January 5, 2022

Dear Interested Party:

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

January 26, 2022

1 p.m.

(Virtually via Microsoft Teams)

You may join us on your computer or mobile app through Microsoft Teams or by calling 1-916-535-0987 and then entering the conference identification number 393 693 522. You are also welcome to submit your comments to me at the address or fax number in this letterhead or via email at BTFD-BTC.InformationRequests@cdtfa.ca.gov by February 11, 2022. 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 participating in 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. We look forward to your comments and suggestions. Should you have any questions, please feel free to contact Business Taxes Committee team member Robert Prasad at 1-916-309-5296, who will be leading the meeting.

Sincerely,

Aimee Olhiser
Chief
Tax Policy Bureau
Business Tax and Fee Division

AO:rp

Enclosures
Interested Party

January 5, 2022

cc: (all with enclosures)
Mr. Nicolas Maduros (MIC 104)
Ms. Trista Gonzalez (MIC 104)
Mr. Robert Tucker (MIC 83)
Ms. Susanne Buehler (MIC 43)
Ms. Michele Pielsticker Linton (MIC 105)
Mr. Jason Mallet (MIC 25)
Mr. Robert Colivas (MIC 47)
Mr. Bill Hain (MIC 70)
Mr. James Dahlen (MIC 57)
Mr. Jason Parker (MIC 49)
Mr. Steven Mercer (MIC 25)
Ms. Ester Cabrera (MIC 23)
Mr. Jeff Vest (MIC 85)
Mr. Mike Loretta (MIC 42)
Ms. Pamela Bergin (MIC 82)
Mr. Bradley Heller (MIC 82)
Mr. David Levine (MIC 85)
Ms. Dana Brown (MIC 85)
Ms. Casey Tichy (MIC 85)
Ms. Lynn Whitaker (MIC 50)
Mr. Greg Buehrer (MIC 44)
Mr. Gentian Droboniku (MIC 67)
Mr. Tom Trach (MIC 67)
Ms. Christine Castillo (MIC 104)
Mr. Marc Alviso (MIC 104)
Ms. Claudette Yang (MIC 104)
Ms. Karina Magana (MIC 47)
Mr. Bradley Miller (MIC 92)
Mr. Robert Wilke (MIC 50)
Mr. Robert Prasad (MIC 50)
DISCUSSION PAPER
Certification of Emergency Regulation 1684.5, *Marketplace Sales*

Issue

Whether the California Department of Tax and Fee Administration (Department) should propose to amend and certify California Code of Regulations, title 18, section (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). Regulation 1684.5 was filed June 29, 2020, as an emergency regulation and became effective and operative June 29, 2020.

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. (RTC, §§ 6201, 6401.) Use tax applies to taxable purchases from retailers regardless of whether the purchases are 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, every “retailer engaged in business in this state,” as defined in RTC section 6203, is required to collect the use tax on their taxable sales to California consumers, and give the consumers a receipt for the tax. (RTC, § 6203, subd. (a).) Consumers remain liable for the use tax, unless they obtain a receipt from a retailer that is registered with the Department. (RTC, § 6202.) Retailers that are engaged in business in this state and selling tangible personal property for storage, use, or other consumption in California are required to register with the Department (RTC, § 6226) and the Department requires such retailers to register for a Certificate of Registration – Use Tax, unless they are also required to hold a seller’s permit. 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 Department in the same manner as a retailer engaged in business in this state. (Reg. 1684, subd. (e).)

Retailers Engaged in Business in this State

In *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274 (*Complete Auto Transit*), the U.S. Supreme Court held that a tax challenged under the U.S. Constitution’s Commerce Clause will be sustained when the tax: (1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State. In *Quill Corp. v. North Dakota* (1992) 504 U.S. 298 (*Quill*), the U.S. Supreme Court held that a retailer does not have a substantial nexus with a state for purposes of the U.S. Constitution’s Commerce Clause, unless it has a physical presence in the
state. In Quill, the Court also affirmed the “sharp distinction,” established in National Bellas Hess, Inc. v. Department of Revenue of Illinois (1967) 386 U.S. 753 (Bellas Hess), “between mail-order sellers with retail outlets, solicitors, or property within a State” that can be required to collect the state’s sales or use tax, “and those who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business” that cannot be required to collect the state’s sales or use tax. California followed the U.S. Supreme Court’s holding in Quill, so only retailers with a physical presence in this state have been historically required to collect and remit California use tax under RTC section 6203.

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
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 the Marketplace Facilitator Act (MFA) to address sales of tangible personal property through marketplaces. The MFA became operative October 1, 2019. The MFA defines the terms “marketplace,” “marketplace facilitator,” “marketplace seller,” and “delivery network company.” (RTC, §§ 6041, 6041.5.) Amongst the key provisions, the MFA specifies that a marketplace facilitator is considered the seller and retailer for each sale facilitated through its marketplace on behalf of a marketplace seller for purposes of determining whether the marketplace facilitator is required to register with the Department 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 Department and who facilitates a retail sale of tangible personal property on behalf of a marketplace seller is the retailer making the sale of the tangible personal property sold through its marketplace 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 Department 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.)
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 Department that the marketplace facilitator has made a reasonable effort to obtain accurate and complete information from the unrelated marketplace seller about a retail sale and that the failure to remit the correct amount of tax was due to incorrect or incomplete information provided to the marketplace facilitator by the unrelated marketplace seller. RTC section 6047 provides specified relief for a marketplace facilitator’s failure to collect sales and use tax on retail sales facilitated for an unrelated marketplace seller prior to January 1, 2023, due to a good faith error (other than an error in sourcing the sale for district tax purposes).

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 Department. SB 92 also amended RTC section 6041.1 to provide that “Newspapers, internet websites, and other entities that advertise tangible personal property for sale, refer purchasers to the seller by telephone, internet link, or other similar means to complete the sale, and do not participate further in the sale are not facilitating a sale under [the MFA].”

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:

   (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:

- 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 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.
- “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.
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• “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 [D]epartment, to be deemed a marketplace facilitator pursuant to [the MFA]. Consistent with this section, the [D]epartment shall adopt regulations that establish the criteria for obtaining and retaining an election to be a marketplace facilitator pursuant to this subdivision.”

Discussion
Provisions in Emergency Regulation 1684.5

The Department adopted emergency Regulation 1684.5 to implement, interpret, and make specific the provisions of the MFA discussed above. The emergency 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 clarifies when a marketplace facilitator is the seller and retailer for purposes of the sale of tangible merchandise facilitated for a marketplace seller and provides procedures for a delivery network company to elect to be a marketplace facilitator. It also includes examples illustrating how its provisions apply.

Definitions

The Department determined that it was necessary to include the statutory definitions of the key terms used in the MFA in Regulation 1684.5 for ease of reference, so that readers of the regulation would not have to refer back to the underlying statutes and to make it easier to clarify the meaning of terms as they are used in the regulation. As such, the Department included the statutory definitions of the following terms in subdivision (a) of the regulation: delivery network company, delivery services, local merchant, local product, marketplace, marketplace facilitator, marketplace seller, and related person. The Department also determined that it was necessary to clarify in subdivision (a) that a delivery network company is not a marketplace facilitator, unless it makes an election to be deemed a marketplace facilitator pursuant to subdivision (d) of the current regulation and that nothing precludes a delivery network company from being a retailer as defined in RTC section 6015.

The Department determined that it was necessary to define and clarify the meaning of many of the undefined terms and phrases used within the statutory definition of marketplace facilitator. As such, the Department defined the following terms and phrases in subdivision (a) of the current regulation: branding sales as those of the marketplace facilitator, facilitate, listing products for sale, payment processing services, setting prices, and virtual currency. The Department also defined the terms “automated clearing house debit” and “payment order” in subdivision (a)

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1 Renumbered as subdivision (e) in the proposed amendments, Exhibit 1.
because those terms are used in the definition of “payment processing services” in subdivision (a).

