



CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION

TAX POLICY BUREAU

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www.cdtfa.ca.govGAVIN NEWSOM
GovernorNICOLAS MADUROS
Director

October 4, 2019

Dear Interested Party:

Enclosed is the Discussion Paper on proposed Regulation 1684.5, Marketplace Sales. Staff would like to invite you to discuss the issue and present any additional suggestions or comments. Accordingly, an interested parties meeting is scheduled as follows:

October 15, 2019
Room 121 at 10:00 a.m.
450 N Street, Sacramento, CA

The event will be webcast for those unable to attend in person. The webcast will be available on our website: www.cdtfa.ca.gov. During and after the webcast, you may submit comments or questions via email to BTFD-BTC.InformationRequests@cdtfa.ca.gov. You are also welcome to submit your comments to me at the address or fax number in this letterhead or via email at Trista.Gonzalez@cdtfa.ca.gov by October 30, 2019. You should submit written comments including proposed language if you have suggestions you would like considered during this process. Copies of the materials you submit may be provided to other interested parties, therefore, ensure your comments do not contain confidential information. Please feel free to publish this information on your website or distribute it to others that may be interested in attending the meeting or presenting their comments.

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

Thank you for your consideration. Staff looks forward to your comments and suggestions. Should you have any questions, please feel free to contact Business Taxes Committee staff member Robert Wilke at 1-916-445-2137, who will be leading the meeting.

Sincerely,

A handwritten signature in black ink that reads "Trista Gonzalez".

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

TG:rsw

Enclosures

cc: (all with enclosures)

Mr. Nicolas Maduros (MIC 104)
Ms. Katie Hagen (MIC 104)
Mr. Robert Tucker (MIC 83)
Ms. Susanne Buehler (MIC 43)
Ms. Michele Pielsticker (MIC 105)
Mr. Jason Mallet (MIC 25)
Mr. Wayne Mashihara (MIC 47)
Mr. Bill Hain (MIC 70)
Mr. James Dahlen (MIC 57)
Ms. Debra Kalfsbeek (MIC 62)
Mr. Kevin Hanks (MIC 49)
Mr. Steven Mercer (MIC 25)
Ms. Ester Cabrera (MIC 23)
Mr. Jeff Vest (MIC 85)
Mr. Mike Loretta (MIC 100)
Ms. Pamela Bergin (MIC 82)
Mr. Bradley Heller (MIC 82)
Mr. Scott Claremon (MIC 82)
Mr. David Levine (MIC 85)
Ms. Dana Brown (MIC 85)
Ms. Casey Tichy (MIC 85)
Ms. Kirsten Stark (MIC 50)
Ms. Lynn Whitaker (MIC 50)
Mr. Gentian Droboniku (MIC 67)
Mr. Marc Alviso (MIC 104)
Ms. Claudette Yang (MIC 104)
Ms. Karina Magana (MIC 47)
Mr. Bradley Miller (MIC 92)
Mr. Michael Patno (MIC 50)
Mr. Robert Wilke (MIC 50)

INITIAL DISCUSSION PAPER

Regulation 1684.5, Marketplace Sales

Issue

Whether the California Department of Tax and Fee Administration (CDTFA) should propose to adopt Regulation 1684.5, Marketplace Sales, to implement, interpret, and make specific the Marketplace Facilitator Act codified in chapter 1.7 (commencing with section 6040) of part 1 of division 2 of the Revenue and Taxation Code (RTC).

Background

General

Under the California Sales and Use Tax Law (RTC, § 6001 et seq.), 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 is actually stored, used, or otherwise consumed in the state. Use tax applies to taxable purchases from retailers, whether, for example, the purchase is made by mail order, telephone, or internet 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 Regulation 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. Consumers remain liable for the use tax, unless they obtain a receipt from a retailer that is registered with the CDTFA. (RTC, § 6202.) 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 CDTFA (RTC, § 6226) and the CDTFA requires such retailers to register for a Certificate of Registration – Use Tax, unless they are also required to hold a seller's permit. Additionally, retailers who are not engaged in business in California may voluntarily apply for a Certificate of Registration – Use Tax. A holder of this certificate is required to collect use tax from purchasers, give receipts therefore, and pay the tax to the CDTFA in the same manner as a retailer engaged in business in California. (Reg. 1684, subd. (e).)

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*,

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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.

Also, prior to 2011, the operative provisions of RTC section 6203, subdivision (c)(1) through (3), provided that the term “retailer engaged in business in this state” means and includes the following three types of retailers: (1) “[a]ny 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) “[a]ny 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”; and (3) “[a]s respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.”

