**Final Statement of Reasons for the**

**Proposed Adoption of California Code of Regulations,**

**Title 18, Section 1684.5, Marketplace Sales**

UPDATE OF INFORMATION IN THE INITIAL STATEMENT OF REASONS

The California Department of Tax and Fee Administration (Department) adopted California Code of Regulations (CCR), title 18, section (Regulation) 1684.5, Marketplace Sales, with the amendments discussed in the initial statement of reasons (ISR) and non-substantial or solely grammatical changes to the definition of "order taking" and examples 11, 13, and 14, which are discussed below. The Department received timely written comments regarding the proposed regulation from Eversheds Sutherland (US) LLP (ES) in a letter dated January 3, 2023 (ES Letter), eBay in a letter dated February 6, 2023 (eBay Letter), and Dimitar Slavov (Slavov) from eCrater in an attachment to an email dated February 7, 2023 (Attachment). The Department timely received a memorandum dated January 31, 2023 (Memorandum), from the California Taxpayers Association (CalTax), as its comments, which contained an analysis of the proposed regulation that was provided to CalTax by Joseph Vinatieri (Vinatieri) and Benjamin Lee (Lee) from Bewley Lassleben & Miller LLP.

The Department conducted a public hearing regarding the proposed regulation on February 7, 2023, and heard oral comments from Slavov, Vinatieri, Lee, Joan Armenta-Roberts (Armenta-Roberts) from CalTax, and Michele Borens (Borens) from ES. Also, the California Government Operations Agency (GovOps) received written comments regarding the proposed regulation from Armenta-Roberts in an email dated February 21, 2023 (Email). GovOps forwarded the Email to the Department for its consideration and Armenta-Roberts agreed that the Department could consider and respond to the comments in the Email as part of the adoption of the proposed regulation. These comments are all summarized and responded to below.

Also, emergency Regulation 1684.5 was repealed by operation of law on June 29, 2022, and before the Department's notice of proposed regulatory action regarding the adoption of Regulation 1684.5 was published on November 18, 2022. Otherwise, the factual basis, specific purposes, and necessity for, the problems intended to be addressed by, and the anticipated benefits from the adoption of proposed Regulation 1684.5 are the same as provided in the ISR.

In addition, the Department did not rely on any data or any technical, theoretical, or empirical study, report, or similar document in proposing or adopting Regulation 1684.5 that was not identified in the ISR, or which was otherwise not identified or made available for public review prior to the close of the public comment period.

Furthermore, the factual basis has not changed for the Department's initial determination that the proposed regulatory action will not have a significant adverse economic impact on business, the Department's determination that the proposed regulatory action is not a major regulation, as defined in Government Code (GC) section 11342.548 and CCR, title 1, section 2000, and the Department's economic impact assessment, which determined that the proposed regulatory action:

- Will neither create nor eliminate jobs in the State of California nor result in the creation of new businesses or the elimination of existing businesses within the state;
- Will not affect the expansion of businesses currently doing business within the State of California; and
- Will not affect the benefits of Regulation 1684.5 to the health and welfare of California residents, worker safety, or the state's environment.

No Mandate on Local Agencies or School Districts

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

Public Comments

*Comments from ES & Borens*

ES requested that the Department consider the scope of each provision of the proposed regulation and whether it is consistent with the statutory provisions and revise any provision of the proposed regulation that exceeds the scope of the statutory provisions. (ES Letter, pp. 1-2.) During the public hearing, Borens said ES is concerned that there are some aspects of the regulation as it is currently drafted that exceed the scope of interpreting the Marketplace Facilitator Act (MFA) (Rev. & Tax. Code (RTC), § 6040 et seq.) and would make someone liable for tax where they would not otherwise be liable. Borens also clarified that it was a "general comment" that was not directed at specific fact patterns and asked the Department to consider that general comment in finalizing the proposed regulation. Therefore, the Department reviewed the proposed regulation in detail. However, it did not make any changes because the Department determined that the provisions of the proposed regulation are consistent with the statutes that they implement, interpret, and make specific and would not make someone liable for tax as a marketplace facilitator that would not otherwise be liable under the MFA.

Also, ES specifically recommended that the Department delete "listing products for sale" from the examples of activities that facilitate sales in the definition of "facilitate" in

subdivision (a)(4) of the proposed regulation[1]; or that the Department alternatively change the definition of "listing products for sale" in subdivision (a)(6) of the proposed regulation to provide that the term "means creating or posting a written, verbal, pictorial, graphic, or similar means of announcement of tangible personal property for sale in a marketplace." (ES Letter, pp. 2-3.) ES said that "The inclusion of 'listing products for sale' in the definition of 'facilitate' creates confusion with the advertising exclusion" because "'listing products for sale' constitutes both advertising and facilitating sales." (ES Letter, p. 2.) ES recommended that the definition of "listing products for sale" be "modified to make clear that simply providing the technology for a person to make a post or authorizing a post is not enough to satisfy this definition." (ES Letter, pp. 2-3). ES also recommended that the Department delete the text stating that listing products for sale includes "an advertisement that contains an announcement of tangible personal property for sale" from the definition of "listing products for sale" because it's confusing for businesses. (ES Letter, p. 3.)

The Department did not make any changes to subdivisions (a)(4) or (a)(6) in response to ES's comments. The Department did not agree to delete "listing products for sale" from the examples of activities that facilitate sales because the Department previously determined that listing a marketplace seller's products for sale is one of the most important activities that a person can engage in to make it possible or easier for a marketplace seller to sell those products. (ISR, p. 17.) The Department did not agree to limit the definition of listing products for sale so that providing the technology for or authorizing a person to list products for sale is not the same as listing the products for sale because the Department previously determined that it is contrary to the Legislature's intent to allow a person that would otherwise be a marketplace facilitator to avoid the provisions of subdivision (b)(2)(C) of RTC section 6041 by authorizing or providing the means for marketplace sellers to list their products for sale in the person's marketplace. (ISR, p. 18.) Also, the Department previously determined that publishing an advertisement can constitute "listing products for sale" when the advertisement contains an announcement of tangible personal property for sale, and there is not a substantive difference between posting an advertisement that constitutes listings products for sale and any other activity that constitutes listing products for sale when the advertising exclusion in RTC section 6041.1 does not apply. (ISR, p. 10.)

In addition, ES specifically recommended that the Department delete the example of "the customer including the items in a physical or virtual shopping cart at checkout" from the definition of "order taking" in subdivision (a)(12) of the proposed regulation because it "potentially expands the marketplace facilitator law beyond its statutory intent." (ES Letter, p. 3.) ES also specifically recommended that the Department add a new sentence

[1] ES did not raise any issues or concerns regarding the Department's proposed amendments to replace "easy" with "possible" in the definition of "facilitate."

to the definition of "setting prices" in subdivision (a)(17) of the proposed regulation to provide that "Setting prices does not include those arrangements where the seller sets the price or a minimum or maximum price and the marketplace facilitator retains part of the price for its service." (*Ibid*.) The Department did not make any changes to subdivisions (a)(12) or (a)(17) of the proposed regulation in response to ES's comments. The Department previously determined that orders are in fact taken at checkout. (ISR, p. 21.) The Department determined that a person does set the price at which an item is offered to customers if they have discretion to set the price higher than a minimum price or lower than a maximum price. The Department determined that whether a person retains part of the price for an item is not relevant to whether that person set the price for that item. Also, the Department agreed with ES that the seller is the party setting prices when the seller in fact sets the prices. However, subdivision (a)(17) defines the term "setting prices," as used in the definition of marketplace facilitator in subdivision (a)(10) of the proposed regulation. Subdivision (a)(10)(B) makes it clear that a person other than a marketplace seller must engage in setting prices "with respect to the marketplace seller's products" for that person's activities to satisfy subdivision (a)(10)(B)(iv) and make that person a marketplace facilitator as defined in subdivision (a)(10). The Department is not aware of any confusion about whether a person is setting prices for a seller's products under subdivision (a)(10)(B)(iv) when the seller is in fact setting the prices. Therefore, the Department determined that it was not necessary to further clarify the definition of setting prices in subdivision (a)(17) of the proposed regulation at this time.

Furthermore, ES recommended "minor changes to Examples 11, 12, 13, and 14 to make clear whose website the example is referencing." (ES Letter, pp. 3-5.) The Department agreed with changing "the seller" to "the seller's website" in example 11 and changing "the website" to "Company B's website" in examples 13 and 14 because the changes did not change the meaning of the examples. The Department also made these non-substantial or solely grammatical changes pursuant to subdivision (c)(1) of GC section 11346.8. The Department did not agree to change "the seller" to "the seller's website" in example 12 because, in that example, Company B is referring potential purchasers to the seller via an email relay service and not necessarily referring them to the seller's website through the email relay service.

*Comments from eBay*

eBay said that it "was appreciative of the ability to participate in the discussions" when the MFA was negotiated and passed by the Legislature in 2019. (eBay Letter, p. 1.) "In these discussions, eBay was particularly concerned about transactions that were completed off platform being in scope of the Act" because eBay's "platforms are only able to collect and remit taxes on the transactions completed via [eBay's] website." (*Ibid*.)

eBay said that "Sellers have the option to: (1) list an item with 'Buy It Now' allowing the buyer to immediately purchase the good, (2) conduct an auction, or (3) allow offers. A majority of transactions for all three purchase types go through [eBay's] payments platform and tax is collected. With Buy It Now, eBay manages the payment and the buyer is only allowed to pay with the [eBay] selected forms of payment." (eBay Letter, p. 1.) However, with auctions or offers "sellers have the ability to mark the item as paid without having completed the payment process through [eBay's] platform," "eBay would not have the ability to collect tax" on such transactions, and eBay may not know "the final payment amount." (eBay Letter, pp. 1-2.) eBay also said that "by redefining 'listing items for sale' and eliminating the payment processing nexus, the proposed rulemaking adds additional uncertainty for companies like eBay that are working to comply with the [MFA.]." (eBay Letter, p. 2.)

The Department did not make any changes to the proposed regulation in response to eBay's comments because eBay did not recommend any specific changes to the proposed regulation or indicate that the proposed regulation was inconsistent with the MFA. However, the Department has offered to work directly with eBay to determine whether eBay is liable for tax as a marketplace facilitator on any specific sales completed off platform and whether eBay is eligible for relief from such liability under RTC section 6046.

Also, the Department participated in discussions regarding the Legislature's enactment of Assembly Bill No. (AB) 147 (Stats. 2019, ch. 5) and Senate Bill No. (SB) 92 (Stats. 2019, ch. 34), and the proposed regulation is consistent with those discussions and the operative text of the MFA, which does not define "listing products for sale" or require a "payment processing nexus."

When AB 147 was first introduced on December 14, 2018, the Legislature proposed to amend RTC section 6015 to make a person that holds a sellers permit or is a retailer engaged in business in this state the retailer when they facilitate a retail sale for another unregistered seller and do "both of the following [as part of the sale]:

(i) Lists or advertises for sale, in any forum, tangible personal property owned by the seller that is subject to tax under this part; and
(ii) Directly or indirectly through agreements or arrangements with third parties *collects payment from the customer and transmits that payment to the seller . . . .*" (Emphasis added.)