In addition, the definition of facilitate in subdivision (a)(5) of the current regulation includes a stand-alone subdivision (A), which provides 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. The stand-alone subdivision includes examples that further illustrate the difference between merely advertising tangible merchandise for sale and referring the buyer to the seller to complete the sale under RTC section 6041.1 and facilitating a sale. The definition of virtual currency in subdivision (a)(16) of the current regulation also includes a stand-alone subdivision (A) explaining that if the consideration for a retail sale of tangible personal property is virtual currency, the measure of the tax shall be determined pursuant to Regulation 1654, Barter, Exchange, “Trade-ins” and Foreign Currency Transactions, since virtual currency is not legal tender in any jurisdiction.

**Registration**

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

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

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

**Marketplace Facilitator as Seller and Retailer**

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

**Delivery Network Company Elections**

Finally, a delivery network company is not a marketplace facilitator, unless the delivery network company elects to be treated as a marketplace facilitator in accordance with regulations prescribed by the Department. Therefore, the Department determined that it was necessary to provide in subdivision (d) of the current regulation that to elect to be a marketplace facilitator a delivery network company must register with the Department for a seller’s permit or a Certificate of Registration – Use Tax, whichever is applicable, unless the delivery network company is already registered, and submit a written or electronic statement signed by an authorized representative that includes an election to be deemed a marketplace facilitator and a voluntary agreement to remain registered with the Department while its election is effective. The Department determined that it was necessary to provide in subdivision (d) that an election is effective at the beginning of the next reporting period starting after the date the election is received by the Department and remains in effect until the beginning of the next reporting period starting after the date the Department receives a written or electronic statement from the delivery network company that it is cancelling its election, which is signed by an authorized representative. The Department also clarified that a
Certification of Emergency Regulation 1684.5, *Marketplace Sales*

delivery network company that makes such an election and facilitates a retail sale of tangible personal property by a marketplace seller through its marketplace for delivery in California while its election is effective shall be the retailer selling or making the sale of the tangible personal property and the retailer responsible for paying sales tax or collecting and remitting use tax on that sale.

**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. Also, the relief provided by RTC 6047 only applies to sales facilitated for an unrelated marketplace seller prior to January 1, 2023. As such, the Department did not include any regulatory guidance with respect to the relief provisions in the regulation.

**Comments from Interested Parties**

The Department sent an email to the interested parties on December 9, 2020, asking whether they had any outstanding issues or concerns regarding the language in emergency Regulation 1684.5 so that the Department could consider those issues before certifying the regulation. The Department received comments from Book Factory, Council On State Taxation (COST), Square Up, and eCrater in response.

*Book Factory (Exhibit 2)*

Mr. Bill Murray, CEO of Book Factory, sent the Department an email on January 9, 2021, that requested an amendment to RTC 6487.07 to extend the deadline by which a qualifying retailer must complete the installment payments for past due liabilities. As an alternative, he requested a regulatory change “to clarify that businesses do not have to collect [use tax] if their revenue sold directly from their entity to end customers is less than $500,000.” However, subdivision (c)(4)(A) of RTC section 6203 expressly requires a retailer to include sales by all persons related to the retailer and subdivision (b) of RTC section 6044 expressly requires a marketplace seller to include all sales facilitated through any marketplace facilitator’s marketplace when determining whether they are a retailer engaged in business in this state under RTC section 6203, subdivision (c)(4). Therefore, staff believes that a statutory change would be needed to support the regulatory change suggested by Mr. Murray. Accordingly, no changes were made to the regulation in response to his comments.

*COST (Exhibit 3)*

Mr. Fredrick J. Nicely, Senior Tax Council for COST, sent the Department a letter dated January 15, 2021, via email. The first comment in the letter said “COST is concerned with the scope of the definition of ‘marketplace facilitator’ in RTC section 6041(b)(1)(A) . . . addressing a person ‘transmitting or otherwise communicating the offer or acceptance between the buyer and seller.’” “An example illustrating that merely advertising a product for sale alone does not constitute transmitting or otherwise communicating an offer would be helpful. The following is an example that could be used: Example: Company A sells advertising space on its website and allows sellers to include the picture, description, and sales price of their merchandise. Company A is not ‘transmitting or otherwise communicating the offer…between the buyer and seller.’” Staff did not
agree with adding this example because an advertisement can constitute an offer to sell under some circumstances.

The second comment in the letter said COST is concerned with the scope of “RTC 6041(b)(1)(B) . . . addressing a person ‘owning or operating the infrastructure, electronic or physical, or technology that brings buyer[s] and sellers together.’” “Another helpful example would clarify that a person owning or operating the infrastructure that brings a buyer and seller together does not include persons that merely own or operate a communications network that provides internet access or delivers television advertising. The following is an example that could be used: Example: Company A provides internet access services over a communications network to third party sellers and/or consumers. In addition, Company A sells advertising space on its website and/or advertising that is shown on its television service and allows sellers to include the picture, description, and sales price of their merchandise. Company A does not participate further in the sales, such as taking orders or providing payment processing or fulfillment services. Company A is not facilitating the sales of tangible merchandise through the advertisements on its website or television service and Company A is not a marketplace facilitator for purposes of those sales.” Staff did not agree with adding this example, but staff did agree that it would be helpful to add an example (discussed below) illustrating that the advertising exclusion in RTC section 6041.1 applies to similar facts.

The third comment in the letter read “It would also be helpful to clarify what ‘listing products for sale’ means as used in RTC 6041(b)(2)(C).” “COST is concerned that this phrase could apply to a person only advertising a product. The following is an example that could be used to assist with the scope of that term: Example: Company A sells advertising space on its website and allows sellers to include the picture, description, and sales price of their merchandise. Company A is not ‘listing products for sale’ for the seller.” Staff did not agree with adding this example because an advertisement can constitute “listing products for sale” and staff does not think there is a sufficient distinction between an advertisement and listings products for sale when the advertising exclusion in RTC section 6041.1 does not apply. Therefore, staff determined that it was necessary to clarify that an advertisement can constitute “listing products for sale” in subdivision (a)(6) of the regulation.

In addition, staff determined that the Legislature intended for the advertising exclusion in RTC section 6041.1 to exclude specific sales from the provisions of RTC sections 6042 and 6043 and that stand-alone subdivision (a)(5)(A) in the current regulation is slightly inaccurate because it indicates that the advertising exclusion is an exclusion from the definition of marketplace facilitator for specific sales. Staff determined that stand-alone subdivision (a)(5)(A)’s placement and wording may be causing confusion about the meaning of the advertising exclusion in RTC section 6041.1, based on COST’s second and third comments. Staff also determined that it would be more helpful to clarify how the advertising exclusion in RTC section 6041.1 works with RTC sections 6042 and 6043 in a new subdivision (d) after subdivisions (a), (b), and (c) have defined the relevant terms and clarified how RTC sections 6042 and 6043 apply in the absence of the advertising exclusion. Therefore, staff deleted stand-alone subdivision (a)(5)(A) from the regulation, clarified how the advertising exclusion in RTC section 6041.1 works with RTC sections 6042 and 6043 in a new subdivision (d) titled “Advertising,” and renumbered current subdivision (d) as subdivision (e).

New subdivision (d) clarifies that when the advertising exclusion applies to a sale, the person publishing the advertisement is not considered the seller and retailer for the sale for purposes of
determining whether the person is required to register with the Department under subdivision (b)(1) of the regulation and the person is not the retailer selling or making the sale of the tangible personal property sold through the advertisement under subdivision (c) of the regulation. It also clarifies that this is true regardless of whether the person is a marketplace facilitator, the seller is a marketplace seller, the tangible personal property is advertised in a marketplace, or the advertisement contains an offer to sell tangible personal property to address COST’s first concern about advertisements in the proper context.

