

## **Notice of Proposed Emergency Action and Finding of Emergency**

### **The California Department of Tax and Fee Administration**

#### **Has Adopted 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 the Department pursuant to Revenue and Taxation Code (RTC) section 7051 and section 7, subdivision (b), of Assembly Bill No. (AB) 147 (Stats. 2019, ch. 5), has adopted California Code of Regulations, title 18, section (Regulation or Reg.) 1684.5, *Marketplace Sales*, as an emergency regulation in accordance with the Administrative Procedure Act (ch. 3.5 (commencing with section 11340) of pt. 1 of div. 3 of tit. 2 of the Gov. Code). Regulation 1684.5 implements, interprets, and makes specific the Marketplace Facilitator Act (MFA) (ch. 1.7 (commencing with section 6040)) added to the Sales and Use Tax Law (RTC, § 6001 et seq.) by section 2 of AB 147.

#### **FINDING OF EMERGENCY**

##### *Section 48 Statement*

Government Code section 11346.1, subdivision (a)(2), requires that, at least five working days prior to submission of the proposed emergency regulation to the Office of Administrative Law, the Department provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the Department. After submission of the proposed emergency regulation to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulation as set forth in Government Code section 11349.6.

##### *Statement of Emergency*

RTC section 7051 generally authorizes the Department to prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of the Sales and Use Tax Law. Section 7, subdivision (b), of AB 147 provides that the implementation of the MFA, “for the 2019–20 fiscal year, is deemed an emergency and necessary for the immediate preservation of the public peace, health, and safety, or general welfare and, therefore, the [Department] is hereby authorized to adopt emergency regulations to implement those provisions during the 2019–20 fiscal year, in accordance with the rulemaking provisions of the Administrative Procedure Act.”

#### **AUTHORITY**

RTC section 7051; section 7, subdivision (b), of AB 147.

#### **REFERENCE**

RTC sections 6041, 6041.1, 6041.5, 6042, 6043, 6044, 6045, 6046, 6051, 6201, 6203, 6204, and 6226.

## INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

### Summary of Existing Laws and Regulations

#### *General Background*

For purposes of California's sales and use taxes, the term "seller" 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." (RTC, § 6014.) As relevant here, the term "retailer" includes every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making sales of tangible personal property for storage, use, or other consumption in this state. (RTC, § 6015.) The terms "gross receipts" and "sales price" 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. (Regulation 1654, *Barter, Exchange, "Trade-ins" and Foreign Currency Transactions*.)

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. (RTC, § 6051.) 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. (RTC, §§ 6201, 6401.) Use tax applies to taxable purchases of tangible personal property from retailers, whether, for example, the purchase is made by mail order, telephone, or internet, and the person actually 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 tax 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. However, pursuant to 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, and they are liable for the use taxes they are required to collect. (RTC, § 6204.) Consumers remain liable for the use tax, unless they obtain a receipt from a retailer that is registered with the Department. (RTC, § 6202; Reg. 1685, *Payment of Tax by Purchasers.*)

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. Also, retailers who are not engaged in business in this state 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 Department in the same manner as a retailer engaged in business in this state. (See subdivision (e) of Reg. 1684, *Collection of Use Tax by Retailers*, for more information regarding Certificates of Registration – Use Tax.)

#### *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 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 only retailers with a physical presence in this state have been historically required to collect and remit California use tax under RTC section 6203.

#### *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)*. 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*.

*Assembly Bill 147 and Senate Bill 92*

On April 25, 2019, the Legislature enacted AB 147 in order 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, operative April 1, 2019, 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)." New subdivision (c)(4) also provided 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 Internal Revenue Code and the regulations thereunder."

AB 147 also added the MFA to the Sales and Use Tax Law to address sales of tangible personal property through marketplaces. The MFA is 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.) Amongst the key provisions, the MFA specifies that a marketplace facilitator is considered the seller and retailer for each sale facilitated through its marketplace on behalf of a marketplace seller for purposes of determining whether the marketplace facilitator is required to register with the Department under chapter 2 (commencing with section 6051) or chapter 3 (commencing with section 6201) 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 (commencing with section 6001) of the Sales and Use Tax Law. (RTC, § 6042.) The MFA also provides that any marketplace facilitator that is registered or required to register with the Department and who facilitates a retail sale of tangible personal property on behalf of a marketplace seller is the retailer making the sale of the tangible personal property sold through its marketplace (RTC, § 6043), which makes the marketplace facilitator the retailer required to pay any sales taxes and collect any use taxes due, not the marketplace seller.

