

File No. 190883

Committee Item No. 7  
Board Item No. 15

### COMMITTEE/BOARD OF SUPERVISORS

#### AGENDA PACKET CONTENTS LIST

Committee: Budget & Finance Committee

Date September 18, 2019

Board of Supervisors Meeting

Date September 24, 2019

#### Cmte Board

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| <input type="checkbox"/>            | <input type="checkbox"/>            | Motion                                       |
| <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | Resolution                                   |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Ordinance                                    |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Legislative Digest                           |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Budget and Legislative Analyst Report        |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Youth Commission Report                      |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Introduction Form                            |
| <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | Department/Agency Cover Letter and/or Report |
| <input type="checkbox"/>            | <input type="checkbox"/>            | MOU  |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Grant Information Form                       |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Grant Budget                                 |
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OTHER (Use back side if additional space is needed)

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| <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | <u>Assembly Bill No. 147</u> |
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Completed by: Linda Wong Date September 13, 2019  
Completed by: Linda Wong Date September 18, 2019

1 [Office of the Treasurer & Tax Collector to Examine Confidential California Department of Tax  
2 and Fee Administration Records]

3 **Resolution authorizing officers and employees of the Office of the Treasurer & Tax**  
4 **Collector of the City and County of San Francisco to examine sales or transactions**  
5 **and use tax records of the California Department of Tax and Fee Administration,**  
6 **pursuant to California Revenue and Taxation Code, Section 7056.**

7  
8 WHEREAS, On June 21, 2018, in South Dakota v. Wayfair, Inc., the United States  
9 Supreme Court upheld the South Dakota law that requires remote sellers that do not have a  
10 physical presence in that state to collect sales tax on all sales into South Dakota based on  
11 the seller's level of economic activity in the state; and

12 WHEREAS, Proposition D was approved by the voters of the City and County of San  
13 Francisco on November 6, 2018, and became operative as of January 1, 2019; and

14 WHEREAS, Proposition D defined "engaging in business within the city" and  
15 expanded the conditions that subject a person to certain business taxes by including  
16 persons with more than \$500,000 in annual gross receipts in the City; and

17 WHEREAS, California State Assembly Bill No. 147 (Burke) specifies that, on and after  
18 April 1, 2019, a retailer engaged in business in this state includes any retailer that has total  
19 combined sales of in this state that exceed \$500,000; and

20 WHEREAS, California State Assembly Bill No. 147 was approved by the Governor on  
21 April 25, 2019, and

22 WHEREAS, Sales and transaction use data would aid the Office of the Treasurer &  
23 Tax Collector in compliance efforts for collecting certain business taxes; and

24 WHEREAS, California Revenue and Taxation Code, Section 7056, allows the  
25 governing body of a city and county by resolution to authorize designated officers and

1 employees to examine confidential sales or transactions and use tax records of the  
2 California Department of Tax and Fee Administration ("CDTFA"); now, therefore, be it

3       RESOLVED, That the following officers and employees of the City and County of San  
4 Francisco are authorized to examine sales or transactions and use tax records of the  
5 California Department of Tax and Fee Administration:

6       -- All officers and employees of the Office of the Treasurer & Tax Collector

7       FURTHER RESOLVED, That information obtained by examination of said California  
8 Department of Tax and Fee Administration records shall be used only for purposes related to  
9 the collection of City and County sales or transactions and use taxes, and for purposes of  
10 collecting and administering the City and County of San Francisco's taxes and fees; and be  
11 it

12       FURTHER RESOLVED, That the Clerk of the Board of Supervisors shall transmit a  
13 certified copy of this Resolution and send a fax or a portable document format (pdf) via e-  
14 email of the Resolution to:

15  
16       California Department of Tax and Fee Administration  
17       P.O. Box 942879  
18       Sacramento, CA 94279-0027  
19       Attn: Donna Puchalski, Business Taxes Specialist  
20       Donna.Puchalski@cdtfa.ca.gov  
21       Fax: (916) 324-8117  
22  
23  
24  
25



## Assembly Bill No. 147

### CHAPTER 5

An act to amend Section 7262 of, to amend, repeal, and add Section 6203 of, to add Section 6203.1 to, and to add Chapter 1.7 (commencing with Section 6040) to Part 1 of Division 2 of, the Revenue and Taxation Code, relating to taxation, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor April 25, 2019. Filed with Secretary of State April 25, 2019.]

