MULTISTATE TAX COMMISSION

Wayfair Implementation & Marketplace Facilitator Work Group 2019 White Paper

MTC UNIFORMITY COMMITTEE

WAYFAIR IMPLEMENTATION AND MARKETPLACE FACILITATOR WORK GROUP

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Introduction

The Uniformity Committee re-convened the *Wayfair* Implementation and Marketplace Facilitator Work Group ("Work Group") to address issues arising from enactment by many state legislatures of sales/use tax laws implementing economic nexus and requiring marketplace facilitators/providers to collect sales/ use tax. This White Paper ("2019 White Paper") includes the Work Group's findings concerning the Committee's prioritized list of issues and is intended to provide guidance to state legislatures and tax agencies considering such laws or amendments during their 2020 legislative sessions. The 2019 White Paper follows up and supersedes (to the extent inconsistent with) the White Paper dated November 20, 2018 ("2018 White Paper," downloadable from the MTC website at www.mtc.gov).

Executive Summary of Findings

This Executive Summary of Findings concerns the issues, in order of priority, from the prioritized issues list.

1. Definition of marketplace facilitator/provider

The 2018 White Paper (pp. 6-10) suggested both broad and narrow versions of the definition of the term "marketplace facilitator/provider."[1] The narrow definition requires direct or indirect processing or collection of the customer's payment by the marketplace facilitator/provider. The broad definition may not. Nineteen states plus the District of Columbia have adopted narrow definitions. Fifteen states have adopted broad definitions. Business participants in the Work Group expressed a strong preference for the narrow definition, because the broad definition leads to more uncertainty. Also, a business falling within the broad definition that does not directly or indirectly process or collect the payment cannot practically comply with the tax collection requirement.

Some business participants have advocated for adoption of exclusions from the definition for certain industries, such as payment processors, advertisers, delivery services, travel and accommodation services, car rentals, etc. Some of the states have included exclusions in their definitions of "marketplace facilitator/provider." The draft working

[1] Some state laws define the term "marketplace facilitator" (see, e.g., Maryland 2019 SB 1301) and others define the term "marketplace provider" (see, e.g., Texas 2019 HB 1525). The terms are interchangeable.

model approved on November 22, 2019 by the National Conference of State Legislatures (NCSL) State and Local Tax (SALT) Task Force ("NCSL working draft model"), to be reviewed by its Executive Committee in early 2020, suggests a narrow definition and includes certain exclusions. The exclusions typically address situations where the type of business falling within the definition lacks access to the sales transaction information and the payment so cannot practically comply, or the industry already has an established tax compliance model in place that would otherwise be disrupted.

2. Who is the retailer?

Most states that have enacted marketplace facilitator/provider sales/use tax collection requirements treat the marketplace facilitator/provider as the "retailer" under their sales/use tax laws. The marketplace facilitator/provider "steps into the shoes" of the retailer and assumes the retailer's rights and obligations under those laws (such as claiming bad debts, vendor compensation, handling refunds, recordkeeping, etc.). Business participants in the Work Group expressed a strong preference for that treatment. The NCSL working draft model includes suggested language.

3. Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection

Most states that have enacted marketplace facilitator/provider sales/use tax collection requirements provide that the marketplace facilitator/provider is subject to audit and liability for failure to properly collect sales/use tax, not the marketplace seller. However, if the marketplace facilitator/provider can show that the failure to collect was due to the marketplace seller providing erroneous information to the marketplace facilitator/provider, then the audit risk and liability can shift to the marketplace seller for those transactions. The 2018 White Paper (pp. 13-14) addressed this. The NCSL working draft model suggests provisions shifting liability from to the marketplace facilitator/provider to the marketplace seller when failure to collect is attributable to erroneous product information from the marketplace seller.

Some state tax agency staff and other Work Group participants have suggested that for administrative efficiency, states should look solely to the marketplace facilitator/provider for recordkeeping, audit and liability for non-collection of sales/use tax. Otherwise, the state may end up conducting two audits: first the marketplace facilitator/provider, then the marketplace seller. The marketplace facilitator/provider and marketplace seller should negotiate between themselves any shifting of the liability risk for non-collection. Other business participants believe that at least for a transition period, liability protection needs to remain in place for marketplace facilitators/providers for

non-collection, due to receiving erroneous information from marketplace sellers. However, all agree on the need for clear guidance on what specific information the marketplace seller must provide to the marketplace facilitator/provider.

4. Marketplace seller-marketplace facilitator/provider information requirements

Information requirements between the marketplace seller and marketplace facilitator/provider should be clear and standardized. Several business participants suggested that the marketplace seller should be required to provide to the marketplace facilitator/provider information needed to properly categorize the product, but should not be responsible for making the taxability determination. When the marketplace seller retains the obligation to collect sales/use tax, the marketplace facilitator/provider should be required to provide the marketplace seller the information needed to properly complete the sales/use tax return.

5. Collection responsibility determination

Most of the states that have enacted marketplace facilitator/provider sales/use tax collection requirements do not permit the marketplace facilitator/provider and marketplace seller to negotiate which party has the collection and reporting responsibility and do not allow the state tax agency to waive that collection or reporting requirement. However, some states have included provisions in their laws allowing the marketplace facilitator/provider and marketplace seller to contractually negotiate which party has the collection and reporting requirement. A few states include provisions allowing the state tax agency to waive the marketplace facilitator/provider collection and reporting requirement, under certain circumstances. The NCSL working draft model suggests waiver language, subject to certain limitations. Several business participants urge the states to provide more flexibility in their laws, through either allowing the parties to negotiate collection responsibility or waiver provisions. States considering such negotiation or waiver provisions should balance the need to address special situations against the risk of undermining the effectiveness of the marketplace facilitator/provider collection model, if those provisions are made too widely available.

One way to preclude marketplace facilitator/provider's collection requirements from applying to certain industries might be to restrict those collection requirements to only certain portions of the state's tax base, such as sales of tangible personal property but not services. However, states that have enacted marketplace facilitator/provider collection requirements generally apply those to the full extent of their tax bases: retail sales of tangible personal property, taxable services, and taxable digital products. Some business participants expressed support for that. Only a few states have limited the

marketplace facilitator/provider collection requirements to sales of tangible personal property.

When the sales transaction involves other applicable taxes or fees, besides sales/use tax, the question arises: who (marketplace facilitator/provider or marketplace seller) should be responsible to collect those other taxes or fees? Generally, state laws requiring marketplace facilitators/providers to collect tax limit that collection requirement only to sales/use tax. The NCSL working draft model contains a provision that would allow the parties to negotiate which party has to collect and remit other applicable taxes, subject to certain limitations. Telecommunications industry participants urged that one party or the other should collect all applicable taxes. Otherwise, a customer may receive multiple invoices for the same transaction. Other participants wanted the marketplace facilitator/provider collection requirement limited to sales/use tax.

6. Marketplace seller economic nexus threshold calculation

Most states that have enacted marketplace facilitator/provider sales/use tax collection requirements include in the sales/use tax economic nexus threshold for marketplace sellers both direct and facilitated sales. However, at least eight states that have recently enacted marketplace facilitator/provider collection requirements only include direct sales in the marketplace seller's economic nexus threshold. Some Work Group participants supported excluding facilitated sales from the marketplace seller's economic threshold to reduce the compliance burden on small marketplace sellers and save administrative costs for processing "zero" or minimal dollar returns. One participant supported including facilitated sales in the marketplace seller's threshold, to "level the playing field" with "brick and mortar" sellers.

7. Remote Seller sales/use tax economic nexus threshold issues

Most states that have enacted sales/use tax economic nexus include in the remote seller's economic nexus threshold an annual gross sales volume threshold or a transactions threshold. However, if the sales volume threshold includes sales for resale, then wholesalers may be required to register and file "zero" returns. At least ten states include only retail sales and two states include only taxable sales in the sales volume threshold. Including only retail sales in the threshold would eliminate registration requirements for remote wholesalers. One participant suggested that basing the sales volume threshold on taxable sales may invite disputes and uncertainty.

At least thirteen states have excluded a transactions threshold from their sales/use tax economic nexus threshold, and two states require that both a sales volume and transactions threshold be exceeded before the remote seller is required to register and collect

the sales/use tax. Several participants recommended that the transactions threshold be eliminated. One business participant supported keeping the transactions threshold.

8. Certification requirement

At least eleven of the states that have enacted marketplace facilitator/provider collection requirements include a provision requiring the marketplace facilitator/provider to certify to the marketplace seller that it has commenced collection of sales/use tax on facilitated sales. This gives the marketplace seller a document to rely on in case the state tax agency attempts to audit the marketplace seller on those facilitated sales. The certificate would show that the marketplace facilitator/provider should be audited on those sales, not the marketplace seller.