For purposes of determining whether a 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 under RTC section 6203, subdivision (c)(4), the MFA requires the 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. (RTC, § 6044.)

The MFA provides that a marketplace seller must register with the Department under chapter 2 (commencing with section 6051) or chapter 3 (commencing with section 6201) 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.) For purposes of determining whether a

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 under RTC section 6203, subdivision (c)(4), the MFA requires the 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. (RTC, § 6044.) In addition, the MFA provides that a delivery network company is not a marketplace facilitator. (RTC, § 6041.5.)

The MFA also 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, 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 a 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 provides specified relief for a marketplace facilitator's failure to collect sales and use tax on retail sales facilitated for an unrelated marketplace seller prior to January 1, 2023, due to a good faith error other than an error in sourcing the sale for district tax purposes.

On June 27, 2019, the Legislature enacted Senate Bill No. (SB) 92 (Stats. 2019, ch. 34). 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 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]." SB 92 also amended RTC section 6203, subdivision (c)(4), to clarify that, for purposes of section 6203, "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," and the Department has separately adopted amendments to Regulation 1684 to implement the amendments made to RTC section 6203 by AB 147 and SB 92.

#### Effect, Objective, and Benefits of Emergency Regulation 1684.5

Department staff reviewed the MFA and determined that:

- The MFA contains undefined terms that may create confusion;
- Marketplace facilitators and marketplace sellers may have trouble understanding their new registration requirements beginning October 1, 2019; and
- 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.

The MFA also 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, Department staff proposed adding Regulation 1684.5, *Marketplace Sales*, to article 17 of chapter 4 of division 2 of title 18 of the California Code of Regulations to have the effect and accomplish the objective of addressing these issues and implementing, interpreting, and making specific the provisions of the MFA discussed above. The proposed regulation defines terms used in the MFA. It explains 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 a sale of tangible merchandise facilitated for a marketplace seller on and after October 1, 2019. It provides procedures for a delivery network company to elect to be a marketplace facilitator. The proposed regulation also includes examples illustrating how its provisions apply.

### *Definitions*

Department staff determined that it was necessary to include the statutory definitions of the key terms used in the MFA in proposed Regulation 1684.5 so that readers of the regulation will not have to refer back to the underlying statutes and to make it easier to clarify the meaning of such terms as they are used in the regulation, in accordance with the clarity standard of Government Code section 11349.1, subdivision (a)(3). Therefore, Department staff incorporated the definitions of the following terms from RTC sections 6041, 6041.2, and 6041.5 into subdivision (a) of the proposed regulation: marketplace, marketplace facilitator, marketplace seller, related person, delivery network company, delivery services, local merchant, and local product. Department staff also clarified in subdivision (a) of the proposed regulation that a delivery network company is not a marketplace facilitator, unless it makes an election to be deemed a marketplace facilitator pursuant to subdivision (d) of the regulation and that nothing precludes a delivery network company from being a retailer as defined in RTC section 6015.

Department staff also determined that it was necessary to define many of the undefined terms and phrases used within the statutory definition of marketplace facilitator in proposed Regulation 1684.5 to help clarify the meaning of the terms and phrases and fully describe the activities that can make a person a marketplace facilitator. Therefore, Department staff proposed to define the following terms and phrases used in RTC section 6041, subdivision (b), in subdivision (a) of the proposed regulation: payment processing services, automated clearing house debit, payment order, virtual currency, listing products for sale, setting prices, branding sales as those of the marketplace facilitator, and facilitate.