However, the definition of “retailer engaged in business in this state” in RTC section 6203, subdivision (c), was amended by Assembly Bill No. (AB) 155 (Stats. 2011, ch. 313) operative September 15, 2012. As relevant here, the amendments added a long-arm statute providing that the term “retailer engaged in business in this state” means “any retailer that has a substantial nexus with this state for purposes of the commerce clause of the United States Constitution.” The amendments further provided that the term “retailer engaged in business in this state” specifically includes, but is not limited to, the three types of retailers engaged in business in this state listed in subdivision (c)(1) through (3).

Regulation 1684 was also amended, operative September 15, 2012, to implement, interpret, and make specific the amendments to RTC section 6203 made by AB 155 in accordance with the physical presence requirement in *Quill*. As relevant here, the amendments incorporated the provisions of the long-arm statute into Regulation 1684, subdivision (b)(1). The amendments established a rebuttable presumption in Regulation 1684, subdivision (b)(2), that a retailer is engaged in business in this state if the retailer has any physical presence in California. The amendments clarified in Regulation 1684, subdivision (c)(1), that the term “retailer engaged in business in this state” includes the types of retailers listed in RTC section 6203, subdivision (c)(1) through (3), and also a retailer that “owns or leases real or tangible personal property, including, but not limited to, a computer server, in California.”

***Wayfair* Decision**

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

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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 No. 147 and Senate Bill No. 92

ECONOMIC NEXUS

On April 25, 2019, the Legislature enacted Assembly Bill No. (AB) 147 (Stats. 2019, ch. 5) in order to modernize California law to include economic nexus provisions that are consistent with the *Wayfair* decision and to add the Marketplace Facilitator Act. 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 [Internal Revenue Code section 267(b)] and the regulations thereunder.”

MARKETPLACE FACILITATOR ACT

AB 147 also added chapter 1.7 (commencing with section 6040) to part 1 of division 2 of the RTC, which is titled the Marketplace Facilitator Act (MFA), 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,” and “delivery network company.” (RTC, §§ 6040, 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 CDTFA for a seller’s permit under RTC section 6066 or for a Certificate of Registration – Use Tax under RTC section 6226. (RTC, § 6042.) The MFA also provides that any marketplace facilitator that is registered or required to be register with the CDTFA 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 and is required to pay any sales taxes and collect any use taxes due, not the marketplace seller. (RTC, § 6043.)

For purposes of determining whether a marketplace facilitator is 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 CDTFA for a seller’s permit under RTC section 6066 or for a Certificate of Registration – Use Tax under RTC section 6226, “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.)

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RELIEF

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 CDTFA 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).

SENATE BILL NO. 92

The MFA provides that a delivery network company is not a marketplace facilitator. On June 27, 2019, the Legislature enacted Senate Bill No. (SB) 92 (Stats. 2019, ch. 34), which 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 CDTFA. SB 92 also amended RTC section 6041.1 to provide that "Newspapers, internet websites, and other entities that advertise tangible personal property for sale, refer purchasers to the seller by telephone, internet link, or other similar means to complete the sale, and do not participate further in the sale are not facilitating a sale under [the MFA]."

Overview of the Marketplace Facilitator Act

GENERAL PROVISIONS AND DEFINITIONS

RTC section 6041 defines the following terms:

"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 California.

"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:

- Transmitting or otherwise communicating the offer or acceptance between the buyer and seller.
- Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together.

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- Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller.
- Software development or research and development activities related to any of the activities described in the following list, 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:

- Payment processing services.
- Fulfillment or storage services.
- Listing products for sale.
- Setting prices.
- Branding sales as those of the marketplace facilitator.
- Order taking.
- Providing customer service or accepting or assisting with returns or exchanges.

“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, of part 1 of division 2 of the RTC (commencing with RTC section 6201), had the sale not been made through that marketplace.

ADVERTISING

RTC section 6041.1 further clarifies what it means to “facilitate” a sale and provides 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].”

RELATED PERSON

RTC section 6041.2 specifies that for purposes of the MFA, “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.”

DELIVERY NETWORK COMPANY EXCEPTION

RTC section 6041.5, subdivision (a), specifies that notwithstanding section 6041, “a person that is a delivery network company is not a marketplace facilitator for purposes of [the MFA].” Section 6041.5, subdivision (b), provides the following definitions:

“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.

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“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.

“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.

