Initial Statement of Reasons for the Proposed
Amendment and Adoption of California Code of Regulations,
Title 18, Section 1684.5, Marketplace Sales

SPECIFIC PURPOSES, PROBLEMS INTENDED TO BE ADDRESSED, NECESSITY, AND ANTICIPATED BENEFITS

Current Law

General Background

Revenue and Taxation Code (RTC) section 6014 provides that the term “seller,” as used in the Sales and Use Tax Law (RTC, § 6001 et seq.), includes “every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax.” Subdivision (a) of RTC section 6015 provides that the term “retailer,” as used in the Sales and Use Tax Law, includes “[e]very seller who makes any retail sale or sales of tangible personal property,” “every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others,” “[e]very person engaged in the business of making sales for storage, use, or other consumption,” and every person “in the business of making sales at auction of tangible personal property owned by the person or others for storage, use, or other consumption.” The terms “gross receipts” and “sales price,” as used in the Sales and Use Tax Law, generally mean the total amount for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction on account of the cost of the property sold or any other expenses. (RTC, §§ 6011, 6012.) Also, if property other than money is exchanged as all or part of the consideration for a retail sale of tangible personal property, the value of the other property in money is generally the amount the buyer and seller agreed to as the allowance for the property, unless the California Department of Tax and Fee Administration (Department) finds that the amount stated in the agreement is less than the property’s fair market value. (Cal. Code. Regs., tit. 18, § (Regulation or Reg.) 1654, Barter, Exchange, “Trade-ins” and Foreign Currency Transactions.)

The Sales and Use Tax Law imposes sales tax on retailers and sales tax applies to retailers’ gross receipts from their retail sales of tangible personal property made within California, unless specifically exempted or excluded from tax. (RTC, § 6051.) Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. (Civ. Code, § 1656.1; Reg. 1700, Reimbursement for Sales Tax.)

When sales tax does not apply, the Sales and Use Tax Law generally imposes use tax on tangible personal property purchased from a retailer for storage, use, or other consumption in California and stored, used, or otherwise consumed in the state, and use tax applies to the sales price of the property. (RTC, §§ 6201, 6401.) Use tax applies to taxable purchases from retailers regardless of how the purchases are made (e.g., mail order, telephone, or internet) and the person storing, using, or otherwise consuming the property purchased from a retailer is liable for the tax. (RTC,
§ 6202.) The state’s sales tax and use taxes are mutually exclusive meaning either sales tax or use tax applies to a single transaction, but not both. (See Reg. 1620, Interstate and Foreign Commerce, for a detailed explanation of when sales and use tax applies to sales of goods being shipped into and out of California.)

California consumers are generally required to report and pay the use tax on their taxable purchases to the state. (RTC, § 6202.) However, every “retailer engaged in business in this state,” as defined in RTC section 6203, is required to collect the use tax on their taxable sales to California consumers and give the consumers a receipt for the tax. (RTC, § 6203, subd. (a).) Consumers remain liable for the use tax, unless they obtain a receipt from a retailer that is registered with the Department. (RTC, § 6202.) Retailers are also liable for use taxes they are required to collect. (RTC, § 6204.)

In addition, every person engaged in the business of selling tangible personal property in this state of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax is generally required to register with the Department for a seller’s permit for each of its places of business in this state under RTC section 6066 in chapter 2 of the Sales and Use Tax Law. (See Reg. 1699, Permits, for more information regarding seller’s permits.) Retailers that are engaged in business in this state and selling tangible personal property for storage, use, or other consumption in California are required to register with the Department to collect use tax under RTC section 6226 in chapter 3 of the Sales and Use Tax Law and the Department requires such retailers to register for a Certificate of Registration – Use Tax, unless they are also required to hold a seller’s permit. (Reg. 1684, Collection of Use Tax by Retailers.) Retailers who are not engaged in business in this state may also voluntarily apply for a Certificate of Registration – Use Tax. (Reg. 1684, subd. (e)(2).) A holder of this certificate is required to collect use tax from purchasers, give receipts therefore, and pay the tax to the Department in the same manner as a retailer engaged in business in this state. (Ibid.)

Retailer Engaged in Business in This State

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

To challenge Quill, South Dakota enacted a law requiring a seller that does not have a physical presence in South Dakota to collect South Dakota’s sales tax if during the previous or current calendar year the seller’s gross revenue from sales into South Dakota exceeded $100,000 or the seller made sales into South Dakota in 200 or more separate transactions. On June 21, 2018, the U.S. Supreme Court issued its decision in South Dakota v. Wayfair, Inc., et al (Wayfair), which held that South Dakota’s law satisfied the substantial nexus requirement from Complete Auto Transit and overruled the holdings in Quill and Bellas Hess.

Assembly Bill No. 147

On April 25, 2019, the Legislature enacted Assembly Bill No. (AB) 147 (Stats. 2019, ch. 5) to modernize California law to include economic nexus provisions that are consistent with the Wayfair decision. As relevant here, AB 147 added a new subdivision (c)(4) to RTC section 6203 to provide that the term “retailer engaged in business in this state” includes “[a]ny retailer that, in the preceding calendar year or the current calendar year, has total combined sales of tangible personal property for delivery in this state by the retailer and all persons related to the retailer that exceed five hundred thousand dollars ($500,000),” operative April 1, 2019. Subdivision (c)(4) also provides that “a person is related to another person if both persons are related to each other pursuant to Section 267(b) of the Internal Revenue Code and the regulations thereunder.” (The Department amended Reg. 1684 to implement subd. (c)(4) of RTC, § 6203.)

AB 147 added the Marketplace Facilitator Act (MFA) (RTC, § 6040 et seq.) to the Sales and Use Tax Law to address sales of tangible personal property through marketplaces. The MFA became operative October 1, 2019. The MFA defines the terms “marketplace,” “marketplace facilitator,” “marketplace seller,” “related person,” and “delivery network company.” (RTC, §§ 6041, 6041.2, 6041.5.) Subdivision (b) of RTC section 6041 expressly provides that:

(b) “Marketplace facilitator” means a person who contracts with marketplace sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the marketplace seller’s products through a marketplace operated by the person or a related person and who does both of the following:
(1) Directly or indirectly, through one or more related persons, engages in any of the following:
(A) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller.
(B) Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together.
(C) Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller.
(D) Software development or research and development activities related to any of the activities described in paragraph (2), if such activities are directly related to a marketplace operated by the person or a related person.
(2) Directly or indirectly, through one or more related persons, engages in any of the following activities with respect to the marketplace seller’s products:
(A) Payment processing services.
(B) Fulfillment or storage services.
(C) Listing products for sale.
(D) Setting prices.
(E) Branding sales as those of the marketplace facilitator.
(F) Order taking.
(G) Providing customer service or accepting or assisting with returns or exchanges.

The MFA provides that a delivery network company is not a marketplace facilitator. (RTC, § 6041.5.) Also, the MFA originally 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.” (RTC, § 6041.1 as added by AB 147, § 2.) However, neither the MFA nor the Sales and Use Tax Law expressly define the meaning of the term “facilitate.”