In addition, Department staff determined that it was necessary to explain in the definition of facilitate in subdivision (a) of proposed Regulation 1684.5 that a person, including, but not limited to a person who operates a newspaper or internet website, that advertises tangible personal property for sale, refers purchasers to the seller by telephone, internet link, or other similar means to complete sales, and does not participate further in the sales, is not facilitating the sales for purposes of the regulation and is not a marketplace facilitator for purposes of the sales. Department staff determined that it was necessary to include examples in the definition of facilitate to further illustrate the difference between merely advertising tangible merchandise for sale and referring purchasers to the seller to complete a sale and “facilitating” a sale for purposes of the MFA. Department staff also determined that it was necessary to clarify in the definition of virtual currency in subdivision (a) of proposed Regulation 1684.5 that if the consideration for a

retail sale of tangible personal property is virtual currency, the measure of the tax needs to be determined pursuant to Regulation 1654 since virtual currency is not legal tender in any jurisdiction and the clarification will help avoid confusion as to how to correctly determine the taxable measure in these types of transactions.

### *Registration*

To help businesses determine their registration requirements, Department staff determined that it was necessary to clarify in subdivision (b)(1) of proposed 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. Staff determined that it was necessary to clarify in subdivision (b)(1) of the proposed regulation 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 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). To further clarify these requirements, Department staff also determined that it was necessary to include an example in subdivision (b)(1) of the proposed regulation of a marketplace facilitator that was a retailer engaged in business in this state under RTC section 6203, subdivision (c)(4), on October 1, 2019, based on its sales on its own behalf and its sales facilitated for a marketplace seller, and required to register with the Department for a Certificate of Registration – Use Tax and collect and remit use tax beginning October 1, 2019.

In addition, Department staff determined that it was necessary to clarify in subdivision (b)(2) of proposed Regulation 1684.5 that on and after October 1, 2019, a marketplace seller shall register for a seller's permit or Certificate of Registration – Use Tax, as required, for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator. Department staff determined that it was necessary to clarify in subdivision (b)(2) of the proposed 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 RTC section 6043 and subdivision (c) of the regulation. Department staff determined that it was necessary to clarify in subdivision (b)(2) of the proposed 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 RTC section 6043 and subdivision (c) of the regulation.

Furthermore, Department staff determined that it was necessary to clarify in subdivision (b)(2) of proposed Regulation 1684.5 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 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). Department staff determined that it was necessary to include an example in

subdivision (b)(2) of the proposed 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. Department staff also determined that it was necessary to include a second example in subdivision (b)(2) of the proposed 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.

#### *Marketplace Facilitator as Seller and Retailer*

To help businesses determine who is the retailer in a marketplace transaction, Department staff determined that it was necessary to clarify in subdivision (c) of proposed 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. Department staff determined that it was necessary to clarify in subdivision (c) of the proposed regulation that when a marketplace facilitator is the retailer for a sale of tangible merchandise, 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. Department staff also determined that it was necessary to include two examples in subdivision (c) of the proposed regulation 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 and after October 1, 2019.

#### *Delivery Network Company Elections*

Finally, a delivery network company is not a marketplace facilitator, unless the delivery network company elects to be treated as a marketplace facilitator in accordance with regulations prescribed by the Department. Therefore, Department staff determined that it was necessary to provide in subdivision (d) of proposed Regulation 1684.5 that 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. Department staff determined that it was necessary to provide in subdivision (d) of the proposed regulation 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 signed by an authorized representative from the delivery network company that it is cancelling

its election. Department staff also determined that it was necessary to clarify in subdivision (d) of the proposed regulation 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 in effect 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.

#### *Adoption of Proposed Regulation as an Emergency Regulation*

Department staff distributed a discussion paper explaining proposed Regulation 1684.5 on October 4, 2019, and held an October 15, 2019, interested parties meeting to obtain public input. During the October 15, 2019, interested parties meeting there seemed to be a general consensus that the proposed regulation provides necessary guidance and a framework for businesses to understand their registration requirements under the MFA and who is the retailer responsible for paying sales tax or collecting use tax on marketplace sales on and after October 1, 2019. Department staff did not receive any written comments following the interested parties meeting.

Also, following the interested parties meeting, Department staff determined that it was necessary to make some minor changes to proposed Regulation 1684.5 to provide further clarification. The changes are included in the discussion of the proposed regulation above. The key changes included: (1) Adding a sentence to subdivision (b)(2) to clarify that a marketplace seller is not required to register 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; (2) Adding the second example to subdivision (b)(2) to illustrate the new sentence; and (3) Clarifying in subdivision (d)(4) that when a delivery network company's election to be a marketplace facilitator is effective and the delivery network company facilitates a retail sale of tangible personal property for a marketplace seller, the delivery network company is the retailer responsible for paying sales tax or collecting and remitting use tax on that sale.