Therefore, the original provisions in AB 147 show that the Legislature knew how to require that a person collect payment from the buyer as a condition to making the person the retailer for a sale made by another seller when that is what the Legislature intended.

In addition, on February 14, 2019, the Legislature revised AB 147 so it no longer proposed to amend RTC section 6015 and proposed to add the MFA, which broadly defines the term "marketplace facilitator," generally makes a marketplace facilitator that is registered or required to be registered with the Department the retailer when it facilitates a retail sale of tangible personal property for a marketplace seller through its marketplace, and does not define the terms "marketplace facilitator" or "facilitate" so they require a payment processing nexus. (RTC, §§ 6041, subd. (b), 6043.)

The July 2021 White Paper published by the Multistate Tax Commission (MTC) Uniformity Committee's Wayfair Implementation & Marketplace Facilitator Work Group (2021 White Paper) referred to in the ISR discusses narrow and broad definitions for the term "marketplace facilitator." It includes examples of both types of definitions on pages 12, 14, and 15. It explains that "The narrow definition requires direct or indirect processing or collection of the customer's payment by the marketplace facilitator/provider." (2021 White Paper, p. 3.) Businesses expressed a preference for the narrow definition because "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." (*Ibid*.) It also explains that California is among the states that "have adopted a broad definition" of marketplace facilitator (2021 White Paper, p. 15.) Therefore, the statutory definition of "marketplace facilitator" and the discussion of that definition in the 2021 White Paper both indicate that a business can be a marketplace facilitator, as defined in the MFA, without directly or indirectly processing or collecting the customers payment. The 2021 White Paper also generally indicates that states, such as California, that adopted broad definitions for the term "marketplace facilitator" did not intend to require a payment processing nexus for a business to be a marketplace facilitator with a tax collection requirement.

The Department also previously determined that "the Legislature intentionally incorporated the broad definition of marketplace facilitator into the MFA." (ISR, p. 14.) The Legislature intended for its broad definition "to be interpreted broadly and encompass a broad variety of different business models." (ISR, p. 17.) The Legislature intended for the terms and phrases used in their broad definition to be interpreted broadly to prevent evasion and carryout the purpose of the MFA (ISR, pp. 14, 15, 17), which is to recognize "the realities of today's e-commerce economy by requiring online marketplaces (e.g., Amazon and eBay) to collect sales and use tax (SUT) on behalf of their third-party retailers." (April 5, 2019, Assembly Floor Analysis of AB 147, p. 1.) The Legislature also intended for the phrase "listing products for sale" to include whatever activities were involved in listing a seller's item for sale in an online marketplace, such as Amazon.com or eBay.com, the Department's proposed amendments make the definition of "listing products for sale" in the proposed regulation consistent with that intent, and the Department does not agree that they create uncertainty.

Furthermore, the Department was previously aware that some interested parties asserted that a person cannot be a marketplace facilitator, as defined in subdivision (b) of RTC section 6041, unless the person processes the purchaser's payment in a manner that permits them to collect tax. (ISR, pp. 14, 18.) However, the Department previously determined that "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." (ISR, p. 14.) The Department also previously determined that it was necessary to add language to the definition of marketplace facilitator in subdivision (a)(10) of Regulation 1684.5 to clarify that point and "avoid further confusion" that a person must provide payment processing services, including payment processing itself, to be a marketplace facilitator. (ISR, pp. 14-15.) Therefore, the Department's proposed amendments to subdivision (a)(10) of Regulation 1684.5 address a point of confusion, but they do not eliminate any sort of payment processing nexus since the statutory definition of "marketplace facilitator" does not require a payment processing nexus.

Finally, when RTC section 6041.1 was first enacted by the Legislature as part of AB 147, the advertising exclusion provided that:

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

However, when the Legislature enacted SB 92, the Legislature substantially limited the scope of the advertising exclusion and deleted the reference to processing payments from RTC section 6041.1. So, the advertising exclusion currently 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 this chapter.

Section 2(B) of the Legislative Digest in SB 92 explains that "on and after October 1, 2019, [RTC section 6042] provides that a marketplace facilitator, as defined, is considered the seller and retailer for each sale facilitated through its marketplace, as defined, for purposes of determining whether that marketplace facilitator is required to register with the department under the Sales and Use Tax Law. [RTC section 6043] provides that any marketplace facilitator that is registered or required to register with the department under the Sales and Use Tax law and that facilitates a retail sale of tangible

personal property by a marketplace seller, as defined, is the retailer selling or making the sale of the tangible personal property sold through its marketplace for purposes of paying any sales taxes and collecting any use taxes. [RTC section 6041.1] . . . excludes certain actions taken by newspapers, internet websites, and other entities from the act of facilitating a sale as a marketplace facilitator [under RTC sections 6042 and 6043] . . . [and the] bill would revise those actions taken by newspapers, internet websites, and other entities that are excluded from the act of facilitating a sale as a marketplace facilitator [under RTC sections 6042 and 6043]." Also, the Department understood that businesses, including eBay, listed items for sale in classified advertisements at the time SB 92 was enacted, these classified advertisements merely referred the buyer to the seller to complete the sale, and that the advertising exclusion was revised so that it would only apply to sales of items listed for sale in such classified advertisements and it would not apply if the business listing items for sale did anything other than refer the buyer to the seller to complete the sale.

As a result, the Department previously determined that that the advertising exclusion does not apply when a person who publishes an advertisement for the sale of tangible merchandise participates further in the sale of that merchandise in any way, except referring purchasers to the seller to complete the sale, such as taking orders or providing payment processing or fulfillment services. (ISR, p. 19.) The Department also previously determined that the Legislature intended for the advertising exclusion to exclude specific sales from the provisions of RTC sections 6042 (nexus) and 6043 (retailer) when the person advertising the tangible personal property for sale is a marketplace facilitator that would otherwise be facilitating the sales in the absence of the exclusion (ISR, p. 10) because RTC sections 6042 and 6043 only apply to marketplace facilitators and no one else needs the advertising exclusion to relieve them from the provisions of those statutes. (ISR, p. 17.)

The Department also previously determined that stand-alone subdivision (a)(5)(A) in repealed emergency Regulation 1684.5 was slightly inaccurate because it indicated that the advertising exclusion is an exclusion from the definition of marketplace facilitator in RTC section 6041 for specific sales. (ISR, p. 10.) The Department was also previously aware that stand-alone subdivision (a)(5)(A) was causing confusion because CalTax read the language implementing the advertising exclusion as excluding a person that does not provide payment processing services from the definition of marketplace facilitator. Therefore, the Department proposed to delete stand-alone subdivision (a)(5)(A) and clarify how the advertising exclusion in RTC section 6041.1 works with RTC sections 6042 and 6043 in a new subdivision (d). (ISR, p. 11.) However, those amendments to the proposed regulation did not eliminate any payment processing nexus since the MFA does not require a payment processing nexus and RTC section 6041.1, as amended by SB 92, does not refer to payment processing.

*Comments from the Memorandum, Email, Armenta-Roberts, Vinatieri. and Lee*

1. Comments Related to Payment Processing and Payment Processing Services

The Memorandum said the proposed "amendments to Regulation 1684.5 will clearly cause additional persons to be liable for tax as marketplace facilitators that are not currently liable and cause these persons to incur significant new costs to comply with the regulation." (Memorandum, p. 1.) The Memorandum said the language in the initial statement of reasons concedes that businesses that do not process payments will have to change their business practices and incur costs to collect tax due to the Department's proposed amendments and not the MFA, and implied that such businesses are examples of persons that will be made liable for tax as marketplace facilitators under the proposed regulation that are not currently liable under the MFA. (Memorandum, p. 13.) The Memorandum also said the Department "previously acknowledged the importance of payment processing services as creating the facilitation relationship." (Memorandum, p. 16.)

Also, during the public hearing, Armenta-Roberts and Vinatieri indicated that they think the way the regulation is currently written would make companies that do not process payments or are not involved in the payment process marketplace facilitators and would make those persons liable for tax when they would not currently be liable. Armenta-Roberts said "I . . .just talked to a former committee consultant that was a consultant at the legislature and this person was involved in every meeting that they had regarding the *Wayfair* decision and marketplace sales and facilitators, and they told me that it was never the intent" to make "companies like Craigslist" liable for tax as marketplace facilitators. Armenta-Roberts asked the Department to speak to the undisclosed consultant and "the legislative committee members or their consultants." Armenta-Roberts confirmed that CalTax's "largest concern" regarding the proposed regulation was including companies that do not process payments in the definition of marketplace facilitator. Armenta-Roberts also said CalTax was shocked "that [the Department] decided to pull them in without a [statutory change];" however, in the Email, Armenta-Roberts subsequently conceded that "the [current] statute can be interpreted to include such companies" in the definition of marketplace facilitator.

In addition, the Memorandum quoted the 2021 White Paper (discussed above) as saying that businesses that do not directly or indirectly process or collect the payment cannot practically comply with the tax collection requirements imposed by the MFA. (Memorandum, p. 3.) The Memorandum set forth reasons why it might be "difficult," "impractical," or "unfeasible" for such businesses to comply without changing their business practices. (Memorandum, pp. 1-2, 16.) The Memorandum also appeared to concede that "it may not be 'impossible' to comply." (Memorandum, p. 17.) Also, Vinatieri raised the practicality issue during the public hearing. Vinatieri quoted page

three of the 2021 White Paper, which says that "a business falling within the broad definition [of marketplace facilitator] that does not directly or indirectly process or collect the payment cannot practically comply with the tax collection requirement." Vinatieri also quoted page 15 in the 2021 White Paper, which says that "With the broad definition, a business may not have access to the details of the sales transaction, and may not handle the customer's payment, yet could still fall within the definition. The marketplace facilitator/provider faces problems complying with the obligation to collect, report and remit sales/use tax on the transaction if it has no access to the transaction details (payment amount, date, delivery address, etc.) or the customer's payment." However, Vinatieri also said that the provisions of the MFA and the proposed regulation reminded Vinatieri of the provisions of subdivision (b) of RTC section 6007, which are implemented, interpreted, and made specific by Regulation 1706, Drop Shipments. This is because those provisions can make a "drop shipper" (i.e., manufacturer, wholesaler, or retailer) responsible for paying or collecting tax on another retailer's sale to a California consumer under circumstances where the drop shipper may not be able to collect sales tax reimbursement or use tax from the consumer.