#### LEGISLATIVE COUNSEL'S DIGEST

AB 147, Burke. Use taxes: collection: retailer engaged in business in this state: marketplace facilitators.

Existing state sales and use tax laws impose a tax on retailers measured by the gross receipts from the sale of tangible personal property sold at retail in this state or on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer for storage, use, or other consumption in this state.

The Sales and Use Tax Law requires every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not otherwise exempt, at the time of making the sales or at the time the storage, use, or other consumption becomes taxable, to collect the tax from the purchaser, file a return, and remit the tax to the California Department of Tax and Fee Administration. That law defines a retailer engaged in business in this state to mean any retailer that has substantial nexus with this state for purposes of the commerce clause of the United States Constitution and any retailer upon whom federal law permits this state to impose a use tax collection duty.

This bill would specify that, on and after April 1, 2019, a retailer engaged in business in this state includes any retailer that, in the preceding calendar year or the current calendar year, has total combined sales of tangible personal property for delivery in this state by the retailer and all persons related to the retailer that exceed \$500,000. The bill would allow the department to grant relief to certain retailers engaged in business in this state for specified interest or penalties imposed on use tax liabilities due and payable for tax reporting periods beginning April 1, 2019 and ending December 31, 2022.

The Sales and Use Tax Law specifically includes as a retailer engaged in business in this state, among others, (1) any retailer that is a member of a commonly controlled group and is a member of a combined reporting group that includes another member of the retailer's commonly controlled group that, pursuant to an agreement with or in cooperation with the retailer,

performs services in this state in connection with tangible personal property to be sold by the retailer and (2) any retailer entering into agreements under which persons in this state, for a commission or other consideration, directly or indirectly refer potential purchasers of tangible personal property to the retailer, whether by an internet-based link or an internet website, or otherwise, provided that the retailer meets specified total cumulative sales thresholds including that the retailer has, during the preceding 12 months, total cumulative sales in this state of tangible personal property in excess of \$1,000,000.

This bill would eliminate, on April 1, 2019, the specific inclusion of those retailers as a retailer engaged in business in this state.

The Sales and Use Tax Law requires every person desiring to engage in or conduct business as a seller within this state to file with the department an application for a permit for each place of business and requires every retailer selling tangible personal property for storage, use, or other consumption in this state to register with the department.

This bill, on and after October 1, 2019, would provide that a marketplace facilitator, as defined, is considered the seller and retailer for each sale facilitated through its marketplace, as defined, for purposes of determining whether that marketplace facilitator is required to register with the department under the Sales and Use Tax Law. The bill would provide that any marketplace facilitator that is registered or required to register with the department under the Sales and Use Tax law and who facilitates a retail sale of tangible personal property by a marketplace seller, as defined, is the retailer selling or making the sale of the tangible personal property sold through its marketplace for purposes of paying any sales taxes and collecting any use taxes. The bill, 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, would require the marketplace facilitator to include all sales made on its own behalf and by all related persons and sales facilitated on behalf of marketplace sellers. The bill would provide a marketplace facilitator relief from liability for the tax on a retail sale in specified circumstances.

The Bradley-Burns Uniform Local Sales and Use Tax Law authorizes counties and cities to impose local sales and use taxes in conformity with the Sales and Use Tax Law, and other existing laws authorize districts, as specified, to impose transactions and use taxes in accordance with the Transactions and Use Tax Law, which generally conforms to the Sales and Use Tax Law.

In conformity with the Sales and Use Tax Law, existing local use tax ordinances adopted pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law require a retailer engaged in business in this state for purposes of the Sales and Use Tax Law to also collect a use tax adopted pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law. In modified conformity with the Sales and Use Tax Law, existing use district tax ordinances adopted in accordance with the Transactions and Use Tax Law generally require a retailer to collect a use tax adopted pursuant to the

Transactions and Use Tax Law only if the retailer is engaged in business in that district.

The changes made to the Sales and Use Tax Law by this bill, by conformity, would be automatically incorporated into local use taxes ordinances adopted pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law. This bill would require districts that impose district use taxes in accordance with the Transactions and Use Tax Law to include a provision, to be operative on April 1, 2019, that provides that a retailer engaged in business in the district includes any retailer that, in the preceding calendar year or the current calendar year, has total combined sales of tangible personal property in the state or for delivery in the state by the retailer and all persons related to the retailer that exceeds \$500,000, thereby requiring those retailers to collect those district use taxes.