Department staff subsequently prepared a memorandum to the Department's Director regarding proposed Regulation 1684.5 dated April 16, 2020. In the memorandum, Department staff recommend that the Department adopt proposed Regulation 1684.5 to have the effect and accomplish the objective of addressing the issues with the MFA discussed above. Department staff also recommend that the Department adopt proposed Regulation 1684.5 as an emergency regulation, pursuant to the Department's authority under section 7, subdivision (b), of AB 147 to adopt emergency regulations implementing the MFA, to ensure that proposed Regulation 1684.5 is effective on the earliest possible date.

The Department adopted Regulation 1684.5, as an emergency regulation, because the Department determined that the adoption of Regulation 1684.5, as an emergency regulation, is necessary to have the effect and accomplish the objective of addressing the issues with the MFA discussed above on the earliest possible date. The Department anticipates that the adoption of emergency Regulation 1684.5 will promote fairness and benefit marketplace facilitators, marketplace sellers, businesses that sell advertising, delivery network companies, and the Department by clarifying the meaning of the terms used in the MFA, clarifying marketplace

facilitators' and marketplace sellers' registration requirements on and after October 1, 2019, clarifying who is the retailer responsible for paying sales tax or collecting use tax on marketplace sales on and after October 1, 2019, and prescribing the requirements for a delivery network company to elect to be a marketplace facilitator.

The Department has performed an evaluation of whether emergency Regulation 1684.5 is inconsistent or incompatible with existing state regulations and determined that the emergency regulation is not inconsistent or incompatible with existing state regulations because it is the only regulation that implements the MFA. In addition, the Department has determined that there are no comparable federal regulations or statutes to emergency Regulation 1684.5.

#### DOCUMENTS RELIED UPON

The Department relied on the memorandum to the Department's Director regarding proposed Regulation 1684.5 dated April 16, 2020, and the attachment to the memorandum in deciding that the adoption of proposed emergency Regulation 1684.5 is necessary to have the effect and accomplish the objective of addressing the issues with the MFA discussed above.

#### NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Department has determined that the adoption of emergency Regulation 1684.5 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

#### ONE-TIME COST TO THE DEPARTMENT, BUT NO OTHER COST OR SAVINGS TO ANY STATE AGENCY, LOCAL AGENCY, OR SCHOOL DISTRICT

The Department has determined that the adoption of emergency Regulation 1684.5 will result in an absorbable \$436 one-time cost for the Department to update its website after the emergency rulemaking process is completed (assuming that average hourly compensation costs are \$54.54 per hour and that it will take approximately eight hours). The Department has determined that the adoption of emergency Regulation 1684.5 will result in no other direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

#### EFFECTIVE PERIOD

Section 7, subdivision (b), of AB 147 provides that the emergency regulations adopted by the Department to implement the MFA "may remain in effect for two years from the date of adoption." Therefore, emergency Regulation 1684.5 shall be effective immediately upon filing with the Secretary of State and shall remain in effect for two years from that date, unless the Department amends or repeals it before the expiration of the two-year period.

## CONTACT PERSON

Questions about emergency Regulation 1684.5 should be directed to Robert Wilke, Program Policy Specialist, by telephone at 916-309-5302 or by email at BTFD-BTC.InformationRequests@cdtfa.ca.gov.

## TEXT OF EMERGENCY REGULATION 1684.5

(A new regulation to be added to Cal. Code Regs., tit. 18, div. 2)

Regulation 1684.5. Marketplace Sales.

(a) Definitions.

(1) “Marketplace” means a physical or electronic place, including, but not limited to, a store, booth, internet website, catalog, television or radio broadcast, or a dedicated sales software application, where a marketplace seller sells or offers for sale tangible personal property for delivery in this state regardless of whether the tangible personal property, marketplace seller, or marketplace has a physical presence in this state.

(2) “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:

(A) Directly or indirectly, through one or more related persons, engages in any of the following:

(i) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller.