Furthermore, the Memorandum indicated that CalTax does not think it's necessary to add language to subdivision (a)(10) of Regulation 1684.5 to clarify that a person that engages in any of the activities in subdivisions (a)(10)(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 because payment processing services are "one of seven possible options" that satisfy subdivision (b)(2) of RTC section 6041. (Memorandum, p. 16.) It also referred to the provision as "superfluous language" (Memorandum, p. 17), which indicated to the Department that CalTax thinks the provision unnecessarily restates the meaning of subdivision (b)(2) of RTC section 6041. However, the Memorandum also said that "a 'sale' cannot be made through [a] marketplace without the deemed marketplace facilitator engaging in payment processing services" and that the same "language is completely beyond the plain language in Section 6041" (*Ibid*, emphasis omitted), and appeared to contradict the prior comments as a result.

The Department did not make any changes to the proposed regulation in response to the above comments from CalTax, Vinatieri, and Armenta-Roberts for the following reasons:

- The Department has never conceded that businesses that do not process payments will have to change their business practices and incur costs due to the proposed regulation and did not do so in the ISR. Also, there seems to be some misunderstanding in this regard because the ISR expressly provided that "The Legislature intends for retailers, including marketplace facilitators that are retailers under the MFA, to take whatever steps are necessary to comply with their statutory obligations to pay sales tax or collect and remit use tax and for the Department to ensure compliance by auditing retailers and issuing determinations

under chapter 5 of the Sales and Use Tax Law." (ISR, p. 19.) It also expressly clarified that "The Department ***never*** determined that a marketplace facilitator does not include a person that does not provide payment processing services and . . . such a determination would conflict with the Legislature's intent as expressed by the plain meaning of the language used in RTC sections 6041, 6042, and 6043." (*Ibid*, emphasis added.)

- The Department has never said that payment processing services are integral to creating "the facilitation relationship."
- The Department has determined that a sale can be facilitated "through" a marketplace without the deemed marketplace facilitator engaging in payment processing services and that nothing in the MFA requires a buyer's payment to be processed in a marketplace for a sale to be facilitated "through" that marketplace.
- The Department has determined that the express provisions of subdivision (b) of RTC section 6041 can make companies that do not process payments or are not involved in the payment process marketplace facilitators and, as stated earlier, Armenta-Roberts conceded that the statute can be interpreted this way. The Department has also determined that the MFA can make those persons liable for tax when they facilitate sales through their marketplaces, the proposed regulation is consistent with the MFA, and the proposed regulation does not make companies that do not process payments or are not involved in the payment process liable for any taxes they would not currently be liable for under the MFA.
- The Department participated in discussions regarding the Legislature's enactment of AB 147 and SB 92. The proposed regulation is consistent with those discussions, the Legislature's express intent, and the express terms of the MFA and will not require companies like Craigslist to register with CDTFA as marketplace facilitators or make companies like Craigslist liable for tax as marketplace facilitators if they advertise tangible personal property for sale in classified ads that refer purchasers to the seller by telephone, internet link, or other similar means to complete the sale, and they do not participate further in any sales. (Reg. 1684.5, subd. (d).) Therefore, the Department determined that it was not necessary to try to speak to the consultant Armenta-Roberts referred to or the legislative committee members or their consultants before adopting the proposed regulation.
- The Department has previously determined that the Legislature did not intend to "to generally excuse marketplace facilitators from complying with the MFA because they prefer not to change their current business models or practices to comply." (ISR, p. 19.) Also, the Department has no authority to excuse compliance because it might be difficult, impractical, or unfeasible for such businesses to comply without changing their business practices, and the Department has determined that it is necessary to add language to subdivision

(a)(10) of Regulation 1684.5 to clarify that a person that engages in any of the activities in subdivisions (a)(10)(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 to address the payment processing issues raised by CalTax and other interested parties.

- Also, the drop shipper provisions in subdivision (b) of RTC section 6007 are an example of statutory language that was intended to make drop shippers liable for paying sales tax and collecting use tax regardless of whether they have access to the details of the sales transaction or handle the customer's payment. Therefore, there is nothing inherently unreasonable about concluding that the Legislature intended for the MFA to make marketplace facilitators liable for paying sales tax and collecting use tax regardless of whether they have access to the details of the sales transaction or handle the customer's payment.

2. Comments Related to the Definition of Facilitate

The Memorandum said the amendments to the definition of "facilitate" in subdivision (a)(4) of the proposed regulation "would capture many persons who may not even facilitate a sale" because "making something possible is beyond the statute's language and legislative intent." The Memorandum said that adding the word "possible" to the definition of "facilitate" makes it less clear. (Memorandum, pp. 2.) The Memorandum reiterated CalTax's prior comment (see ISR, p. 18) that the MFA requires the Department to determine "whether the level of facilitation is such that the person operating the marketplace is responsible for collecting and remitting tax" and that "these efforts must not only be substantial, but they must place the 'facilitator' in a position where it is able to calculate and collect the tax." (Memorandum, p. 4.) The Memorandum said adding "possible" to the definition of "facilitate" means "that the marketplace seller may not have committed to selling through the marketplace" and that this is inconsistent with the statutory definition of marketplace seller, which "implies that the commitment, and the actual sales, are already occurring." (Memorandum, p. 14.) The Memorandum indicated that CalTax thinks the use of the word "engage" in the definition of marketplace facilitator is inconsistent with the word "possible" being included in the definition of "facilitate" and including the word "possible" in the definition "erodes the force and effect of [the advertising exclusion] by weakening the distinction between 'listing products for sale' and 'advertising.'" *(Ibid*.)

The Memorandum said the plain meaning of the term "facilitate" does not include making something possible and that "nowhere in the cited [Merriam-Webster] dictionary does it suggest that facilitate means 'possible.'" (Memorandum, p. 14.) The Memorandum said subdivision (b) of RTC section 6041 "does not indicate that simply allowing the *possibility* that a marketplace seller could sell tangible personal property through their marketplace would cause a person to qualify as a marketplace facilitator."

(*Ibid*.) The Memorandum also said that "the statute requires a person to 'engage' in certain activities in order to be a marketplace facilitator, whereas including the word 'possible' in the definition of 'facilitate' would suggest that a person may be considered a marketplace facilitator even in situations where they do not actively participate in, or there is no transaction.'" (Memorandum, pp. 14-15.) Also, during the public hearing, Lee said adding "possible" to the definition of "facilitate" will lead to an arbitrary and discriminatory application and makes the definition "void for vagueness."

The Department did not make any changes to the definition of "facilitate" in the proposed regulation in response to the above comments from CalTax and Lee because:

- The MFA only requires a person to "contract" with marketplace sellers to facilitate sales of their products through its marketplace and satisfy one of the requirements in subdivisions (b)(1) and (2) of RTC section 6041 to be a marketplace facilitator. Also, the statutory definition of marketplace facilitator does not require the Department to determine if a marketplace seller has committed to selling through a marketplace at the time it contracts with another person to facilitate its sales.
- The MFA requires a marketplace facilitator to facilitate an actual retail sale to be liable for tax on that sale under RTC section 6043 and adding possible to the definition of marketplace facilitator will not make anyone liable for tax unless they facilitate an actual retail sale through their marketplace and the advertising exclusion does not apply to that sale.
- The ISR explains that "RTC sections 6041, 6042, and 6043 do not require that the activity or activities that facilitate a sale be substantial and do not require that the activity or activities that facilitate a sale place the marketplace facilitator in a position where it can calculate and collect the tax." (ISR, p. 19.) "Additionally, while these sections do not require that the activity or activities that facilitate a sale place the marketplace facilitator in a position where it can calculate and collect the tax, RTC section 6046 provides relief of the liability to the extent that the marketplace facilitator demonstrates to the Department's satisfaction that it has made reasonable efforts to collect the tax, and that the failure to remit the correct amount of tax was due to incorrect or incomplete information from an unrelated marketplace seller." (*Ibid*.)
- The ISR also explains that the "Department proposed to replace 'easy' with 'possible' in the definition of 'facilitate' . . . 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. (See, e.g., merriam-webster.com/dictionary/facilitate.)." The use of the phrase "makes it possible" in the definition of "facilitate" is consistent with the phrases "helping cause or bring about something" in the Merriam-Webster Dictionary's definition of "facilitate,"

and neither the Memorandum nor Lee addressed that part of the Merriam-Webster Dictionary's definition.

- The Legislature did not define the term "facilitate" or expressly indicate in the legislative history that the Legislature intended for the Department to give the word "facilitate" a special meaning. Also, making the definition of facilitate in the proposed regulation consistent with the common meaning of the word "facilitate" does not make the definition in the proposed regulation less clear and it will not lead to an arbitrary and discriminatory application.
- Subdivision (b) of RTC section 6041 does not use the word "engage" in the same phrase as the word "facilitate" or require a person to engage in any specific activities to "contract" to facilitate sales. Also, the way subdivision (b)(2) of RTC section 6041 uses the word "engage" is consistent with the word "possible" being included in the definition of "facilitate" since engaging in the activities listed in subdivision (b)(2) can make it possible or easier for a marketplace seller to sell its products through a marketplace.
- Finally, including "possible" in the definition of "facilitate" will not erode the force and effect of the advertising exclusion because all the provisions in the advertising exclusion in RTC section 6041.1 are incorporated into subdivision (d) of the proposed regulation.

3. Comments Related to the Definition of Listing Products for Sale and the Advertising Exclusion

The Memorandum said the "amended definition of 'listing products for sale' includes advertising, in direct contrast to the statute" (Memorandum, p. 2) and "goes beyond the plain meaning of the statute." (Memorandum, p. 15.) The Memorandum also said that RTC section 6041.1 "excludes persons who are simply advertisers and who do not participate further in any sale from being considered marketplace facilitators subject to tax collection and reporting requirements under the marketplace facilitator act. This new language only weakens the distinction between 'advertising' and 'listing products for sale' to broaden the scope of persons subject to the regulation and increase the number of persons deemed marketplace facilitators required to collect and remit sales tax reimbursement." (Quoting Memorandum, p. 2; similar comments on Memorandum, p. 15.)

The Memorandum indicated that CalTax disagrees with the amendments deleting stand-alone subdivision (a)(5)(A) from the proposed regulation and adding subdivision (d) because "Moving the language for advertising provides less clarity, as the necessary context to comprehend the reasoning for the advertising definition is lost by its placement at the end of the regulation." (Memorandum, p. 15.) The Memorandum said that "Under the proposed revised language to Regulation 1684.5, an advertiser could be considered a

marketplace facilitator without participating in any sale," and that the proposed language "goes beyond what is provided in Section 6041.1," and "goes against the legislative intent in the statute." (Memorandum, pp. 15-16.) "For example, an online advertiser that owns or operates the 'infrastructure' that 'brings buyers and sellers together' posts advertisements related to tangible personal property for sale. This advertiser also authorizes others to post on its platform in exchange for a fee. The advertiser does not participate any further in the sale. In this hypothetical, the advertiser may be deemed a 'marketplace facilitator' under the proposed revisions to the regulation because it owns and operates the infrastructure bringing potential buyers and sellers together, and the expanded definition of 'listing products for sale,' includes an advertisement." (Memorandum, p. 16.) The Memorandum also said that defining "listing products for sale" to include an advertisement that contains an announcement of tangible personal property for sale "would essentially make Section 6041.1 meaningless, as advertisers that do not participate in any sale could now be considered a 'marketplace facilitator.'" (*Ibid*.)