This bill would declare that it is to take effect immediately as an urgency statute.

*The people of the State of California do enact as follows:*

SECTION 1. The Legislature hereby finds and declares all of the following:

(a) On June 21, 2018, in *South Dakota v. Wayfair, Inc.* (2018) 585 U.S. \_\_\_\_ (hereafter *Wayfair*), the United States Supreme Court upheld SDCL Chapter 10-64, the South Dakota law that requires remote sellers that do not have a physical presence in that state to collect sales tax on all sales into South Dakota based on the seller's level of economic activity in the state.

(b) SDCL Chapter 10-64-2 provides, in part, that remote sellers with no physical presence in South Dakota are required to collect and remit sales tax and follow all procedures of the law, as if they have a presence in the state, if they meet one of two criteria in the previous calendar year or the current calendar year: (1) the remote seller's gross revenue from the sale of tangible personal property, any products transferred electronically, or services delivered into South Dakota exceeds \$100,000; or (2) the remote seller has sold tangible personal property, any products transferred electronically, or services for delivery into South Dakota in 200 or more separate transactions.

(c) *Wayfair* overturned longstanding United States Supreme Court precedent, established in *Quill Corp. v. North Dakota*, (1992) 504 U.S. 298, which precluded states from imposing an obligation to collect sales or use tax on a seller unless the seller had a physical presence in the state.

(d) Current California law has a "long-arm" provision that imposes a duty to collect use tax on any retailer that has substantial nexus with this state for the purposes of the commerce clause of the United States Constitution and any retailer upon whom federal law permits this state to impose a use tax collection duty.

(e) In *Wayfair*, the Court found that South Dakota did not violate the commerce clause of the United States Constitution by imposing a sales tax

collection duty on sellers whose economic activity in the state satisfies the sales thresholds in SDCL Chapter 10-64-2.

(f) It is the intent of the Legislature by enacting this act to modernize California law consistent with the holding of *Wayfair*, which allows this state to impose a use tax collection duty on retailers who have specified levels of economic activity in this state, even though they do not have a physical presence in this state. It is also the intent of the Legislature to ensure that small businesses are not unduly burdened by the expansion of the duty to collect use tax.

(g) The provisions of this act are intended to protect small businesses by modifying existing law to: (1) increase the level of economic activity a retailer must have in California for the state to impose a use tax collection obligation on the retailer; (2) define the term “retailer” to include marketplace facilitators and require marketplace facilitators that meet the higher economic activity threshold to collect and remit the use tax on behalf of their marketplace sellers; and (3) alleviate the burden of tracking economic activity in each individual district that imposes a district tax.

SEC. 2. Chapter 1.7 (commencing with Section 6040) is added to Part 1 of Division 2 of the Revenue and Taxation Code, to read:

#### CHAPTER 1.7. MARKETPLACE FACILITATOR ACT

##### Article 1. General Provisions and Definitions

6040. This chapter shall be known as and referred to as the Marketplace Facilitator Act.

6041. For purposes of this chapter, the following definitions shall apply:

(a) “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.

(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.

(c) "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 tax imposed pursuant to Chapter 3 (commencing with Section 6201), had the sale not been made through that marketplace.

6041.1. Newspapers, internet websites, and other entities that advertise tangible personal property for sale, that do not transmit or otherwise communicate the offer and acceptance for the sale of tangible personal property between the seller and purchaser, and do not process payments directly or indirectly through third parties for the tangible personal property sold, are not facilitating a sale under this chapter.

6041.2. For purposes of this chapter, a person is related to another person if both persons are related to each other pursuant to Section 267(b) of Title 26 of the United States Code and the regulations thereunder.

6041.5. (a) Notwithstanding Section 6041, a person that is a delivery network company is not a marketplace facilitator for purposes of this chapter.

(b) For purposes of this section, all of the following definitions shall apply:

(1) "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.

(2) "Delivery network courier" means an individual who provides delivery services through a delivery network company internet website or mobile application using a personal means of transportation, such as a passenger vehicle, as defined in Section 465 of the Vehicle Code, bicycle, scooter, or other similar means of transportation, using public transportation, or walking.

(3) "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.

(4) "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.