(ii) Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together.

(iii) Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller.

(iv) Software development or research and development activities related to any of the activities described in subdivision (a)(2)(B) of this regulation, if such activities are directly related to a marketplace operated by the person or a related person.

(B) Directly or indirectly, through one or more related persons, engages in any of the following activities with respect to the marketplace seller’s products:

(i) Payment processing services.

(ii) Fulfillment or storage services.

- (iii) Listing products for sale.
- (iv) Setting prices.
- (v) Branding sales as those of the marketplace facilitator.
- (vi) Order taking.
- (vii) Providing customer service or accepting or assisting with returns or exchanges.

Example 1: Company A owns and operates a website where third-party sellers offer to sell merchandise for delivery in California. Company A also enters into contracts to facilitate the sale of third-party sellers' merchandise through its website for a fee and provides payment processing services for sales of these sellers' merchandise sold through its website. Therefore, Company A is a marketplace facilitator.

(3) "Marketplace seller" means a person who has an agreement with a marketplace facilitator and makes retail sales of tangible personal property through a marketplace owned, operated, or controlled by a marketplace facilitator, even if that person would not have been required to hold a seller's permit or permits, or required to collect the use tax imposed pursuant to chapter 3 (commencing with section 6201) of part 1 of division 2 of the Revenue and Taxation Code, had the sale not been made through that marketplace.

(4) "Related Person." For the purposes of this regulation, 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.

(5) "Payment Processing Services" means providing a person, directly or indirectly, with the means used to charge or debit accounts through the use of any payment method or mechanism, including, but not limited to, credit cards, debit cards, prepaid cards, stored value cards, Automated Clearing House (ACH) debits, and payment orders, whether accomplished through the use of software or otherwise.

(6) "Automated Clearing House Debit" means any completed or attempted debit to an account at a financial institution that is processed electronically through the Automated Clearing House Network (ACH Network).

(7) "Payment Order" means a written instruction or order to pay money signed by the person giving the instruction whether created in electronic or paper format.

(8) "Virtual Currency" is a digital representation of value that functions as a medium of exchange, a unit of account, or a store of value, but which does not have legal tender status in any jurisdiction. Virtual currency does not include retailer coupons or gift cards.

If the consideration for a retail sale of tangible personal property is virtual currency, the measure of tax shall be determined pursuant to Regulation 1654, Barter, Exchange, "Trade-ins" and Foreign Currency Transactions.

(9) “Listing Products for Sale” means a written, verbal, pictorial, graphic, etc., announcement of goods for sale.

(10) “Setting Prices” means establishing a price or prices at which an item is offered for sale or sold to customers and includes establishing a price at which an item must be sold or a minimum or maximum price, below or above which an item cannot be sold.

(11) “Branding sales as those of the marketplace facilitator” means using any means, including, but not limited to a name, logo, sign, symbol, or a combination of these, to identify the marketplace facilitator as the person selling a marketplace seller’s product.

(12) “Delivery network company” means a business entity that maintains an internet website or mobile application used to facilitate delivery services for the sale of local products. A person that is a delivery network company is not a marketplace facilitator, unless it makes an election to be deemed a marketplace facilitator pursuant to subdivision (d) of this regulation. Nothing in this regulation shall preclude a delivery network company from being a retailer as defined in Revenue and Taxation Code section 6015.

(13) “Delivery services” means the pickup of one or more local products from a local merchant and delivery of the local products to a customer. “Delivery services” do not include any delivery requiring over 75 miles of travel from the local merchant to the customer.

(14) “Local merchant” means a third-party merchant, including, but not limited to, a kitchen, restaurant, grocery store, retail store, convenience store, or business of another type, that is not under common ownership or control with the delivery network company.

(15) “Local product” means any item, including food, other than freight, mail, or a package to which postage has been affixed.

(16) “Facilitate.” For purposes of this regulation, a person contracts with a marketplace seller to facilitate the sale of the marketplace seller’s products through a marketplace if the person agrees to do anything directly or indirectly, through one or more related persons, that makes it easy or easier for the marketplace seller to sell its products through the marketplace. Also, a marketplace facilitator facilitates a sale by a marketplace seller through its marketplace if it does anything directly or indirectly, through one or more related persons, that makes it easy or easier for the marketplace seller to make the sale through the marketplace. Such activities include, but are not limited to communicating the offer or acceptance between the buyer and seller, taking orders for merchandise, or providing payment processing or fulfillment services.