Two states expressed opposition to the certification requirement. Several business participants opposed it as burdensome on the marketplace facilitator/provider, urging that the marketplace facilitator/provider and marketplace seller cover this in their contractual agreement instead, or that the certification be satisfied informally, such as by an email. One business participant supported the requirement.

9. Information sharing

The Federation of Tax Administrators administers the Uniform Exchange of Information Agreement, which provides a mechanism for participating tax agencies to exchange confidential taxpayer information for the purposes of administering their tax laws. However, states should avoid taking information sharing actions that would discourage remote sellers from coming forward to register in some, but not all states imposing sales/use tax.

10. Taxability determination

Business participants strongly recommended that to reduce the compliance burden on remote sellers, state tax agencies should publish specific guidance to assist remote sellers in quickly determining items included in the state's sales/use tax base and items exempted.

11. Return simplification

Some states requiring marketplace facilitators/providers to collect still require marketplace sellers to report those sales on their returns. Some states do not. States should consider whether it is necessary for the marketplace seller to report facilitated sales on its return, if the marketplace facilitator/provider is registered and collecting sales/use tax on those sales.

Some states that have enacted marketplace facilitator/provider sales/use tax collection requirements allow the marketplace facilitator/provider to either report both direct and facilitated sales on one return or separately on two returns. Other states require separate reporting of direct sales vs. facilitated sales, and still others require reporting both direct and facilitated sales on one return. The NCSL working draft model provides for allowing the marketplace facilitator/provider the option of either reporting both direct and facilitated sales on one return or on separate returns. Some of the business participants preferred the consolidated or combined return containing both direct and facilitated sales and others preferred the separate reporting of direct sales on one return and facilitated sales on another.

12. Foreign sellers

Although treaties may protect foreign sellers without a permanent establishment in the U.S. from state income or franchise taxes, they are subject to the state's sales/use tax on remote sales made into the state. However, states face enforcement obstacles, if the foreign seller lacks any assets in the state.

Business participants indicate that foreign sellers have encountered difficulties in attempting to register with states when they lack a permanent establishment in the U.S. and do not have FEIN numbers. Foreign sellers have also been requested to provide SSNs for their officers or responsible persons, who may not be U.S. citizens. States should develop work-around processes for foreign sellers needing to register for sales/use tax when those foreign sellers have no permanent establishment, lack FEIN numbers and their officers are not U.S. citizens.

13. Local sales/use taxes

Collection of local sales/use tax adds complexity to tax compliance for remote sellers. States and local governments need to reduce that complexity, in order to decrease the compliance burden.

States that are members of the Streamlined Sales and Use Tax Agreement (SSUTA) do include simplification/uniformity features into their sales tax laws concerning local sales tax administration, such as state-level administration, uniform state and local tax bases, providing databases for local rates and boundaries, imposing notice requirements for rate and boundary changes, and destination sourcing.

In some states, local jurisdictions have "home rule" authority concerning the ability to impose and administer local sales/use taxes. Those states have undertaken efforts to simplify administration of their local sales/use taxes for remote sellers. Colorado and Louisiana are working to create centralized filing systems for the local "home rule" taxes. Alabama, Texas and Louisiana currently permit remote sellers to use a single combined state and local rate. Colorado and New Mexico are phasing in adoption of destination sourcing.

Objective of the Work Group

The objective of the Work Group is to analyze the prioritized list of issues stemming from states' enactment of legislation imposing sales/use tax economic nexus and marketplace facilitator/provider collection requirements, and to present ideas for states to consider to address those issues, with the goal of maximizing tax compliance while minimizing the burden on marketplace facilitators/providers and remote sellers.

Background

The marketplace facilitator/provider sales/use tax collection model offers states a highly effective, efficient way to achieve enhanced tax compliance in the rapidly expanding area of marketplace sales. The state registers one marketplace facilitator/provider that will collect and remit sales/use tax on the sales of its many marketplace sellers—without the state needing to deal directly with each marketplace seller. It should be no surprise that so many states have quickly adopted this new model.

The watershed *South Dakota v. Wayfair*, 585 U.S. __, 138 S. Ct. 2020 (2018) decision, setting aside the physical presence nexus standard, opened the door for states to rapidly adopt sales/use tax economic nexus. Many of those states have simultaneously enacted sales/use tax economic nexus and marketplace facilitator/provider sales/use tax collection requirements.

The following states have enacted legislation requiring marketplace facilitators to collect and remit sales/use tax on facilitated marketplace sales (or for two states, giving marketplace facilitators the option to collect and remit tax or comply with notice and reporting requirements):

Alabama (2018 HB 470, option to collect or notice/report)
Arkansas (2019 HB 576)
Arizona (2019 HB 2757)
California (2019 AB 147, 2019 SB 92)
Colorado (HB 19-1240)
Connecticut (2018 SB 417)
DC (Internet Sales Tax Emergency Amendment Act of 2018)
Hawaii (2019 SB 396)
Idaho (2019 HB 259)
Indiana (2019 HEA 1001)
Iowa (2018 SF 2417)
Kentucky (2019 HB 354)
Maine (2019 HP 1064)
Maryland (2019 HB 1301)
Minnesota (2017 HF 1, 2019 HF 5)
Massachusetts (2019 H 4000)
North Carolina (2019 S 557)
North Dakota (2019 SB 2338)
Nebraska (2019 LB 284)
New Jersey (2018 A4496)
New Mexico (2019 HB 6)
New York (2019 S. 1509 Part G)
Nevada (2019 AB 445)
Ohio (2019 HB 166)
Oklahoma (2018 HB 1019XX, option to collect or notice/report)
Pennsylvania (2017 Act 43, 2019 HB 262)
Rhode Island (2017 H 5175A, 2019 S 251)
South Carolina (2019 SB 214)
South Dakota (2018 SB2)

Texas (2019 HB 1525)
Utah (2019 SB 168)
Virginia (2019 H 1722)
Vermont (2019 H 536)
Washington (2017 HB 2163, 2019 SB 5581)
Wisconsin (2019 AB 251)
West Virginia (2019 HB 2813)
Wyoming (2019 SB 69).

Many of those bills also include sales/use tax economic nexus provisions, if those were not already in place. The enacted bills above are available for download from the MTC website at www.mtc.gov under the topics "Uniformity," "Current and Recent Uniformity Projects," and "Wayfair Implementation and Marketplace Facilitator Work Group."

The Work Group proposed and Uniformity Committee published the 2018 White Paper to provide guidance to states considering enactment of sales/use tax economic nexus and marketplace facilitator/provider collection legislation. Some states had already enacted such laws, and many state legislatures enacted them in 2019.

At its April 25, 2019 meeting in Denver, CO, the Uniformity Committee approved a new project to reconvene the Work Group to address follow-up issues arising from enactment by many states of such laws. Responses were solicited from Uniformity Committee and Work Group participants to identify and rank those issues.

At its August 6, 2019 meeting, the Uniformity Committee tasked the Work Group to address a prioritized issues list, and to develop a new White Paper providing guidance for interested state legislatures and tax agencies for the 2020 legislative sessions concerning those issues. Tommy Hoyt (Office of Texas Comptroller of Public Accounts) chaired the Work Group, which convened teleconferences on August 29, September 19, October 4, 10 and 24, 2019. A wide variety of state tax agency staff, businesses, tax practitioners, and nonprofit organizations participated in those teleconferences. The 2019 White Paper is the product of those discussions.

The National Conference of State Legislatures ("NCSL") State and Local Tax ("SALT") Task Force has developed and approved on November 22, 2019 model legislation that may address some of the issues included in the prioritized issues list. As of the date of this White Paper, this model legislation is expected to be reviewed by the Executive Committee of the NCSL in early 2020. The latest draft of such model legislation ("NCSL working draft model") is included as Appendix A, and relevant portions are discussed herein.

For states that have already enacted sales/use tax economic nexus and marketplace facilitator/provider collection requirements, there understandably may be reluctance to make changes to those laws. Provided below are the Work Group's findings concerning the issues raised, in order of priority.

Findings

These findings are based on analysis of relevant portions of enacted laws and the NCSL working draft model, written comments, and comments made during Work Group teleconferences.

Issues

1. Definition of marketplace facilitator/provider

Statutory definitions of "marketplace facilitator/provider" fall into two categories: narrow and broad. The 2018 White Paper (pp. 6-10) suggested both narrow and broad definitions.