New subdivision (d) includes a new example 10 illustrating how the advertising exclusion in RTC section 6041.1 applies to a company that provides internet access and digital television services, which is based on COST’s second example above and consistent with the clarifications discussed above. New subdivision (d) also includes examples 11 through 13, which were previously included as examples one through three in stand-alone subdivision (a)(5)(A), with minor changes to make them consistent with the clarifications discussed above.

Square Up (Exhibit 4)

Ms. Carolee Clark-Reid, Global Indirect Tax Lead at SquareUp.com, sent the Department an email on January 15, 2021. The email said we think the regulation’s definition of “marketplace” encompasses a wider range of businesses than intended by the legislature. The email proposed adding a new example 5 to read as follows to clarify what constitutes a marketplace facilitator:

Sellers contract with Company B for web hosting services and various SaaS solutions. Company B’s solutions allow sellers to create an e-commerce website and provide each seller with a unique website from which its customers are able to purchase products sold only by that single seller. Company B also provides payment processing services to sellers on each of the websites built using its tools. The seller’s website is directly and separately accessed by potential customers either by entering the unique URL into a web browser or by searching through a third-party search engine. The products of other sellers are not listed on a particular seller’s website. Company B does not own, operate, or maintain any single Internet site that aggregates the products of multiple sellers. Therefore, Company B is not a marketplace facilitator.

The email proposed to modify current example 4 to read as follows to clarify what constitutes a marketplace (the proposed text is in italics):

Company A owns and operates a website where multiple third-party sellers offer to sell merchandise for delivery in California. Company A also enters into contracts to facilitate the sale of various 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. The taxpayer aggregates the product listings of multiple sellers on a single searchable platform, and potential customers can access multiple sellers’ online stores by visiting the taxpayer’s website. Therefore, Company A is a marketplace facilitator.

The email also proposed to modify the regulation’s definition of “marketplace” to read as follows (the proposed text is in italics):

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"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, that connects multiple marketplace sellers to facilitate their sales in a single physical or electronic place, 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.

Staff agreed with SquareUp.com that the Legislature intended for a marketplace to have more than one seller because RTC section 6041 requires that a person contract “with marketplace sellers to facilitate . . . the sale of [their] products through a [single] marketplace” to be a marketplace facilitator. Staff determined that it was necessary to change the definition of “marketplace” in subdivision (a)(9) so it is consistent with the Legislature’s intent and describes a marketplace as a place where “marketplace sellers sell or offer to sell” tangible personal property. Staff determined that it was necessary to add a new example 1 to the regulation to specifically illustrate that point. Staff determined that it would be more helpful to add a new example 2 to the regulation to illustrate that a website that aggregates the tangible merchandise listed for sale in marketplace sellers’ online stores on a single searchable platform where the marketplace sellers offer to sell and sell the tangible merchandise for delivery in California is a marketplace, rather than add similar facts to example 4. Staff determined that it would be more helpful to add a new example 3 to the regulation to illustrate that unique e-commerce websites where only one seller offers to sell and sells tangible merchandise are not marketplaces using similar facts as the proposed example 5, rather than add the proposed example 5. Staff determined that it would be helpful to add the word “multiple” to the first sentence in example 4 as proposed. Staff also determined that it was necessary to replace “third-party” with “multiple” in the first sentence in example 4, replace “third-party” with “the” in the second sentence in example 4, and delete “third-party retailer” from example 8 in subdivision (c) since there is no reason to say the marketplace sellers in the examples are also third-party retailers, and including that unnecessary information may cause confusion by unintentionally making some readers think it was included for a specific reason. However, staff did not agree with the other specific amendments proposed by SquareUp.com and did not make any additional changes based on their comments.

eCrater (Exhibit 5)

Mr. Dimitar Slavov from eCrater sent the Department an email on January 6, 2021, expressing his concerns with several of the regulation’s current definitions.

The email requested that the Department add a sentence to the end of the regulation’s definition of “branding sales as those of the marketplace facilitator” to provide that “‘Branding sales’ exists only a) when the product page does not contain any references to the marketplace seller, thus leaving the buyer to believe that the is purchasing directly from the online marketplace; or b) when the product page specifically states that the order will be fulfilled by the marketplace.” Staff did not agree with adding the specific language because it limits the meaning of the regulation’s current definition. However, staff agrees that when a marketplace seller is expressly identified as the person selling the marketplace seller’s tangible personal property, the sale of that property is not branded as a sale of the marketplace facilitator. Therefore, staff added a sentence to that effect to the end of the regulation’s definition of “branding sales as those of the marketplace facilitator” to provide a bright-line rule.
The email requested that the Department define “fulfillment and storage services” in the regulation and provide that it means “the process of receiving, packaging and shipping products.” Staff did not agree to add the requested definition because it limits the meaning of the statutory phrase. However, after reviewing the requested language, staff determined that it was necessary to add new subdivision (a)(5) to the regulation to define “fulfillment and storage services” and clarify that it “means any services related to receiving, storing, or shipping a marketplace seller’s tangible personal property, including, but not limited to, picking, packing, shipping, or delivering a marketplace seller’s tangible personal property to fulfill an order.”

The email requested that the Department define “listing products for sale” so it means “creating a written, verbal, pictorial, graphic, etc., announcement of goods for sale.” Staff did not agree to add “creating” to the definition by itself because doing so would limit the meaning of the statutory phrase. However, after reviewing the requested language, staff determined that it was necessary to further clarify the regulation’s definition of “listing products for sale” to avoid confusion and changed the definition so the phrase means “creating or posting or authorizing or enabling another person to create or post a written, verbal, pictorial, graphic, or similar announcement of tangible personal property for sale.”

The email requested that the Department define “order taking” in the regulation so it means “a process when a marketplace agent or representative accepts orders on behalf of the marketplace sellers using phone, fax, email, messages, chat or any other means of communication.” Staff did not agree to add the requested definition because it limits the meaning of the statutory phrase. However, after reviewing the requested language, staff determined that it was necessary to add new subdivision (a)(12) to the regulation to define “order taking” and clarify that it means “the process of getting or obtaining a buyer’s order to buy a marketplace seller’s tangible personal property by telephone, fax, email or any other physical or electronic means, including, but not limited to, the items in a physical or virtual shopping cart.”

The email requested that the Department define “payment processing services” so it means “that a person or entity either directly or indirectly through contracts, agreement, or other arrangements with third parties, collects the payment from one party and transmits all or part of the payment to another party.” The email also recommended adding the following related example to the regulation:

Company A owns and operates a website where third-party sellers offer to sell merchandise for delivery in California. Company A does not provide directly or indirectly through contracts and agreements payment processing services to its sellers. Instead, the sellers contract other companies for payment processing services and operate their own independent payment accounts with them. Company A is not a part of these agreements between the sellers and the payment processors and as a result is not able to collect all or part of the payments submitted to the marketplace sellers. Therefore, Company A is not a marketplace facilitator.
Staff disagreed with the requested definition of “payment processing services” because the Legislature incorporated the broad definition of marketplace facilitator\(^2\) into the MFA and intended for the phrase to be interpreted broadly to include any services related to charging a buyer the price to purchase a marketplace seller’s tangible personal property, collecting, handling, or processing the payment, and transmitting any portion of the payment to the marketplace seller. Therefore, staff determined that it was necessary to amend the regulation’s definition of “payment processing services” so the term means any services related to charging a buyer the price to purchase a marketplace seller’s tangible personal property, collecting, handling, or processing the payment, and transmitting any portion of the payment to the marketplace seller, including providing a physical or virtual credit or debit card terminal, integrating payment processing services with an online shopping cart, or otherwise directly or indirectly providing, authorizing, or enabling payment processing in any manner. Also, staff did not agree with the example because a person that engages in any of the activities described in subdivisions (b)(2)(B) through (G) of RTC section 6041 with respect to the marketplace seller’s products is not required to provide payment processing services to be a marketplace facilitator. However, after reviewing the requested example, staff determined that it was necessary to added language clarifying that point to the end of the regulation’s definition of “marketplace facilitator” to avoid further confusion regarding the importance of payment processing services.