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

#### Article 2. Registration and Collection

6042. 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 under Chapter 2 (commencing with Section 6051) or Chapter 3 (commencing with Section 6201), in addition to each sale for which the marketplace facilitator is the seller or retailer or both under Chapter 1 (commencing with Section 6001).

6043. A marketplace facilitator that is registered with the department or required to register with the department under Chapter 2 (commencing with Section 6051) or Chapter 3 (commencing with Section 6201) and that facilitates a retail sale of tangible personal property by a marketplace seller is the retailer selling or making the sale of the tangible personal property sold through its marketplace for purposes of this part.

6044. For purposes of determining the total combined sales of tangible personal property for delivery in this state pursuant to Section 6203:

(a) A 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.

(b) A 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.

6045. A marketplace seller shall register with the department under Chapter 2 (commencing with Section 6051) or Chapter 3 (commencing with Section 6201), as required, for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator.

#### Article 3. Marketplace Facilitator Relief

6046. 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 an unrelated marketplace seller about a retail sale and that the failure to remit the correct amount of tax imposed under this part was due to incorrect or incomplete information provided to the marketplace facilitator by the unrelated marketplace seller, then the marketplace facilitator shall be relieved of liability for the tax for that retail sale. This section does not apply with regard to a retail sale for

which the marketplace facilitator is the retailer selling or making the sale of the tangible personal property on its own behalf or if the marketplace facilitator and marketplace seller are related. Where a marketplace facilitator is relieved of liability for the tax on a retail sale under this section, the marketplace seller is the retailer for that retail sale.

6047. (a) A marketplace facilitator shall be relieved of the tax on retail sales facilitated through its marketplace as provided in subdivision (c) if the marketplace facilitator demonstrates to the satisfaction of the department all of the following:

(1) The retail sales were facilitated for a marketplace seller prior to January 1, 2023, through a marketplace of the marketplace facilitator.

(2) The marketplace facilitator is not the marketplace seller.

(3) The marketplace facilitator and the marketplace seller are not related.

(4) The failure to collect sales and use tax was due to a good faith error other than an error in sourcing the sale pursuant to the Transactions and Use Tax Law (Part 1:6 (commencing with Section 7251)).

(b) To the extent that a marketplace facilitator is relieved of liability for collection of sales and use tax under this section, the marketplace seller for whom the marketplace facilitator has facilitated the retail sale is also relieved of liability, unless the marketplace seller is the retailer for those retail sales pursuant to Section 6046. The department may determine the manner in which a marketplace facilitator or marketplace seller shall claim the liability relief provided in this section.

(c) The liability relief provided under this section shall not exceed the following percentage of the total sales and use tax due on sales facilitated by a marketplace facilitator for marketplace sellers, which sales shall not include sales by the marketplace facilitator or persons related to the marketplace facilitators:

(1) For sales facilitated during the fourth quarter of 2019 or during the 2020 calendar year, 7 percent.

(2) For sales facilitated during the 2021 calendar year, 5 percent.

(3) For sales facilitated during the 2022 calendar year, 3 percent.

(d) Nothing in this section shall be construed to relieve any person of liability for collecting but failing to remit to the department sales and use tax.

#### Article 4. Operative Date

6049.5. (a) This chapter shall become operative on October 1, 2019.

(b) The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 3. Section 6203 of the Revenue and Taxation Code, as added by Section 3 of Chapter 313 of the Statutes of 2011, is amended to read:

6203. (a) Except as provided by Sections 6292 and 6293, every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapter 3.5 (commencing with Section 6271) or Chapter 4 (commencing with Section 6351), shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the department.

(b) As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

(c) "Retailer engaged in business in this state" as used in this section and Section 6202 means any retailer that has substantial nexus with this state for purposes of the commerce clause of the United States Constitution and any retailer upon whom federal law permits this state to impose a use tax collection duty. "Retailer engaged in business in this state" specifically includes, but is not limited to, any of the following:

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

(2) Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property.

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

(4) (A) Any retailer that, in the preceding calendar year or the current calendar year, has total combined sales of tangible personal property for delivery in this state by the retailer and all persons related to the retailer that exceed five hundred thousand dollars (\$500,000).

(B) For purposes of this section, 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.