Narrow Definition

The narrow definition requires that the marketplace or forum list the marketplace seller's item on the marketplace and, directly or indirectly, take the customer's payment and transmit payment to the marketplace seller.

A recently enacted example of the narrow definition is contained in Maryland 2019 HB 1301, Section 1 (C-2)(1):

> "Marketplace facilitator" means a person that:
>
> (i) facilitates a retail sale by a marketplace seller by listing or advertising for sale in a marketplace tangible personal property; and
>
> (ii) regardless of whether the person receives compensation or other consideration in exchange for the person's services, directly or indirectly through agreements with third parties, collects payment from a buyer and transmits the payment to the marketplace seller.

This definition is similar to NCSL working draft model Section 2 A. (Appendix A):

> A. "Marketplace facilitator" means a person, including any affiliate of the person, that:

> 1. Contracts or otherwise agrees 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 physical or electronic marketplace operated, owned, or otherwise controlled by the person; and,
>
> 2. Either directly or indirectly through contracts, agreements or other arrangements with third parties, collects the payment from the purchaser and transmits all or part of the payment to the marketplace seller.

Nineteen States and the District of Columbia have adopted a narrow definition: Arkansas, Arizona, Colorado, Connecticut, Hawaii, Illinois, Maryland, Maine, Minnesota, Nebraska, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Dakota, Texas, Wisconsin, and Wyoming.

Comments:

The Texas Comptroller staff stated that thus far, the Comptroller has not encountered any interpretation problems with the Texas definition for "marketplace provider."

The Texas definition at 2019 HB 1525, Section 2 provides:

> "Marketplace provider" means a person who owns or operates a marketplace and directly or indirectly processes sales or payments for marketplace sellers.

See written comments submitted by Anonymous response (Appendix B), AT&T (telecommunications company) (Appendix C), Charter Communications (telecommunications company) (Appendix D), Instacart (a technology company providing grocery delivery service) (Appendix E), the National Retail Federation (Appendix F), and Booking Holdings Inc. (holding company for several online travel companies [OTCs]["Booking Companies"]) (Appendix J) all strongly supporting the narrow definition of "marketplace facilitator/provider."

Booking Companies (Appendix J, p.3) states that the definition must contain the requirement for the person to directly or indirectly process or collect the customer's payment. Otherwise, it is not possible for that person to collect and remit the tax.

Broad Definition

The broad definition contains two lists of different activities. If the business performs at least one activity in each of those lists, the business can fall within the definition.

A recently enacted example of the broad definition is contained in Massachusetts 2019 H 4000, Section 31:

"Marketplace facilitator", a person that contracts with 1 or more marketplace sellers to facilitate for a consideration, regardless of whether deducted as fees from the transaction, the sale of the seller's tangible personal property or services through a marketplace operated by the person, and engages:

(a) directly or indirectly, through 1 or more related persons, in any of the following:

(i) transmitting or otherwise communicating the offer or acceptance between the buyer and the seller;

(ii) owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;

(iii) providing a virtual currency that buyers are allowed or required to use to purchase tangible personal property or services from the seller; or

(iv) software development or research and development activities related to any of the activities described in subsection

(b), if such activities are directly related to a physical or electronic marketplace operated by the person or a related person; and

(c) in any of the following activities with respect to the seller's tangible personal property or services:

(i) payment processing services;

(ii) fulfillment or storage services;

(iii) listing tangible personal property or services for sale;

(iv) setting prices;

(v) branding sales as those of the marketplace facilitator; (vi) order taking;

(vii) advertising or promotion; or

(viii) providing customer service or accepting or assisting with returns or exchanges; provided, however, that a marketplace facilitator may also be a marketplace seller . . . .

Fifteen States have adopted a broad definition of marketplace facilitator/provider: California, Iowa, Idaho, Kentucky, Massachusetts, North Dakota, New Jersey, Nevada, Ohio, Rhode Island, Utah, Virginia, Vermont, Washington, and West Virginia.

With the broad definition, a business may not have access to the details of the sales transaction, and may not handle the customer's payment, yet could still fall within the definition. The marketplace facilitator/provider faces problems complying with the obligation to collect, report and remit sales/use tax on the transaction if it has no access to the transaction details (payment amount, date, delivery address, etc.) or the customer's payment.

Comments:

Diane Yetter (tax practitioner, Yetter Tax) raised the concern that if the business does only one of five items listed in the broad definition (providing a product listing on the website or doing advertising, for example), it may fall within the definition, even though the business is disassociated from the financial aspects of the transaction. The business may not have access to the price of the item being sold, and may not be handling the money. How can the business know what the tax should be, collect the tax and file a return?

Beth Sosidka (AT&T) echoed Diane's comments. More than one party can fit within the broad facilitator definition. The facilitator should be the entity handling the financial aspects of the transaction. She urged that there needs to be an exclusion from the definition for mere advertising.

Jamie Fenwick (Charter Communications) stated that "owning the infrastructure . . . that brings the buyers and sellers together" needs to be an exclusion from the "marketplace facilitator/provider" definition. This phrase captures many telecommunications companies that literally fall within the broad "marketplace facilitator/provider" definition but have no involvement with handling the actual sales transaction.

Scott Peterson (Avalara, Certified Service Provider [CSP]) stated that Avalara has both marketplace sellers and facilitators as clients. The broad definition may have different interpretations in different states. A business could be considered a marketplace facilitator in one state but not in another—causing complexity and confusion. With the narrow definition, it is less likely that states can make differing interpretations on whether a business is a marketplace facilitator.

Written comments of Erich Tschopp (Indirect Tax Director, Airbnb, Appendix L) suggest that all platforms, whether falling within the definition of "marketplace facilitator" or not, display applicable sales and use tax as part of the total price of the goods, or take other steps to ensure that consumers are aware of the taxes due.

Exclusions from definition of marketplace facilitator/provider

For states that have already adopted a statutory definition for "marketplace facilitator/provider," one way to narrow that definition may be adoption of exclusions from that definition to cover situations where it may not be advisable to impose the sales/use tax collection obligation on the types of businesses that would otherwise fall within the definition.

Advertising Exclusion

Businesses that only perform advertising activities are one category that some states have excluded from their definition. The following states have adopted such an exclusion: California, Colorado, Maryland, Nevada, Ohio, Virginia, Washington.

Examples are provided below.

California 2019 AB 92 provides:

> 6041.1. Newspapers, internet websites, and other entities that advertise tangible personal property for sale, refer purchasers to the seller by telephone, internet link, or other similar means to complete the sale, and do not participate further in the sale are not facilitating a sale under this chapter.

Colorado HB 19-1240 provides:

> (b) a "marketplace facilitator" does not include a person that exclusively provides internet advertising services or lists products for sale, and that does not otherwise meet the definition set forth in subsection (5.9)(a) of this section.

The NCSL draft working model Section 2. A. 3. (Appendix A) contains the following exclusion for advertising services:

> 3. A "marketplace facilitator" does not include: a) a platform or forum that exclusively provides advertising services, including listing products for sale, so long as the advertising service platform or forum does not also engage directly or indirectly through one or more affiliated persons in the activities described in A.1. and A.2. of this section. . . .

Payment Processing Exclusion

Another exclusion adopted by some states includes payment processors. The following states have adopted a payment processor exclusion: Arizona, Indiana, Maryland, Massachusetts, Nebraska, Utah, Virginia, West Virginia.

Examples of statutory exclusions for payment processing are provided below.

Arizona 2019 HB 2757, Section 4 (exclusion from definition of marketplace facilitator) provides:

> (b) does not include a payment processor business that is appointed to handle payment transactions from various channels, such as charge cards, credit cards and debit cards, and whose sole activity with respect to marketplace sales is to handle transactions between two parties.

Indiana 2019 HEA 1001 p. 136 (exclusion from definition of marketplace facilitator) provides:

> (b) The term does not include a payment processor business: (1) that is appointed by a merchant to handle payment transactions from various channels, including credit cards and debit cards; and (2) whose sole activity with respect to marketplace sales is to handle payment transactions between two (2) parties.

The NCSL draft working model Section 2. A. 3. (Appendix A) contains the following exclusion for payment processors:

> A "marketplace facilitator" does not include: . . . (b) a person whose principal activity with respect to marketplace sales is to provide payment processing services between two parties. . . .

Comment:

The NRF (Appendix F) supports an exclusion for payment processors.

Delivery Services Exclusion

Some states have adopted exclusions for delivery services (California, Maryland).