During the public hearing, Lee said some of the proposed revisions "essentially make other portions of the statute repetitive or useless" and do not "effectuate the purpose of the statute." Lee also said the revisions to the definition of "listing products for sale" to include advertisements is an example because it "essentially makes RTC section 6041.1 meaningless as advertisers could be marketplace facilitators." In the Email, Armenta-Roberts said, "companies like Craigslist, FB Marketplace and OfferUp," and "newspapers with classified ads could also be included in the definition of marketplace facilitator" in the proposed regulation. Armenta-Roberts suggested that the advertising exclusion could be read broadly to exclude businesses that do not process payment from the definition of marketplace facilitator. Armenta-Roberts also said that "While it would have been preferred that the legislature not change the original language of 6041.1, clearly 'do not participate further in the sale' can be defined as not getting involved with the details of the sale and not processing payments."

The Department did not make any changes to the definition of "listing products for sale" in the proposed regulation or add stand-alone subdivision (a)(5)(A) back to the proposed regulation or delete subdivision (d) from the proposed regulation in response to the above comments from CalTax, Armenta-Roberts, and Lee because:

- Section 2(B) of the Legislative Digest in SB 92 explains that RTC section 6041.1 is intended to exclude certain actions taken by newspapers, internet websites, and other entities from the act of facilitating a sale "as a marketplace facilitator" under RTC sections 6042 (nexus) and 6043 (retailer). It is not intended to exclude such persons from the definition of "marketplace facilitator" and being a "marketplace facilitator," alone, does not require anyone to register with the Department under RTC section 6042 or pay sales tax or collect use tax under RTC section 6043.

- Subdivision (d) of the proposed regulation will exclude newspapers, internet websites, and other entities from the act of facilitating a sale as a marketplace facilitator under RTC sections 6042 and 6043 if they merely advertise tangible personal property for sale, refer purchasers to the seller by telephone, internet link, or other similar means to complete the sale, and they do not participate further in any sales, as provided in RTC section 6041.1. Also, examples 11 and 12 in the proposed regulation illustrate that this is true even if they are marketplace facilitators. Therefore, the proposed regulation does not make RTC section 6041.1 meaningless or limit its meaning in any way. The proposed regulation will not require companies like Craigslist to register with CDTFA as marketplace facilitators or make companies like Craigslist liable for tax as marketplace facilitators if they advertise tangible personal property for sale, refer purchasers to the seller by telephone, internet link, or other similar means to complete the sale, and they do not participate further in any sales. (Reg. 1684.5, subd. (d).)
- The Department previously determined, based on the express terms of RTC section 6041.1, that the advertising exclusion "does not apply when a person who publishes an advertisement for the sale of tangible merchandise participates further in the sale of that merchandise in any way, except referring purchasers to the seller to complete the sale, 'such as taking orders or providing payment processing or fulfillment services.'" (ISR, p. 19.) Therefore, the Department does not agree that the statutory phrase "do not participate further in the sale" means not getting involved with the details of the sale and not processing payments.
- The Department determined that clarifying that "listing products for sale" includes an advertisement that contains "an announcement of tangible personal property for sale" does not limit the advertising exclusion in RTC section 6401.1 in any way or make the advertising exclusion less clear. The Department also determined that the clarification is consistent with the definition of listing products for sale in the repealed emergency regulation and the proposed regulation.
- The Department previously determined that for purposes of the MFA there is not "a sufficient distinction between an advertisement" that contains an announcement of tangible personal property for sale and "listings products for sale" when the advertising exclusion in RTC section 6041.1 does not apply. (ISR, pp. 10 and 17.)
- Also, CalTax's comments demonstrate that there is some misunderstanding about the meaning of stand-alone subdivision (a)(5)(A) in repealed emergency Regulation 1684.5 because it did not contain an "advertising definition" and the Department previously determined that its "placement and wording [was] causing confusion about the meaning of the advertising exclusion in RTC section 6041.1 . . . The Department also determined that it would be more helpful for

Regulation 1684.5 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 to specific sales in the absence of the advertising exclusion." (ISR, pp. 10-11.)

4. Comments Related to the Definition of Providing Customer Service

The Memorandum said that "the amended definition of 'providing customer service' is overly broad, beyond the statute's language and intent." (Memorandum, p. 2.) The Memorandum said the "proposed definition of 'providing customer service' is also ambiguous as it defines that term to mean 'any service related to a marketplace seller's tangible personal property to a potential buyer….' The statute only states 'providing customer service or accepting or assisting with returns or exchanges." (*Ibid*.) The Memorandum also said that "when a statute contains a list of catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope" and "a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to other items in the list." (*Ibid*, quoting *Moore v. California State Bd. Of Accountancy* (1992) 2 Cal. 4th 999, 1011-1012 (*Moore*), emphasis omitted.) The Memorandum also said the "proposed expansive definition of providing customer service would not only make other items in the list unnecessary or redundant but would also make 'providing customer service' markedly different from just 'accepting or assisting with returns or exchanges.'" (*Ibid*.) Also, during the public hearing, Lee quoted the same text from *Moore*, made the same comments about the proposed regulation's definition of "providing customer service," and Lee added that the definition was void for vagueness.

In addition, the Memorandum said the definition of "providing customer service or accepting or assisting with returns or exchanges" in the proposed regulation is contrary the Legislature's intent since it "subsumes all of 6041(b)(1) and (2), or at least 6041(b)(1) and 6041(b)(2)(A), (B), and (F)." (Memorandum, p. 17.) It also said the definition violates the plain language of the phrase "providing customer service or accepting or assisting with returns or exchanges" because it does not give meaning to the phrase "accepting or assisting with returns or exchanges." (Memorandum, p. 18.)

The Department did not make any changes to the definition of "providing customer service or accepting or assisting with returns or exchanges" in the proposed regulation in response to the above comments from CalTax and Lee because:

- A service provided to a potential buyer regarding a marketplace seller's tangible personal property is a customer service. Customer service commonly includes answering a potential buyer's questions about property they are considering buying or the terms of its sale. Customer service commonly includes assisting a buyer with requesting a refund or credit for property they purchased. Sellers also commonly issue refunds and credits or provide replacement property to buyers without requiring the buyers to return or exchange the property they previously received, as a customer service. Therefore, defining "providing customer service" to include all of these activities is consistent with the general meaning of the phrase "providing customer service."
- The Legislature expressly included the word "or" in the statutory phrase "Providing customer service ***or*** accepting or assisting with returns or exchanges" (emphasis added) and did not indicate that the phrase "accepting or assisting with returns or exchanges" was intended to limit the phrase "providing customer service" in any way.
- Assisting buyers with requesting refunds or credits is a customer service that includes "assisting with returns" for refunds or credits. Therefore, including assisting the buyer with requesting a refund or credit as an example of "providing customer service or accepting or assisting with returns or exchanges" does not limit the phrase "accepting or assisting with returns or exchanges" or render it meaningless or subsume the entire definition of marketplace facilitator.
- Also, the definition of "providing customer service or accepting or assisting with returns or exchanges" in the proposed regulation does not limit the meaning of the phrase "accepting or assisting with returns or exchanges" because it includes "providing any service to a buyer related to their purchase of a marketplace seller's tangible personal property . . ., including but not limited to, . . . 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."
- In addition, in *Moore*, *supra*, the appellants made the arguments quoted above regarding a statute that contains a list of items. (*Moore* at p. 1011). However, the California Supreme Court said that the quoted doctrines are maxims of jurisprudence. (*Id*. at p. 1012.) The California Supreme Court also said that "In construing a statute a court's objective is to ascertain and effectuate the underlying legislative intent" and "This fundamental rule overrides [doctrines and maxims] if application of the doctrine or maxim would frustrate the intent underlying the statute." (*Ibid*.) In *Lucent Technologies, Inc. v. State Board of Equalization* (241 Cal.App.4th 19, 40) (*Lucent*), the court of appeal held that "An interpretive maxim is a helpful guide to use when a statute's language is ambiguous and the competing arguments on how to construe that statute are in

equipoise; [but] maxims cannot be used to trump a statute's plain text." Also, the Department determined that limiting the general meaning of "customer service" so it does not include services provided to a buyer or potential buyer or does not include assisting a buyer with requesting a refund or credit would impermissibly trump the plain meaning of the phrase "providing customer service or accepting or assisting with returns or exchanges." It would also be contrary to the Legislature's intent in enacting the broad definition of marketplace facilitator included in the MFA, which is discussed in further detail in response to Slavov's comments below.

5. Comments Regarding the Need for Changes to the Repealed Emergency Regulation

The Memorandum implied that CalTax thinks the Department cannot change the provisions included in repealed emergency Regulation 1684.5 without a "significant change in the statutory language that would support the substantial new departure from the interpretations in the [repealed] regulation." (Memorandum, p. 3.) The Memorandum also said "taxpayers do not need further clarification" of repealed emergency Regulation 1684.5, that the clarifications will lead to disputes, and create "multitudinous, needless appeals." (Memorandum, p. 19.) Also, during the public hearing, Armenta-Roberts said that the Department had a "long time" to prepare the repealed emergency regulation and the Department just decided to "totally revamp the regulation . . . out of the blue."

The Department did not make any changes to the proposed regulation in response to the above comments from CalTax and Armenta-Roberts because the Department prepared the first draft of emergency Regulation 1684.5 before the MFA became operative. The Department distributed a discussion paper explaining the first draft of emergency Regulation 1684.5 on October 4, 2019, and held an October 15, 2019, interested parties meeting to obtain public input, but no interested parties raised any specific concerns about the MFA or the draft emergency regulation. However, Slavov began raising issues regarding the meaning of the proposed emergency regulation immediately after the emergency regulation was submitted to OAL for review. The Department began to identify new issues (or problems) with the emergency regulation as it gained experience during the first two years of its implementation and enforcement. The Department received comments from the interested parties in January 2021 that raised numerous issues and helped identify additional problems with the emergency regulation, which are discussed in the ISR. (ISR, pp. 9-15.) The Department also explained in the ISR how it determined that each change to Regulation 1684.5 is necessary to address a specific issue (or problem) with the MFA or the repealed emergency regulation, as required by the Administrative Procedure Act (APA) (GC, § 11340 et seq.) (ISR, pp. 10, 12-18, 20-23.)

In addition, the APA does not require there to be a change in statute to justify an amendment to a regulation that implements, interprets, or makes specific the statute.

Also, some of the changes to Regulation 1684.5, including the changes deleting stand-alone subdivision (a)(5)(A) and adding new subdivision (d), are intended to make the proposed regulation more consistent with RTC section 6041.1 and the express legislative intent for that statute, and an agency does not need a statutory change to make its regulation more consistent with a statute or the Legislature's intent.