The email also requested that the regulation separately define “providing customer service” and “accepting or assisting with returns or exchanges” so that “providing customer service” means “answering questions about products using product specific information that is not already displayed on any of the marketplace seller’s pages” and “accepting or assisting with returns or exchanges” means “initiating returns or exchanges without the marketplace seller’s authorization or physically accepting the returned products to assist the marketplace’s seller.” Staff did not agree to separately define “providing customer service” and “accepting or assisting with returns or exchanges” because the Legislature intended for the entire statutory phrase “providing customer service or accepting or assisting with returns or exchanges” to be read together. Also, staff did not agree with the requested language because it limits the meaning of the statutory phrase. However, after reviewing the requested language, staff determined that it was necessary to add subdivision (a)(15) to the regulation to define “providing customer service or accepting or assisting with returns or exchanges” and clarify that it means “providing any service related to a marketplace seller’s tangible personal property to a potential buyer with or without the marketplace seller’s authorization, including, but not limited to, answering a question about the property or the terms of its sale. It also means providing any service to a buyer related to their purchase of a marketplace seller’s tangible personal property with or without the marketplace seller’s authorization, including, but not limited to, answering a question about the property’s use, assisting with fixing or trouble shooting a problem with the property, assisting the buyer with requesting a refund or credit for the property or requesting to exchange the property for other property, or accepting the buyer’s return of the property or exchanging the buyer’s property for other property.”

\(^2\) See the discussion of the broad and narrow definitions of marketplace facilitator in the July 2021 White Paper published by the Multistate Tax Commission Uniformity Committee’s Wayfair Implementation & Marketplace Facilitator Work Group.
Proposed Amendments for Certification of Regulation 1684.5

Staff proposes amendments to Regulation 1684.5 as indicated in Exhibit 1. Staff used underline to indicate additions to and strikeout to indicate deletions from the emergency regulation. Most of the proposed amendments are discussed above. However, the Department also made the following additional amendments that are not directly related to the interested parties’ comments.

Subdivision (a)

Staff deleted subdivision (a)(1) from the regulation, which defined the term “Automated Clearing House Debit,” because it is a commonly used term that is not used in the MFA and does not need to be defined in the regulation. As result of this deletion, staff also renumbered current subdivisions (a)(2) through (5), as subdivisions (a)(1) through (4).

Staff replaced “easy” with “possible” in the definition of “facilitate” in renumbered subdivision (a)(4) to make the definition more consistent with the common meaning of the term, which includes making something easier and helping cause or bring about something. Staff also added “listing products for sale” to the examples of activities that facilitate sales in this definition.

Finally, staff deleted stand-alone subdivision (A) from the definition of “virtual currency” in renumbered subdivision (a)(18) because it is not part of the definition of virtual currency and it is not necessary to address the measure of tax in the regulation’s definition of virtual currency.

Subdivision (b)

Staff added language to subdivisions (b)(1) and (b)(2) to clarify that for purposes of determining whether a marketplace facilitator or marketplace seller is a retailer engaged in business in this state under RTC section 6203, subdivision (c)(4), they must include all sales of tangible personal property for delivery in this state “regardless of whether the sales are taxable.”

The department also amended the first sentence in subdivision (b)(2) to further clarify and implement the provisions of RTC section 6045 by explaining that on and after October 1, 2019, a marketplace seller is “the seller for sales and the retailer” for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator, “for purposes of determining whether the marketplace seller is required to register with the Department for a seller’s permit or Certificate of Registration - Use Tax.”

Subdivision (c)

Staff did not make any additional amendments to subdivision (c) that are not discussed above.

Subdivision (d)

Staff did not make any additional changes to new subdivision (d) that are not discussed above.

Subdivision (e)

Staff did not make any changes to renumbered subdivision (e).

Summary

The proposed amendments to Regulation 1684.5, Marketplace Sales, illustrated in Exhibit 1 are intended to further implement the MFA, clarify the provisions of the emergency regulation, and generally help businesses understand and comply with their obligations to register with the Department, and collect and pay the applicable sales and use taxes. Staff looks forward to meeting
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with the interested parties to discuss the proposed amendments. The interested parties meeting is scheduled for January 26, 2022 and participation is encouraged. The deadline for interested parties to provide written responses regarding this discussion paper is February 15, 2022.

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

Current as of 12/16/2021
Regulation 1684.5. Marketplace Sales.

(a) Definitions.

(1) “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).

(12) “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 tangible personal property. If a marketplace seller is expressly identified as the person selling the marketplace seller’s tangible personal property, the sale of that property is not branded as a sale of the marketplace facilitator.

(23) “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.

(34) “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.

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

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

Example 1: Company A is a marketplace facilitator that facilitates sales of tangible merchandise by marketplace sellers through its website. In addition, Company A sells advertising space on its website and allows sellers to include the picture, description,
and sales price of their merchandise. Company A also allows the sellers to provide an internet link to the seller’s website so that Company A may refer potential purchasers to these sellers to complete sales of the tangible merchandise advertised for sale on Company A’s website. Company A does not otherwise participate further in the sales, such as taking orders or providing payment processing or fulfillment services. Therefore, Company A is not facilitating the sales of tangible merchandise made through the advertisements on its website and Company A is not a marketplace facilitator for purposes of those sales.

Example 2: The facts are the same as in example 1, except that Company A offers an email relay service to sellers that advertise on its website whereby Company A provides a fabricated email address to both the buyer and seller to mask their personal email addresses. The provision of such an email relay service does not constitute participation in the sale of the tangible merchandise advertised for sale on its website beyond advertising the merchandise for sale and referring the purchaser to the seller to complete the sale. Therefore, Company A is not facilitating the sales of tangible merchandise made through the advertisements on its website and Company A is not a marketplace facilitator for purposes of those sales.

Example 3: The facts are the same as in example 1, except that Company A also contracts to provide payment processing services to sellers that advertise on its website to make it easier for them to sell their merchandise through the website. Therefore, Company A is facilitating the sales of the tangible merchandise made through the advertisements on its website and Company A is a marketplace facilitator for purposes of those sales.

(5) “Fulfillment or storage services” means any services related to receiving, storing, or shipping a marketplace seller’s tangible personal property, including, but not limited to, picking, packing, shipping, or delivering a marketplace seller’s tangible personal property to fulfill an order.

(6) “Listing products for sale” means creating or posting or authorizing or enabling another person to create or post a written, verbal, pictorial, graphic, or similar means of announcement of tangible personal property goods for sale, including, but not limited to, an advertisement that contains an announcement of tangible personal property for sale.

(7) “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.

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

(9) “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 sellers sells or offers for sale tangible personal property for delivery in this state regardless of whether the tangible personal property, marketplace sellers, or marketplace has a physical presence in this state.
Example 1. Company A owns and operates a website where multiple marketplace sellers offer to sell and sell tangible merchandise for delivery in California. Therefore, Company A’s website is a marketplace.

Example 2. Company B owns and operates a website that aggregates the tangible merchandise listed for sale in marketplace sellers’ online stores on a single searchable platform where the marketplace sellers offer to sell and sell the tangible merchandise for delivery in California. Therefore, Company B’s website is a marketplace.

Example 3. Company C owns and operates its own website where it is the only seller offering to sell and selling tangible merchandise and services. Company C sells web hosting and related services to Sellers D and E, including payment processing services. Sellers D and E use the services to create their own unique e-commerce websites where each of them is the only seller offering to sell and selling tangible merchandise. Therefore, Company C’s, Seller D’s, and Seller E’s websites are not marketplaces.

(10) “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 in a marketplace.

   (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)(10)(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.