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

RTC section 6041.5, subdivision (c), further provides that a delivery network company that meets the definition set forth in subdivision (b) “may elect, in a reasonable manner and duration prescribed by the [CDTFA], to be deemed a marketplace facilitator. The [CDTFA] shall adopt regulations that establish the criteria for obtaining and retaining an election to be a marketplace facilitator.”

Discussion

CDTFA staff believes there is the potential for confusion because the MFA contains undefined terms and as such, marketplace facilitators and marketplace sellers may have trouble understanding their new registration requirements. In addition, 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. The MFA also requires the CDTFA to adopt regulations that establish the criteria for a delivery network company to obtain and retain an election to be a marketplace facilitator. Therefore, CDTFA staff proposes 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 address these issues and implement, interpret, and make specific the provisions of the MFA discussed above. The proposed regulation defines terms used in the MFA and explains the registration requirements for marketplace facilitators and marketplace sellers on and after October 1, 2019. It also clarifies when a marketplace facilitator is the seller and retailer for purposes of the sale of tangible merchandise facilitated for a marketplace seller and provides procedures for a delivery network company to elect to be a marketplace facilitator. Regulation 1684.5 also includes examples illustrating how its provisions apply.

DEFINITIONS

Staff determined that it is necessary to include the definitions of the key terms used in the MFA in Regulation 1684.5 for ease of reference, so that the 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. As such, staff proposes to incorporate the statutory definitions of the following terms into proposed subdivision (a): marketplace, marketplace facilitator, marketplace seller, related person, delivery network company, delivery services, local merchant, and local product. Staff also proposes to clarify in proposed subdivision (a) that a delivery network company is not a marketplace facilitator, unless it makes an election to be deemed a marketplace facilitator pursuant to subdivision (d) of the regulation and that nothing precludes a delivery network company from being a retailer as defined in Revenue and Taxation Code section 6015.

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Staff also determined that it is necessary to clarify the applicable meaning of the undefined terms and phrases used within the statutory definition of marketplace facilitator with respect to the activities a person, or related person, is required to perform to be a marketplace facilitator. As such, staff is also proposing to define the following terms and phrases in subdivision (a): 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, staff proposes explaining in the definition of facilitate 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. Staff is proposing to include examples in the definition of facilitate to further illustrate the difference between merely advertising tangible merchandise for sale and facilitating a sale. Staff also proposes to clarify in the definition of virtual currency that, since virtual currency is not legal tender in any jurisdiction, if the consideration for a retail sale of tangible personal property is virtual currency, the measure of the tax would need to be determined pursuant to Regulation 1654, Barter, Exchange, “Trade-ins” and Foreign Currency Transactions. Staff believes that this 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, staff proposes incorporating the MFA’s new requirements for determining whether marketplace facilitators are engaged in business in this state under RTC section 6203, subdivision (c)(4). Staff also proposes guidance regarding whether a marketplace facilitator is required to register for a seller’s permit or Certificate of Registration – Use Tax. (See subdivision (b)(1) of Regulation 1684.5.) To further clarify these requirements, staff has included an example in subdivision (b)(1).

Similar to marketplace facilitators, staff believes it is important to include the MFA’s new requirements for marketplace sellers to register for a seller’s permit or Certificate of Registration – Use Tax, as required, for retail sales made on their own behalf and not facilitated through a registered marketplace facilitator into subdivision (b)(2) of Regulation 1684.5. Staff also incorporated the MFA’s new requirements for determining whether marketplace sellers are engaged in business in this state under RTC section 6203, subdivision (c)(4). (See subdivision (b)(2).) The proposed regulation also clarifies in subdivision (b)(2) that on and after October 1, 2019, a marketplace seller is not required to register with the CDTFA 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. Again, staff included an example in subdivision (b)(2) to clarify these requirements.

MARKETPLACE FACILITATOR AS SELLER AND RETAILER

The MFA’s provision providing that any marketplace facilitator that is registered or required to be

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register with the CDTFA and who 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 was incorporated into subdivision (c) of Regulation 1684.5. The proposed language explains in subdivision (c) that when a marketplace facilitator is the retailer for a sale of tangible merchandise under that provision, the marketplace facilitator is responsible for paying sales tax or collecting and remitting use tax on that sale and the marketplace seller is not the retailer responsible for paying sales tax or collecting and remitting use tax on that sale, unless the marketplace facilitator qualifies for relief from liability for the tax on that sale pursuant to Revenue and Taxation Code section 6046. Staff also proposes to include two examples in subdivision (c) to explain the added provision.