However, a person, including, but not limited to a person who operates a newspaper or internet website, that advertises tangible personal property for sale, refers purchasers to the seller by telephone, mail, email, website address, internet link, or other similar means to complete sales, and does not participate further in the sales is not facilitating the sales for purposes of this regulation. Therefore, such a person is not a marketplace facilitator for purposes of the sales.

Example 2: Company A is a marketplace facilitator that facilitates sales of tangible merchandise by marketplace sellers through its website. In addition, Company A sells advertising space on its website and allows sellers to include the picture, description, and sales price of their merchandise. Company A also allows the sellers to provide an internet link to the seller's website so that Company A may refer potential purchasers to these sellers to complete sales of the tangible merchandise advertised for sale on Company A's website. Company A does not otherwise participate further in the sales, such as taking orders or providing payment processing or fulfillment services. Therefore, Company A is not facilitating the sales of tangible merchandise made through the advertisements on its website and Company A is not a marketplace facilitator for purposes of those sales.

Example 3: The facts are the same as in example 2, except that Company A offers an email relay service to sellers that advertise on its website whereby Company A provides a fabricated email address to both the buyer and seller to mask their personal email addresses. The provision of such an email relay service does not constitute participation in the sale of the tangible merchandise advertised for sale on its website beyond advertising the merchandise for sale and referring the purchaser to the seller to complete the sale. Therefore, Company A is not facilitating the sales of tangible merchandise made through the advertisements on its website and Company A is not a marketplace facilitator for purposes of those sales.

Example 4: The facts are the same as in example 2, except that Company A also contracts to provide payment processing services to sellers that advertise on its website to make it easier for them to sell their merchandise through the website. Therefore, Company A is facilitating the sales of the tangible merchandise made through the advertisements on its website and Company A is a marketplace facilitator for purposes of those sales.

(b) Registration Requirements for Marketplace Facilitators and Marketplace Sellers.

(1) 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 with the Department for a seller's permit or Certificate of Registration – Use Tax, in addition to each sale for which the marketplace facilitator is the seller or retailer or both under chapter 1 (commencing with Section 6001) of part 1 of division 2 of the Revenue and Taxation Code. Also, on and after October 1, 2019, for purposes of determining whether a marketplace facilitator is a retailer 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 Revenue and Taxation Code section 6203, subdivision (c)(4), the marketplace facilitator shall include all sales of tangible personal property for delivery in this state, including sales made on its own behalf and by all related persons and sales facilitated on behalf of marketplace sellers.

Example 5: Company A is a marketplace facilitator with no physical presence in California. Company A did not make or facilitate any sales of tangible merchandise for delivery in California during 2018. From January 1, 2019, to September 30, 2019, Company A sold \$300,000 of tangible merchandise for delivery in California on its own behalf and facilitated sales of \$250,000 of tangible merchandise for delivery in California through its marketplace

for Seller A, a marketplace seller. Since the total combined sales of tangible merchandise for delivery in California exceeded the \$500,000 threshold in Revenue and Taxation Code section 6203, subdivision (c)(4), during 2019 and prior to October 1, 2019, Company A is a retailer engaged in business in this state on October 1, 2019, and must register with the Department for a Certificate of Registration – Use Tax, and collect and remit use tax beginning October 1, 2019.

(2) On and after October 1, 2019, a marketplace seller shall register with the Department for a seller's permit or Certificate of Registration – Use Tax, as required, for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator. 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 this regulation. On and after October 1, 2019, a marketplace seller is not required to register with the Department for a Certificate of Registration – Use Tax 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 this regulation. Also, on and after October 1, 2019, for purposes of determining whether a marketplace seller is a retailer 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 Revenue and Taxation Code section 6203, subdivision (c)(4), the marketplace seller shall 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.