6. Comments Regarding Economic Nexus

The Memorandum questioned the addition of "regardless of whether the sales are taxable" to subdivision (b)(1) of the proposed regulation. It said that "it seems counterintuitive to require taxpayers who make nontaxable sales to comply with the new registration requirements" and the Department "has yet to identify why this new language is necessary to effectuate the purpose of the [MFA]." (Memorandum, p. 18.)

The Department did not make any changes to the proposed regulation in response to the above comments from CalTax. The ISR explains that subdivision (c)(4) of RTC section 6203 provides 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)." (ISR, p 3, emphasis added.) "The MFA requires a marketplace facilitator to include all sales for delivery in this state, including sales made on its own behalf, sales by all related persons, and sales facilitated on behalf of marketplace sellers, for purposes of determining whether the marketplace facilitator has total combined sales of tangible personal property for delivery in this state that would make it a retailer engaged in business in this state. (RTC, § 6044.)" (ISR, p. 4.) Also, neither RTC section 6044 nor section 6203 exclude nontaxable sales from a marketplace facilitator's total combined sales of tangible personal property for delivery in this state. Therefore, the addition of "regardless of whether the sales are taxable" to subdivision (b)(1) of the proposed regulation makes that subdivision consistent with RTC sections 6044 and 6203.

7. Comments Regarding Occasional Sales

The Email also asked "how will the occasional sales law be applied? Most of the sales made on [platforms like Craigslist, Offerup and FB Marketplace] involve two individuals; an individual selling a used item and a buyer that has a need or desire for that particular item. If a company is expected to report the tax on sales made on their platform, how will they know if it is an occasional sale?"

The Department assumed that the "occasional sales law" mentioned in the Email was the exclusion for "occasional sales" as defined in subdivision (a) of RTC section 6006.5 and that both questions in the Email were in regard to that occasional sales law based on the information provided. Also, the Department did not make any changes to the proposed

regulation in response to the questions because they did not directly relate to any provisions in the proposed regulation.

In addition, a sale is an occasional sale as defined in subdivision (a) of RTC section 6006.5 if: (A) the seller is not required to hold a seller's permit and would not be required to hold a seller's permit if its activities were conducted in this state; or (B) the tangible personal property sold was not held or used by the seller in the course of activities for which the seller is required to hold a seller's permit or would be required to hold a seller's permit if the activities were conducted in this state. When the advertising exclusion in RTC section 6041.1 does not apply and RTC section 6043 makes a marketplace facilitator the retailer for a sale of tangible personal property, then RTC section 6043 also makes the marketplace facilitator the person "selling or making the sale of the tangible personal property" for purposes of determine whether the sale is an "occasional sale" as defined in subdivision (a) of RTC section 6006.5. Therefore, the occasional sales law will apply to the marketplace facilitator, not the marketplace seller, when the advertising exclusion in RTC section 6041.1 does not apply and RTC section 6043 makes a marketplace facilitator the retailer for a sale of tangible personal property.

*Comments from Slavov*

The Attachment included 34 comments and Slavov either read, paraphrased, or discussed comments 1-11 and 31-34 during the public hearing.

1. Comments Regarding the Definition of "Marketplace Facilitator" and Small Marketplaces

In Slavov's comments 1, 2, 3, 6, 9, 11, 12, 14, 17, 21, and 29, Slavov said that the ISR cites *Levitt v. Faber et al.* (1937) 20 Cal.App.2d Supp. 758, 762 (*Levitt*)), which interpreted the statutory term "labor" broadly to include "personal services" to fulfill the statute's intended purpose. (Attachment, pp. 1 and 2.) Slavov said that interpreting labor to mean professional services is fair and reasonable. (Attachment, p. 2.). However, Slavov thinks "that is not the case with some of the Department's definitions" of the terms and phrases used in the statutory definition of "marketplace facilitator." Instead, Slavov thinks some of those definitions "are neither fair nor reasonable and do not align with the intent of the Legislature" (Attachment, p. 2), some of the definitions are "illogical" (Slavov Letter, p. 7), some of the definitions are "unfamiliar, unfair, and random" (Slavov Letter, p. 8), and some give the terms and phrases "special" meanings (Attachment, pp. 2 and 3) that do not "align" with the intent of the Legislature. (Attachment, pp. 5 and 19.) Slavov thinks the broad definitions are not "justified" by citing *Levitt* (Attachment, p. 2) or the fact that the Legislature enacted what the 2021 White Paper refers to as a "broad" definition of marketplace facilitator. (Attachment, pp. 3, 9.) Slavov said the fact that the Legislature did not "define the phrases used in

6041(b)(1) and 6041(b)(2)" and the way the phrases are "used individually on separate lines" shows the Legislature intended for them to have "ordinary" meanings. (Attachment, p. 3.) Slavov also said "there is no evidence the Legislature intended to assign the terms outlined in RTC 6041(b)(1) and 6041(b)(2)" what Slavov thinks are "different meanings than the ones generally and ordinarily given to these phrases." (Attachment, p. 9.)

In addition, Slavov said that all marketplaces satisfy subdivision (b)(1) of RTC section 6041 because they all transmit or otherwise communicate the offer or acceptance between the buyer and seller (Attachment, p. 5) and owning or operating the infrastructure that brings the buyers and the sellers together. (Attachment, pp. 2, 5, 8, 11, 14.) Therefore, Slavov believes the Legislature added subdivision (b)(2) to RTC section 6041 to "limit the scope" of the definition of marketplace facilitator (Attachment, pp. 2) and generally exclude "small marketplaces," which Slavov said would not "typically" perform the activities outlined in that subdivision (Attachment, pp. 5 and 6) if the terms and phrases were defined in what Slavov says is a "fair, reasonable manner" (Attachment, p. 5) that aligns with what Slavov says is "the Legislature's intent" to exclude small marketplaces.[2] (Attachment, pp. 5 and 19.) Thus, Slavov also said:

- "Fulfillment or storage services" should involve "an agreement with the marketplace seller to ship the products to the marketplace" and allow the marketplace "to sell and directly ship the products." (Attachment, p. 6.)
- "Setting prices" should involve "assigning individuals" to "closely monitor competitor's prices" and "adjust prices frequently" and "quickly" to guarantee competitiveness. (*Ibid*.)
- "Branding sales as those of the marketplace facilitator" should involve "displaying the marketplace logo and not displaying the seller's name to give the buyer the impression that they are purchasing directly from the marketplace, not from its sellers." (*Ibid*.)[3]

The Department did not make any changes to the proposed regulation in response to the above comments from Slavov. This is because the express legislative history regarding the enactment of AB 147 supports the Department's previous determinations that "the Legislature intentionally incorporated the broad definition of marketplace facilitator into the MFA" (ISR, p. 14, footnote omitted)), "the Legislature intended for its broad definition of 'marketplace facilitator' to be interpreted broadly and encompass a broad variety of different business models " (ISR, p. 17), and the Legislature intended for marketplace facilitators that are retailers under the MFA "to take whatever steps are

[2] Slavov's comments do not define "small marketplace," but they do refer to "eCrater [where] there are currently 7,167 Californian individuals and businesses who sell their products online" as an example of a small marketplace. (Attachment, p. 19.)

[3] Slavov's related comments about the definitions of "listing products for sale," "order taking," "payment processing services," and "providing customer service or accepting or assisting with returns or exchanges" are summarized and discussed separately below.

necessary to comply with their statutory obligations to pay sales tax or collect and remit use tax and for the Department to ensure compliance." (ISR, p. 19.) Also, the express legislative history indicates that the Legislature enacted AB 147 to provide relief for small out-of-state sellers that make less than $500,000 in sales of tangible personal property for delivery in California or make sales through marketplaces for delivery in California. The Legislature did not craft the broad definition of "marketplace facilitator" to exclude small marketplaces that make or facilitate more than $500,000 in sales of tangible personal property for delivery in California.

Page seven in the February 22, 2019, Assembly Revenue and Taxation Committee analysis of AB 147 (February 2019 Analysis) contains the following statement from the author in support of the bill:

> AB 147 establishes a comprehensive set of post-*Wayfair* use tax collection rules to promote marketplace fairness while balancing the needs of consumers, small businesses, local governments, and the state. It is long past time to bring California's use tax regime into the 20th century. It is also imperative that we provide meaningful relief to small retailers who, without this legislation, would be forced to register with [the Department] and collect taxes on their minimal sales into California.

Page seven in the February 2019 Analysis also explains that AB 147 was sponsored by Treasurer Fiona Ma who noted that "AB 147 establishes a comprehensive and more equitable set of post-*Wayfair* tax collection rules that make sense for consumers, small businesses, and the state . . . in three ways:

- First, AB 147 provides relief to small businesses by increasing the "economic nexus" threshold from $100,000 to $500,000, and eliminating the "200 or more separate transactions" threshold entirely.
- Second, AB 147 recognizes the realities of today's e-commerce economy by requiring online marketplaces to collect use tax on behalf of their third-party retailers.
- Finally, AB 147 promotes clarity and simplicity by requiring retailers to collect and remit local district taxes once they sell over $500,000 in California, eliminating the burdensome requirement to track sales in each district.

Page seven in the March 22, 2019, Senate Committee on Governance and Finance analysis of AB 147 (March 2019 Analysis) explains that the change in the nexus threshold "should ease the compliance burden for smaller out-of-state retailers who now face a myriad of sales tax requirements in the various states where they sell goods due to *Wayfair* and allow [the Department] to focus its compliance efforts on larger sellers." It explains that the "marketplace facilitator provisions seek to make tax collection easier for

consumers, out-of-state retailers, and [the Department] by shifting tax collection responsibilities from the tens of thousands of out-of-state retailers located around the world onto online marketplaces where consumers buy things. AB 147 makes the marketplace facilitator requirement effective for the fourth quarter of this year (October 1, 2019) to give marketplaces enough time to adjust to the bill's new requirements, and follows ten other states where the requirement is already in place." (*Ibid*.) It explains that the Legislature heard that "some marketplace facilitators say they need more time because significant time, cost, and effort is necessary to make the programming changes necessary for their platform to account for California's exemptions and various local tax rates, and are asking for more time to comply." (*Ibid*.) However, the Legislature did not agree to a further delay, in part, because "AB 147 provides additional funds for public services by requiring marketplaces to collect and remit sales and use taxes on any sale it facilitates, and eliminates the competitive disadvantage faced by California retailers." (*Ibid*.)

In addition, the March 2019 Analysis clarifies that the "States who enacted [a marketplace facilitator] requirement split between a broad definition and a narrow one." (March 2019 Analysis, p. 7.) The Legislature specifically considered whether to enact the narrow or broad definitions for the term "marketplace facilitator" included in the MTC's Final, November 20, 2018, White Paper (2018 White Paper). (*Ibid*.) The Legislature understood that the "narrow definition required the facilitator handle or process the customer payment to be considered a marketplace facilitator" and that states supporting the narrow definition argued that "the marketplace facilitator must have access to the payment to correctly collect the tax on the transaction." (March 2019 Analysis, pp. 7-8.) The Legislature also understood that "States supporting the broader definition asserted that the broader definition reduced the chances that a marketplace could *reorganize its structure to evade registration and collection requirements*, and more effectively account for potential future changes in the industry and technology" and "AB 147 adopts the broader definition suggested by MTC" with exceptions for delivery network companies and business that only advertise tangible personal property for sale. (March 2019 Analysis, p. 8, emphasis added.)