A person that engages in any of the activities in subdivisions (a)(9)(B)(ii) through (vii) with respect to the marketplace seller’s products is not required to provide payment processing services to be a marketplace facilitator.

Example 4: Company A owns and operates a website where multiple third-party sellers sell and offer to sell merchandise for delivery in California. Company A also enters into contracts to facilitate the sale of the 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.

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

(12) “Order taking” means the process of getting or obtaining a buyer’s order to buy a marketplace seller’s tangible personal property by telephone, fax, email or any other physical or electronic means, including, but not limited, the customer including the items in a physical or virtual shopping cart.

(13) “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.

(14) “Payment Processing Services” means any services related to charging a buyer the price to purchase a marketplace seller’s tangible personal property, collecting, handling, or processing the payment, and transmitting any portion of the payment to the marketplace seller. Such services include, but are not limited to, providing a person, directly or indirectly, with the means used to charge or debit accounts through the use of a physical or virtual credit or debit card terminal, integrating payment processing services with an online shopping cart, or otherwise directly or indirectly providing, authorizing, or enabling payment processing in any manner, any payment methods or mechanism, including, but are 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.

(15) “Providing customer service or accepting or assisting with returns or exchanges” means providing any service related to a marketplace seller’s tangible personal property to a potential buyer with or without the marketplace seller’s authorization, including, but not limited to, answering a question about the property or the terms of its sale. It also means providing any service to a buyer related to their purchase of a marketplace seller’s tangible personal property with or without the marketplace seller’s authorization, including, but not limited to, answering a question about the property’s
use, assisting with fixing or trouble shooting a problem with the property, assisting the buyer with requesting a refund or credit for the property or requesting to exchange the property for other property, or accepting the buyer’s return of the property or exchanging the buyer’s property for other property.

(164) “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.

(175) “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.

(186) “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.

(A) 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.

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

(1) On and after October 1, 2019, a marketplace facilitator shall be considered the seller and retailer for each sale facilitated through its marketplace for purposes of determining whether the marketplace facilitator is required to register with the Department for a seller’s permit or Certificate of Registration - Use Tax, in addition to each sale for which the marketplace facilitator is the seller or retailer or both under chapter 1 (commencing with Section 6001) of part 1 of division 2 of the Revenue and Taxation Code. Also, on and after October 1, 2019, for purposes of determining whether a marketplace facilitator is a retailer engaged in business in this state because its total combined sales of tangible personal property for delivery in this state exceed the $500,000 threshold in Revenue and Taxation Code section 6203, subdivision (c)(4), the marketplace facilitator shall include all sales of tangible personal property for delivery in this state, including sales made on its own behalf and by all related persons and sales facilitated on behalf of marketplace sellers, regardless of whether the sales are taxable.

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
(2) On and after October 1, 2019, a marketplace seller is the seller for sales and the retailer shall register with the Department for a seller’s permit or Certificate of Registration - Use Tax, as required, for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator, for purposes of determining whether the marketplace seller is required to register with the Department for a seller’s permit or Certificate of Registration - Use Tax. On and after October 1, 2019, a marketplace seller is not required to register with the Department for a seller’s permit if it does not make any sales of tangible personal property in this state, except for sales facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales pursuant to subdivision (c) of this regulation. On and after October 1, 2019, a marketplace seller is not required to register with the Department for a Certificate of Registration - Use Tax if it does not make any sales of tangible personal property for storage, use, or other consumption in this state, except for sales facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales pursuant to subdivision (c) of this regulation. Also, on and after October 1, 2019, for purposes of determining whether a marketplace seller is a retailer engaged in business in this state because its total combined sales of tangible personal property for delivery in this state exceed the $500,000 threshold in Revenue and Taxation Code section 6203, subdivision (c)(4), the marketplace seller shall include all sales of tangible personal property for delivery in this state, including sales made on its own behalf and sales facilitated through any marketplace facilitator’s marketplace, regardless of whether the sales are taxable.

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

Example 7: Seller B is a marketplace seller that leases spaces in a California warehouse where it stores some of its inventory and fulfills some of its orders. However, on and after October 1, 2019, Seller B will only make sales of tangible merchandise in California or for delivery in California that are facilitated by Company
C, a marketplace facilitator who will be the seller and retailer for purposes of those sales pursuant to subdivision (c) of this regulation. Therefore, on and after October 1, 2019, Seller B will not be the retailer responsible for paying sales tax or collecting and remitting use tax on its sales in California or for delivery in California and Seller B will not be required to be registered with the Department for a seller’s permit or Certificate of Registration - Use Tax on and after October 1, 2019.

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

A marketplace facilitator that is registered with the Department or required to register with the Department for a seller’s permit or Certificate of Registration - Use Tax and facilitates a retail sale of tangible personal property by a marketplace seller on or after October 1, 2019, is the retailer selling or making the sale of the tangible personal property sold through its marketplace. Therefore, the marketplace facilitator is the retailer responsible for paying sales tax or collecting and remitting use tax on that sale and the marketplace seller is not the retailer responsible for paying sales tax or collecting and remitting use tax on that sale, unless the marketplace facilitator qualifies for relief from liability for the tax on that sale pursuant to Revenue and Taxation Code section 6046.

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

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

A person, including, but not limited to, a person who operates a newspaper or internet website, that advertises tangible personal property for sale, refers purchasers to the seller by telephone, mail, email, website address, internet link, or other similar means to complete the sale, and does not participate further in the sale is not facilitating the sale. Therefore, the person is not considered the seller and retailer for the sale for purposes of determining whether the person is required to register with the Department under subdivision (b)(1) and the person is not the retailer selling or making the sale of the tangible personal property under subdivision (c), regardless of whether the person is a marketplace facilitator, the seller is a marketplace seller, the tangible personal property is advertised in a marketplace, or the advertisement contains an offer to sell tangible personal property.

Example 10: Company A provides internet access and digital television services. Company A sells advertising space on its website and television service and allows sellers to include the picture, description, and sales price of their merchandise and the address of or internet link to their website, so that Company A may refer potential purchasers to the sellers to complete sales of the tangible merchandise advertised for sale on Company A's website or television service. Company A does not otherwise participate further in the sales, such as taking orders or providing payment processing or fulfillment services. Therefore, Company A is not facilitating the sales of tangible merchandise through the advertisements on its website or television service, Company A is not the seller and retailer for those sales for purposes of determining whether Company A is required to register with the Department under subdivision (b)(1), and Company A is not the retailer selling or making the sale of that merchandise under subdivision (c).

Example 11: Company B is a marketplace facilitator that facilitates sales of tangible merchandise by marketplace sellers through its website and is currently registered for a seller's permit with the Department. In addition, Company B sells advertising space on its website and allows sellers advertising on its website to include a picture, description, and sales price of their merchandise and an internet link to their website in their advertisements, so that Company B may refer potential purchasers to the sellers to complete sales of the tangible merchandise advertised for sale on Company B's website. Company B does not otherwise participate further in the sales of merchandise advertised for sale on its website, such as by taking orders, or providing payment processing or fulfillment services. Therefore, Company B is not facilitating the retail sales of tangible merchandise made through the advertisements on its website, Company B is not the seller and retailer for those sales for purposes of determining whether Company B is required to register with the Department under subdivision (b)(1), and Company B is not the retailer selling or making the sale of that merchandise under subdivision (c).

Example 12: The facts are the same as in example 1, except that Company B offers an email relay service to sellers that advertise on its website whereby Company B will refer potential purchasers to the sellers to complete sales using an email relay service that masks the purchasers’ and sellers’ personal email addresses. The provision of such an email relay service does not constitute participation in the sales of the tangible merchandise advertised for sale on its website beyond advertising the merchandise for
sale and referring the purchaser to the seller to complete the sale. Therefore, Company B is not facilitating the retail sales of tangible merchandise made through the advertisements on its website, Company B is not the seller and retailer for those sales for purposes of determining whether Company B is required to register with the Department under subdivision (b)(1), and Company B is not the retailer selling or making the sales of that merchandise under subdivision (c).

