

**Proposed Amendments to
California Code of Regulations, Title 18,
Section 1684.5, Marketplace Sales**

Regulation 1684.5. Marketplace Sales.

(a) Definitions.

~~(1) “Automated Clearing House Debit” means any completed or attempted debit to an account at a financial institution that is processed electronically through the Automated Clearing House Network (ACH Network).~~

~~(12) “Branding sales as those of the marketplace facilitator” means using any means, including, but not limited to a name, logo, sign, symbol, or a combination of these, to identify the marketplace facilitator as the person selling a marketplace seller’s tangible personal property product. If a marketplace seller is expressly identified as the person selling the marketplace seller’s tangible personal property, the sale of that property is not branded as a sale of the marketplace facilitator.~~

~~(23) “Delivery network company” means a business entity that maintains an internet website or mobile application used to facilitate delivery services for the sale of local products. A person that is a delivery network company is not a marketplace facilitator, unless it makes an election to be deemed a marketplace facilitator pursuant to subdivision (e) of this regulation. Nothing in this regulation shall preclude a delivery network company from being a retailer as defined in Revenue and Taxation Code section 6015.~~

~~(34) “Delivery services” means the pickup of one or more local products from a local merchant and delivery of the local products to a customer. “Delivery services” do not include any delivery requiring over 75 miles of travel from the local merchant to the customer.~~

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

~~(A) However, a person, including, but not limited to a person who operates a newspaper or internet website, that advertises tangible personal property for sale, refers purchasers to the seller by telephone, mail, email, website address, internet link, or other similar means~~

to complete sales, and does not participate further in the sales is not facilitating the sales for purposes of this regulation. Therefore, such a person is not a marketplace facilitator for purposes of the sales.

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

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

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

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

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

(7) “Local merchant” means a third-party merchant, including, but not limited to, a kitchen, restaurant, grocery store, retail store, convenience store, or business of another type, that is not under common ownership or control with the delivery network company.

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

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

Example 1. Company A owns and operates a website where multiple marketplace sellers offer to sell and sell tangible merchandise for delivery in California. Therefore, Company A’s website is a marketplace.

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

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

(10) “Marketplace facilitator” means a person who contracts with marketplace sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the marketplace seller’s products through a marketplace operated by the person or a related person and who does both of the following:

(A) Directly or indirectly, through one or more related persons, engages in any of the following:

(i) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller.

(ii) Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together in a marketplace.

(iii) Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller.

(iv) Software development or research and development activities related to any of the activities described in subdivision (a)(10)(B) of this regulation, if such activities are directly related to a marketplace operated by the person or a related person.

(B) Directly or indirectly, through one or more related persons, engages in any of the following activities with respect to the marketplace seller's products:

(i) Payment processing services.

(ii) Fulfillment or storage services.

(iii) Listing products for sale.

(iv) Setting prices.

(v) Branding sales as those of the marketplace facilitator.

(vi) Order taking.

(vii) Providing customer service or accepting or assisting with returns or exchanges.

A person that engages in any of the activities in subdivisions (a)(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.

Example 4: Company A owns and operates a website where ~~multiple third-party~~ sellers sell and offer to sell merchandise for delivery in California. Company A also enters into contracts to facilitate the sale of ~~the third-party~~ sellers' merchandise through its website for a fee and provides payment processing services for sales of these sellers' merchandise sold through its website. Therefore, Company A is a marketplace facilitator.

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

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

(132) “~~Payment order~~Order” means a written instruction or order to pay money signed by the person giving the instruction whether created in electronic or paper format.

(143) “~~Payment processing services~~Processing Services” means any services related to charging a buyer the price to purchase a marketplace seller’s tangible personal property, collecting, handling, or processing the payment, and transmitting any portion of the payment to the marketplace seller. Such services include, but are not limited to, providing a physical or virtual credit or debit card terminal, integrating payment processing with an online shopping cart at checkout, or otherwise directly or indirectly authorizing or providing the means for payment processing in any manner. ~~person, directly or indirectly, with the means used to charge or debit accounts through the use of any payment method or mechanism, including~~Payment methods may include, but are not limited to, credit cards, debit cards, prepaid cards, stored value cards, Automated Clearing House (ACH) debits, and payment orders, whether accomplished through the use of software or otherwise.

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

(164) “~~Related person~~Person.” For the purposes of this regulation, a person is related to another person if both persons are related to each other pursuant to section 267(b) of the Internal Revenue Code and the regulations thereunder.

(175) “~~Setting prices~~Prices” means establishing a price or prices at which an item is offered for sale or sold to customers and includes establishing a price at which an item must be sold or a minimum or maximum price, below or above which an item cannot be sold.

(186) “~~Virtual currency~~Currency” is a digital representation of value that functions as a medium of exchange, a unit of account, or a store of value, but which does not have legal tender status in any jurisdiction. Virtual currency does not include retailer coupons or gift cards.