Amongst its key provisions, the MFA provides that a marketplace facilitator is considered the seller and retailer for each sale facilitated through its marketplace for purposes of determining whether the marketplace facilitator is required to register with the Department under chapter 2 or chapter 3 of the Sales and Use Tax Law, in addition to each sale for which the marketplace facilitator is the seller or retailer or both under chapter 1 of the Sales and Use Tax Law. (RTC, § 6042.) 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.) The MFA also provides that any marketplace facilitator that is registered or required to register with the Department under chapter 2 or 3 that facilitates a retail sale of tangible personal property on behalf of a marketplace seller is the retailer selling or making the sale of the tangible personal property sold through its marketplace for purposes of the Sales and Use Tax Law (RTC, § 6043), which makes the marketplace facilitator the retailer required to pay any sales tax and collect any use tax due on the sale, unless the marketplace facilitator qualifies for relief under RTC section 6046 (discussed below).

The MFA provides that a marketplace seller must register with the Department under chapter 2 or chapter 3 of the Sales and Use Tax Law, “as required, for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator.” (RTC, § 6045.) The MFA also requires a marketplace seller to include all sales of tangible personal property for delivery in this state, including sales made on its own behalf and sales facilitated through any marketplace facilitator’s marketplace, for purposes of determining whether the marketplace seller has total combined sales of tangible personal property for delivery in this state that would make it a retailer engaged in business in this state. (RTC, § 6044.)

In addition, the MFA includes RTC sections 6046 and 6047, which provide a marketplace facilitator relief from liability under specified circumstances. As relevant here, RTC section
6046 makes an unrelated marketplace seller the retailer responsible for paying any sales taxes and collecting any use taxes due on a retail sale, instead of the marketplace facilitator, if the marketplace facilitator demonstrates to the satisfaction of the Department that the marketplace facilitator has made a reasonable effort to obtain accurate and complete information from the unrelated marketplace seller about the retail sale and that the failure to remit the correct amount of tax was due to incorrect or incomplete information provided to the marketplace facilitator by the unrelated marketplace seller. RTC section 6047 relieves a marketplace facilitator from sales and use tax due on retail sales facilitated for unrelated marketplace sellers prior to January 1, 2023, if the marketplace facilitator failed to collect sales tax reimbursement or use tax on the sales due to a good faith error other than an error in sourcing the sale for district tax purposes. The relief provided by RTC section 6047 is capped at:

- 7 percent of a marketplace facilitator’s sales and use taxes due on sales facilitated for unrelated marketplace sellers during calendar years 2019 or 2020;
- 5 percent of a marketplace facilitator’s sales and use taxes due on sales facilitated for unrelated marketplace sellers during calendar year 2021; and
- 3 percent of a marketplace facilitator’s sales and use taxes and other specified fees due on sales facilitated for unrelated marketplace sellers during calendar year 2022.

AB 147 also authorized the Department to adopt emergency regulations during the 2019–2020 fiscal year to implement the MFA. (AB 147, § 7.)

Senate Bill No. 92

On June 27, 2019, the Legislature enacted Senate Bill No. (SB) 92 (Stats. 2019, ch. 34). As relevant here, SB 92 added subdivision (c) to RTC section 6041.5 to authorize a delivery network company to elect to be deemed a marketplace facilitator in accordance with regulations adopted by the Department. SB 92 also amended RTC section 6041.1 to provide that, “Newspapers, internet websites, and other entities that advertise tangible personal property for sale, refer purchasers to the seller by telephone, internet link, or other similar means to complete the sale, and do not participate further in the sale are not facilitating a sale under [the MFA].”

AB 1402

On September 30, 2021, the Legislature enacted AB 1402 (Stats. 2021, ch. 421). As relevant here, AB 1402 amended RTC section 6041.2 to define the term “fee administered pursuant to Part 30 (commencing with Section 55001),” effective January 1, 2022. It amended the definition of marketplace seller in RTC section 6041, effective January 1, 2022, so that a person can be a marketplace seller even if the person would not have been required to collect a fee administered pursuant to Part 30 (commencing with Section 55001) if the person’s sales had not been made through a marketplace. It amended RTC section 6042 so that a marketplace facilitator is also considered the seller, retailer, and dealer for each sale facilitated through its marketplace for purposes of determining whether the marketplace facilitator is required to register with the Department under any law that imposes a fee administered pursuant to Part 30 (commencing with Section 55001), effective January 1, 2022. It also amended RTC sections 6046 and 6047 so that their relief provisions also apply to a fee administered pursuant to Part 30 (commencing with
Section 55001), effective January 1, 2022. However, AB 1402 did not make any substantive changes to how the MFA applies for sales and use tax purposes.

**Regulation 1684.5**

The Department determined that the following issues (or problems) with the MFA needed to be addressed through the adoption of an emergency regulation:

- The MFA contains undefined terms and phrases that can create confusion;
- Marketplace facilitators and marketplace sellers may have trouble understanding their new registration requirements beginning October 1, 2019;
- Marketplace facilitators and marketplace sellers may have trouble determining who is the retailer responsible for paying sales tax or collecting use tax on marketplace sales on and after October 1, 2019; and
- The MFA requires the Department to adopt regulations that establish the criteria for a delivery network company to obtain and retain an election to be a marketplace facilitator.

Therefore, the Department adopted Regulation 1684.5, Marketplace Sales, as an emergency regulation for the specific purpose of addressing those issues (or problems) and emergency Regulation 1684.5 became operative June 29, 2020. The emergency regulation defines terms and phrases used in the MFA and clarifies the registration requirements for marketplace facilitators and marketplace sellers on and after October 1, 2019. It clarifies when a marketplace facilitator is the seller and retailer for purposes of the sale of tangible merchandise facilitated for a marketplace seller and provides procedures for a delivery network company to elect to be a marketplace facilitator. It also includes examples illustrating how its provisions apply.

The Department determined that it was necessary to include the statutory definitions of the key terms used in the MFA in subdivision (a) of Regulation 1684.5 so that readers would not need to refer to the underlying statutes and to make it easier to clarify the meaning of those terms as they are used in the regulation. As such, the Department included the statutory definitions of the following terms in subdivision (a): delivery network company, delivery services, local merchant, local product, marketplace, marketplace facilitator, marketplace seller, and related person. The Department determined that it was necessary to clarify subdivision (a) that a delivery network company is not a marketplace facilitator, unless it makes an election to be deemed a marketplace facilitator pursuant to subdivision (d) of the regulation and that nothing precludes a delivery network company from being a retailer as defined in RTC section 6015 (discussed above). The Department determined that it was necessary to define and clarify many of the undefined terms and phrases used within the definition of marketplace facilitator in subdivision (a). The Department also determined that it was necessary to define them in a manner that gives each part of the definition the meaning and effect which it appears the Legislature intended based on the context in which they are used and the approved usage of the language. (Code Civ. Proc, § 16.)