DELIVERY NETWORK COMPANY ELECTIONS

Finally, a delivery network company (also known as a DNC) 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 CDTFA. Therefore, staff determined that it is necessary to provide in subdivision (d) of 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 CDTFA while its election is effective. Subdivision (d) also provides that an election is effective at the beginning of the next reporting period starting after the date the election is received by the CDTFA and remains in effect until the beginning of the next reporting period starting after the date the CDTFA receives a written or electronic statement from the delivery network company that it is cancelling its election, which is signed by an authorized representative. Staff also proposes to clarify in subdivision (d) that a delivery network company that makes such an election and facilitates a retail sale of tangible personal property by a marketplace seller through its marketplace for delivery in California while its election is effective shall be the retailer selling or making the sale of the tangible personal property.

RELIEF

As previously noted, RTC sections 6046 and 6047 provide relief for marketplace facilitators under certain circumstances. Whether relief is warranted is based on the applicable facts and circumstances and should be determined on a case-by-case basis. As such, staff is not proposing any regulatory guidance with respect to the relief provisions.

Summary

Proposed Regulation 1684.5, Marketplace Sales, as provided in Exhibit 1, is intended to help businesses affected by the MFA understand and comply with their obligations to register, collect, and pay the applicable sales and use taxes. Staff looks forward to hearing the interested parties' thoughts regarding the proposed regulation as well as any additional issues that may warrant further consideration. The interested parties meeting is scheduled for October 15, 2019, and participation is encouraged. The deadline for interested parties to provide written responses regarding this discussion paper is October 30, 2019.

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

Current as of 10/1/2019

(A new regulation to be added to article 17 of chapter 4 of division 2 of title 18 of the California Code of Regulations.)

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 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 for consideration the sale of the marketplace seller's products through a marketplace operated by the person or a related person if the person agrees to do anything directly or indirectly, through one or more related persons, for a consideration that makes it easy or easier for the marketplace seller to sell its products through a marketplace operated by the person or a related person, including, but 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, 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 and is not a marketplace facilitator for purposes of the sales.

Example 2: Company A owns a website where third-party sellers offer to sell merchandise for delivery in California and Company A contracts to advertise tangible merchandise for sale by third-party sellers on its website for a fee. Sellers using Company A's advertising service are permitted to post the picture, description, and sales price of their merchandise on Company A's website and include their personal or business contact information, such as a phone number or email address, or a link to their website so Company A can refer purchasers to the sellers to complete sales. However, Company A does not take orders or provide payments processing or fulfillment services for sales of any merchandise advertised for sale on its website using its advertising service and does not otherwise participate further in the sale of any merchandise advertised for sale on its website using its advertising service.

Therefore, Company A is not facilitating the sale of any merchandise advertised for sale on its website using its advertising service and Company A is not a marketplace facilitator for purposes of the sale of any merchandise advertised for sale on its website using its advertising service.

Example 3: The facts are the same as in example 2, except that Company A offers an email relay service 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 beyond advertising the tangible merchandise for sale and referring the purchaser to the seller to complete the sale. Therefore, Company A is not facilitating the sale of any merchandise advertised for sale on its website using its advertising service and Company A is not a marketplace facilitator for purposes of the sale of any merchandise advertised for sale on its website using its advertising service.

Example 4: The facts are the same as in example 2, except that Company A also contracts to provide payment processing service to third-party sellers using its advertising service to make it easier for them to sell their merchandise through Company A's website. Therefore, Company A is facilitating the sale of the merchandise advertised for sale on its website using its advertising service and Company A will be a marketplace facilitator for purposes of the sale of tangible merchandise advertised for sale on its website using its advertising service.

(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, 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, for purposes of determining whether the marketplace facilitator is a retailer engaged in business in this state pursuant to Revenue and Taxation Code section 6203, subdivision (c)(4).

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 is only required to 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 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, for purposes of determining whether the marketplace seller is a retailer engaged in business in this state pursuant to Revenue and Taxation Code section 6203, subdivision (c)(4). Also, 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.

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 personal property 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 personal property for delivery in California through its website that 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.

(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 that 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 7: 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, and Company B provides Company A with sufficient information for Company A to determine the correct amount of tax due on retail sales of Company B's tangible 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 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 8: 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 effective.
- (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 effective shall be the retailer selling or making the sale of the tangible personal property.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6041, 6041.1, 6041.5, 6042, 6043, 6044, 6045, 6046, 6051, 6203, 6204, and 6226, Revenue and Taxation Code.