the U.S. Supreme Court's holding in *Quill*, so RTC section 6203 has historically defined the term "retailer engaged in business in this state" so only retailers with a physical presence in this state have been historically required to collect and remit California use tax.

Wayfair Decision

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 transactions. On June 21, 2018, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair, Inc., et al* (*Wayfair*), which held that South Dakota's law satisfied the substantial nexus requirement from *Complete Auto Transit* and overruled the holdings in *Quill* and *Bellas Hess*.

AB 147

On April 25, 2019, the Legislature enacted AB 147 to modernize California law to include economic nexus provisions that are consistent with the *Wayfair* decision. As relevant here, AB 147 added a new subdivision (c)(4) to RTC section 6203 to provide that the term "retailer engaged in business in this state" includes "[a]ny 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)," operative April 1, 2019. Subdivision (c)(4) also currently 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 Department amended Reg. 1684 to implement subd. (c)(4) of RTC, § 6203.)

AB 147 added the MFA to the Sales and Use Tax Law to address sales of tangible personal property through marketplaces. The MFA became operative October 1, 2019. The MFA defines the terms "marketplace," "marketplace facilitator," "marketplace seller," "related person," and "delivery network company." (RTC, §§ 6041, 6041.2, 6041.5.) Subdivision (b) of RTC section 6041 expressly provides that:

(b) "Marketplace facilitator" means a person who contracts with marketplace sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction,

the sale of the marketplace seller's products through a marketplace operated by the person or a related person and who does both of the following:

- (1) Directly or indirectly, through one or more related persons, engages in any of the following:
 - (A) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller.
 - (B) Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together.
 - (C) Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller.
 - (D) Software development or research and development activities related to any of the activities described in paragraph (2), if such activities are directly related to a marketplace operated by the person or a related person.
- (2) Directly or indirectly, through one or more related persons, engages in any of the following activities with respect to the marketplace seller's products:
 - (A) Payment processing services.
 - (B) Fulfillment or storage services.
 - (C) Listing products for sale.
 - (D) Setting prices.
 - (E) Branding sales as those of the marketplace facilitator.
 - (F) Order taking.
 - (G) Providing customer service or accepting or assisting with returns or exchanges.

The MFA also provides that a delivery network company is not a marketplace facilitator. (RTC, § 6041.5.)

Amongst its key provisions, the MFA provides that a marketplace facilitator is considered the seller and retailer for each sale facilitated through its marketplace for purposes of determining whether the marketplace facilitator is required to register with the Department under chapter 2 or chapter 3 of the Sales and Use Tax Law, in addition to each sale for which the marketplace facilitator is the seller or retailer or both under chapter 1 of the Sales and Use Tax Law. (RTC, § 6042.) The MFA requires a marketplace facilitator to include all sales for delivery in this state, including sales made on its own behalf, sales by all related persons, and sales facilitated on behalf of marketplace sellers, for purposes of determining whether the marketplace facilitator has total combined sales of tangible personal property for delivery in this state that would make it a retailer engaged in business in this state. (RTC, § 6044.) The MFA also provides that any marketplace facilitator that is registered or required to register with the Department under chapter 2 or 3 that facilitates a retail sale of tangible personal property on behalf of a marketplace seller is the retailer selling or making the sale of the tangible personal property sold through its marketplace for purposes of the Sales and Use Tax Law (RTC, § 6043), which makes the marketplace facilitator the retailer required to pay any sales tax and collect any use tax due on the sale, unless the marketplace facilitator qualifies for relief under RTC section 6046 (discussed below).

The MFA provides that a marketplace seller must register with the Department under chapter 2 or chapter 3 of the Sales and Use Tax Law, "as required, for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator." (RTC, § 6045.) The MFA also requires a

marketplace seller to include all sales of tangible personal property for delivery in this state, including sales made on its own behalf and sales facilitated through any marketplace facilitator’s marketplace, for purposes of determining whether the marketplace seller has total combined sales of tangible personal property for delivery in this state that would make it a retailer engaged in business in this state. (RTC, § 6044.)