Furthermore, it appears that the Legislature was aware that the Washington Department of Revenue supported the broad definition because "it minimizes 'loopholes' and should prevent businesses that would otherwise be considered marketplace facilitators under the narrow definition from changing their business models so as to fall outside that narrow definition" and "the broad definition is intended to more effectively accommodate future changes in the industry and technology," as discussed on page nine in the 2018 White Paper. It also appears that the Legislature was aware that "small, specialized marketplaces could end up falling within the broad definition, even though they only provide the platform infrastructure and are not processing payments, and may also not

have access to the information on the actual sales transactions," as discussed on page 10 in the 2018 White Paper, but the Legislature was not persuaded to enact a narrow definition, such as the one initially included in AB 147 and discussed on page five (above).

As a result, there is substantial evidence that the Legislature did specifically adopt a broad definition of "marketplace facilitator" with the intent that it be interpreted broadly to minimize tax loopholes and prevent a business from reorganizing its structure to evade the MFA's registration and collection requirements. The Department is justified in refraining from giving the undefined terms and phrases in the MFA a narrow or restrictive meaning if such construction would result in an evasion of the evident purpose of the [MFA] when a broader meaning would prevent the evasion and carry out that purpose" based on *Levitt*, *supra*. Also, the Department's definitions of the phrases "fulfillment or storage services" and "setting prices" are reasonable, align with the Legislature's intent, and are not unfamiliar, unfair or unreasonable because:

- A person can engage in "storage" or "fulfillment" services with respect to a marketplace seller's products without having an agreement for the marketplace seller to ship the products to the person or authority to sell and directly ship the products; and
- A person can engage in "setting prices" with respect to a marketplace seller's products electronically and without assigning individuals to closely monitor competitor's prices and adjust prices frequently and quickly to guarantee competitiveness.

In addition, the Department's definition of the phrase "branding sales as those of the marketplace facilitator" is reasonable, aligns with the Legislature's intent, and is not unfamiliar, unfair or unreasonable because a person can brand sales as its own without using a logo, and it's possible to display other sellers' names and still give the buyer the impression that they are purchasing directly from the marketplace facilitator under some circumstances. Also, the Department previously revised the definition to provide a safe harbor for a marketplace facilitator that does not intend to brand sales as its own in response to Slavov's January 2021 comments regarding the definition. (ISR, p. 13.) The revised definition clarifies that "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."

2. Comments Regarding Payment Processing and Payment Processing Services

In Slavov's comments 3, 4, 5, 6, 7, 9, 10, 21, 22, 23, 24, 25, 26, and 33, Slavov said the "broad definitions [of marketplace facilitator, including the one in the MFA,] are labeled 'broad' only because they do not require the marketplace [facilitator] to be able to take

the customer's payment." (Attachment, p. 3.) Slavov clarified that the sentence the Department is adding to subdivision (a)(10) of the proposed regulation to clarify that a person "is not required to provide payment processing services to be a marketplace facilitator" actually "follows the [MFA] and states an obvious fact." (Attachment, p. 7.) However, Slavov does not agree with the sentence. (*Ibid*.) Instead, Slavov thinks it's impossible to comply with the MFA if "a marketplace does not have access to the transactions details (such as payment amount, date, delivery address, etc.) or the customer payment." (Attachment, p. 4.) Slavov does not think the Department has explained how such a marketplace can comply with the MFA, and Slavov thinks the Department has "declined to comment on it." (Attachment, p. 4.) Slavov thinks the proposed regulation "does not comply with the consistency standard" in GC section 11349.1 (Attachment, p. 4) and violates the U.S. Constitution's Equal Protection Clause (Attachment, pp. 4-5) if it applies "in instances where the business operates as a sole proprietorship" or operates a small marketplace that lacks "the resources to implement payment solutions" (Attachment, p. 4) and performs at least one activity in subdivision (b)(2) of RTC section 6041, but is unable to process or collect payments or withdraw funds from the merchant's payment account because compliance is impossible (citing Civil Code section 3531). (Attachment, pp. 4-5.) Slavov also said "The Department should reconsider [Civil Code section 3531] and determine if it aligns with their professional standards." (Attachment, p. 5.)

Also, Slavov said "Payment processing services" should involve "collecting payments from buyers and transmitting them to the seller's payment account, thus giving the marketplace full control over the payment flow," including the ability to "directly charge sellers various fees and control when to release payment to the seller's account." (Attachment, p. 6.) Slavov does not agree that "integrating payment processing with an online shopping cart at checkout" is a payment processing service. (Attachment, p. 13.) Slavov said the provisions in subdivision (b)(2) of RTC section 6041 "prove" that the Legislature intended to exclude persons that operate "marketplaces with shopping carts and checkout process[es]" where most "transactions are completed online" from the definition of marketplace facilitator if their checkout processes are integrated with a payment processor's website, even though Slavov does not think they satisfy the advertising exclusion. (Attachment, p. 14.) Again, this is because Slavov thinks a person must be able to directly or indirectly "process payments" to provide "payment processing services" (Attachment, p. 15) and Slavov thinks this proves that "integration with a service offered by a payment processor" is not a payment processing service, unless it allows the website integrated with the payment processor to process payments. (Attachment, p. 16.)

In addition, Slavov said the term "payment processing services" has been defined to only include payment processing in "United States of America v. Internet Transaction

Services, Inc., et al. (Dist. Court, CD California 2021, 21-6582-JFW)" (*ITS*), "United States of America v. Charles Kafeiti, et al. (Dist. Court, ED New York 2019, 18-CV-6581)" (*Kafeiti*), and "FTC v. Your Money Access, LLC, at al., (Dist. Court, ED Pennsylvania 2010, 07-5147)" (*Money*). (Attachment, pp. 16.) Slavov thinks the proposed definition of "payment processing services" uses language incorrectly and violates CCR, title 1, section (Rule) 16(a)(4) because it uses "the core of the phrase it defines." (Attachment, p. 15.) Slavov thinks the proposed definition is also too broad and violates Rule 16(a)(4) "If the Department meant that integrating with any service offered by a company that also offers payment processing" constitutes payment processing services. (Attachment, p. 17).

As a result, Slavov proposes to define "payment processing services" more narrowly so it 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 physical or virtual credit or debit card terminal, providing payment accounts to the marketplace sellers, transmitting the transaction data to the buyer's bank for authorization and handling the subsequent clearing and settlement." (Attachment, p. 20.)

The Department did not make any changes to the proposed regulation in response to the above comments from Slavov. The Department did not make any changes to the sentence the Department add to subdivision (a)(10) of the proposed regulation to clarify that a person "is not required to provide payment processing services to be a marketplace facilitator" because Slavov conceded that it "follows the [MFA] and states an obvious fact" (Attachment, p. 7) and the Department determined that the language is necessary to avoid further confusion that a person must provide payment processing services to be a marketplace facilitator. Also, the March 2019 Analysis of AB 147 shows that the Legislature did not intend to require that a person handle or process the customer payment to be considered a marketplace facilitator, and the Legislature delayed the operative date of the MFA to give marketplaces facilitators enough time to adjust to the bill's new requirements. In addition, the 2021 White Paper does not indicate that it is impossible for a business that does not process payments to comply with the MFA, the Department does not agree that it is impossible for such a business to comply or that such a business is excused from compliance under Civil Code section 3531. This is because it would frustrate the express language and underlying intent of the MFA and maxims, such as the one in Civil Code section 3531, cannot be used to trump a statute's plain text. (*Lucent*, *supra*, at p. 40.) Moreover, the Department has no power to declare the MFA unconstitutional or refuse to enforce it on the basis that it is unconstitutional or violates federal law, unless an appellate court has made a determination that such statute is unconstitutional. (Cal. Const., art. III, § 3.5.)

In addition, the Department did not make any changes to the definition of "payment processing services" in the proposed regulation because the Legislature knows how to expressly require that a person collect payment from the buyer when that is what the Legislature intends (e.g., the amendments to RTC section 6015 in the December 14, 2018, version of AB 147). The Legislature also knows how to require that a person engage in "payment processing" when that is what the Legislature intends, but, in this case, the Legislative expressly required that a person engage in "payment processing services" and the legislative history does not indicate that the phrase was intended to be construed narrowly to only mean "payment processing." Also, integrating payment processing with an online shopping cart at checkout is a valuable service related to payment processing and therefore a payment processing service within the general meaning of that phrase.

Furthermore, in *ITS*, *supra*, the United States filed a civil complaint against the defendant for violations of 18 U.S.C. §§ 1343 (wire fraud), 1344 (bank fraud), and 1349 (attempt and conspiracy to violate §§ 1343 and 1344). (*ITS* order, p. 1.) The district court entered a Final Order of Permanent Injunction enjoining the defendant from committing or conspiring to commit wire fraud and bank fraud. (*ITS* order, p. 4.) The order also defined "Payment Processing Services" to mean "handling credit card transactions, debit card transactions, Automated Clearing House (ACH) transactions, check transactions, money orders, or cash transactions" (*ITS* order, p. 3) for purposes requiring the defendant to "notify the United States if he . . . Creates, operates, is employed by, or otherwise becomes involved in any business or entity that provides, or consults or provides advice regarding Payment Processing Services." (*ITS* order, p. 5.)

In *Kafeiti*, *supra*, the United States filed a civil complaint against the defendants for engaging in mail fraud. (*Kafeiti* order, p. 2.) The district court entered a Default Judgement and Permanent Injunction Order enjoining the defendants from opening, mailing, handling, and using "Covered Materials," such as correspondence representing that a recipient has won a prize, sweepstakes, etc. (*Kafeiti* order, pp. 3-5.) The order also defined "payment processing services" to mean "handling, forwarding, transmitting, or depositing payments, including but not limited to currency, bank checks, certified checks, money orders, or credit card authorizations" (*Kafeiti* order, p. 5) for purposes of permanently enjoining the defendants from "performing or engaging in payment processing services on mail or payments contained in or received in response to any Covered Materials." (*Kafeiti* order, p. 6.)

In *Money*, *supra*, the Federal Trade Commission (FTC) and several states filed a civil complaint against the defendants for fraud in violation of federal and state law. (*Money* order, pp. 1-2.) The district court issued a Stipulated Final Order as to defendant Derrelle Janey enjoining the defendant from violating the FTC's "Telemarketing Sales Rule" (*Money* order, pp. 5-7.) The order also defined "Payment Processing Services" to mean

"a service or product designed to provide systematic access to the bank accounts of consumers through the use of Remotely Created Checks (a/k/a Draft Checks) and/or ACH Debits" (*Money* order, p.4) for purposes of enjoining the defendant from providing, selling, or arranging "Payment Processing Services." (*Money* order, p. 6.)