As such, the Department defined the following terms and phrases in subdivision (a): branding sales as those of the marketplace facilitator, facilitate, listing products for sale, payment processing services, setting prices, and virtual currency. The Department also defined the terms “automated clearing house debit” and “payment order” in subdivision (a) because those terms are used in the subdivision’s definition of “payment processing services.”
In addition, the definition of facilitate in subdivision (a)(5) of Regulation 1684.5 includes a stand-alone subdivision (A), which was intended to incorporate and clarify the application of the advertising exclusion in RTC section 6041.1, as amended by SB 92. It provides that “a person, including, but not limited to a person who operates a newspaper or internet website, that advertises tangible personal property for sale, refers purchasers to the seller by telephone, internet link, or other similar means to complete sales, and does not participate further in the sales is not facilitating the sales for purposes of the regulation and is not a marketplace facilitator for purposes of the sales.” It also includes examples that further illustrate when a person is merely advertising tangible merchandise for sale and referring the buyer to the seller to complete the sale under RTC section 6041.1. The definition of virtual currency in subdivision (a)(16) of the current regulation also includes another stand-alone subdivision (A) explaining that “[i]f the consideration for a retail sale of tangible personal property is virtual currency, the measure of the tax shall be determined pursuant to Regulation 1654, Barter, Exchange, ‘Trade-ins’ and Foreign Currency Transactions,” since virtual currency is not legal tender in any jurisdiction.

To help businesses determine their registration requirements under the MFA, the Department determined that it was necessary to clarify in subdivision (b)(1) of Regulation 1684.5 that on and after October 1, 2019, a marketplace facilitator shall be considered the seller and retailer for each sale facilitated through its marketplace for purposes of determining whether the marketplace facilitator is required to register for a seller’s permit or Certificate of Registration – Use Tax. The Department determined that it was necessary to clarify in subdivision (b)(1) that on and after October 1, 2019, a marketplace facilitator is required to include the sales it facilitates for marketplace sellers for purposes of determining whether it is a retailer engaged in business in this state under RTC section 6203, subdivision (c)(4). The Department also determined that it was necessary to include an example in subdivision (b)(1) of a marketplace facilitator that was a retailer engaged in business in this state under RTC section 6203, subdivision (c)(4), and required to register with the Department for a Certificate of Registration – Use Tax and collect and remit use tax beginning October 1, 2019, based on its sales on its own behalf and its sales facilitated for a marketplace seller.

In addition, the Department determined that it was necessary to clarify in subdivision (b)(2) of Regulation 1684.5 that on and after October 1, 2019, a marketplace seller shall register for a seller’s permit or Certificate of Registration – Use Tax, as required, for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator. The Department determined that it was necessary to clarify in subdivision (b)(2) of the regulation that on and after October 1, 2019, a marketplace seller is not required to register with the Department for a seller’s permit if it does not make any sales of tangible personal property in this state, except for sales facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales pursuant to subdivision (c) of the regulation. The Department also determined that it was necessary to clarify in subdivision (b)(2) of the regulation that on and after October 1, 2019, a marketplace seller is not required to register with the Department for a Certificate of Registration – Use Tax under RTC section 6226 if it does not make any sales of tangible personal property for storage, use, or other consumption in this state, except for sales facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales pursuant to subdivision (c) of the regulation.
Furthermore, the Department determined that it was necessary to clarify in subdivision (b)(2) of the regulation that on and after October 1, 2019, a marketplace seller is required to include its sales facilitated through any marketplace facilitator’s marketplace when determining whether it is a retailer engaged in business in this state under RTC section 6203, subdivision (c)(4). The Department determined that it was necessary to include an example in subdivision (b)(2) of the regulation to clarify when an out-of-state marketplace seller is engaged in business in this state because its total combined sales of tangible personal property for delivery in this state exceed the $500,000 threshold in RTC section 6203, subdivision (c)(4), and required to register with the Department for a Certificate of Registration – Use Tax and collect and remit use tax. The Department also determined that it was necessary to include a second example in subdivision (b)(2) of the regulation to further clarify that a marketplace seller with a physical presence in this state is not required to register for a seller’s permit or a Certificate of Registration – Use Tax if it only makes sales of tangible merchandise in California or for delivery in California that are facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales.

To help businesses determine who is the retailer in a marketplace transaction under the MFA, the Department determined that it was necessary to clarify in subdivision (c) of Regulation 1684.5 that any marketplace facilitator that is registered or required to be registered with the Department for a seller’s permit or Certificate of Registration – Use Tax and who facilitates a retail sale of tangible personal property by a marketplace seller on or after October 1, 2019, is the retailer selling or making the sale of the tangible personal property sold through its marketplace. The Department determined that it was necessary to clarify in subdivision (c) that when a marketplace facilitator is the retailer for a sale of tangible merchandise under that provision, the marketplace facilitator is responsible for paying sales tax or collecting and remitting use tax on that sale and the marketplace seller is not the retailer responsible for paying sales tax or collecting and remitting use tax on that sale, unless the marketplace facilitator qualifies for relief from liability for the tax on that sale pursuant to RTC section 6046 (discussed above). The Department also determined that it was necessary to include two examples in subdivision (c) to further clarify when a marketplace facilitator or a marketplace seller is the retailer responsible for paying or collecting tax on a sale the marketplace facilitator facilitated for the marketplace seller through its marketplace on or after October 1, 2019.

Finally, the Department determined that it was necessary to prescribe the requirements for a delivery network company to elect to be deemed a marketplace facilitator and retain such an election in subdivision (d) of Regulation 1684.5. The Department determined that it was necessary to provide in subdivision (d) that, to elect to be a marketplace facilitator, a delivery network company must register with the Department for a seller’s permit or a Certificate of Registration – Use Tax, whichever is applicable, unless the delivery network company is already registered, and submit a written or electronic statement signed by an authorized representative that includes an election to be deemed a marketplace facilitator and a voluntary agreement to remain registered with the Department while its election is effective. The Department determined that it was necessary to provide in subdivision (d) that an election is effective at the beginning of the next reporting period starting after the date the election is received by the Department and remains in effect until the beginning of the next reporting period starting after the date the Department receives a written or electronic statement from the delivery network company that it is cancelling its election, which is signed by an authorized representative. The Department also determined that it was necessary to clarify in subdivision (d) that a delivery
network company that makes such an election and facilitates a retail sale of tangible personal property by a marketplace seller through its marketplace for delivery in California while its election is effective shall be the retailer selling or making the sale of the tangible personal property and the retailer responsible for paying sales tax or collecting and remitting use tax on that sale.