In addition, the MFA includes RTC sections 6046 and 6047, which provide a marketplace facilitator relief from liability under specified circumstances. As relevant here, RTC section 6046 makes an unrelated marketplace seller the retailer responsible for paying any sales taxes and collecting any use taxes due on a retail sale, instead of the marketplace facilitator, if the marketplace facilitator demonstrates to the satisfaction of the Department that the marketplace facilitator has made a reasonable effort to obtain accurate and complete information from the unrelated marketplace seller about the retail sale and that the failure to remit the correct amount of tax was due to incorrect or incomplete information provided to the marketplace facilitator by the unrelated marketplace seller. RTC section 6047 relieves a marketplace facilitator from sales and use tax due on retail sales facilitated for unrelated marketplace sellers prior to January 1, 2023, if the marketplace facilitator failed to collect sales tax reimbursement or use tax on the sales due to a good faith error other than an error in sourcing the sale for district tax purposes. The relief provided by RTC section 6047 is capped at:

- 7 percent of a marketplace facilitator’s sales and use taxes due on sales facilitated for unrelated marketplace sellers during calendar years 2019 or 2020;
- 5 percent of a marketplace facilitator’s sales and use taxes due on sales facilitated for unrelated marketplace sellers during calendar year 2021; and
- 3 percent of a marketplace facilitator’s sales and use taxes and other specified fees due on sales facilitated for unrelated marketplace sellers during calendar year 2022.

AB 147 also authorized the Department to adopt emergency regulations during the 2019–2020 fiscal year to implement the MFA. (AB 147, § 7.)

SB 92

On June 27, 2019, the Legislature enacted SB 92. As relevant here, SB 92 added subdivision (c) to RTC section 6041.5 to authorize a delivery network company to elect to be deemed a marketplace facilitator in accordance with regulations adopted by the Department. SB 92 also amended RTC section 6041.1 to provide that, “Newspapers, internet websites, and other entities that advertise tangible personal property for sale, refer purchasers to the seller by telephone, internet link, or other similar means to complete the sale, and do not participate further in the sale are not facilitating a sale under [the MFA].”

Regulation 1684.5

The Department determined that the following issues (or problems) with the MFA needed to be addressed through the adoption of an emergency regulation:

- The MFA contains undefined terms and phrases that can create confusion;
- Marketplace facilitators and marketplace sellers may have trouble understanding their new registration requirements beginning October 1, 2019;
- Marketplace facilitators and marketplace sellers may have trouble determining who is the retailer responsible for paying sales tax or collecting use tax on marketplace sales on and after October 1, 2019; and
- The MFA requires the Department to adopt regulations that establish the criteria for a delivery network company to obtain and retain an election to be a marketplace facilitator.

Therefore, the Department adopted Regulation 1684.5, Marketplace Sales, as an emergency regulation to have the effect and accomplish the objective of addressing those issues (or problems) and emergency Regulation 1684.5 became operative June 29, 2020. The emergency regulation defines terms and phrases used in the MFA and clarifies the registration requirements for marketplace facilitators and marketplace sellers on and after October 1, 2019. It clarifies when a marketplace facilitator is the seller and retailer for purposes of the sale of tangible merchandise facilitated for a marketplace seller and provides procedures for a delivery network company to elect to be a marketplace facilitator. It also includes examples illustrating how its provisions apply.

Effects, Objectives, and Benefits of the Proposed Regulation

Comments from Interested Parties

The Department sent an email to the interested parties on December 9, 2020, asking whether they had any outstanding issues or concerns regarding the language in emergency Regulation 1684.5 so that the Department could consider those issues before proposing to adopt Regulation 1684.5 through the regular rulemaking process. The Department received comments from interested parties regarding emergency Regulation 1684.5 in January 2021 and determined that it was necessary to amend Regulation 1684.5 based on the Department's understanding of the MFA and the emergency regulation and some of the comments received from interested parties.

The Department distributed the proposed amendments to Regulation 1684.5 to the interested parties along with a Discussion Paper dated January 5, 2022, providing background regarding the emergency regulation, describing the interested parties' January 2021 comments and the Department's responses, and explaining all the proposed amendments. The Department also posted both documents on its website.

The Department conducted an interested parties meeting to discuss the proposed amendments to Regulation 1684.5 on January 26, 2022. The Department also received comments from interested parties regarding emergency Regulation 1684.5 and the proposed amendments in February 2022 and determined that it was necessary to make additional changes to some of the proposed amendments to Regulation 1684.5 based on the Department's understanding of the MFA and some of the comments received from interested parties.

Proposed Regulation

The Department is now proposing to adopt Regulation 1684.5 with the amendments through the regular rulemaking process to have the effect and accomplish the objectives of avoiding confusion and ensuring that the MFA is implemented in accordance with the Legislature's intent. The Department is also proposing to adopt Regulation 1684.5 through the regular rulemaking process to have the effect and accomplish the objective of providing procedures for a delivery network company to elect and retain an election to be deemed a marketplace facilitator.