However, none of these district court orders defined the term "payment processing services," as used in the MFA's definition of "marketplace facilitator" or any other law, and none of these cases cited any laws (e.g., statutes, regulations, etc.) as support for the definitions adopted by the district courts. Therefore, the orders issued by the district courts in these fraud cases are not relevant. They do not shed any light on the meaning of the phrase "payment processing services," as used in the MFA's definition of "marketplace facilitator," and they do not indicate that the definition in the proposed regulation is overly broad or inconsistent with the Legislature's intent since none of the district courts' orders construed that intent.

Finally, the definition of "payment processing services" in the proposed regulation does not say payment processing services include integrating with *any* service offered by a company that also offers payment processing. The definition of "payment processing services" in the proposed regulation does not violate Rule 16(a)(4) because it refers to "payment processing" when defining "payment processing services" and Slavov's comments indicate that Slavov understood the meaning of the definition of "payment processing services" in the proposed regulation. Also, the Department has repeatedly said that marketplace facilitators as defined in subdivision (b) of RTC section 6041 may have to change their business practices or business models to either satisfy the advertising exclusion or comply with their obligations to pay sales tax and collect use tax on the sales of tangible personal property they facilitate through their marketplaces. However, Slavov is correct that the Department has not specifically explained how a business that does not have access to their customers' payments can collect sales tax reimbursement or use tax from their customers without changing their business practices or business models in some way.

3. Comments Regarding the Definition of "Listing Products for Sale"

In comments 9, 11, 12, 13, and 31, Slavov said "listing products for sale" should involve "dedicating personnel to list products for sale in the marketplace" (Attachment, p. 6.), not listing products for sale on a person's website. Slavov said "listing products for sale" should not include "merely providing the means" to list products for sale on a person's website. (Attachment, p. 9.) Slavov thinks including "providing the means" for someone's products to be listed for sale in a marketplace in the definition of "listing products for sale" violates Rule 16(a)(2) and (4) because it "uses language incorrectly" and in an "illogical manner" (Attachment, p. 7) and conflicts with the Department's description of the effect of the definition as being in accordance with the Legislature's

intent. (Attachment, pp. 7 and 8.) Therefore, Slavov proposed deleting "or providing the means for" from the definition of "listing products for sale. (Attachment, p. 20.)

Also, Slavov said the proposed definition of "listing products for sale" is "unfair," "random," contrary to its "general meaning," and contrary to the Legislature's intent because "Google search results for the query 'list product for sale' return only results which imply that the users are the ones that create and post the products for sale" and the definition of "sale" on dictionary.com uses the term sale in the following sentence: "Facebook Shops is an e-commerce feature that lets businesses list products for sale across its apps via virtual storefronts." (Attachment, p. 8.) Slavov said "Marketplaces can either create the product announcements directly or provide the means for their sellers to create them." (*Ibid*.) Slavov said the fact that the Legislature included "listing products for sale" in the subdivision (b)(2) of RTC section 6041 "proves that the Legislature did not consider all marketplaces to satisfy the 'listing products for sale' rule." (*Ibid*.) Therefore, Slavov thinks the Legislature did not intend for the fact that products are listed for sale in a person's marketplace using that person's infrastructure to mean that the person is "listing products for sale," and the Department incorrectly "believes that all marketplaces should fall within the definition of 'listing products for sale', including those that only provide [the] means to create product listings." (*Ibid*.)

In addition, Slavov said the Department "did not provide any" reason why the definition of "listing products for sale" in the proposed regulation provides that "a written, verbal, pictorial, graphic, or similar means of announcement of tangible personal property for sale" includes "an advertisement that contains an announcement of tangible personal property for sale." (Attachment, p. 9.) Slavov thinks there is a significant difference between "publishing products for sale" and "listing products for sale" because Slavov thinks a person is not listing products for sale unless that person is "creating the product announcement" and "posting it in the marketplace." (*Ibid*.) Slavov also said that subdivision (b)(2)(C) of RTC section 6041 would say "publishing," instead of "listing," if "publishing" was what the Legislature intended and that sellers are generally the ones listing products for sale in marketplaces as a result. (*Ibid*.)

The Department did not make any changes to the definition of "listing products for sale" in the proposed regulation in response to the above comments from Slavov. This is because Slavov's comments indicated that doing so would limit the meaning of the statutory phrase so that it would not generally apply to any marketplaces and potentially render the phrase meaningless in the context of the MFA.

In addition, the Department never said that it thinks all marketplaces list products for sale or that the Legislature thought all marketplaces list products for sale. However, the March 2019 Analysis discussed above indicates that the Legislature intended for its broad definition of marketplace facilitator to close loopholes and reduce the chances that a

marketplace could reorganize its structure to evade registration and collection requirements. The Legislature would not have included subdivision (b)(2)(C) in RTC section 6041 if the Legislature thought marketplace sellers are generally the persons that list products for sale in online marketplaces, rather than the persons that own and operate the websites that in fact list the products for sale. There is nothing indicating the Legislature did the types of internet searches that Slavov did or considered how dictionary.com uses the phrase "list products for sale" in its definition of "sale." There is nothing indicating that the Legislature only intended for subdivision (b)(2)(C) to apply in the rare instance where someone that owns or operates an online marketplace dedicates personnel to create the product announcements for marketplace sellers in today's e-commerce economy. There is nothing indicating that the Legislature intended for the Department to allow a person that would otherwise be a marketplace facilitator to avoid the provisions of subdivision (b)(2)(C) of RTC section 6041 by authorizing or providing the means for marketplace sellers to list their products for sale in the person's marketplace using that person's infrastructure, instead of dedicating personnel to do it. Also, interpreting and implementing the statutory phrase in such a narrow way would create a substantial loophole that is contrary to the Legislature express intent. Therefore, the Department determined that it was necessary to refrain from giving subdivision (b)(2)(C) "a narrow or restrictive meaning if such construction would result in an evasion of the evident purpose of the [MFA] when a broader meaning would prevent the evasion and carry out that purpose." (*Levitt*, *supra*, at p. 762.)

Furthermore, the Department does not agree that the definition of "listing products for sale" in the proposed regulation violates Rule 16(a)(2) and (4). This is because the proposed definition does not conflict with the description of its effect in the ISR, the definition does not use incorrect spelling, grammar or punctuation or otherwise use language incorrectly, and Slavov's comments indicate that Slavov understood the meaning of the definition of "listing products for sale" in the proposed regulation.

4. Comments Regarding the Definition of "Order Taking"

In comments 9, 15, 16, 17, 18, 19, 20, and 32, Slavov said "order taking" should involve "assigning individuals to receive orders from buyers," "acknowledge the orders," and make decisions "on whether to accept or decline them." (Attachment, p. 6.) Slavov thinks "a marketplace that simply stores, emails or displays the order information to the marketplace seller does not satisfy the term 'order taking'" (Attachment, p. 12) because Slavov thinks the different term "order taker" is generally defined to mean an "assigned" person that "takes" or "accepts" orders. (*Ibid*.) Also, eBay provides a shopping cart and checkout process, Slavov's research indicates the internet commonly refers to sellers as "taking orders on ebay" and does not commonly say "eBay takes orders" or "eBay is taking orders" (*ibid*), so Slavov does not think the Legislature intended for such a shopping cart and checkout process to constitute "order taking" within the meaning of

subdivision (b)(2)(F) of RTC section 6041. (Attachment, pp. 12-13.) Slavov also thinks the "technology provides the means for the marketplace seller to accept the order," but does not accept the order unless specifically authorized. (Attachment, p. 13.)

Also, Slavov does not think the proposed regulation's definition of "order taking" should include "the customer including the items in a physical or virtual shopping cart at checkout" as an example. (Attachment, p. 10.) Slavov said including it violates Rule 16(a)(2) and (4) because it conflicts with the Department's description of the effect of the regulation as being in accordance with the Legislature's intent because Slavov thinks the Legislature intended to exclude "marketplaces that provide [a] shopping cart and checkout process" from the definition" of "order taking." (Attachment, pp. 10-11.) Slavov said the definition uses language incorrectly by "implying that [a] 'customer including the items in a shopping cart' constitutes 'order taking' . . . [when there] is no guarantee that the customer will place the order after the customer adds an item (or items) in a shopping cart." (Attachment, p. 10.) Slavov also prefers to define "order taking" to mean "initiating the process for taking someone's money, at the time when *the order is taken* or in the future, for something they have already decided to buy" (Attachment, pp. 10 and 20, emphasis added) because "businesses take orders in order to receive payments for the products they sell." (Attachment, p. 10.) Slavov also suggested replacing "order to buy" with the more common phrase "order for" in the proposed definition of "order taking." (Attachment, pp. 10 and 20.) Therefore, Slavov suggested that the proposed regulation define "order taking" as:

- "the process through which a person is getting or obtaining a buyer's order for a marketplace seller's tangible personal property by telephone, fax, email or any other physical or electronic means, including, but not limited to, live chat, website or app with a shopping cart and checkout process" (Attachment, p. 20); or

- "the process of obtaining and acknowledging a buyer's order for a marketplace seller's tangible personal property by telephone, fax, email or any other physical or electronic means, including, but not limited to, live chat, website or app with a shopping cart and checkout process." (Attachment, p. 20.)

The Department agreed to replace "order to buy" with the more common phrase "order for" in the definition of "order taking" in the proposed regulation. However, the Department did not make any other changes to the definition of "listing products for sale" in the proposed regulation in response to the above comments from Slavov. The Department determined that obtaining "order information" and storing, emailing, or displaying the order information for the marketplace seller is in fact a form of "order taking." The Department determined that in today's e-commerce economy orders are commonly taken by having a customer include the items the customer is going to order in the customer's shopping cart at checkout when orders are taken. Also, nothing in the

legislative history indicates that the Legislature intended for the Department to allow a person to obtain order information from a marketplace seller's customer and then make that order information available to the marketplace seller so they can complete the sale and still avoid engaging in "order taking" within the meaning of subdivision (b)(2)(F) of RTC section 6041. (*Levitt*, supra, at p. 762.) In addition, the Legislature did not require that a person take orders *and* either acknowledge the orders or make decisions on whether to accept or decline the orders or initiate the process to collect money for the orders to satisfy subdivision (b)(2)(F) of RTC section 6041 and the Department determined that adding those requirements would further limit the express statutory language and be contrary to the Legislature's express intent in adopting the broad definition of marketplace facilitator.