Example 6: Seller A is a marketplace seller that has no physical presence in California. Seller A did not make more than \$500,000 in sales of tangible merchandise for delivery in California during 2018, and from January 1, 2019, to September 30, 2019, Seller A made \$200,000 in sales of tangible merchandise for delivery in California that were facilitated through a marketplace facilitator's marketplace and made \$299,500 in sales of tangible merchandise for delivery in California through its own website. Therefore, on October 1, 2019, Seller A is not a retailer engaged in business in this state and is not required to be registered with the Department. However, on October 2, 2019, Seller A made a \$900 sale of tangible merchandise for delivery in California through its website that when combined with its other sales exceeded the \$500,000 threshold in Revenue and Taxation Code section 6203, subdivision (c)(4). Therefore, Seller A is a retailer engaged in business in this state and required to register with the Department for a Certificate of Registration – Use Tax immediately after the \$900 sale on October 2, 2019. Also, Seller A is required to collect and remit use tax on its subsequent retail sales to California customers, except for its retail sales facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales pursuant to subdivision (c) of this regulation.

Example 7: Seller B is a marketplace seller that leases spaces in a California warehouse where it stores some of its inventory and fulfills some of its orders. However, on and after October 1, 2019, Seller B will only make sales of tangible merchandise in California or for delivery in California that are facilitated by Company C, a marketplace facilitator who will be the seller and retailer for purposes of those sales pursuant to subdivision (c) of this

regulation. Therefore, on and after October 1, 2019, Seller B will not be the retailer responsible for paying sales tax or collecting and remitting use tax on its sales in California or for delivery in California and Seller B will not be required to be registered with the Department for a seller's permit or Certificate of Registration – Use Tax on and after October 1, 2019.

(c) When a Marketplace Facilitator is the Seller and Retailer.

A marketplace facilitator that is registered with the Department or required to register with the Department for a seller's permit or Certificate of Registration – Use Tax and 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. Therefore, the marketplace facilitator is the retailer 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 Revenue and Taxation Code section 6046.

Example 8: Company A is a marketplace facilitator that is currently registered for a seller's permit with the Department. Company A enters into an agreement with Company B, a third-party retailer and marketplace seller, to facilitate sales of Company B's tangible merchandise through Company A's marketplace. Company B provides Company A with sufficient information for Company A to determine the correct amount of tax due on the retail sales of Company B's merchandise for delivery in California. Therefore, when Company A facilitates a retail sale of Company B's tangible merchandise for delivery in California through its marketplace on or after October 1, 2019, Company A is the retailer selling or making the sale of the merchandise sold for delivery in California and the retailer responsible for paying sales tax or collecting and remitting use tax on that sale, and Company B is not the retailer responsible for paying sales tax or collecting and remitting use tax on that sale.

Example 9: The facts are the same as in example 7, except that Company A is not registered or required to be registered with the Department for a seller's permit or Certificate of Registration – Use Tax on October 1, 2019, because it does not have a physical presence in California, it did not make any sales for delivery in California during 2018, and it only made or facilitated \$250,000 in total combined sales of tangible merchandise for delivery in California from January 1, 2019, through September 30, 2019. Also, Company B is required to be registered with the Department for a Certificate of Registration – Use Tax on October 1, 2019, because it made \$550,000 in sales of merchandise for delivery in California from January 1, 2019, through September 30, 2019, and it makes sales for storage, use or other consumption in California that are not facilitated through a registered marketplace facilitator. Therefore, when Company A facilitates a sale of Company B's merchandise through its marketplace on October 1, 2019, Company B is the retailer selling or making the sale of the merchandise and the retailer responsible for collecting and remitting use tax on that sale, and Company A is not the retailer responsible for collecting and remitting use tax on that sale.

(d) Election.

(1) A delivery network company that meets the definition of marketplace facilitator in subdivision (a) of this regulation may elect to be deemed a marketplace facilitator.

(2) To be deemed 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 in effect.

(3) 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.

(4) 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 in effect 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.

Note: Authority cited: Section 7051, Revenue and Taxation Code; Section 7, subdivision (b), Statutes 2019, chapter 5 (Assem. Bill No. 147). Reference: Sections 6041, 6041.1, 6041.5, 6042, 6043, 6044, 6045, 6046, 6051, 6201, 6203, 6204, and 6226, Revenue and Taxation Code.