



This Week in State Tax (TWIST)

September 11, 2023



To listen to the podcast please [click here](#)

California: Recently Adopted Regulation Addresses Aspects of the Marketplace Facilitator Law

The California Office of Administrative Law has finalized amendments to California Code Regulations section 1684.5, addressing marketplace sales. The finalized regulation is generally unchanged from a proposed version that was released earlier. Recall, under California law, on and after October 1, 2019, a marketplace facilitator is a retailer engaged in business in the state if its total combined sales (i.e., including both sales of its own property and sales it facilitates on behalf of marketplace sellers) of tangible personal property for delivery into California exceed \$500,000. Similarly, a marketplace seller must include both direct sales and marketplace facilitated sales in determining whether it exceeds the economic nexus threshold. One amendment to the regulation confirms that a marketplace facilitator and a marketplace seller must include both taxable and nontaxable sales in determining whether it exceeds the \$500,000 threshold. Another amendment clarifies that to be considered a "marketplace," a physical or electronic place must offer tangible personal property for sale by multiple marketplace sellers. As such, a company that sells web hosting services and related services (e.g., payment processing) to other sellers who use the services to create their own e-commerce websites is not considered a marketplace facilitator. The revised regulation also makes clear that a person is not required to provide payment processing services to be considered a marketplace facilitator.

Another set of amendments to the regulation address the statutory carve out for websites that merely advertise tangible personal property for sale and refer a purchaser to the seller to complete the sale. Under California law, such entities are not considered to be facilitating a sale. The amended regulation adopts a new subsection to address "advertising" to clarify that when the advertising exclusion applies to a sale, the person publishing the advertisement is not considered the seller and retailer for the sale and that such person is not the retailer selling or making the sale of the tangible personal property sold through the advertisement. 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. One of the new examples in the "advertising" section confirms that when a person takes orders for sellers that advertise goods on the person's website, that person is facilitating the sale of tangible personal property and is considered the retailer for those sales. "Order taking" is newly defined to mean 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. The regulatory action is effective August 28, 2023, but the CDTFA may enforce the regulations retroactively as the changes were not the result of a change in statute and are therefore declarative of existing law. Please contact [Jim Kuhl](#) with questions on California's marketplace facilitator regulation.

kpmg.com/socialmedia



© 2023 KPMG LLP, a Delaware limited liability partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved. USCS000670-1K

The following information is not intended to be "written advice concerning one or more federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230.

The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.