The Department did not determine that it was necessary to duplicate or otherwise expressly incorporate the MFA’s relief provisions in Regulation 1684.5. (Gov. Code, §§ 11349., 11349.1.) This is because the relief provided by RTC section 6046 is only warranted when the Department is satisfied that a marketplace facilitator made a reasonable effort to obtain accurate and complete information from an unrelated marketplace seller about a retail sale and that the failure to remit the correct amount of tax on that sale was due to incorrect or incomplete information provided to the marketplace facilitator by the unrelated marketplace seller based on the specific facts and circumstances related to that sale. The relief provided by RTC section 6047 is only warranted when the Department is satisfied that a marketplace facilitator has failed to collect sales tax reimbursement or use tax on retail sales facilitated for an unrelated marketplace seller due to a good faith error (other than a specified sourcing error) based on the specific facts and circumstances related to those sales. So, the Department will determine whether relief is warranted under RTC section 6046 or 6047 on a case-by-case basis. Also, the relief provided by RTC section 6047 only applies to sales facilitated for an unrelated marketplace seller prior to January 1, 2023.

**January 2021 Comments from Interested Parties**

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

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

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

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

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

In addition, the Department determined that the Legislature intended for the advertising exclusion in RTC section 6041.1 to exclude specific sales from the provisions of RTC sections 6042 and 6043 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. The Department determined that stand-alone subdivision (a)(5)(A) in emergency Regulation 1684.5 is slightly inaccurate because it indicates that the advertising exclusion is an exclusion from the definition of marketplace facilitator in RTC section 6041 for specific sales. The Department determined that stand-alone subdivision (a)(5)(A)’s placement and wording is causing confusion about the meaning of the advertising exclusion in RTC section 6041.1, based
on COST’s second and third comments. 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. Therefore, the Department proposed to amend Regulation 1684.5 to delete stand-alone subdivision (a)(5)(A) from the regulation, clarify how the advertising exclusion in RTC section 6041.1 works with RTC sections 6042 and 6043 in a new subdivision (d) titled “Advertising,” and renumber current subdivision (d) as subdivision (e).

New subdivision (d) clarifies that when the advertising exclusion applies to a sale, the person publishing the advertisement is not considered the seller and retailer for the sale for purposes of determining whether the person is required to register with the Department under subdivision (b)(1) of the regulation and the person is not the retailer selling or making the sale of the tangible personal property sold through the advertisement under subdivision (c) of the regulation. It also clarifies that this is true regardless of whether the person is a marketplace facilitator, the seller is a marketplace seller, the tangible personal property is advertised in a marketplace, or the advertisement contains an offer to sell tangible personal property to address COST’s first comment about advertisements in the proper context. New subdivision (d) includes a new example 10 illustrating how the advertising exclusion in RTC section 6041.1 applies to a company that provides internet access and digital television services, which is based on COST’s second example above and consistent with the clarifications discussed above. New subdivision (d) also includes examples 11 through 13, which were previously included as examples 1 through 3 in stand-alone subdivision (a)(5)(A), with minor changes to make them consistent with the clarifications discussed above.

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

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

The email proposed to modify current example 4 to read as follows to clarify what constitutes a marketplace (the proposed text is in italics):
Company A owns and operates a website where multiple third-party sellers offer to sell merchandise for delivery in California. Company A also enters into contracts to facilitate the sale of various third-party sellers’ merchandise through its website for a fee and provides payment processing services for sales of these sellers’ merchandise sold through its website. The taxpayer aggregates the product listings of multiple sellers on a single searchable platform, and potential customers can access multiple sellers’ online stores by visiting the taxpayer’s website. Therefore, Company A is a marketplace facilitator.

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

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

The Department agreed with SquareUp.com that the Legislature intended for a marketplace to have more than one seller because RTC section 6041 requires that a person contract “with marketplace sellers to facilitate . . . the sale of [their] products through a [single] marketplace” to be a marketplace facilitator. The Department determined that it was necessary to amend the definition of “marketplace” in subdivision (a)(9) of Regulation 1684.5 so it is consistent with the Legislature’s intent and describes a marketplace as a place where “marketplace sellers sell or offer to sell” tangible personal property. The Department determined that it was necessary to propose to add a new example 1 to the regulation to specifically illustrate that point. The Department determined that it would be more helpful to add a new example 2 to the regulation to illustrate that a website that aggregates the tangible merchandise listed for sale in marketplace sellers’ online stores on a single searchable platform where the marketplace sellers offer to sell and sell the tangible merchandise for delivery in California is a marketplace, rather than add similar facts to example 4. The Department determined that it would be more helpful to add a new example 3 to the regulation to illustrate that unique e-commerce websites where only one seller offers to sell and sells tangible merchandise are not marketplaces using similar facts as the proposed example 5, rather than add the proposed example 5. The Department determined that it would be helpful to add the word “multiple” to the first sentence in example 4 as proposed. The Department also determined that it was necessary to replace “third-party” with “multiple” in the first sentence in example 4, replace “third-party” with “the” in the second sentence in example 4, and delete “third-party retailer” from example 8 in subdivision (c) since there is no reason to say the marketplace sellers in the examples are also third-party retailers, and including that unnecessary information may cause confusion by unintentionally making some readers think it was included for a specific reason. Therefore, the Department proposed to amend the definition of marketplace, add new examples 1 through 3, and amend examples 4 and 8 accordingly. However, the Department did not agree with the other specific amendments proposed by SquareUp.com and did not propose any additional changes based on their comments.
Dimitar Slavov from eCrater sent the Department an email on January 6, 2021, expressing his concerns with several of the regulation’s current definitions. The email requested that the Department add a sentence to the end of the regulation’s definition of “branding sales as those of the marketplace facilitator” to provide that “‘Branding sales’ exists only a) when the product page does not contain any references to the marketplace seller, thus leaving the buyer to believe that he is purchasing directly from the online marketplace; or b) when the product page specifically states that the order will be fulfilled by the marketplace.” The Department did not agree with adding the specific language because it limits the meaning of the regulation’s current definition. However, the Department agrees that when a marketplace seller is expressly identified as the person selling the marketplace seller’s tangible personal property, the sale of that property is not branded as a sale of the marketplace facilitator. Therefore, the Department determined that it was necessary to add a sentence to that effect to the end of the regulation’s definition of “branding sales as those of the marketplace facilitator” to provide a bright-line rule and proposed to amend Regulation 1684.5 to add the sentence.

The email requested that the Department define “fulfillment or storage services” in the regulation and provide that it means “the process of receiving, packaging and shipping products.” The Department did not agree to add the requested definition because it limits the meaning of the statutory phrase. However, after reviewing the requested language, the Department determined that it was necessary to add new subdivision (a)(5) to the regulation to define “fulfillment or storage services” and clarify that it “means any services related to receiving, storing, or shipping a marketplace seller’s tangible personal property, including, but not limited to, picking, packing, shipping, or delivering a marketplace seller’s tangible personal property to fulfill an order.” Therefore, the Department proposed to amend Regulation 1684.5 to add a new subdivision (a)(5) to regulation to define and clarify “fulfillment or storage services.”