California 2019 SB 92 provides an exclusion for delivery network companies, but allows such service to elect to be a marketplace facilitator with the obligation to collect sales/use tax:

> 6041.5. (a) Notwithstanding Section 6041, a person that is a delivery network company is not a marketplace facilitator for purposes of this chapter.
>
> (b) For purposes of this section, all of the following definitions shall apply:

> (1) "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.
>
> (2) "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.
>
> (3) "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.
>
> (4) "Local product" means any item, including food, other than freight, mail, or a package to which postage has been affixed.
>
> (c) Notwithstanding subdivision (a), a delivery network company that meets the definition set forth in subdivision (b) of Section 6041 may elect, in a reasonable manner and duration prescribed by the department, to be deemed a marketplace facilitator pursuant to this chapter. Consistent with this section, the department shall adopt regulations that establish the criteria for obtaining and retaining an election to be a marketplace facilitator pursuant to this subdivision.

Maryland 2019 HB 1301, Section 1 (C-2)(2) exclusions for delivery service companies provides:

> (2) "marketplace facilitator" does not include: . . .
>
> (iv) a delivery service company that delivers tangible personal property on behalf of a marketplace seller that is engaged in the business of a retail vendor and holds a license issued under subtitle 7 of this title.

Comments:

Instacart (Appendix E) supports an exclusion for food delivery services, or alternatively, the flexible approach contained in the California law.

NRF (Appendix F) supports exclusions for food delivery services and for certain franchisors that have mobile apps or websites whereby a customer will order food from the brand, and the order will be referred to the local franchisee who fulfills the order.

Accommodations, Car Rentals, Car Sharing Exclusions

Some states have adopted exclusions for facilitation of travel packages or accommodations (Nevada, Ohio, Washington); peer-to-peer car sharing programs (Maryland); facilitation of car rentals (Nevada, New York).

Maryland 2019 HB 1301, Section 1 (C-2)(2) exclusion for peer-to-peer car sharing programs provides:

> (2) "marketplace facilitator" does not include:
>
> . . . (iii) a peer–to–peer car sharing program, as defined in § 19–520 of the insurance article. . . .

Nevada 2019 AB 445 Section 3 (exclusions for vacation or travel packages, and car rentals) provides:

> 2. The term [marketplace facilitator] does not include:
>
> . . . (b) A person who arranges, books or otherwise facilitates, for a commission, fee or other consideration, vacation or travel packages or rental car or other travel reservations or accommodations through a marketplace owned, operated or controlled by the person. The exclusion set forth in this paragraph applies only with respect to the arranging, booking or facilitation, for a commission, fee or other consideration, of the lease or rental of a passenger car, as defined in NRS 482.087.

New York 2019 S. 1509 Part G, Section 1 (e)(1) (exclusion for car rentals) provides:

> For purposes of this paragraph, a "sale of tangible personal property" shall not include the rental of a passenger car as described in section eleven hundred sixty of this chapter but shall include a lease described in subdivision(i) of section eleven hundred eleven of this article.

Ohio 2019 HB 166, p. 1785 (hotel lodging exclusion) provides:

> (3) The subject of the sale is tangible personal property or services other than lodging by a hotel that is or is to be furnished to transient guests.

Washington 2019 SSB 5581 exclusion for travel agency services at Section 105 amending 82.08.010(15)(b)(i) provides:

> (b)(i) "Marketplace facilitator" does not include: . . . or (B) A person with respect to the provision of travel agency services or the operation of a

> marketplace or that portion of a marketplace that enables consumers to purchase transient lodging accommodations in a hotel or other commercial transient lodging facility. (ii) The exclusion in this subsection (15)(b) does not apply to a marketplace or that portion of a marketplace that facilitates the retail sale of transient lodging accommodations in homes, apartments, cabins, or other residential dwelling units.

NCSL draft working model Section 2. A. 4. (Appendix A) suggests the following accommodations exclusion from the definition:

> 4. [OPTIONAL—If sales tax in state applies to hotel/lodging, consider adding following language to exclude from definition of "marketplace facilitator": "A person is not a marketplace facilitator with respect to the sale or charges for rooms, lodgings or accommodations described in (cite code section) if the rooms, lodgings or accommodations are provided by a hotel, motel, inn, or other place that is a [registered seller] under (cite code section) and the [registered seller] provides the rooms, lodgings or accommodations for occupancy under a brand belonging to such person.

Comments:

Booking Companies (Appendix J) supports an exclusion for OTCs similar to the language used in Washington's exclusion. Booking Companies explains that tax compliance models already exist in the OTC industry, because OTCs are marketing accommodations or car rentals for brick and mortar businesses, in contrast to a marketplace facilitator/provider that is marketing sales of tangible personal property of remote marketplace sellers. Thus, an exclusion is needed.

Emmitt O'Keefe (Booking Companies) supported the exclusion for hotel/lodging and OTCs in the Nevada and Washington laws. He commented that the exclusion language for "hotel/lodging" in the NCSL working draft model should not be optional and suggested that the exclusion should not be limited to those providing rooms, lodgings or accommodations under a brand name belonging to the person registered. Otherwise, that language discriminates against independent hotels and OTCs.

The Travel Technology Association (Appendix K) and Airbnb (Appendix L) both support an exclusion for OTCs and recommend specific revisions to the language in NCSL draft working model Section 2. A. 4. to provide for that.

Other Exclusions

NCSL draft working model Section 2. A. 3. (Appendix A) suggests the following additional exclusion from the definition:

> 3. A "marketplace facilitator" does not include: . . . (c) a derivatives clearing organization, a designated contract market, foreign board of trade or swap execution facility, registered with the Commodity Futures Trading Commission ("CFTC registered platforms"), and any clearing members, futures commission merchants or brokers when using the services of CFTC registered platforms.

2. Who is the retailer?

Should marketplace facilitator/providers have the same rights as retailers under state law, such as claiming price adjustments, bad debt deductions, vendor compensation (if provided by the state), etc.?

The prevailing trend among states enacting marketplace facilitator/provider collection laws is to treat the marketplace facilitator/provider as the "retailer" under the sales/use tax laws. The marketplace facilitator/provider should have the same rights and obligations as a "retailer"[2] under the sales/use tax laws. The following states consider the marketplace facilitator/provider to be the "retailer" concerning facilitated sales: Arkansas, California, Colorado, Connecticut, DC, Hawaii, Illinois, Maine, Massachusetts, North Carolina, North Dakota, Nebraska, New Jersey, New York, Ohio, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, West Virginia, Wyoming.

Example statutes are provided below.

Arizona HB 2757, p. 6, defines "person" to include "marketplace facilitator or remote seller," and "sale" is defined to include:

> Transactions facilitated by a marketplace facilitator on behalf of a marketplace seller.

California 2019 AB 147 provides:

> 6042. 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 under Chapter 2 (commencing with Section 6051) or Chapter 3 (commencing

[2] Some states use the term "retailer" in their sales/use tax laws. Others may use the term "seller" or "vendor."

> with Section 6201), in addition to each sale for which the marketplace facilitator is the seller or retailer or both under Chapter 1 (commencing with Section 6001).

Colorado HB 19-1240, Section 1 provides:

> (8) "Retailer" or "vendor" means a person doing business in this state including a remote seller, known to the trade and public as such, and selling to the user or consumer, and not for resale. The term includes a Marketplace facilitator, a marketplace seller, and a Multichannel seller doing business in this state.
>
> (1.5) (a) with respect to sales of tangible personal property, commodities, or services made by marketplace sellers in or through a marketplace facilitator's marketplace, a marketplace facilitator has all of the liabilities, obligations, and rights of a retailer or vendor under subsection (1) of this section and this Article 26 whether or not the marketplace seller, because the marketplace seller is a multichannel seller:
>
> (i) has or is required to have a license under section 39-26-103; or
>
> (ii) would have been required to collect and remit tax
>
> Under this article 26 had the sale not been made in or through the marketplace.

Hawaii 2019 SB 396, Section 1 provides:

> "1237- Marketplace facilitators. (a) A marketplace facilitator shall be deemed the seller of tangible personal property, intangible property, or services and the seller on whose behalf the sale is made shall be deemed to be making a sale at wholesale pursuant to section 237-4.

Illinois 2019 SB 689, pp. 119-120 provides:

> (b) Beginning on January 1, 2020, a marketplace facilitator who meets either of the following criteria is considered the retailer of each sale of tangible personal property made on the marketplace. . . .
>
> (c) A marketplace facilitator that meets either of the thresholds in subsection (b) of this Section is considered the retailer of each sale made through its marketplace and is liable for collecting and remitting the tax under this Act on all such sales. The marketplace facilitator has all the rights and duties, and is required to comply with the same requirements and procedures, as all other retailers

> maintaining a place of business in this State who are registered or who are required to be registered to collect and remit the tax imposed by this Act.