(A) ~~If the consideration for a retail sale of tangible personal property is virtual currency, the measure of tax shall be determined pursuant to Regulation 1654, Barter, Exchange, “Trade-ins” and Foreign Currency Transactions.~~

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

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

Example 5: Company A is a marketplace facilitator with no physical presence in California. Company A did not make or facilitate any sales of tangible merchandise for delivery in California during 2018. From January 1, 2019, to September 30, 2019, Company A sold \$300,000 of tangible merchandise for delivery in California on its own behalf and facilitated sales of \$250,000 of tangible merchandise for delivery in California through its marketplace for Seller A, a marketplace seller. Since the total combined sales of tangible merchandise for delivery in California exceeded the \$500,000 threshold in Revenue and Taxation Code section 6203, subdivision (c)(4), during 2019 and prior to October 1, 2019, Company A is a retailer engaged in business in this state on October 1, 2019, and must register with the Department for a Certificate of Registration - Use Tax, and collect and remit use tax beginning October 1, 2019.

(2) On and after October 1, 2019, a marketplace seller is the seller for sales and the retailer shall register with the Department for a seller's permit or Certificate of Registration - Use Tax, as required, for retail sales made on its own behalf and not facilitated through a registered marketplace facilitator, for purposes of determining whether the marketplace seller is required to register with the Department for a seller's permit or Certificate of Registration - Use Tax. On and after October 1, 2019, a marketplace seller is not required to register with the Department for a seller's permit if it does not make any sales of tangible personal property in this state, except for sales facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales pursuant to subdivision (c) of this regulation. On and after October 1, 2019, a marketplace seller is not required to register with the Department for a Certificate of Registration - Use Tax if it does not make any sales of tangible personal property for storage, use, or other consumption in this state, except for sales facilitated by marketplace facilitators who are the sellers and retailers for purposes of those sales pursuant to subdivision (c) of this regulation. Also, on and after October 1, 2019, for

purposes of determining whether a marketplace seller is a retailer engaged in business in this state because its total combined sales of tangible personal property for delivery in this state exceed the \$500,000 threshold in Revenue and Taxation Code section 6203, subdivision (c)(4), the marketplace seller shall include all sales of tangible personal property for delivery in this state, including sales made on its own behalf and sales facilitated through any marketplace facilitator's marketplace, regardless of whether the sales are taxable.

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

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

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

A marketplace facilitator that is registered with the Department or required to register with the Department for a seller's permit or Certificate of Registration - Use Tax and facilitates a retail sale of tangible personal property by a marketplace seller on or after October 1, 2019, is the retailer selling or making the sale of the tangible personal property sold through its marketplace. Therefore, the marketplace facilitator is the retailer responsible for paying sales tax or collecting

and remitting use tax on that sale and the marketplace seller is not the retailer responsible for paying sales tax or collecting and remitting use tax on that sale, unless the marketplace facilitator qualifies for relief from liability for the tax on that sale pursuant to Revenue and Taxation Code section 6046.

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

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

(d) Advertising.

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

tangible personal property is advertised in a marketplace, or the advertisement contains an offer to sell tangible personal property.

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

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

Example 12: The facts are the same as in example 11, except that Company B offers an email relay service to sellers that advertise on its website whereby Company B will refer potential purchasers to the sellers to complete sales using an email relay service that masks the purchasers' and sellers' personal email addresses. The provision of such an email relay service does not constitute participation in the sales of the tangible merchandise advertised for sale on its website beyond advertising the merchandise for sale and referring the purchaser to the seller to complete the sale. Therefore, Company B is not facilitating the retail sales of tangible merchandise made through the advertisements on its website, Company B is not the seller and retailer for those sales for purposes of determining whether Company B is required to register with the Department under subdivision (b)(1), and Company B is not the retailer selling or making the sales of that merchandise under subdivision (c).

Example 13: The facts are the same as in example 11, except that Company B will take orders for sellers that advertise on its website to make it easier for them to sell their merchandise through the website. Therefore, when Company B takes an order for a sale of tangible merchandise advertised for sale on its website, Company B is facilitating the sale of that merchandise, Company B is the seller and retailer for that sale for purposes of determining whether Company B is required to register with the Department under subdivision (b)(1), Company B is the retailer selling or making the sale of that merchandise under subdivision (c), and Company B is responsible for paying sales tax or collecting and remitting use tax on that sale.

Example 14: The facts are the same as in example 11, except that Company B will provide payment processing services to sellers that advertise on its website to make it easier for them to sell their merchandise through the website. Therefore, when Company B provides payment processing services for a sale of tangible merchandise advertised for sale on its website, Company B is facilitating the sale of that merchandise, Company B is the seller and retailer for that sale for purposes of determining whether Company B is required to register with the Department under subdivision (b)(1), Company B is the retailer selling or making the sale of that merchandise under subdivision (c), and Company B is responsible for paying sales tax or collecting and remitting use tax on that sale.

(e~~f~~) Election.

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

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

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

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

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