The Department determined that it was necessary to include the statutory definitions of the key terms used in the MFA in subdivision (a) of Regulation 1684.5 so that readers would not need to refer to the underlying statutes and to make it easier to clarify the meaning of those terms as they are used in the regulation. As such, the Department included the statutory definitions of the following terms in subdivision (a): delivery network company, delivery services, local merchant, local product, marketplace, marketplace facilitator, marketplace seller, and related person. The Department determined that it was necessary to clarify in subdivision (a) that a delivery network company is not a marketplace facilitator, unless it makes an election to be deemed a marketplace facilitator pursuant to subdivision (e) of the regulation and that nothing precludes a delivery network company from being a retailer as defined in RTC section 6015 (discussed above). The Department determined that it was necessary to clarify in subdivision (a) that a marketplace is a place where "marketplace sellers sell or offer to sell" tangible personal property and include examples of websites that are and are not marketplaces. The Department determined that it was necessary to clarify in subdivision (a) that the provisions of subdivision (b)(1)(B) of RTC section 6041 apply when a person owns or operates the infrastructure or technology that brings buyers and sellers together "in a marketplace." The Department also determined that it was necessary to clarify in subdivision (a) that a person that engages in any of the activities in subdivisions (b)(2)(B) through (G) of RTC section 6041 with respect to a marketplace seller's products is not required to provide payment processing services to be a marketplace facilitator.

The Department determined that it was necessary to define and clarify many of the undefined terms and phrases used within the definition of marketplace facilitator in subdivision (a) of Regulation 1684.5 including branding sales as those of the marketplace facilitator, facilitate, fulfillment or storage services, listing products for sale, order taking, payment processing services, providing customer service or accepting or assisting with returns or exchanges, setting prices, and virtual currency. The Department determined that it was necessary to define these terms and phrases in a manner that gives each part of the MFA the meaning and effect which it appears the Legislature intended based on the context in which they are used and the approved usage of the language. (Code Civ. Proc, § 16.) The Department determined that it was necessary to refrain "from giving [them] a narrow or restrictive meaning if such construction would result in an evasion of the evident purpose of the [MFA] when a broader meaning would prevent the evasion and carry out that purpose." (*Levitt v. Faber et al.* (1937) 20 Cal.App.2d Supp. 758, 762 (*Levitt*)). The Department also determined that it is necessary to define the term "payment order" in subdivision (a) because that term is used in the subdivision's definition of "payment processing services."

To help businesses determine their registration requirements under the MFA, the Department determined that it was necessary to clarify in subdivision (b)(1) of Regulation 1684.5 that on and after

October 1, 2019, a marketplace facilitator shall be considered the seller and retailer for each sale facilitated through its marketplace for purposes of determining whether the marketplace facilitator is required to register for a seller's permit or Certificate of Registration – Use Tax. The Department determined that it was necessary to clarify in subdivision (b)(1) that on and after October 1, 2019, a marketplace facilitator is required to include the sales it facilitates for marketplace sellers for purposes of determining whether it is a retailer engaged in business in this state under RTC section 6203, subdivision (c)(4), regardless of whether the sales are taxable. The Department also determined that it was necessary to include an example in subdivision (b)(1) of a marketplace facilitator that was a retailer engaged in business in this state under RTC section 6203, subdivision (c)(4), and required to register with the Department for a Certificate of Registration – Use Tax and collect and remit use tax beginning October 1, 2019, based on its sales on its own behalf and its sales facilitated for a marketplace seller.

In addition, the Department determined that it was necessary to clarify in subdivision (b)(2) of Regulation 1684.5 that on and after October 1, 2019, a marketplace seller is the seller and the retailer for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator for purposes of determining whether the marketplace seller is required to register for a seller's permit or Certificate of Registration – Use Tax. The Department determined that it was necessary to clarify in subdivision (b)(2) of the regulation that on and after October 1, 2019, a marketplace seller is not required to register with the Department for a seller's permit if it does not make any sales of tangible personal property in this state, except for sales facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales pursuant to subdivision (c) of the regulation. The Department also determined that it was necessary to clarify in subdivision (b)(2) of the regulation that on and after October 1, 2019, a marketplace seller is not required to register with the Department for a Certificate of Registration – Use Tax under RTC section 6226 if it does not make any sales of tangible personal property for storage, use, or other consumption in this state, except for sales facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales pursuant to subdivision (c) of the regulation.