(d) Except as provided in this subdivision, a retailer is not a "retailer engaged in business in this state" under paragraph (2) of subdivision (c) if that retailer's sole physical presence in this state is to engage in convention and trade show activities as described in Section 513(d)(3)(A) of the Internal Revenue Code, and if the retailer, including any of the retailer's representatives, agents, salespersons, canvassers, independent contractors, or solicitors, does not engage in those convention and trade show activities for more than 15 days, in whole or in part, in this state during any 12-month period and did not derive more than one hundred thousand dollars (\$100,000) of net income from those activities in this state during the prior calendar

year. Notwithstanding the preceding sentence, a retailer engaging in convention and trade show activities, as described in Section 513(d)(3)(A) of the Internal Revenue Code, is a “retailer engaged in business in this state,” and is liable for collection of the applicable use tax, with respect to any sale of tangible personal property occurring at the convention and trade show activities and with respect to any sale of tangible personal property made pursuant to an order taken at or during those convention and trade show activities.

(e) Any limitations created by this section upon the definition of “retailer engaged in business in this state” shall only apply for purposes of tax liability under this code. Nothing in this section is intended to affect or limit, in any way, civil liability or jurisdiction under Section 410.10 of the Code of Civil Procedure.

(f) (1) The amendments made to this section by the act adding this subdivision shall become operative on April 1, 2019.

(2) If the amendments made to this section by the act adding this subdivision are held in a final decision of a court of competent jurisdiction to violate the substantial nexus standard of the commerce clause of the United States Constitution, this section shall become inoperative and shall be repealed on the date of that final decision.

SEC. 4. Section 6203 is added to the Revenue and Taxation Code, to read:

6203. (a) Except as provided by Sections 6292 and 6293, every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapter 3.5 (commencing with Section 6271) or Chapter 4 (commencing with Section 6351), shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the department.

(b) As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

(c) “Retailer engaged in business in this state” as used in this section and Section 6202 means any retailer that has substantial nexus with this state for purposes of the commerce clause of the United States Constitution and any retailer upon whom federal law permits this state to impose a use tax collection duty. “Retailer engaged in business in this state” specifically includes, but is not limited to, any of the following:

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

(2) Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority

of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property.

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

(4) Any retailer that is a member of a commonly controlled group, as defined in Section 25105, and is a member of a combined reporting group, as defined in paragraph (3) of subdivision (b) of Section 25106.5 of Title 18 of the California Code of Regulations, that includes another member of the retailer's commonly controlled group that, pursuant to an agreement with or in cooperation with the retailer, performs services in this state in connection with tangible personal property to be sold by the retailer, including, but not limited to, design and development of tangible personal property sold by the retailer, or the solicitation of sales of tangible personal property on behalf of the retailer.

(5) (A) Any retailer entering into an agreement or agreements under which a person or persons in this state, for a commission or other consideration, directly or indirectly refer potential purchasers of tangible personal property to the retailer, whether by an internet-based link or an internet website, or otherwise, provided that both of the following conditions are met:

(i) The total cumulative sales price from all of the retailer's sales, within the preceding 12 months, of tangible personal property to purchasers in this state that are referred pursuant to all of those agreements with a person or persons in this state, is in excess of ten thousand dollars (\$10,000).

(ii) The retailer, within the preceding 12 months, has total cumulative sales of tangible personal property to purchasers in this state in excess of one million dollars (\$1,000,000).

(B) An agreement under which a retailer purchases advertisements from a person or persons in this state, to be delivered on television, radio, in print, on the internet, or by any other medium, is not an agreement described in subparagraph (A), unless the advertisement revenue paid to the person or persons in this state consists of commissions or other consideration that is based upon sales of tangible personal property.

(C) Notwithstanding subparagraph (B), an agreement under which a retailer engages a person in this state to place an advertisement on an internet website operated by that person, or operated by another person in this state, is not an agreement described in subparagraph (A), unless the person entering the agreement with the retailer also directly or indirectly solicits potential customers in this state through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation specifically targeted at potential customers in this state.

(D) For purposes of this paragraph, "retailer" includes an entity affiliated with a retailer within the meaning of Section 1504 of the Internal Revenue Code.

(E) This paragraph shall not apply if the retailer can demonstrate that the person in this state with whom the retailer has an agreement did not engage in referrals in the state on behalf of the retailer that would satisfy the requirements of the commerce clause of the United States Constitution.