The email requested that the Department add the word “creating” to the regulation’s definition of “listing products for sale” so the phrase means “creating a written, verbal, pictorial, graphic, etc., announcement of goods for sale.” The Department did not agree to add “creating” to the definition by itself because doing so would limit the meaning of the statutory phrase and the Department determined that it was necessary to refrain 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.” (Levitt v. Faber et al. (1937) 20 Cal.App.2d Supp. 758, 762 (Levitt).) However, after reviewing the requested language, the Department determined that it was necessary to further clarify the regulation’s definition of “listing products for sale” to avoid confusion and proposed to amend the definition so the phrase means “creating or posting or authorizing or enabling another person to create or post a written, verbal, pictorial, graphic, or similar announcement of tangible personal property for sale.”

The email requested that the Department define “order taking” in the regulation so it means “a process when a marketplace agent or representative accepts orders on behalf of the marketplace sellers using phone, fax, email, messages, chat or any other means of communication.” The Department did not agree to add the requested definition because it limits the meaning of the statutory phrase and could lead to the evasion of the evident purpose of the MFA. (Levitt, supra, at p. 762.) However, after reviewing the requested language, the Department determined that it was necessary to propose to add new subdivision (a)(12) to the regulation to define “order
taking” and clarify that it means “the process of getting or obtaining a buyer’s order to buy a marketplace seller’s tangible personal property by telephone, fax, email or any other physical or electronic means, including, but not limited, the customer including the items in a physical or virtual shopping cart.”

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

Company A owns and operates a website where third-party sellers offer to sell merchandise for delivery in California. Company A does not provide directly or indirectly through contracts and agreements payment processing services to its sellers. Instead, the sellers contract other companies for payment processing services and operate their own independent payment accounts with them. Company A is not a part of these agreements between the sellers and the payment processors and as a result is not able to collect all or part of the payments submitted to the marketplace sellers. Therefore, Company A is not a marketplace facilitator.

The Department disagreed with the requested definition of “payment processing services” because it limits the meaning of the statutory phrase and could lead to the evasion of the evident purpose of the MFA. (Levitt, supra, at p. 762.) The Department determined that the Legislature intentionally incorporated the broad definition of marketplace facilitator into the MFA and intended for the phrase “payment processing services” to be interpreted broadly to include any services related to charging a buyer the price to purchase a marketplace seller’s tangible personal property, collecting, handling, or processing the payment, and transmitting any portion of the payment to the marketplace seller. Therefore, the Department determined that it was necessary to amend the regulation’s definition of “payment processing services” so the term means any services related to charging a buyer the price to purchase a marketplace seller’s tangible personal property, collecting, handling, or processing the payment, and transmitting any portion of the payment to the marketplace seller, including providing a physical or virtual credit or debit card terminal, integrating payment processing services with an online shopping cart, or otherwise directly or indirectly providing, authorizing, or enabling payment processing in any manner. Also, the Department did not agree with the example because a person that engages in any of the activities described in subdivisions (b)(2)(B) through (G) of RTC section 6041 with respect to the marketplace seller’s products is not required to provide payment processing services to be a marketplace facilitator. However, after reviewing the requested example, the Department determined that it was necessary to add language clarifying that point to the end of the regulation’s definition of “marketplace facilitator” to avoid further confusion regarding the importance of engaging in payment processing services, as opposed to the activities described in

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subdivisions (b)(2)(B) through (G) of RTC section 6041. So, the Department proposed both amendments.

The email also requested that the regulation separately define “providing customer service” and “accepting or assisting with returns or exchanges” so that “providing customer service” means “answering questions about products using product specific information that is not already displayed on any of the marketplace seller’s pages” and “accepting or assisting with returns or exchanges” means “initiating returns or exchanges without the marketplace seller’s authorization or physically accepting the returned products to assist the marketplace’s seller.” The Department did not agree to separately define “providing customer service” and “accepting or assisting with returns or exchanges” because the Legislature intended for the entire statutory phrase “providing customer service or accepting or assisting with returns or exchanges” to be read together. Also, the Department did not agree with the requested language because the term “customer service” has a broader meaning2 and the requested language limits the meaning of the whole statutory phrase in a manner that could lead to the evasion of the evident purpose of the MFA. (Levitt, supra, at p. 762.). However, after reviewing the requested language, the Department determined that it was necessary to propose to add subdivision (a)(15) to the regulation to define “providing customer service or accepting or assisting with returns or exchanges” and clarify that the whole statutory phrase means “providing any service related to a marketplace seller’s tangible personal property to a potential buyer with or without the marketplace seller’s authorization, including, but not limited to, answering a question about the property or the terms of its sale. It also means providing any service to a buyer related to their purchase of a marketplace seller’s tangible personal property with or without the marketplace seller’s authorization, including, but not limited to, answering a question about the property’s use, assisting with fixing or troubleshooting a problem with the property, assisting the buyer with requesting a refund or credit for the property or requesting to exchange the property for other property, or accepting the buyer’s return of the property or exchanging the buyer’s property for other property.”

Additional Amendments

The Department also determined that it was necessary to propose the following additional amendments to Regulation 1684.5 that were not directly related to the interested parties’ January 2021 comments. The Department proposed to delete subdivision (a)(1) from the regulation, which defined the term “Automated Clearing House Debit,” because it is a commonly used term that is not used in the MFA and does not need to be defined in the regulation, and renumber current subdivisions (a)(2) through (5), as subdivisions (a)(1) through (4). The Department proposed to replace “easy” with “possible” in the definition of “facilitate” in renumbered subdivision (a)(4) to make the definition more consistent with the common meaning of the term, which includes making something easier and helping cause or bring about something. (See, e.g., merriam-webster.com/dictionary/facilitate.) The Department proposed to add “listing products for sale” to the examples of activities that facilitate sales in the definition of “facilitate” in renumbered subdivision (a)(4). The Department determined that it was necessary to propose to amend subdivision (a)(10)(A)(ii) in the definition of marketplace facilitator to clarify that it only

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2 See, for example, the discussion of customer service at www.the-future-of-commerce.com/2021/08/02/what-is-customer-service-definition-examples, which provides that “Customer service is the assistance and guidance a company provides to people before, during, and after they buy a product or service.”
applies when a person directly or indirectly, through one or more related persons, owns or operates the infrastructure, electronic or physical, or technology that brings buyers and sellers together “in a marketplace.” The Department proposed to delete stand-alone subdivision (A) from the definition of “virtual currency” in renumbered subdivision (a)(18) because it is not part of the definition of virtual currency and it is not necessary to address the measure of tax in the regulation’s definition of virtual currency. The Department proposed to add language to subdivisions (b)(1) and (b)(2) to clarify that for purposes of determining whether a marketplace facilitator or marketplace seller is a retailer engaged in business in this state under RTC section 6203, subdivision (c)(4), they must include all sales of tangible personal property for delivery in this state “regardless of whether the sales are taxable.” The Department also proposed to amend the first sentence in subdivision (b)(2) to further clarify and implement the provisions of RTC section 6045 by explaining that on and after October 1, 2019, a marketplace seller is “the seller for sales and the retailer” for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator, “for purposes of determining whether the marketplace seller is required to register with the Department for a seller’s permit or Certificate of Registration - Use Tax.”