Furthermore, the Department determined that it was necessary to clarify in subdivision (b)(2) of the regulation that on and after October 1, 2019, a marketplace seller is required to include its sales facilitated through any marketplace facilitator's marketplace when determining whether it is a retailer engaged in business in this state under RTC section 6203, subdivision (c)(4), regardless of whether the sales are taxable. The Department determined that it was necessary to include an example in subdivision (b)(2) of the regulation to clarify when an out-of-state marketplace seller is engaged in business in this state because its total combined sales of tangible personal property for delivery in this state exceed the \$500,000 threshold in RTC section 6203, subdivision (c)(4), and required to register with the Department for a Certificate of Registration – Use Tax and collect and remit use tax. The Department also determined that it was necessary to include a second example in subdivision (b)(2) of the regulation to further clarify that a marketplace seller with a physical presence in this state is not required to register for a seller's permit or a Certificate of Registration – Use Tax if it only makes sales of tangible merchandise in California or for delivery in California that are facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales.

To help businesses determine who is the retailer in a marketplace transaction under the MFA, the Department determined that it was necessary to clarify in subdivision (c) of Regulation 1684.5 that

any marketplace facilitator that is registered or required to be registered with the Department for a seller's permit or Certificate of Registration – Use Tax and who facilitates a retail sale of tangible personal property by a marketplace seller on or after October 1, 2019, is the retailer selling or making the sale of the tangible personal property sold through its marketplace. The Department determined that it was necessary to clarify in subdivision (c) that when a marketplace facilitator is the retailer for a sale of tangible merchandise under that provision, the marketplace facilitator is responsible for paying sales tax or collecting and remitting use tax on that sale and the marketplace seller is not the retailer responsible for paying sales tax or collecting and remitting use tax on that sale, unless the marketplace facilitator qualifies for relief from liability for the tax on that sale pursuant to RTC section 6046 (discussed above). The Department also determined that it was necessary to include two examples in subdivision (c) to further clarify when a marketplace facilitator or a marketplace seller is the retailer responsible for paying or collecting tax on a sale the marketplace facilitator facilitated for the marketplace seller through its marketplace on or after October 1, 2019.

To help businesses understand how the advertising exclusion in RTC section 6041.1 works with RTC sections 6042 and 6043, the Department determined that it was necessary to clarify in subdivision (d) of Regulation 1684.5 that when the advertising exclusion applies to a sale, the person publishing the advertisement is not considered the seller and retailer for the sale for purposes of determining whether the person is required to register with the Department under RTC section 6042 and the person is not the retailer selling or making the sale of the tangible personal property sold through the advertisement under RTC section 6043. Subdivision (d) also clarifies that this is true regardless of whether the person is a marketplace facilitator, the seller is a marketplace seller, the tangible personal property is advertised in a marketplace, or the advertisement contains an offer to sell tangible personal property. Subdivision (d) includes an example illustrating how the advertising exclusion in RTC section 6041.1 applies to a company that provides internet access and digital television services, two examples illustrating how the advertising exclusion applies to a marketplace facilitator that advertises tangible merchandise for sale in its marketplace, but does not participate further in the sale, and two examples illustrating that the advertising exclusion does not apply when a marketplace facilitator participates further in the sale of the advertised merchandise, such as by taking orders or providing payment processing services.

Finally, the Department determined that it was necessary to prescribe the requirements for a delivery network company to elect to be deemed a marketplace facilitator and retain such an election in subdivision (e) of Regulation 1684.5. The Department determined that it was necessary to provide in subdivision (e) that, to elect to be a marketplace facilitator, a delivery network company must register with the Department for a seller's permit or a Certificate of Registration – Use Tax, whichever is applicable, unless the delivery network company is already registered, and submit a written or electronic statement signed by an authorized representative that includes an election to be deemed a marketplace facilitator and a voluntary agreement to remain registered with the Department while its election is effective. The Department determined that it was necessary to provide in subdivision (e) that an election is effective at the beginning of the next reporting period starting after the date the election is received by the Department and remains in effect until the beginning of the next reporting period starting after the date the Department receives a written or electronic statement from the delivery network company that it is cancelling its election, which is signed by an authorized representative. The Department also determined that it was necessary to clarify in subdivision (e) that a delivery network company that makes such an election and facilitates a retail sale of tangible

personal property by a marketplace seller through its marketplace for delivery in California while its election is effective shall be the retailer selling or making the sale of the tangible personal property and the retailer responsible for paying sales tax or collecting and remitting use tax on that sale. The Department did not determine that it was necessary to duplicate or otherwise expressly incorporate the MFA's relief provisions in Regulation 1684.5. (Gov. Code, §§ 11349., 11349.1.)