Example 13: The facts are the same as in example 1, except that Company B also contracts to provide payment processing services to sellers that advertise on its website to make it easier for them to sell their merchandise through the website. Therefore, Company B is facilitating the sales of the tangible merchandise made through the advertisements on its website, Company B is the seller and retailer for those sales for purposes of determining whether Company B is required to register with the Department under subdivision (b)(1), Company B is the retailer selling or making the sales of that merchandise under subdivision (c), and Company B is responsible for paying sales tax or collecting and remitting use tax on those sales.

(eed) Election.

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

(2) To be deemed a marketplace facilitator a delivery network company must register with the Department for a Seller’s Permit or a Certificate of Registration - Use Tax, whichever is applicable, unless the delivery network company is already registered, and submit a written or electronic statement signed by an authorized representative that includes an election to be deemed a marketplace facilitator and a voluntary agreement to remain registered with the Department while its election is in effect.

(3) An election is effective at the beginning of the next reporting period starting after the date the election is received by the Department and remains in effect until the beginning of the next reporting period starting after the date the Department receives a written or electronic statement from the delivery network company that it is cancelling its election, which is signed by an authorized representative.

(4) A delivery network company that makes such an election and facilitates a retail sale of tangible personal property by a marketplace seller through its marketplace for delivery in California while its election is in effect shall be the retailer selling or making the sale of the tangible personal property and the retailer responsible for paying sales tax or collecting and remitting use tax on that sale.

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

I am writing to urge an amendment to Rev. & Tax. Code § 6487.07 (SB 92), to extend the deadline by which a “qualifying retailer” must complete installment payments for past due liabilities. Under the current law, “qualifying retailers” are liable for past due taxes on sales through a marketplace facilitator’s warehouse for the period April 1, 2016, to March 31, 2019, and “qualifying retailers” were permitted to pay these taxes on installment basis with the final payment due no later than December 31, 2021 (we pay $3,000 a month (which costs us one job) and we have a balloon payment of more than $100,000 due on Dec 31, 2021 – we do not have that $100,000+, we are a small business). Rev. & Tax. Code § 6487.07(b)(3). Virtually all “qualifying retailers” are small businesses. Indeed, my small business is a “qualifying retailer.”

The global pandemic has severely affected small businesses, and many have ceased operating. In light of these severe circumstances, I believe California should extend the deadline to the final installment payment by two years. This would allow small businesses to regain their footing and satisfy their liabilities without going out of business (it is also much more proportionate to the time the CDTFA did a look back on charging us for Amazon sales (which Amazon should have collected taxes on)). I urge the CDTFA to sponsor such an amendment.

Secondly, I want to urge an amendment to Rev. & Tax. Code § 6487.07 (SB 92) or, in the alternative, a regulatory clarification, to clarify that businesses do not have to collect Sales Tax if their revenue sold directly from their entity to end customers is less than $500,000 – today there is confusion where we are being told that we owe sales tax if our revenue plus Amazon’s revenue selling our products is above $500,000. That is pretty unfair – Amazon is making the sales and is collecting and remitting the sales tax on those sales, so why are these unrelated Amazon sales being added to our sales from our plant in Ohio to give us an obligation to collect and report and submit taxes on those small Ohio sales? Amazon is one of the largest companies in the world (and owned by the richest man in the world) and the burden for us to collect and report and submit taxes on our sales out of our plant in Ohio to California is quite a lot (we have to use a tax consultant to help compile our returns). FYI we are also a B2B business and what we are finding is that our customers have already remitted Sales Tax to California for their purchases as they should have. An Example is the Santa Clara Jail which buys a lot of books from us and is telling us they already paid the Sales Taxes to California – well we also paid California Sales Tax on those very same orders so there are lots of double Sales Tax payments going on. I urge the CDTFA to sponsor such an amendment.

Supporting this amendment is the fact that in the Supreme Court’s South Dakota vs. Wayfair decision – in the majority opinion Justice Anthony Kennedy wrote that states “may not impose undue burdens on interstate commerce.” We put forth that having to hire a consultant on an ongoing basis to compile Sales Tax reports on B2B sales which only totaled to a $3,300 Sales Tax bill for Q-3 2020 and where are customers are paying Use Taxes on the very same orders...
is an undue burden on us. Thank you for your consideration of this matter. If you have any questions, please do not hesitate to contact me at 650-619-9663.

- Bill Murray
- CEO
- BookFactory

On Wed, Dec 9, 2020 at 5:51 PM BTFD-BTC Information Requests BTFD-BTC.InformationRequests@cdtfa.ca.gov wrote:

Dear Interested Parties,

We would like to commence the formal rulemaking process to permanently adopt Emergency Sales and Use Tax Regulation 1684.5, *Marketplace Sales*. However, prior to doing so, we would like your input as to whether there are any outstanding issues or concerns regarding marketplace sales which could be addressed through additional revisions to Regulation 1684.5. Therefore, if you have any comments or suggestions that you would like us to consider, including proposed regulatory language, we request that you provide those comments to us by reply to this email by January 15, 2021. We will review and consider all comments received to determine whether to proceed with the formal rulemaking process or to begin the informal interested process to provide the opportunity for further discussion of any outstanding issues or concerns.

For reference, material regarding the adoption of emergency Regulation 1684.5 can be found at:


Thank you,

Robert Wilke
Program Policy Specialist
California Department of Tax and Fee Administration
Business Taxes Committee Team

450 N Street, MIC: 50, Sacramento, CA 95814
Phone: 916-309-5302 | Fax: 916-322-2958
E: robert.wilke@cdtfa.ca.gov | www.cdtfa.ca.gov

Thank You for Connecting with Us:
January 15, 2021

California Department of Tax and Fee Administration
Comments on Regulation 1684.5 – Marketplace Sales

VIA EMAIL

Re: Comments on Regulation 1684.5 -Permanently Adopt Marketplace Sales Regulation

Dear Mr. Wilke and the Business Taxes Committee Team:

On behalf of the Council On State Taxation (COST), I am writing to provide comments on Regulation 1684.5 and to request clarification on certain aspects of the proposed regulation before it is made permanent.

About COST

COST is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce, and today COST has an independent membership of over 500 major corporations engaged in interstate and international business representing every industry doing business in every state. COST’s objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities—a mission it has steadfastly maintained since its creation. Many COST members do business in California and are impacted by this regulation.

Clarification on Scope of Marketplace Facilitator Definition

The intent of the marketplace facilitator law is to require a person who is facilitating sales on behalf of a marketplace seller to collect and remit the State’s sales/use tax under certain circumstances. COST is concerned with the scope of the definition of “marketplace facilitator” in RTC 6041(b)(1)(A) and regulation 1684.5(a)(2)(A(i) addressing a person “transmitting or otherwise communicating the offer or acceptance between the buyer and seller,” along with RTC 6041(b)(1)(B) and regulation 1684.5(a)(2)(A(ii) addressing a person “owning or operating the infrastructure, electronic or physical, or technology that brings buyer and sellers together.”

An example illustrating that merely advertising a product for sale alone does not constitute transmitting or otherwise communicating an offer would be helpful. The following is an example that could be used:

Example: Company A sells advertising space on its website and allows sellers to include the picture, description, and sales price of their merchandise. Company A is not “transmitting or otherwise communicating the offer...between the buyer and seller.”

Another helpful example would clarify that a person owning or operating the infrastructure that brings a buyer and seller together does not include persons that merely own or
operate a communications network that provides internet access or delivers television advertising. The following is an example that could be used:

Example: Company A provides internet access services over a communications network to third party sellers and/or consumers. In addition, Company A sells advertising space on its website and/or advertising that is shown on its television service and allows sellers to include the picture, description, and sales price of their merchandise. Company A does not participate further in the sales, such as taking orders or providing payment processing or fulfillment services. Company A is not facilitating the sales of tangible merchandise through the advertisements on its website or television service and Company A is not a marketplace facilitator for purposes of those sales.