Indiana 2019 HEA 1001 provides:

> The marketplace facilitator shall also be considered a retail merchant for purposes of section 3 of this chapter.
>
> ….
>
> Sec. 18. (a) A marketplace facilitator shall be considered the retail merchant of each retail transaction (including a retail transaction under section 4 of this chapter) that is facilitated for sellers on its marketplace . . . .

Massachusetts 2019 H 4000, Section 31 provides:

> "Retailer", includes (i) every person, including a marketplace seller, engaged in the business of making sales at retail; (ii) every person engaged in the making of retail sales at auction of tangible personal property whether owned by such person or others; (iii) every marketplace facilitator engaged in facilitating retail sales of tangible personal property or services, irrespective of whether such tangible personal property is owned by the facilitator or a marketplace seller and irrespective of whether such services are performed by the facilitator or a marketplace seller; (iv) every person, including a marketplace seller or marketplace facilitator, engaged in the business of making sales for storage, use or other consumption, or in the business of making sales at auction of tangible personal property whether owned by such person or others for storage, use or other consumption;

Nebraska 2019 LB 284, Section 3 includes in definition of "seller:"

> (f) Every person operating a multivendor marketplace platform that (i) acts as the intermediary by facilitating sales between a seller and the purchaser or that engages directly or indirectly through one or more affiliated persons in transmitting or otherwise communicating the offer or acceptance between the seller and purchaser and (ii) either directly or indirectly through agreements or arrangements with third parties, collects payment from the purchaser and transmits payment to the seller.

New York 2019 S 1509 Part G, Section 2 provides:

> (1) "Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: . . every marketplace provider with respect

> to sales of tangible personal property it facilitates as described in paragraph one of subdivision (e) of section eleven hundred one of this article.
>
> . . . .
>
> (l)(1) A marketplace provider with respect to a sale of tangible personal property it facilitates:
>
> (A) shall have all the obligations and rights of a vendor under this article and article twenty-nine of this chapter and under any regulations adopted pursuant thereto, including, but not limited to, the duty to obtain a certificate of authority, to collect tax, file returns, remit tax, and the right to accept a certificate or other documentation from a customer substantiating an exemption or exclusion from tax, the right to receive the refund authorized by subdivision (e) of this section and the credit allowed by subdivision (f) of section eleven hundred thirty-seven of this part subject to the provisions of such subdivisions; and (B) shall keep such records and information and cooperate with the commissioner to ensure the proper collection and remittance of tax imposed, collected or required to be collected under this article and article twenty-nine of this chapter.

North Dakota 2019 SB 2338, Section 2 provides:

> Notwithstanding any other provision of law, any marketplace facilitator facilitating sales of tangible personal property or other products or services subject to tax under section 57 - 39.2 - 02.1, which does not have a physical presence in this state, is a retailer subject to chapters 57 - 39.2 and 57 - 40.2 . . . .

Ohio 2019 HB 166 provides:

> A marketplace facilitator shall be treated as the "seller" with respect to all sales facilitated by the marketplace facilitator on behalf of one or more marketplace sellers . . . .
>
> **Sec. 5741.07.** Except as otherwise provided in section 5741.11 of the Revised Code, a marketplace facilitator that is treated as a seller pursuant to division (E) of section 5741.01 of the Revised Code has the same rights and obligations under this chapter as other sellers. . . .

Rhode Island 2019 S 251, Section 3 provides:

> (iii) A marketplace facilitator with respect to a sale of tangible personal property, prewritten computer software delivered electronically by load and leave,

> vendor-hosted prewritten software, and/or taxable services it facilitates: (A)shall have all the obligations and rights of a retailer under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws and under any regulations adopted pursuant thereto. . . .

Washington 2019 SSB 5581, Section 105 amending definition of "seller" in RCW 82.08.010 (2)(a)(ii) to include marketplace facilitators, provides:

> (ii) "Seller" includes marketplace facilitators, whether making sales in their own right or facilitating sales on behalf of marketplace sellers.

Texas 2019 HB 1525, Section 1 provides:

> (b) "Seller" and "retailer" include:. . . . (7) a person who is a marketplace provider under\
>
> Section 151.0242. . . . (b) Except as otherwise provided by this section, a marketplace provider has the rights and duties of a seller or retailer under this chapter with respect to sales made through the marketplace.

Texas Comptroller staff explained that the Texas law (2019 HB 1525) defines the marketplace provider as the "seller." Thus, the marketplace provider is eligible to claim the vendor discount.

Utah 2019 SB 168, Section 1 provides:

> (b) "Seller" includes a marketplace facilitator.

Vermont 2019 H 536, Section 3 provides:

> (14) "Persons required to collect tax" or "persons required to collect any tax imposed by this chapter" means every vendor of taxable tangible personal property or services, and every recipient of amusement charges. These terms also include marketplace facilitators with respect to retail sales made on behalf of a marketplace seller.

Virginia 2019 H 1722, Section 58.1-612.1 provides:

> D. 1. A marketplace facilitator shall be considered a dealer for purposes of this chapter and shall collect the tax imposed by this chapter on all transactions that it facilitates through its marketplace. . . .

Wisconsin 2019 AB 251 provides:

> 77.585 **(1g)** A marketplace provider who collects and remits tax on behalf of a marketplace seller under s.
>
> 77.523 may claim a bad debt deduction under this subsection if either the marketplace provider or marketplace seller may claim a deduction under section 166 of the Internal Revenue Code for the sales transaction.

NCSL draft working model Section 2 C. (Appendix A) contains the following provision:

> For purposes of [cite this law or appropriate sales and use tax code], a marketplace facilitator has the same rights and duties as a seller.

The following states consider marketplace facilitator/provider to be acting on behalf of the marketplace seller, who is the retailer/seller with facilitated sales: Arizona, Iowa, West Virginia.

An example is provided below.

West Virginia 2019 HB 2813, Section 11-15A-8b provides:

> . . . (b) Agency. — For purposes of §11-15A-6b of this code, a marketplace facilitator or referrer is deemed to be an agent of any marketplace seller making retail sales through the marketplace facilitator's physical or electronic marketplace or directly resulting from a referral of the purchaser by the referrer.

Comments:

Stephanie Gilfeather (Instacart) stated that not all states implementing marketplace facilitator collection laws have eliminated the marketplace seller's liability for the tax. States need to be consistent: if the marketplace facilitator is responsible for collecting the tax, the marketplace seller should be removed entirely from that liability.

Beth Sosidka (AT&T) stated that the marketplace facilitator needs to "step into the shoes" of the retailer, be able to claim bad debts, be responsible for recordkeeping, and have the same rights and obligations as the retailer. It confuses customers when there is ambiguity as to who is collecting and liable for the tax. See AT&T written comments (Appendix C).

To the question of whether the marketplace facilitator/provider should be treated as the retailer, Anonymous response (Appendix B) states:

Yes, but only as it relates specifically to the sales and use tax law. Specifically, any blanket rights and responsibilities provision should be carefully limited to ensure that other areas of state law (such as products liability, etc.) are not inadvertently impacted. States should thoughtfully consider whether specifically addressing certain rights and responsibilities is needed to alleviate uncertainty for taxpayers, such as adding explicit language/guidance indicating that the marketplace facilitator/provider is able to accept tax exemption certificates in the name of either the marketplace facilitator or the marketplace seller for whom they are facilitating the sale.

Refund provisions

When a state includes marketplace facilitator/providers within its definition of seller/retailer/vendor, then the refund provisions applicable to a seller/retailer/vendor should apply to marketplace facilitators/providers.

Should refund procedures be specified for marketplace facilitators/ providers?

States should provide guidance on the handling of sales/use tax refund claims arising from marketplace transactions. The following states included in their marketplace facilitator/provider collection statutes provisions concerning filing of refund claims: Arizona, Connecticut, Indiana, Maryland, Utah. Examples are provided below.

Arizona refund procedure in 2019 HB 2757, p. 10 provides:

> F. Refund claims related to an overpayment of transaction privilege tax collected by a marketplace facilitator shall be filed as prescribed by section 42-1118. If a refund claim is denied, the claimant may appeal the denial pursuant to chapter 1, article 6 of this title.

Connecticut 2018 SB 417, Section 4(d) provides:

> Any purchaser of tangible personal property or taxable services who overpaid sales or use tax to a marketplace facilitator may submit a claim for refund with the commissioner . . . .