(d) Except as provided in this subdivision, a retailer is not a “retailer engaged in business in this state” under paragraph (2) of subdivision (c) if that retailer’s sole physical presence in this state is to engage in convention and trade show activities as described in Section 513(d)(3)(A) of the Internal Revenue Code, and if the retailer, including any of the retailer’s representatives, agents, salespersons, canvassers, independent contractors, or solicitors, does not engage in those convention and trade show activities for more than 15 days, in whole or in part, in this state during any 12-month period and did not derive more than one hundred thousand dollars (\$100,000) of net income from those activities in this state during the prior calendar year. Notwithstanding the preceding sentence, a retailer engaging in convention and trade show activities, as described in Section 513(d)(3)(A) of the Internal Revenue Code, is a “retailer engaged in business in this state,” and is liable for collection of the applicable use tax, with respect to any sale of tangible personal property occurring at the convention and trade show activities and with respect to any sale of tangible personal property made pursuant to an order taken at or during those convention and trade show activities.

(e) Any limitations created by this section upon the definition of “retailer engaged in business in this state” shall only apply for purposes of tax liability under this code. Nothing in this section is intended to affect or limit, in any way, civil liability or jurisdiction under Section 410.10 of the Code of Civil Procedure.

(f) If the amendments to Section 6203, as added by Section 3 of Chapter 313 of the Statutes of 2011, made by the act adding this section are held in a final decision of a court of competent jurisdiction to violate the substantial nexus standard of the commerce clause of the United States Constitution, this section shall become operative on the date of that final decision.

SEC. 5. Section 6203.1 is added to the Revenue and Taxation Code, to read:

6203.1. (a) The department, in its discretion, may relieve a retailer engaged in business in this state that meets the requirements of subdivision (b) of the following:

- (1) The penalties provided by Sections 6484, 6511, and 6591.
- (2) All or any part of the interest imposed on the person by this part.

(b) This section shall apply to any retailer engaged in business in this state that meets all of the following conditions:

(1) The retailer registered under Article 2 (commencing with Section 6225) on or after April 1, 2019, as a retailer engaged in business pursuant to paragraph (4) of subdivision (c) of Section 6203.

(2) The total combined sales from the retailer and all persons related to the retailer, within the preceding 12 months, of tangible personal property

in this state or for delivery in this state does not exceed one million dollars (\$1,000,000).

(3) The retailer was not previously registered, or required to be registered, with the department under Chapter 2 (commencing with Section 6051) or Chapter 3 (commencing with Section 6201).

(4) The retailer's failure to collect and remit use tax was due to a good faith error and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect.

(5) The retailer is not a marketplace facilitator as defined in Section 6041.

(6) Any other factors as deemed necessary by the department.

(c) For purposes of this section, a person is related to another person if both persons are related to each other pursuant to Section 267(b) of Title 26 of the United States Code and the regulations thereunder.

(d) The department may grant relief only for interest or penalties imposed on use tax liabilities due and payable for tax reporting periods beginning April 1, 2019, and ending December 31, 2022.

SEC. 6. Section 7262 of the Revenue and Taxation Code is amended to read:

7262. The use tax portion of any transactions and use tax ordinance adopted under this part shall impose a complementary tax upon the storage, use, or other consumption in the district of tangible personal property purchased from any retailer for storage, use, or other consumption in the district. The tax shall be at a rate of one-eighth of 1 percent, or a multiple thereof, of the sales price of the property whose storage, use, or other consumption is subject to the tax, and the ordinance shall include provisions in substance as follows:

(a) Provisions identical to those contained in Part 1 (commencing with Section 6001), insofar as they relate to use taxes and are not inconsistent with this part, except that the name of the district as the taxing agency shall be substituted for that of the state. The name of the district shall be substituted for the word "state" in the phrase "retailer engaged in business in this state" in Section 6203 and in the definition of that phrase.

The following additional provisions shall be included:

(1) "A retailer engaged in business in the district" shall also include any retailer that, in the preceding calendar year or the current calendar year, has total combined sales of tangible personal property in this state or for delivery in the state by the retailer and all persons related to the retailer that exceeds five hundred thousand dollars (\$500,000). For purposes of this section, a person is related to another person if both persons are related to each other pursuant to Section 267(b) of Title 26 of the United States Code and the regulations thereunder.

(2) Except as provided in paragraph (3), a retailer engaged in business in the district shall not be required to collect use tax from the purchaser of tangible personal property, unless the retailer ships or delivers the property into the district or participates within the district in making the sale of the property, including, but not limited to, soliciting or receiving the order, either directly or indirectly, at a place of business of the retailer in the district

or through any representative, agent, canvasser, solicitor, subsidiary, or person in the district under the authority of the retailer.