**Clarification on “Listing Products for Sale”**

It would also be helpful to clarify what “listing products for sale” means as used in RTC 6041(b)((2)(C) and regulation 1684.5(a)(2)(B)(ii). COST is concerned that this phrase could apply to a person only advertising a product. The following is an example that could be used to assist with the scope of that term:

Example: Company A sells advertising space on its website and allows sellers to include the picture, description, and sales price of their merchandise. Company A is not “listing products for sale” for the seller.

**Conclusion**

COST appreciates the opportunity to provide comments to this regulation and we hope you can add these examples (or similar examples to address our concerns) to the regulation. Please let us know if we can assist in making these changes to the regulation before it becomes permanent.

Sincerely,

Fredrick Nicely

cc:  COST Board of Directors
    Douglas L. Lindholm, COST President & Executive Director
Under the Marketplace Facilitator Act (“MFA”), effective October 1, 2019, marketplace facilitators are required to collect sales and use tax on sales facilitated through their marketplaces on behalf of marketplace sellers. To clarify the application of, and address several issues with, the MFA, the California Department of Tax and Fee Administration (“Department”) has proposed the adoption of emergency regulation Cal. Rev. & Tax. Code § 1684.5. We write to respectfully request the Department consider a proposed update to the definition of a “marketplace” to provide clarity on the specific types of businesses the MFA was intended to capture.

Pursuant to Cal. Rev. & Tax. Code § 1684.5(a)(9), a “marketplace” is defined by the proposed emergency regulation as:

(9) “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.

This definition is broad and encompasses a wider range of businesses than intended by the legislature.

Proposals:

To further clarify what constitutes a marketplace facilitator, we propose adding the below example after the existing Example 4 that follows Reg. 1684.5(a)(10), in the proposed regulation to reflect an example of a company that is not a marketplace facilitator:

Example 5: Sellers contract with Company B for web hosting services and various SaaS solutions. Company B’s solutions allow sellers to create an e-commerce website and provide each seller with a unique website from which its customers are able to purchase products sold only by that single seller. Company B also provides payment processing services to sellers on each of the websites built using its tools. The seller’s website is directly and separately accessed by potential customers either by entering the unique URL into a web browser or by searching through a third-party search engine. The products of other sellers are not listed for sale on a particular seller’s website. Company B does not own, operate, or maintain any single Internet site that aggregates the products of multiple sellers. Therefore, Company B is not a marketplace facilitator.

To further clarify what constitutes a marketplace, we propose modifying the existing Example 4 that follows Reg. 1684.5(a)(10), in the proposed regulation to read:

Example 4: Company A owns and operates a website where multiple third-party sellers offer to sell merchandise for delivery in California. Company A also enters into contracts to facilitate the sale of various 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. The taxpayer aggregates the product listings of multiple sellers on a single searchable platform, and potential customers can access multiple sellers’ online stores by visiting the taxpayer’s website. Therefore, Company A is a marketplace facilitator.
If it is the intent of the legislature that only Example 4 above be encompassed under the ambit of the regulation, we respectfully propose that the Department consider the following modification to the definition as underlined below:

(9) “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, that connects multiple marketplace sellers to facilitate their sales in a single physical or electronic place, 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.
Date: 01/06/2021

Regulation 1684.5 Marketplace Sales, Comments and suggestions

Dear CDTFA,

On 06/18/2020, I submitted to OAL and CDTFA my comments in regards to Regulation 1684.5, Marketplace sales. You can find the updated version of these comments at the bottom of this email or at the following link:

[Comments from Dimitar Slavov](#) (revised to update a dead link, included a new issue and some other minor changes)

In that letter I outlined some major issues with the proposed regulation, provided reasoning behind my comments and showed that Regulation 1684.5 did not comply with the clarity and consistency standard of Government Code section 11349.1.

On 06/24/2020 CDTFA submitted a response to my comments to OAL. The response did not discuss any of the issues I raised and simply stated:

“Based on our initial review, the Department does not agree that there are clarity issues with emergency Regulation 1684.5 and does not believe it is necessary to delay the approval of the regulation to make changes at this time. However, the Department will continue to review the issues raised in the emailed letter from Dimitar Slavov to determine if any of them need to be addressed through the adoption of amendments to Regulation 1684.5 in future.”

After CDTFA’s response to OAL I received further confirmation that two of the issues I raised were valid, and ironically this confirmation came from CDTFA. I have a number of emails from your employee Nicole Campbell stating that “you are providing customer service or accepting or assisting with returns or exchanges” and that my company Ecrater “engages in payment processing services with respect to the marketplace seller's products” although I explained multiple times to her that we do not (issues #1 and #3 in my letter). In the meantime on 08/25/2020 your employee Greg Buehrer (Audit and Information Section Mic 44) correctly concluded:

"Although the site allows purchasers to select payment options that are provided by PayPal, a third party payment processor, this option does not constitute payment processing services because Mr. Stavov does not contract with either merchants or their customers to provide such services."

Mr. Buehrer further continued that:

"Regardless, when Mr. Stavov lists products for sale and enables order taking on his electronic platform, prong three is satisfied for the purpose of determining whether he is a marketplace facilitator."

He incorrectly assumed that the marketplace lists the products for sale while in reality the products are being listed by the marketplace sellers (issue #5 in my letter). He also incorrectly interpreted the “Order taking” rule, assuming that the marketplace is taking the orders and not realizing that the marketplace sellers are the ones taking the orders (issue #4 in my letter).
If there were no clarity issues with emergency Regulation 1684.5 as CDTFA stated in the reply to OAL, there should not have been two contradicting opinions within the same agency, one from a specialist and one from an auditor.

This additionally proves that Regulation 1684.5, Marketplace sales does not comply with the clarity standard of Government Code section 11349.1, specifically matching the CCR § 16 (a)(1), CCR § 16 (a)(3) and CCR § 16 (a)(5) rules.

In her answer to OAL, Trista Gonzales did not even mention the consistency standard of Government Code section 11349.1, an issue that I raised in my letter as well.

To address the outlined problems I am proposing the following revisions:

I. Suggestions for definitions

I am proposing 3 definitions to be updated (Payment Processing Services, Branding sales as those of the marketplace facilitator, Listing Products for Sale) and 4 new definitions to be included (Order taking, Providing customer service, Fulfillment or storage services, Accepting or assisting with returns or exchanges):

“Payment Processing Services” means that a person or entity either directly or indirectly through contracts, agreement, or other arrangements with third parties, collects the payment from one party and transmits all or part of the payment to another party.

“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. “Branding sales” exists only a) when the product page does not contain any references to the marketplace seller, thus leaving the buyer to believe that he is purchasing directly from the online marketplace; or b) when the product page specifically states that the order will be fulfilled by the marketplace”.

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

“Order taking” means a process when a marketplace agent or representative accepts orders on behalf of the marketplace sellers using phone, fax, email, messages, chat or any other means of communication.

“Providing customer service” means answering questions about products using product specific information that is not already displayed on any of the marketplace seller’s pages.

“Accepting or assisting with returns or exchanges” means initiating returns or exchanges without the marketplace seller’s authorization or physically accepting the returned products to assist the marketplace’s seller.
"Fulfillment or storage services" means the process of receiving, packaging and shipping products.

II. Suggestion for another example to be included that is applicable to small marketplaces:

“Example 1” in Regulation 1684.5, Marketplace sales describes the case when a marketplace provides payment processing services to its sellers. Small online marketplaces do not provide payment processing services. I am recommending another example to be added to cover these cases:

Example : Company A owns and operates a website where third-party sellers offer to sell merchandise for delivery in California. Company A does not provide directly or indirectly through contracts and agreements payment processing services to its sellers. Instead, the sellers contract other companies for payment processing services and operate their own independent payment accounts with them.