2022 Discussion Paper and Interested Parties Meeting

The Department distributed the proposed amendments to Regulation 1684.5 to the interested parties along with a Discussion Paper dated January 5, 2022, providing background regarding the emergency regulation, describing the interested parties’ January 2021 comments and the Department’s responses, and explaining all the proposed amendments. The Department also posted both documents on its website.

The Department conducted an interested parties meeting to discuss the proposed amendments to Regulation 1684.5 on January 26, 2022. Dimitar Slavov from eCrater submitted written comments regarding Regulation 1684.5 and the proposed amendments in an email dated February 8, 2022 (eCrater email). Joan Armenta-Roberts submitted the California Taxpayer Association’s (CalTax’s) written comments regarding the proposed amendments in a letter dated February 15, 2022 (CalTax letter).

2022 Comments from Interested Parties

The CalTax letter disagreed with replacing “easy” with “possible” in the definition of “facilitate” and adding “listing products for sale” to the examples of activities that make it possible or easier for a marketplace seller to sell its products through a marketplace in renumbered subdivision (a)(4) of Regulation 1684.5. CalTax said it thinks “incorporating the word ‘possible’ means that the marketplace seller may not have committed to selling through the marketplace.” It thinks that using the word “possible” conflicts with the statutory definition of marketplace seller, that “true facilitation of a sale” has to occur “after the seller has offered the goods and the prospective buyer has seen the offer and elected to begin negotiations to purchase the goods,” and “that it is the actions of the ‘marketplace’ that make one a marketplace facilitator” because the definition of “marketplace facilitator” includes the word “engage.” It also thinks it is unnecessary to include listing products for sale because it is included in the definition of marketplace facilitator, and “it erodes the force and effect of [RTC] section 6041.1 by weakening the distinction between ‘listing products for sale’ and ‘advertising.’”
The Department disagreed with CalTax’s comments regarding the proposed amendments to renumbered subdivision (a)(4) and did not make any changes to those proposed amendments. The plain meaning of the word “facilitate” includes making something possible. (Cambridge Dictionary available at dictionary.cambridge.org.) The plain language in subdivision (b) of RTC section 6041 can reasonably be read as making someone a marketplace facilitator when they contract to make it possible for a marketplace seller to sell tangible personal property through their marketplace, they own or operate the infrastructure that brings buyers and sellers together in the marketplace, and they list the marketplace seller’s products for sale in the marketplace. Listing a marketplace seller’s products for sale in a marketplace is one of the most important activities that a marketplace facilitator can engage in to make it possible or easier for a marketplace seller to sell those products through the marketplace. Subdivision (b) of RTC section 6041 does not require a marketplace seller to have committed to selling through a marketplace at the time it enters into an agreement with a marketplace facilitator to facilitate its sales through a marketplace or require a person to engage in activities after a prospective buyer has elected to begin negotiations to purchase goods to be a marketplace facilitator, and the definition of marketplace seller does not use the word “facilitate.”

In addition, publishing an advertisement for products can constitute “listing products for sale” and the Department does not think there is a sufficient distinction between an advertisement and listings products for sale when the advertising exclusion in RTC section 6041.1 does not apply. It appears that the Legislature intended for its broad definition of “marketplace facilitator” to be interpreted broadly and encompass a broad variety of different business models. It also appears that the Legislature intended for the advertising exclusion in RTC section 6041.1 to apply when the person publishing the advertisement would be a marketplace facilitator facilitating a sale of tangible merchandise for a marketplace seller through its marketplace under RTC sections 6042 and 6043 in the absence of the exclusion. This is 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.

The CalTax letter disagreed with the proposed amendments to the definition of “listing products for sale” in subdivision (a)(6) of Regulation 1684.5 because CalTax thinks subdivision (b)(2)(C) of RTC section 6041 is only satisfied if products are listed for sale “on or within” a marketplace and the proposed amendments would expand the meaning of listing products for sale “beyond what was contemplated by the Legislature.” The eCrater email disagreed with the use of the word “enabling” in the proposed amendments to the definition of “listing products for sale” in subdivision (a)(6) and suggested deleting the word or replacing it with “requesting” because Dimitar Slavov thinks it “creates confusion and leaves room for different interpretations.” He also thinks it might make a reader think a “marketplace listed the product for sale simply because it provided/enabled access to its platform to the marketplace seller,” even though he thinks “the marketplace sellers are the ones who” list the products for sale under such circumstances.

The Department agreed with CalTax that subdivision (b)(2)(C) of RTC section 6041 is only satisfied if products are listed for sale in a marketplace, determined that it is necessary to add “in a marketplace” to the Department’s proposed amendments to the definition of “listing products for sale” in subdivision (a)(6) to clarify that point and prevent the definition from being interpreted so it goes beyond the Legislature’s intent, and included that language in its proposed amendments. The Department agreed with Dimitar Slavov that the use of the word “enabling” in
the proposed amendments to subdivision (a)(6) may cause confusion because enabling can mean to “give (someone or something) the authority or means to do something” (see, e.g., Google’s English Dictionary provided by Oxford Languages) and using “enabling” in the phrase “authorizing or enabling” is somewhat redundant. Therefore, the Department determined that it is necessary to replace “enabling” with “providing the means for” in the Department’s proposed amendments to subdivision (a)(6) to avoid confusion and changed its proposed amendments accordingly. However, the Department did not make any other changes to subdivision (a)(6) because it does not appear 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, instead of doing it directly itself. (Levitt, supra, at p. 762.)

Both the CalTax letter and eCrater email disagreed with the language the Department proposed to add 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) is not required to provide payment processing services to be a marketplace facilitator. The CalTax letter said CalTax thinks that when a marketplace facilitator facilitates a sale of tangible personal property for a marketplace seller through its marketplace, the MFA requires the Department to determine “whether the level of facilitation is such that” the marketplace facilitator “is responsible for collecting and remitting” tax on the sale, and that this requires that the marketplace facilitator’s efforts “be substantial” and “place the ‘facilitator’ in a position where it can calculate and collect the tax.” CalTax thinks that a person cannot be a marketplace facilitator facilitating a sale for a marketplace seller within the meaning of RTC section 6043, unless it provides payment processing services because “the absence of payment processing services creates a situation where it is impractical or impossible for the deemed facilitator to calculate the tax, much less collect it.” CalTax also thinks it is apparent from the current language in stand-alone subdivision (A) in subdivision (a)(5) of Regulation 1684.5 that the Department previously “determined that a marketplace facilitator does not include a person that does not provide payment processing services.”