Indiana 2019 HEA 1001, p. 143 refund procedures:

> Sec. 13.5. Any purchaser of tangible personal property or services who has overpaid gross retail or use tax to a marketplace facilitator: (1) may file a claim for refund with the department; and (2) shall not have a cause of action against the marketplace facilitator for the recovery of the overpayment. . . .

Maryland 2019 HB 130, Section 11-404(3) provides:

> (C) a marketplace facilitator, or other appropriate party, shall refund to a buyer the proportionate amount of sales and use tax that the buyer has paid if: (1) (i) a sale is rescinded or canceled; or
>
> (ii) the property sold is returned to the marketplace facilitator or marketplace seller; and (2) the purchase price is wholly or partially repaid or credited.

Utah 2019 SB 168, Section 4 provides:

> (10) (a) A purchaser of tangible personal property, a product transferred electronically, or a service may file a claim for a refund with the marketplace facilitator if the purchaser overpaid sales and use taxes imposed under this chapter.

3. Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection

Enacted marketplace facilitator/provider collection laws generally provide that the marketplace facilitator/provider is the party to be audited, not the marketplace seller, on facilitated sales transactions. However, some of those laws also impose recordkeeping requirements on marketplace sellers for facilitated sales and subject the marketplace seller to audit when the marketplace facilitator/provider can establish that its failure to collect was due to erroneous information provided by the marketplace seller. Such laws may include liability protection for the marketplace facilitator/provider when the failure to collect is due to incorrect or insufficient information provided by the marketplace seller. In that case, liability shifts to the marketplace seller. Some of those laws limit liability shifting only to "incorrect" information provided by the marketplace seller.

Do clearer, simpler standards need to be put in place (such as defining the specific information the marketplace facilitator/provider can rely on for the marketplace seller to provide, and vice versa) in assigning liability for failure to collect between the marketplace facilitator/provider and the marketplace seller and in determining which party is subject to audit under what circumstances?

Audit Exposure

For states that include the marketplace facilitator/provider within the definition of "retailer" under their sales/use tax laws, the recordkeeping obligation and exposure to audit would clearly apply to the marketplace facilitator/provider.

Many states explicitly provide that the marketplace facilitator/provider is subject to audit on the facilitated transactions that it is required to collect sales/use tax on, and that the marketplace seller is not subject to audit on those transactions.

Kentucky 2019 SB 354 provides:

> (4) (a) The marketplace provider shall be subject to audit on all sales made on its own behalf and on all sales facilitated by the marketplace provider. (b) The marketplace retailer shall be relieved of all liability for the collection and remittance of the sales or use tax on sales facilitated by the marketplace provider.

Maryland 2019 HB 1301 provides:

> (I) (1) if the comptroller conducts an audit for compliance with this section, the comptroller may audit only the marketplace facilitator for sales made by a marketplace seller that are facilitated by the marketplace facilitator.
>
> (2) the comptroller may not audit the marketplace seller for sales facilitated by the marketplace facilitator for which the marketplace facilitator collected or should have collected the sales and use tax due.

Minnesota 2019 HF 5 provides:

> (a) A marketplace provider is subject to audit on the retail sales it facilitates if it is required to collect sales and use taxes and remit them to the commissioner under subdivision 2, paragraphs (b) and (c).

In some of those provisions, the marketplace seller may be subject to audit and liable when the marketplace facilitator/provider is seeking to shift liability due to marketplace seller errors. Examples are provided below.

Maine 2019 HP 1064 provides:

> I. Nothing in this section prohibits the State Tax Assessor from auditing marketplace facilitators or marketplace sellers, except the assessor is prohibited from auditing: (1) Marketplace facilitators to the extent that the marketplace seller collected and remitted sales and use tax and was audited with respect to the relevant sales; or (2) Marketplace sellers to the extent that the marketplace facilitator collected and remitted sales and use tax and was audited with respect to the relevant sales unless the marketplace facilitator is seeking relief of liability under paragraph E.

> J. If a marketplace facilitator pays sales or use tax on a retail sale facilitated for a marketplace seller as a result of an audit or otherwise, the marketplace facilitator may recover the tax and any associated interest and penalties from the marketplace seller within the applicable statutory period following the date of payment by the marketplace facilitator.

New Mexico 2019 HB 6 provides:

> B. The department shall audit a marketplace provider, but not a marketplace seller, with respect to gross receipts from transactions facilitated by a marketplace provider and for which the marketplace seller may claim a deduction pursuant to Section 36 of this 2019 act, unless an audit of the marketplace seller is necessary to determine the correct amount of tax due, including examining the marketplace seller:
>
> (1) to determine compliance with Section 36 of this 2019 act;
>
> (2) to determine if the marketplace provider should be relieved of liability pursuant to Subsection C of Section 7-9-5 NMSA 1978; or
>
> (3) to enforce any other provision of the Tax Administration Act.

North Dakota 2019 SB 2338 provides:

> [The marketplace facilitator shall] be subject to audit by the tax commissioner with respect to all retail sales for which it is required to collect and pay the tax imposed under chapters 57 - 39.2 and 57 - 40.2. If the tax commissioner audits the marketplace facilitator, the tax commissioner is prohibited from auditing the marketplace seller for the same retail sales unless the marketplace facilitator seeks relief under subsection 4 .

Ohio 2019 HB 166 provides:

> (B) The commissioner may audit only the marketplace facilitator for sales with respect to which the marketplace facilitator is treated as the seller pursuant to division (E) of section 5741.01 of the Revised Code and may not audit the marketplace seller on behalf of which the sale was facilitated. This division does not absolve a marketplace seller or the purchaser from personal liability under division (B) of section 5741.11 of the Revised Code for taxes that are not properly collected, paid, or remitted due to the inability of the marketplace facilitator to obtain accurate information about the sale from the marketplace seller.

Rhode Island 2019 S. 251 provides:

> (iv) A marketplace facilitator shall be subject to audit by the tax administrator with respect to all retail sales for which it is required to collect and pay the tax imposed under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws. Where the tax administrator audits the marketplace facilitator, the tax administrator is prohibited from auditing the marketplace seller for the same retail sales unless the marketplace facilitator seeks relief under this subsection (iv).

Virginia 2019 H 1722 provides:

> F. A marketplace facilitator is the sole entity subject to audit by the Department for sales and use tax collection for all transactions facilitated by the marketplace facilitator unless (i) the marketplace facilitator can demonstrate that its failure to collect the proper tax was due to incorrect information provided by the marketplace seller or (ii) the marketplace seller is subject to a waiver granted pursuant to subdivision D 3.

NCSL working draft model Section 2. G. (Appendix A) suggests the following provision dealing with marketplace facilitator/provider audit exposure:

> The [department] shall solely audit the marketplace facilitator for sales made by marketplace sellers but facilitated by the marketplace facilitator, except with respect to transactions that are subject to Section 1.C or 1.D. The [department] will not audit or otherwise assess tax against marketplace sellers for sales facilitated by a marketplace facilitator except to the extent the marketplace facilitator seeks relief under section (H) or with respect to transactions that are subject to Section 1.C or 1.D.

Comments:

AT&T written comments (Appendix C) suggest that audit exposure should be limited to the party responsible for collecting and remitting the tax.

Robert D. Plattner (former deputy commissioner for tax policy, New York State Department of Taxation and Finance) submitted as his comment to the Work Group his recent article entitled "Marketplace Facilitator Laws: Looking Out for the Little Guy," published in *Tax Analysts State Tax Notes*, October 14, 2019 (Appendix G). In this article (p. 4), Robert views providing statutory liability protection for marketplace facilitators as unnecessary. Requiring the revenue agency to do a second audit of the marketplace seller after first auditing the marketplace facilitator on the same transactions is an inherently inefficient use of resources.

The National Association of Certified Service Providers (NACSP) (Appendix H) suggests that states that are not members of the Streamlined Sales and Use Tax Agreement (SSUTA) should develop audit standards and procedures that recognize the unique situation of remote sellers; when auditing a seller that utilizes a CSP, audit inquiries should be directed to the CSP.; and those states should consider participating with the Streamlined States when conducting audits of CSPs.

Liability Protection

Most states that have enacted laws requiring marketplace facilitators/providers to collect sales/use tax on facilitated sales generally include provisions protecting marketplace facilitators/providers from liability for failure to collect in certain circumstances. Several states (see Arizona, Colorado, Maine, Nevada, New Mexico, North Carolina, Rhode Island, Vermont) provide that if the marketplace facilitator/provider can demonstrate that the failure to collect was due to "incorrect" information provided by an unaffiliated marketplace seller to the marketplace facilitator/provider, then the marketplace facilitator/provider is relieved of liability, and such liability shifts to the marketplace seller. Examples are provided below.