Company A is not a part of these agreements between the sellers and the payment processors and as a result is not able to collect all or part of the payments submitted to the marketplace sellers.

Therefore, Company A is not a marketplace facilitator.

Thank you for your time and consideration. If you have any questions, please do not hesitate to contact me.

Sincerely,

Dimitar Slavov

P.S Below is the revised version of the letter I sent to OAL/CDTFA on 06/18/2020. I included a new issue + some other minor changes.
Date: 01/06/2021, rev.1

Subject: Regulation 1684.5, Marketplace sales.

Dear CDTFA,

I would like to comment on Regulation 1684.5, Marketplace sales.

I run a small online marketplace called Ecrater which connects buyers and sellers and allows small sellers to create their own online stores.

I appreciate the opportunity to provide feedback for CDTFA and hope that these comments will clearly outline some major issues in the proposed regulation.

Creating a requirement for marketplace facilitators to remit the tax is a significant change to the sales and use tax law and such a monumental change deserves a robust stakeholder process to ensure a smooth implementation.

The proposed Regulation “1684.5, Marketplace sales” aims to implement, interpret and make specific the Marketplace Facilitator Act codified in chapter 1.7 of part 1 of division 2 of the Revenue and Taxation Code. The proposed regulation defines the following terms:

- Payment Processing Services
- Branding sales as those of marketplace facilitator
- Listing Products for Sale

Comments on Issues:

Issue #1: The Regulation 1684.5, Marketplace sales failed to further clarify the term “Payment Processing Services”, thus leaving room for different interpretations and inability to comply in certain cases.

The paper contains the following definition:

“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.

Not only the proposed definition does not make the Marketplace Facilitator Act 6041(2)(A) more specific but it also creates further confusion and uncertainty.
Reasoning: Small online marketplaces do not deal with payment processing because they do not have the resources to implement such payment solutions (either directly or indirectly) and to manage the risks associated with each transaction (fraud and disputes). Instead such online marketplaces allow their merchants to use their own independent payment accounts with different payment processors.

The proposed definition creates a confusion that a marketplace might be indirectly processing payments or providing means to process payments simply because during the checkout process it redirects the buyers to the payment processor to complete a transaction. Even if found to be within the proposed definition a marketplace will not be able to comply with the tax collection requirement if such marketplace cannot withdraw, collect funds from the merchants’ payment accounts or redirect funds from these accounts into its own payment account.

The problem is recognized and described in the Multistate Tax Commission paper “Wayfair Implementation & Marketplace Facilitator work Group July 2020 White Paper”, please see https://www.mtc.gov/Uniformity/Project-Teams/Wayfair-Implementation-Informational-Project page 3:

“All a business falling within the broad definition that does not directly or indirectly process or collect the payment cannot practically comply with the tax collection requirement.”

Possible solution: including further clarification that “Payment Processing Services” means that a person or entity either directly or indirectly through contracts, agreement, or other arrangements with third parties, collects the payment from one party and transmits all or part of the payment to another party; or

including a text that online marketplaces that do not directly or indirectly through contracts, agreements, or other arrangements with third parties, collect the payment from the purchaser and transmit all or part of the payment to the marketplace seller, are not considered marketplace facilitators.

The proposed solutions are based on the NCSL (National Conference of State Legislatures) model, please see Appendix A of the “Wayfair Implementation & Marketplace Facilitator work Group July 2020 White Paper”

Issue #2: The Regulation 1684.5, Marketplace sales failed to further clarify the term “Branding sales as those of marketplace facilitator” used in 1684.5(a)(2)(B)(v), thus leaving room for different interpretations

The paper contains the following definition:

“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.”
Discussion Paper  
Certification of Emergency Regulation 1684.5, Marketplace Sales  
Comments from eCrater - Mr. Dimitar Slavov

Reasoning: Almost all websites/apps have logos. Displaying a logo or another symbol that will identify
the marketplace as the person selling a marketplace seller’s product is a necessary but not sufficient
condition to assume that the marketplace is indeed selling the product. In order to make such a
conclusion the web/app page should not contain any references to the marketplace seller, thus leaving
the buyers to believe that they are buying directly from the online marketplace.

Issue #3: The Regulation 1684.5, Marketplace sales failed to further clarify the rule “Providing customer
service or accepting or assisting with returns or exchanges” used in 1684.5(a)(2)(B)(vii), thus leaving
room for different interpretations

Reasoning: Millions of websites/apps provide customer service to their users.

The proposed regulation does not define or provide any further clarification what is considered
customer service in respect to the marketplace seller’s products. For example, will a marketplace that
simply emails a URL to a buyer looking for a specific product satisfy this rule? Or will citing a portion of a
product page while communicating with a buyer be considered as providing customer service in respect
to the marketplace seller’s product?

The proposed regulation also does not define to what extent the marketplaces need to assist the buyers
with returns and exchanges to satisfy this rule. For example, could a marketplace satisfy this rule if it is
unable to initiate a return or exchange process on behalf of the marketplace seller?

Issue #4: The Regulation 1684.5, Marketplace sales failed to further clarify the rule “Order taking” used
in 1684.5(a)(2)(B)(vi), thus leaving room for different interpretations

Reasoning: Online marketplaces usually generate order numbers for the purchases and these orders are
handled and shipped by the marketplace sellers. By not further clarifying the rule, the proposed
regulation may create a confusion that the marketplace is the entity taking the orders.

Issue #5: The Regulation 1684.5, Marketplace sales failed to further clarify the rule “Listing Products for
Sale” used in 1684.5(a)(2)(B)(vi), thus leaving room for different interpretations.

Reasoning: The word “listing” is a verb and implies an action while your definition is a noun. To “list”
does not mean an “announcement”. The current definition may create a confusion that the marketplace
listed the product. A logical fix will be to add the word “creating.”

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

Because of the above issues the proposed Regulation 1684.5, Marketplace sales does not comply with
clarity standard of Government Code section 11349.1, specifically matching the CCR § 16 (a)(1), CCR § 16
(a)(3) and CCR § 16 (a)(5) rules:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following
conditions exists:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one
meaning;

(3) the regulation uses terms which do not have meanings generally familiar to those “directly affected”
by the regulation, and those terms are defined neither in the regulation nor in the governing statute;
(5) the regulation presents information in a format that is not readily understandable by persons “directly affected;”

In addition the proposed Regulation 1684.5, Marketplace sales does not comply with the consistency standard of Government Code section 11349.1 in cases when the business performs at least one activity described in the proposed

1684.5(a)(2)(A) and 1684.5(a)(2)(B) and does not directly or indirectly process or collect the payment. In these cases the proposed Regulation 1684.5 will violate the Cal. Civ. Code § 3531 (“The law never requires impossibilities.”)

Thank you for your time and consideration.

Sincerely,

Dimitar Slavov

On Wednesday, December 9, 2020 10:51:11 PM PST you wrote:

Dear Interested Parties,

We would like to commence the formal rulemaking process to permanently adopt Emergency Sales and Use Tax Regulation 1684.5, Marketplace Sales. However, prior to doing so, we would like your input as to whether there are any outstanding issues or concerns regarding marketplace sales which could be addressed through additional revisions to Regulation 1684.5. Therefore, if you have any comments or suggestions that you would like us to consider, including proposed regulatory language, we request that you provide those comments to us by reply to this email by January 15, 2021. We will review and consider all comments received to determine whether to proceed with the formal rulemaking process or to begin the informal interested process to provide the opportunity for further discussion of any outstanding issues or concerns.

For reference, material regarding the adoption of emergency Regulation 1684.5 can be found at: https://www.cdtfa.ca.gov/taxes-and-fees/reg-1684-5-2020.htm.

Thank you,

Robert Wilke

Program Policy Specialist

California Department of Tax and Fee Administration Business Taxes

Committee Team

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