The Department anticipates that the adoption of Regulation 1684.5 through the regular rulemaking process will promote fairness and benefit the Department and taxpayers, including marketplace facilitators, marketplace sellers, delivery network companies, and businesses that sell advertising for tangible merchandise, by clarifying the meaning of terms and phrases used in the MFA, clarifying the MFA's registration requirements, clarifying when a marketplace facilitator is a retailer under the MFA, clarifying when the MFA's advertising exclusion applies, and providing procedures for a delivery network company to elect to be a marketplace facilitator.

The Department has performed an evaluation of whether Regulation 1684.5 is inconsistent or incompatible with existing state regulations and determined that the proposed regulation is not inconsistent or incompatible with existing state regulations because it is the only regulation that implements, interprets, or makes specific the provisions of the MFA. Also, the Department has determined that there is no existing federal regulation or statute that is comparable to Regulation 1684.5.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Department has determined that the adoption of proposed Regulation 1684.5 will not impose a mandate on local agencies or school districts, including a mandate that requires state reimbursement under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

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

The Department has determined that the adoption of proposed Regulation 1684.5 will result in an absorbable \$484 one-time cost for the Department to update its website after the proposed regulatory action is completed. The Department has determined that the adoption of proposed Regulation 1684.5 will not result in any other direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made an initial determination that the adoption of proposed Regulation 1684.5 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of proposed Regulation 1684.5 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

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

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

The Department assessed the economic impact of proposed Regulation 1684.5 on California businesses and individuals and determined that the proposed regulatory action is not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Department prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. In the economic impact assessment, the Department determined that the adoption of proposed Regulation 1684.5 will neither create nor eliminate jobs in the State of California nor result in the creation of new businesses or the elimination of existing businesses within the state and will not affect the expansion of businesses currently doing business within the State of California. Furthermore, the Department determined that the adoption of proposed Regulation 1684.5 will not affect the benefits of the regulation to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of proposed Regulation 1684.5 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

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

CONTACT PERSONS

Questions regarding the substance of proposed Regulation 1684.5 should be directed to Robert Prasad, by telephone at (916) 309-5296, by e-mail at Robert.Prasad@cdtfa.ca.gov, or by mail at California Department of Tax and Fee Administration, Attn: Robert Prasad, MIC:50, 450 N Street, PO Box 942879, Sacramento, CA 94279-0050.

Written comments for the Department's consideration, written requests to hold a public hearing, notices of intent to present testimony or witnesses at the public hearing, and other inquiries concerning the proposed regulatory action should be directed to Kim DeArte, Regulations Coordinator, by telephone at (916) 309-5227, by fax at (916) 322-2958, by e-mail at CDTFARegulations@cdtfa.ca.gov or by mail at California Department of Tax and Fee Administration, Attn: Kim DeArte, MIC:50,

450 N Street, PO Box 942879, Sacramento, CA 94279-0050. Kim DeArte is the designated backup contact person to Robert Prasad.

WRITTEN COMMENT PERIOD

The written comment period ends on January 3, 2023. The Department will consider the statements, arguments, and/or contentions contained in written comments received by Kim DeArte at the postal address, email address, or fax number provided above, prior to the close of the written comment period, before the Department decides whether to adopt proposed Regulation 1684.5. The Department will only consider written comments received by that time.

However, if a public hearing is held, written comments may also be submitted during the day of and at the public hearing and the Department will consider the statements, arguments, and/or contentions contained in written comments submitted during the day of or at the public hearing before the Department decides whether to adopt proposed Regulation 1684.5.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Department has prepared copies of the text of proposed Regulation 1684.5 illustrating the express terms of the proposed action. The amendments to emergency Regulation 1684.5 are illustrated in strikeout and underline format.

The Department has also prepared an initial statement of reasons for the adoption of proposed Regulation 1684.5, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed regulation is based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of proposed Regulation 1684.5 and the initial statement of reasons are also available on the Department's website at www.cdtfa.ca.gov.

PUBLIC HEARING

The Department has not scheduled a public hearing to discuss the proposed adoption of proposed Regulation 1684.5. However, any interested person or their authorized representative may submit a written request for a public hearing no later than 15 days before the close of the written comment period, and the Department will hold a public hearing if it receives a timely written request.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Department may adopt proposed Regulation 1684.5 with changes that are non-substantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Department will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before

adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Kim DeArte. The Department will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Department adopts proposed Regulation 1684.5, the Department will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Department's website at www.cdtfa.ca.gov.