The eCrater email agreed that the proposed language “follows the [MFA].” However, the eCrater email said Dimitar Slavov still thinks the proposed language “will violate” Civil Code section 3531, which provides that “[t]he law never requires impossibilities,” and that the proposed language should clarify that businesses that cannot withdraw or collect funds from sellers payment accounts are not marketplace facilitators “to make the regulation compliant with the consistency standard of Government Code section 11349.1.” He also said that “Small online marketplaces do not deal with payment processing because they do not have the resources to implement such payment solutions (either directly or indirectly) and to manage the risks associated with each transaction (fraud and disputes). Instead, such online marketplaces allow their merchants to use their own independent payment accounts with different payment processors. Even if found to be a marketplace facilitator, a marketplace will not be able to comply with the tax collection requirement if such marketplace cannot withdraw, collect funds from the merchants’ payment accounts or redirect funds from these accounts into its own payment account. The problem is recognized and described in the Multistate Tax Commission paper ‘Wayfair Implementation & Marketplace Facilitator Work Group July 2020 White Paper.’”
The Department did not agree with CalTax’s comments. This is because 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. This is because RTC sections 6041, 6042, and 6043 do not require that the activity or activities that facilitate a sale be substantial. 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. The Department never determined that a marketplace facilitator does not include a person that does not provide payment processing services and it appears to the Department that 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. Also, the Department included language in example 1 in subdivision (a)(5) of Regulation 1684.5 that was specifically intended to clarify that the Department determined 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.” So, the Department does not agree that the current language in stand-alone subdivision (A) in subdivision (a)(5) of Regulation 1684.5 indicates that the Department previously determined that a marketplace facilitator does not include a person that does not provide payment processing services.

The Department did not agree with Dimitar Slavov’s comments. This is because Dimitar Slavov acknowledges that the proposed language follows the MFA. The Legislature has imposed the duty and responsibility to enforce the Sales and Use Tax Law, including the MFA, on the Department. (Gov. Code, § 15570.22; RTC, §7051.) 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. The Maxims of Jurisprudence, including the provisions of Civil Code section 3531, are merely guides to statutory interpretation, and the Legislature presumably did not intend for the provisions of Civil Code section 3531 to generally excuse marketplace facilitators from complying with the MFA because they prefer not to change their current business models or practices to comply. Also, page 15 in the 2021 White Paper acknowledges that the broad definition of “marketplace facilitator” enacted by the Legislature can create compliance “problems,” but it does not conclude that it is impossible for marketplace facilitators, as so defined, to comply with their sales and use tax obligations, and the Department does not agree with Dimitar Slavov that it is impossible for marketplace facilitators, as so defined, to comply with the MFA.

Furthermore, the Department did not agree with CalTax’s and Dimitar Slavov’s comments because the Legislature did not enact an exclusion for marketplace facilitators that do not provide payment processing services or small marketplace facilitators. In fact, SB 92 amended the advertising exclusion so it 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. SB 92 also amended the advertising exclusion so it no longer applies merely because the person does not transmit or otherwise communicate the offer and acceptance for the sale between the seller and purchaser and does not process payments for the property sold. Also, CalTax’s and Dimitar Slavov’s comments indicate to the Department that it is necessary to:

- Clarify that a person that engages in any of the activities in subdivisions (a)(10)(B)(ii) through (vii) of Regulation 1684.5 is not required to provide payment processing services to be a marketplace facilitator to avoid further confusion;
- Delete stand-alone subdivision (A) from renumbered subdivision (a)(4) so it does not inadvertently give readers, such as CalTax, the impression that the Department previously determined that a marketplace facilitator does not include a person that does not provide payment processing services; and
- Include an additional example in new subdivision (d) to further clarify that the advertising exclusion in RTC section 6041.1 does not apply when a marketplace facilitator publishes an advertisement for the sale of tangible merchandise in its marketplace and participates further in the sale of that merchandise in any way, except referring purchasers to the seller to complete the sale.

Therefore, the Department proposed to add a new example 13 to subdivision (d) to illustrate that the advertising exclusion does not apply when a marketplace facilitator publishes an advertisement for the sale of tangible merchandise in its marketplace and participates further in the sale by taking an order for the merchandise, and renumber proposed example 13 as example 14.

The eCrater email disagreed with the definition of “order taking” the Department proposed to include in new subdivision (a)(12) because Dimitar Slavov does not think a marketplace facilitator is taking an order when “it stores the order information in its database and emails or displays the order information to the marketplace seller.” He thinks the information “just stays there” and the “order taking process” is only triggered when “the order information is accessed by the marketplace seller.” The Department did not agree because there is no difference between obtaining “order information” and “order taking.” It does not appear 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.) Also, it does not appear that the Legislature intended for the advertising exclusion in RTC section 6041.1 to apply under such circumstances because the person would be doing more than referring the purchaser to the seller to complete the sale.

The eCrater email said the Department should delete the phrase “to buy a marketplace seller’s tangible personal property” from the definition of “order taking” in new subdivision (a)(12) because Dimitar Slavov thinks it “implies that the one taking the order is buying something.” The Department did not agree because the phrase is preceded by the words “buyer’s order” and it is sufficiently clear that the subdivision is referring to the buyer’s order to buy something, not the one taking the order’s order to buy something. Also, the Department determined that it is necessary to keep the phrase Dimitar Slavov is referring to because it clarifies that order taking
only includes taking orders for a marketplace seller’s tangible products, and not for the marketplace facilitator’s tangible products.

The eCrater email said the Department should delete the phrase “including, but not limited, the customer including the items in a physical or virtual shopping cart” from the definition of “order taking” in new subdivision (a)(12) because only part of the order’s information may come from the shopping cart and the “rest of the order’s information comes from the checkout process.” Also, “customers can place orders through a buy button without using a shopping cart at all” and he thinks the language may limit the scope of the definition. The Department did not agree to delete the phrase. However, the Department did determine that it was necessary to change the phrase so it is sufficiently clear that order taking includes, but is not limited “to,” the customer including the items in a physical or virtual shopping cart “at checkout” when orders are actually taken, and changed new subdivision (a)(12) accordingly.

The eCrater email also suggested changing new subdivision (a)(12) to provide that “Order taking means the process of taking someone’s money for something they have already decided to buy.” However, the Department did not agree with this suggestion because it is common for businesses to take orders from customers before taking their money and the suggested language is not consistent with the common meaning of the term “order taking.” Also, it does not appear that the Legislature intended for the Department to allow a person that takes orders to avoid engaging in “order taking” within the meaning of subdivision (b)(2)(F) of RTC section 6041 solely because the person does not collect payment at the time it takes the orders. (Levitt, supra, at p. 762.)