5. Comments Regarding the Definition of "Providing Customer Service or Accepting or Assisting with Returns or Exchanges"

In comments 9, 27, 28, and 34, Slavov said "providing customer service or accepting or assisting with returns or exchanges" should involve "assigning individuals to respond to customer inquiries" that are "knowledgeable about the product details" or "at least have access to the product to obtain further information" and that "are able to initiate returns or exchanges when requested" under a "formal agreement between the marketplace and the sellers." (Attachment, p. 6.) Slavov thinks the definition of "providing customer service or accepting or assisting with returns or exchanges" in the proposed regulation violates Rule 16(a)(2) because it conflicts with the Department's description of the effect of the regulation as being in accordance with the Legislature's intent. (Attachment, pp. 17 and 18.) Slavov also thinks the Legislature intended to limit the meaning of "customer service" so it does not include "assisting the buyer with requesting [a] refund or credit" because the Legislature included "or accepting or assisting with returns or exchanges" in the statutory phrase "providing customer service or accepting or assisting with returns or exchanges." (Attachment, p. 18.)

In addition, Slavov said customer service is a "service that the seller provides to the buyer" and "can only occur with the seller's authorization because the buyer is a customer of the seller, and not of the marketplace" (Attachment, p. 18.), "the sellers are customers of the [marketplace's] platform" (Attachment, p. 19), and "the marketplace cannot offer any assistance in regards to purchases of the seller's products" unless "explicitly authorized by the marketplace seller." (*Ibid*.). Slavov also recommended that the proposed regulation define "providing customer service or accepting or assisting with returns or exchanges" to mean "providing services related to a marketplace seller's tangible personal property that normally the marketplace seller would provide to a potential buyer, including, but not limited to, answering a question about the property or the terms of its sale. It also means providing services to a buyer related to their purchase of a marketplace seller's tangible personal property that normally the marketplace seller

would provide, 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 return of 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." (Attachment, p. 21.)

The Department did not make any changes to the definition of "providing customer service or accepting or assisting with returns or exchanges" in the proposed regulation in response to the above comments from Slavov because:

- Customer service generally includes "the assistance and guidance a company provides to people before, during, and after they buy a product";[4]
- Assisting a buyer with requesting a refund or credit is a "customer service";
- The fact that the Legislature included the word "or" between the smaller phrases "providing customer service" or "accepting or assisting with returns or exchanges" is evidence of the Legislature's express intent for the larger phrase "providing customer service or accepting or assisting with returns or exchanges" to be read broadly to include both smaller phrases and for neither of the smaller phrases to limit the other phrase; and
- Defining the larger phrase so it limits the meaning of "customer service" conflicts with the Legislature's express intent.

In addition, businesses regularly provide automated customer service without assigning individuals in today's e-commerce economy and there is nothing indicating that the Legislature intended to limit the phrase "providing customer service" to customer service provided by an assigned individual, much less an individual that is subjectively "knowledgeable" about a specific product or has access to a specific product or only provides customer service that normally the marketplace seller would provide under an explicit agreement.

Moreover, the overall statutory scheme in the MFA indicates that the Legislature intended for the reference to "providing customer service" in subdivision (b)(2)(G) of RTC section 6041 to include customer service a person provides to people before, during, and after they buy a product through the person's online marketplace to increase the satisfaction of the marketplace's customers or increase their marketplace's brand loyalty or increase the revenue from their marketplace. There is nothing in the statutory scheme or Legislative history that indicates that the Legislature intended for the reference to "providing customer service" to be limited to customer service that a person with a marketplace provides to sellers selling products through the person's marketplace.

[4] www.the-future-of-commerce.com/2021/08/02/what-is-customer-service-definition-examples/.

6. Comments Regarding the Advertising Exclusion

In comments 8 and 21, Slavov said there are three "main types of marketplace:

"- group 1: classified websites – connect sellers and buyers and the transactions are typically completed offline after the buyer examines the product. Craigslist is the most prominent example in this category."

"- group 2: marketplaces with shopping carts and checkout process – connect buyers and sellers. Most transactions are completed online and the seller typically ships the product to the buyer. Most marketplaces fall into this category. The marketplaces in this group can be divided into two sub-groups. Group 2(a) includes marketplaces that provide payment processing for their merchants. Group 2(b) includes marketplaces that do not provide payment processing, but instead direct the buyers to the payment processor's website to input payment information and complete the transaction."

"- group 3: websites that compare prices – after the buyers locate the product they are looking for, they are presented with a list of websites where they can purchase the product from. By clicking on these links, they are taken to the respective website where they can place their orders. Examples here are Google Shopping, Shopzilla, Pricegrabber (before their 2-nd acquisition), Nextag (until they closed)." (Attachment, p. 14.)

Slavov said "Marketplaces from group 1 and group 3 satisfy the advertising exclusion in RTC section 6041.1 because they bring the buyers and the sellers together and advertise products for sale, but only refer the buyers to the sellers' websites." (Attachment, p. 14.) However, Slavov thinks the advertising exclusion in RTC section 6041.1 "does not imply that further participation in the sales makes a person a marketplace facilitator, as suggested by the Department." (Attachment, p. 5.) Therefore, Slavov thinks that "This practically means that if a person who satisfies the advertising exclusion performs some of the activities described in [subdivisions] 6041(b)(1) and 6041(b)(2) of [the] RTC, then this person is not considered a marketplace facilitator. For example, if such a person provides customer service with respect to the marketplace seller's product or helps the marketplace seller by listing his products for sale on its website, then the exclusion will apply and this person will not be considered a marketplace facilitator." (*Ibid*.) Slavov also thinks a similar analysis allows a person that operates a marketplace to refer its customers to a payment processor's website to purchase items listed for sale in the person marketplace and not be determined to be a marketplace facilitator because "merely referring the customer[s] to a payment processor Website is not a sufficient condition for such a determination to be made." (Attachment, pp. 14.)

The Department agrees that the advertising exclusion in RTC section 6041.1 applies when a business that operates a website that brings buyers and sellers together advertises products for sale on its website and only refers the buyers to the sellers. Also, this is true

regardless of whether the advertisements would constitute listing products for sale, as illustrated by examples 11 and 12 in subdivision (d) of the proposed regulation.

However, the Department did not make any changes to the proposed regulation in response to the above comments from Slavov. This is because the express terms of the advertising exclusion in RTC section 6041.1 do not apply when a business that operates a website that brings buyers and the sellers together advertises products for sale on its website and does *anything* to participate further in the sale of the products they advertise, except referring the buyers to the seller to complete the sale by telephone, internet link, or other similar means.

When a payment processor is not the seller, the Department does not agree that referring buyers to the payment processor is the same as referring them to the seller for purpose of the advertising exclusion. Also, a business that operates a website that brings buyers and the sellers together and advertises products for sale on its website does in fact participate further in the sale of the products they advertise when they integrate payment processing with their website, their website obtains and transmits buyers' order information to a payment processor, and their website directs the buyers to the payment processor's website to input their payment information and complete their purchases.

In addition, the March 2019 Analysis of AB 147 shows that the Legislature did not intend to require that a person handle or process the customer payment to be considered a marketplace facilitator. There is nothing indicating that the Legislature intended for the advertising exclusion to be interpreted broadly. There is also nothing indicating that the Legislature intended to provide an unexpressed exclusion from the definition of "marketplace facilitator" in subdivision (b) of RTC sections 6041 or an unexpressed exemption from the provisions of RTC sections 6042 (nexus) and 6043 (retailer) for businesses in what Slavov calls group 2(b) that participate further in the sales of products they advertise for sale in their marketplaces.

7. Comments Regarding the Scope, Constitutionality, and Economic Impact of the Proposed Regulation

Finally, in comments 29 and 30, Slavov said "some of the Department's [proposed definitions] do not align with the Legislature's intent," "are not harmonized with the MFA," "make certain marketplaces liable for taxes they would not normally be liable for," and the proposed regulation violates the U.S. Constitution for that reason. (Attachment, p. 19.) Slavov also thinks that by "seeking to make small marketplaces liable for tax that they would not normally be liable for" the proposed regulation will cause "many small marketplaces . . . to shut down due to the impossibility of compliance and uncertainty" and the Department failed to "accurately assess the economic impact of the proposed regulation." (*Ibid*.)

The Department did not make any changes to the proposed regulation or its assessment of the economic impact of adopting the proposed regulation in response to the above comments from Slavov. The Department determined that the definition of "marketplace facilitator" in the proposed regulation and the definitions of the undefined statutory terms and phrases used in the definition of "marketplace facilitator" in the proposed regulation are consistent with the express language used in subdivision (b) of RTC section 6041. They are also consistent with the Legislature's express intent in adopting the broad definition of marketplace facilitator included in the MFA, which was to:

- Close loopholes;
- Reduce the chances that a marketplace could reorganize its structure to evade the MFA's registration and collection requirements;
- Provide a means to more effectively account for potential future changes in the industry and technology; and
- Not limit the MFA so it only applies to businesses that handle or process or otherwise have access to the customer's payment. (March 2019 Analysis, pp. 7-8.)

In addition, the Department determined that subdivision (d) of the proposed regulation incorporates all the provisions in RTC section 6041.1, as amended by SB 92. Subdivision (d) clarifies that the advertising exclusion is an exclusion from RTC sections 6042 (nexus) and 6043 (retailer) for specific sales, not an exclusion from the definition of marketplace facilitator, as provided by the express language in RTC section 6041.1, which applies to specific sales. Subdivision (d) is consistent with the Legislature express intent, as provided in section 2(B) of the Legislative Digest in SB 92, which was to amend the express terms of RTC section 6041.1 to limit the actions "that are excluded from the act of facilitating a sale as a marketplace facilitator." Also, any provisions in stand-alone subdivision (a)(5)(A) of emergency Regulation 1684.5 that Slavov thinks expand the scope of the advertising exclusion were repealed on June 29, 2022, and do not currently apply.

Furthermore, the Department determined that the Legislature understood that businesses would have to adjust to the MFA's new requirements and that it could require significant time, cost, and effort. (March 2019 Analysis, p. 7.) Therefore, the Department has determined that the adoption of the proposed regulation will not make anyone, including the small marketplaces referred to by Slavov, liable for tax as a marketplace facilitator that they would not currently be liable for under the MFA. The Department determined that business and individuals, including the small marketplaces referred to by Slavov, will not incur any costs to comply with the proposed regulation that they would not otherwise incur to comply with the MFA, and the proposed regulation will not cause small

marketplaces to shut down that would not otherwise do so due to the cost of complying with the MFA.

Determinations Regarding Alternatives

The Department determined that no alternative to Regulation 1684.5 would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

The Department did not reject any reasonable alternative to Regulation 1684.5 that would lessen any adverse impact the proposed regulatory action may have on small business.

No reasonable alternative has been identified and brought to the Department's attention that would lessen any adverse impact the proposed action may have on small business, be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

Effective Date

Regulation 1684.5 implements, interprets, and makes specific statutory provisions that have been operative since October 1, 2019. Also, proposed Regulation 1684.5 replaces emergency Regulation 1684.5, which was repealed several months ago. Therefore, the Department has determined that these facts establish good cause for an early effective date and the Department hereby requests that Regulation 1684.5 be effective immediately upon filing with the Secretary of State pursuant to subdivision (b)(3) of GC section 11343.4.