Arizona 2019 HB 2757 provides:

> A. A marketplace facilitator is not liable for failing to pay the correct amount of transaction privilege tax for a marketplace seller's sales through the marketplace facilitator's marketplace to the extent that the marketplace facilitator demonstrates any of the following to the satisfaction of the department: 1. The failure to pay the correct amount of tax was due to incorrect information given to the marketplace facilitator by the marketplace seller, and the marketplace facilitator and the marketplace seller are not affiliated persons. 2. The marketplace facilitator and the marketplace seller are not affiliated persons, and the failure to pay the correct amount of tax was due to an error other than an error in sourcing the sale under section 42-5040.

Colorado HB 19-1240:

> (b) (I) if a marketplace facilitator demonstrates to the satisfaction of the executive director of the department of revenue that the marketplace facilitator made a reasonable effort to obtain accurate information regarding the obligation to collect tax from the marketplace seller and that the failure to collect tax on any tangible personal property, commodities, or services sold was due to incorrect information provided to the marketplace facilitator by the marketplace seller, then the marketplace facilitator, but not the marketplace seller, is relieved of

> liability under this section for the amount of the tax the marketplace facilitator failed to collect, plus applicable penalties and interest.
>
> (ii) if a marketplace facilitator is relieved of liability under subsection (3)(b)(i) of this section, the marketplace seller is liable under this section for the amount of tax the marketplace facilitator failed to collect, plus applicable penalties and interest.
>
> (iii) this subsection (3)(b) does not apply to any sale by a marketplace facilitator that is not facilitated on behalf of a marketplace seller or that is facilitated on behalf of a marketplace seller who is an affiliate of the marketplace facilitator.

Maine 2019 HP 1064 provides:

> E. A marketplace facilitator is relieved of liability under this section for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect information given to the marketplace facilitator by the marketplace seller, except that this paragraph does not apply if the marketplace facilitator and the marketplace seller are members of an affiliated group as defined in section 5102, subsection 1-B.

Other states (Arkansas, California, Idaho, Illinois, Indiana, Maryland, Minnesota, Nebraska, North Dakota, New York, Ohio, Texas, Utah, Wisconsin) expand the liability protection for marketplace facilitators/providers to include the marketplace facilitator/provider demonstrating that the failure to collect was due to the unaffiliated marketplace seller providing "<u>insufficient or</u> incorrect" information to the marketplace facilitator/provider. Examples of such statutes are provided below:

Arkansas 2019 SB 576 provides:

> (f)(1) A marketplace facilitator is relieved of liability under this section for failure to collect and remit the correct amount of tax under this section to the extent that the failure was due to incorrect or insufficient information given to the marketplace facilitator by the marketplace seller.
>
> (2) This subsection does not apply if the marketplace facilitator and the marketplace seller are related.

California 2019 AB 147 provides:

> 6046. 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 an unrelated marketplace seller about a

> retail sale and that the failure to remit the correct amount of tax imposed under this part was due to incorrect or incomplete information provided to the marketplace facilitator by the unrelated marketplace seller, then the marketplace facilitator shall be relieved of liability for the tax for that retail sale. This section does not apply with regard to a retail sale for which the marketplace facilitator is the retailer selling or making the sale of the tangible personal property on its own behalf or if the marketplace facilitator and marketplace seller are related.

Indiana 2019 HEA 1001, p. 143:

> (b) For calendar years beginning after December 31, 2021, except in cases in which the marketplace facilitator and the seller are affiliated, a marketplace facilitator is not liable under this section for failure to collect and remit gross retail and use taxes if the marketplace facilitator demonstrates to the satisfaction of the department that: (1) the marketplace facilitator has a system in place to require the seller to provide accurate information and has made a reasonable effort to obtain accurate information from the seller about a retail transaction; (2) the failure to collect and remit the correct tax was due to incorrect or insufficient information provided to the marketplace facilitator by the seller; and (3) the marketplace facilitator provides information showing who the purchaser was in each transaction for which the tax had not been collected. If the marketplace facilitator is relieved of liability under this subsection, the purchaser is liable for any amount of uncollected, unpaid, or unremitted tax.

Massachusetts has extended liability protection for marketplace facilitators/providers for failure to collect to also include certain erroneous information provided to the marketplace facilitator/provider by the purchaser or the Commonwealth itself.

Massachusetts 2019 H 4000 provides:

> A marketplace facilitator shall be relieved from liability, including penalties and interest, for the incorrect collection or remittance of sales and use tax on transactions it facilitates or for which it is the seller if the error is due to reasonable reliance on (i) an invalid exemption certificate provided by the marketplace seller or the purchaser; (ii) incorrect information provided by the commonwealth; or (iii) incorrect information provided by the marketplace seller or purchaser regarding the tax classification or proper sourcing of an item or transaction, provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain accurate information from the marketplace seller or purchaser.

Virginia has also extended the circumstances when liability protection is provided to the marketplace facilitator/provider, including an invalid exemption certificate from the purchaser, and erroneous information from the Commonwealth. However, Virginia has limited the circumstances when liability protection is provided due to erroneous information from the marketplace seller. The protection for such erroneous information only includes tax classification or sourcing.

Virginia 2019 H 1722 provides:

> E. A marketplace facilitator shall be relieved from liability, including penalties and interest, for the incorrect collection or remittance of sales and use tax on transactions it facilitates or for which it is the seller if the error is due to reasonable reliance on (i) an invalid exemption certificate provided by the marketplace seller or the purchaser; (ii) incorrect or insufficient information provided by the Commonwealth; or (iii) incorrect or insufficient information provided by the marketplace seller or purchaser regarding the tax classification or proper sourcing of an item or transaction, provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain accurate information from the marketplace seller or purchaser. The relief from liability afforded to the marketplace facilitator pursuant to this subsection shall not exceed the total amount of tax due from the marketplace facilitator on the incorrect transaction independent of any penalties or interest that would have otherwise applied. Any deficiency resulting from incorrect information provided by the marketplace seller or as the result of an audit shall be the liability of the marketplace seller
>
> . . . .
>
> 2. Notwithstanding subdivision 1, any remote seller or marketplace facilitator that has collected an incorrect amount of sales and use tax shall be relieved from liability for such amount, including any penalty or interest, if the error is a result of the remote seller's or marketplace facilitator's reasonable reliance on information provided by the Commonwealth.

NCSL working draft model Section 2 H. (Appendix A) suggests the following provision dealing with marketplace facilitator/provider liability protection:

> H. A marketplace facilitator shall be relieved of liability under this [section] for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect or insufficient information on the nature of the product or service given to the marketplace facilitator by the marketplace seller, provided that the marketplace facilitator can demonstrate it made a reasonable

> effort to obtain correct and sufficient information from the marketplace seller. Provided, however, this [subsection] shall not apply if the marketplace facilitator and the marketplace seller are related as defined in [cite code section].

Note that the above language limits the marketplace facilitator's liability protection to incorrect or insufficient information from the marketplace seller on the nature of the product or service.

Comments:

Anonymous response (Appendix B) supports language similar to the NCSL working draft model making the marketplace facilitator/provider generally responsible for audits and assessments on facilitated sales, but providing liability protection for the marketplace facilitator/provider and shifting liability for uncollected sales/use tax to the marketplace seller when the marketplace seller has provided insufficient or incorrect information. Additionally, Anonymous supports states providing interest and penalty relief when a vendor, seller or marketplace facilitator demonstrates good-faith effort to implement systems and make process changes to comply with the new marketplace facilitator collection, remittance, and reporting responsibilities.

NRF (Appendix F) supports liability protection for marketplace facilitators/providers from assessments caused by inaccurate product mapping information from the marketplace seller.

Texas Comptroller staff advised that the marketplace provider is responsible for collecting and remitting the tax and must certify that to the marketplace seller, but the marketplace seller is responsible for providing the taxability determination on its products to the marketplace provider. If the marketplace seller provides bad information, and the marketplace provider relies on it in good faith for failure to collect, then liability shifts to the marketplace seller. However, if the marketplace sellers tells the provider that a T-shirt it sells is not taxable, it would be questionable that the provider's reliance on that would be in "good faith."

Richard Dobson (Kentucky Department of Revenue) suggested that the state should hold the marketplace facilitator responsible for correctly collecting the tax, and the marketplace facilitator and seller can contractually deal with shifting liability between those parties. That is much simpler than the state having to look to the marketplace facilitator for collection on some transactions and to the marketplace seller on others.