The eCrater email disagreed with the Department’s proposed amendments to the definition of “payment processing services” in renumbered subdivision (a)(14) of Regulation 1684.5. Specifically, Dimitar Slavov does not think a marketplace facilitator provides “payment processing services” “simply because [its] marketplace has integration with a payment processor that allows the marketplace seller to use his own payment account” because that type of integration does not allow the marketplace facilitator to access or redirect funds to collect tax. Dimitar Slavov also pointed out in the eCrater email that the definition of “payment processing services” is not sufficiently clear because it uses the term it is defining. The Department did not agree with the first comment because the Legislature did not draft subdivision (b)(2)(A) of RTC section 6041 so it requires that a person be a payment processor or process payments in a manner that allows the person to collect tax. Also, a marketplace facilitator does provide payment processing services with respect to sales of marketplace sellers’ products when it integrates its online marketplace with a payment processor so that marketplace sellers can use the payment processor to collect payments from their customers when they make sales through the marketplace. However, the Department agreed with Dimitar Slavov that the definition of payment processing services should not use the term payment processing services. The Department determined that it is necessary to change the amendments to renumbered subdivision (a)(14) to refer to “integrating payment processing with an online shopping cart at checkout” to avoid confusion. The Department also determined that it is necessary to replace “enabling” with “providing the means for” in renumbered subdivision (a)(14) for the same reason it is necessary to replace “enabling” with “providing the means for” in the proposed amendments to subdivision (a)(6). Therefore, the Department made those changes to its proposed amendments.
The eCrater email disagreed with the definition of “providing customer service or accepting or assisting with returns or exchanges” the Department proposed to include in new subdivision (a)(15) because Dimitar Slavov thinks it too broad in three respects. First, he thinks the definition should not include answering a buyer’s question about the property or terms of sale if the information provided in the answer “is already publicly visible on the product page.” Second, he thinks the definition should not include responding to a complaint from a customer that has not received its products by requesting proof of shipping or refund from the marketplace seller. Third, he thinks the definition should not include “assisting the buyer with requesting a refund or credit.” The Department did not agree with these comments because answering buyers’ questions, responding to buyers’ complaints, and assisting buyers with requesting a refund or credit are all types of customer service, and assisting buyers with requesting a refund or credit and requesting proof of refunds from sellers are also ways of assisting with returns.

In addition, the CalTax letter says that CalTax thinks Regulation 1684.5 is inconsistent with Regulation 1565, Auctioneers, because the Department has previously concluded that the owners of Internet auction sites are not generally auctioneers that are retailers under RTC section 6015 and Regulation 1565, but owners of internet auction sites can be marketplace facilitators that are retailers under RTC section 6043 and the corresponding provisions of Regulation 1684.5. However, the Department does not agree that the regulations are inconsistent in this respect because neither regulation specifically discusses internet auction sites and the fact that the owners of an internet auction site can be retailers under the MFA, without being retailers under section 6015 as implemented, interpreted and made specific by Regulation 1565, is due to differences in the Sales and Use Tax Law, not any inconsistency in the Department’s regulations.

Finally, the CalTax letter requested “that the language of [RTC] section 6046 be included in the proposed amendments to Regulation 1684.5, along with examples that may illustrate the statute’s applicability.” It also said that CalTax thinks that “[n]ot all taxpayers are sophisticated enough to search the statutes for potential relief, and there is no harm in adding a provision that notifies taxpayers and agency staff about the potential for relief.” However, the Department did not agree that it was necessary to duplicate or otherwise expressly incorporate RTC section 6046’s provisions in Regulation 1684.5. This is because the Department intends to determine whether relief is warranted under RTC section 6046 on a case-by-case basis and the Department included a reference to RTC section 6046 in subdivision (c) of Regulation 1684.5 so taxpayers that read the regulation will not need to search the Sales and Use Tax Law for that code section.

Determinations

The Department has determined that the adoption of Regulation 1684.5 through the regular rulemaking process with the amendments discussed above is reasonably necessary for the specific purposes of addressing the issues (or problems) discussed above by:

- Defining the undefined terms and phrases used in the MFA that can create confusion;
- Clarifying the registration requirements for marketplace facilitators and marketplace sellers under the MFA;
- Clarifying when a marketplace facilitator is the seller and retailer for purposes of a sale of tangible merchandise facilitated for a marketplace seller under the MFA;
- Clarifying how the MFA’s advertising exclusion applies;
• Providing procedures for a delivery network company to elect to be a marketplace facilitator; and
• Providing illustrative examples.

The Department anticipates that the adoption of Regulation 1684.5 will promote fairness and benefit the Department and taxpayers, including marketplace facilitators, marketplace sellers, delivery network companies, and businesses that sell advertising for tangible merchandise, by clarifying the meaning of terms and phrases used in the MFA, clarifying the MFA’s registration requirements, clarifying when a marketplace facilitator is a retailer under the MFA, clarifying when the MFA’s advertising exclusion applies, and providing procedures for a delivery network company to elect to be a marketplace facilitator. In addition, the Department has determined that the adoption of Regulation 1684.5 is not mandated by federal law or regulations, and there are no federal regulations or statutes that are identical to Regulation 1684.5.

DOCUMENTS RELIED UPON

The Department relied upon Department staff’s understanding of the Sales and Use Tax Law, including the MFA, in proposing to adopt Regulation 1684.5 with the amendments discussed above. The Department did not rely upon any technical, theoretical, or empirical study, report or similar document.

ALTERNATIVES CONSIDERED

The Department considered whether to begin the regular rulemaking process to adopt Regulation 1684.5 with the amendments discussed above at this time or, alternatively, whether to take no action at this time. The Department decided to begin the regular rulemaking process to adopt Regulation 1684.5 with the amendments discussed above because the Department determined that the provisions of Regulation 1684.5 are reasonably necessary for the reasons set forth above.

The Department did not reject any reasonable alternative to Regulation 1684.5, including any reasonable alternative that would lessen any adverse impact the proposed action may have on small business or that would be less burdensome and equally effective in achieving the purposes of the proposed action. No reasonable alternative to Regulation 1684.5 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 purposes 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.

INFORMATION REQUIRED BY GOVERNMENT CODE SECTION 11346.2, SUBDIVISION (b)(5) AND ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The Department assessed the economic impact of adopting Regulation 1684.5 with the amendments discussed above on California businesses and individuals. The Department determined that the amendments clarify the MFA, but do not make anyone liable for tax as a marketplace facilitator that would not currently be liable. The Department determined that
business and individuals will not incur any costs to comply with Regulation 1684.5 that they
would not otherwise incur to comply with the MFA. The Department also determined that
businesses that sell or facilitate sales of tangible merchandise through marketplaces for delivery
in California, businesses that advertise tangible merchandise for sale, and delivery network
companies will generally benefit from the clarifications provided by Regulation 1684.5, but they
will not receive a monetary benefit.

As a result, the Department determined that the proposed regulatory action is not a major
regulation, as defined in Government Code section 11342.548 and California Code of
Regulations, title 1, section 2000. The Department also prepared the economic impact
assessment required by Government Code section 11346.3, subdivision (b)(1), and the
Department determined in the economic impact assessment that the adoption of Regulation
1684.5 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 and will not affect the
expansion of businesses currently doing business within the State of California.

Furthermore, Regulation 1684.5 does not regulate the health and welfare of California residents,
worker safety, or the state’s environment. Therefore, the Department determined that the
adoption of Regulation 1684.5 will not affect the benefits of the regulation to the health and
welfare of California residents, worker safety, or the state’s environment.

The forgoing information also provides the factual basis for the Department’s initial
determination that the adoption of Regulation 1684.5 with the amendments discussed above will
not have a significant adverse economic impact on business.