(3) "A retailer engaged in business in the district" shall also include any retailer of any of the following: vehicles subject to registration pursuant to Chapter 1 (commencing with Section 4000) of Division 3 of the Vehicle Code, aircraft licensed in compliance with Section 21411 of the Public Utilities Code, or undocumented vessels registered under Division 3.5 (commencing with Section 9840) of the Vehicle Code. That retailer shall be required to collect use tax from any purchaser who registers or licenses the vehicle, vessel, or aircraft at an address in the district.

(b) A provision that all amendments to the provisions of Part 1 (commencing with Section 6001) relating to the use tax and not inconsistent with this part shall automatically become a part of the ordinance. However, no amendment shall operate so as to affect the rate of tax imposed by the district's board.

(c) A provision that the amount subject to tax shall not include the amount of any sales tax or use tax imposed by the State of California or by any city, city and county, or county pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law (Part 1.5 (commencing with Section 7200)) or the amount of any state-administered transactions or use tax.

(d) A provision that any person subject to a use tax under an ordinance adopted pursuant to this part shall be entitled to credit against that tax or any transactions tax, or to reimbursement for a transactions tax, paid to a district or retailer in a district imposing a transactions and use tax pursuant to this part.

(e) A provision that, in addition to the exemptions provided in Sections 6366 and 6366.1, the storage, use, or other consumption of tangible personal property, other than fuel or petroleum products, purchased by operators of aircraft, and used or consumed by the operators directly and exclusively in the use of the aircraft as common carriers of persons or property for hire or compensation under a certificate of public convenience and necessity issued pursuant to the laws of this state, the United States, or any foreign government, is exempt from the use tax.

(f) A provision that the storage, use, or other consumption in the district of tangible personal property is exempt from the tax if the purchaser is obligated to purchase the property for a fixed price pursuant to a contract entered into prior to the operative date of the ordinance. The possession of, or the exercise of any right or power over, tangible personal property under a lease which is a continuing purchase of the property is exempt from tax for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to the operative date of the ordinance. For purposes of this subdivision, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.

(g) Any provision in an ordinance that is required to be included pursuant to paragraph (1) of subdivision (a) shall become operative on April 1, 2019.

SEC. 7. (a) The Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code) shall not apply to any guidelines, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600 of the Government Code, established or issued by the California Department of Tax and Fee Administration before January 1, 2021, to implement, interpret, or make specific the amendments made to Sections 6203 and 7262 of the Revenue and Taxation Code by this act. This subdivision shall not apply to any new regulation or amendment to an existing regulation as defined in Section 11342.600 of the Government Code established or issued on or after January 1, 2021.

(b) Implementation of Chapter 1.7 (commencing with Section 6040) of Part 1 of Division 2 of the Revenue and Taxation Code and Section 6203.1 of the Revenue and Taxation Code, as both proposed to be added by this act, 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 California Department of Tax and Fee Administration 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 (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). Notwithstanding any other law, the emergency regulations adopted by the California Department of Tax and Fee Administration may remain in effect for two years from the date of adoption.

SEC. 8. The amendments made to Sections 6203 and 7262 of the Revenue and Taxation Code by this act shall not have any retroactive effect.

SEC. 9. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure that small businesses are not unduly burdened by the default expansion of the duty to collect use tax under state law due to the application of the holding in *South Dakota v. Wayfair, Inc.*, (2018) 585 U.S. \_\_\_ and to ensure that the state and local governments timely receive tax revenues that have been previously undercollected to enable them to fund crucial programs and services, it is necessary for this act to take effect immediately.

Office of the Treasurer & Tax Collector  
City and County of San Francisco



José Cisneros, Treasurer

July 29, 2019

Angela Calvillo, Clerk of the Board  
Board of Supervisors  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco, CA 94102-4689

Dear Ms. Calvillo:

Attached please find an original single-sided and two single-sided, black and white copies of the proposed resolution for Board of Supervisors approval, which authorizes the Office of the Treasurer & Tax to Examine Confidential California Department of Tax and Fee Administration Records.

Thank you,

Amanda Fried  
Chief of Policy and Communications  
(415) 554-0889  
[Amanda.Fried@sfgov.org](mailto:Amanda.Fried@sfgov.org)

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