Robert D. Plattner recommends in his article (Appendix G, p. 4) that the Work Group embrace the position that marketplace facilitators are the best equipped to help themselves and not in need of special liability protection. Robert argues that the marketplace

facilitator/provider can shift liability to the marketplace seller for uncollected tax attributable to erroneous information from the marketplace seller in the terms of the agreement between the parties. (Appendix G, p. 3-4).

Paul Rafelson (Online Merchants Guild) asked, if the marketplace seller is in China, how will the state enforce any liability for non-collection against such party? The marketplace facilitator should be considered the retailer, and the marketplace seller should be treated as a wholesaler providing inventory only. The marketplace facilitator should be fully responsible for the tax liability. He suggested that marketplace facilitators should be held to the same standard as a large or small retailer. It should not be that difficult for the facilitator to properly track the taxability of items being sold on its marketplace—just like the retailer does. Why should facilitators get special treatment on shifting the tax liability to marketplace sellers?

Stephanie Gilfeather (Instacart) commented that depending on the size of the marketplace facilitator and number products being handled, it is not reasonable for a small marketplace facilitator to correctly determine taxability of each product. Not all facilitators are sophisticated enough to deal with such complexity. Small facilitators have difficulty getting taxability information from their marketplace sellers, who may lack that information as well. This is a transition issue—so states need to provide clear guidance to help facilitators and sellers comply. Not all facilitators are large and sophisticated.

Russ Brubaker (FedTax, CSP) stated that lack of tax knowledge and sophistication of some marketplace sellers and facilitators cannot be overestimated.

Beth Sosidka (AT&T) commented that tax treatment and categorization of telecommunications and related services are extremely complex. Product classification and sourcing are also complex. AT&T sells globally. There may be multiple services, tax types, states, even countries, on one invoice. Allowing marketplace facilitators to shift tax liability onto marketplace sellers is a giant loophole. States need to specify what information the marketplace facilitator is responsible for providing and what information the seller is responsible for. States should look at the CSP model in the Streamlined Sales and Use Tax Agreement (SSUTA). It specifies the information a seller must provide to the CSP on the products being sold.

See AT&T written comments (Appendix C), suggesting that liability for uncollected tax should be limited to the party responsible for collecting and remitting the tax.

Diane Yetter (Yetter Tax) suggested that the facilitator should look to the marketplace seller to map and catalog its product items to the appropriate tax category. The variety of products is extreme for facilitators. States have different product definitions. The

same definition does not work in multiple states. What if the marketplace facilitator does not provide enough category options for the marketplace seller to correctly map their products? The marketplace seller should not be liable when the facilitator lacks the capability to handle different state tax treatments and definitions for the same products.

Ariel McDowell (Walmart) noted that Walmart's marketplace has 100 million product SKUs, while the brick and mortar stores have significantly smaller number of product SKUs—that needs to be kept in mind.

Craig Johnson (Executive Director, Streamlined Sales Tax Governing Board) pointed out that imposing requirements on marketplace sellers to provide facilitators with taxability determinations arguably places an undue burden on those sellers. States need to decrease those burdens.

The comments received indicate that states with laws allowing liability shifting from the marketplace facilitator/provider to the marketplace seller for uncollected sales/use tax may want to reconsider those. Administrative costs may be reduced for the state and the marketplace seller by the state holding the marketplace facilitator/provider solely liable for failure to properly collect on audited transactions. The marketplace facilitator/provider and marketplace seller can contractually deal with any liability shifting attributable to erroneous information provided by the marketplace seller.

At a minimum, when state laws allow liability for non-collection of sales/use tax to be shifted from the marketplace facilitator/provider to the marketplace seller when the marketplace seller has provided "insufficient" or "incorrect" information to the marketplace facilitator/provider, then clear guidance needs to specify the type information that the marketplace facilitator/provider can rely on the marketplace seller to provide. Several commenters suggested that this should be limited to only product categorization information.

Recordkeeping Requirements

As previously mentioned, for states that include the marketplace facilitator/provider within their definition of "retailer," the marketplace facilitator/provider would be subject to the recordkeeping requirements that apply to the retailer. However, some states also impose recordkeeping requirements on marketplace sellers. Examples of recordkeeping requirements are provided below.

Illinois 2019 SB 689 provides:

> (e) A marketplace seller shall retain books and records for all sales made through a marketplace in accordance with the requirements of Section 11.

Texas 2019 HB 1525 provides:

> (e) A marketplace seller shall retain records for all marketplace sales as required by Section 151.025.

Comments:

The NACSP (Appendix H) suggests: states that are not members of the SSUTA should provide clear guidelines outlining the data that remote retailers should maintain and how long that data should be retained.

Beth Sosidka (AT&T) commented that the marketplace seller should not have to keep records—that should be the facilitator's responsibility.

4. Marketplace seller-marketplace facilitator/provider information requirements

Should clear guidelines exist as to the specific information each party (marketplace seller or marketplace facilitator/provider) must provide to the other in order for the obligated party to correctly collect and report the sales/use tax?

The answer is "yes." Examples of information requirements imposed on marketplace sellers are provided below.

Illinois 2019 SB 689:

> (f) A marketplace seller shall furnish to the marketplace facilitator information that is necessary for the marketplace facilitator to correctly collect and remit taxes for a retail sale. The information may include a certification that an item being sold is taxable, not taxable, exempt from taxation, or taxable at a specified rate. A marketplace seller shall be held harmless for liability for the tax imposed under this Act when a marketplace facilitator fails to correctly collect and remit tax after having been provided with information by a marketplace seller to correctly collect and remit taxes imposed under this Act.

Texas 2019 H 1525:

> (f) A marketplace seller shall furnish to the marketplace provider information that is required to correctly collect and remit taxes imposed by this chapter. The

> information may include a certification of taxability that an item being sold is a taxable item, is not a taxable item, or is exempt from taxation.

Texas Comptroller staff advised that under the Texas law, the marketplace provider certifies to the marketplace seller that it is collecting, but the marketplace seller must provide the taxability information on the products to the marketplace provider. There have been issues concerning what is considered "insufficient" or "incorrect information" from the marketplace seller. Some marketplace providers have said that they are going to make taxability determinations themselves.

An example of an information requirement imposed on the marketplace facilitator is provided below:

North Carolina 2019 S 557, Section 4(c):

> A marketplace facilitator must provide or make available to each marketplace seller the information listed in this subsection [gross sales and number of transactions] with respect to marketplace-facilitated sales that are made on behalf of the marketplace seller and that are sourced to this state. The information may be provided in any format and shall be provided or made available no later than 10 days after the end of each calendar month.

Comments:

Beth Soditka (AT&T) stated that there are situations where the marketplace facilitator has information about transactions that the marketplace seller needs in order to deal with income tax issues, but the marketplace facilitator will not provide that information to the marketplace seller, despite requests. The marketplace seller should have access to that information.

AT&T written comments (Appendix C) state:

There are no standards on what constitutes "incorrect or insufficient information". There are also no standards on what determinations are solely the responsibility of the marketplace facilitator. This is in contrast with the strict standards that apply to Certified Services Providers (CSPs) in many of the same states. Under those arrangements the seller is required to provide detailed information about their product and service and map that to the CSPs product codes/categories. Once that mapping has been completed, it is the CSPs responsibility to know the taxability rules that apply to each of those classifications in the various taxing jurisdictions. This would include, whether it is taxable or exempt, and the jurisdictions taxing rates, boundaries and sourcing rules. The same clarity and certainty should be set forth in these [marketplace facilitator

collection] bills so that the sellers know the information they need to supply to ensure they will not be held liable for any errors that may occur after that information has been provided.

Joe Bishop-Henchman (McDermott Will & Emery) noted that there are double remittance situations when multiple marketplace facilitators may be involved—such as with tour groups. One or more parties may be remitting the tax. Guidance is needed on this situation.

Diane Yetter (Yetter Tax) suggested to keep in mind that taxability determination and product classification are two different things. It may be reasonable to expect that the marketplace seller can properly classify its products into the correct product categories, but it should be the marketplace facilitator's, not the marketplace seller's, responsibility to make the taxability determination. Marketplace sellers can upload to the facilitator product classification information, but please don't make them responsible for determining what product is taxable or exempt in multiple states, or responsible for providing the correct rates.

Anonymous response (Appendix B) states that the marketplace facilitator/provider should not be required to provide any data or information beyond what is required for the facilitator/provider to collect and remit sales and use (or applicable transaction) tax. Anonymous further states that guidelines should be established to enable the party responsible for collection and remittance to fulfill its obligation. The data requirements should be uniform, and the data format should be standardized. The provider of the data should be allowed no less than 15 days.

NRF (Appendix F) suggests that the facilitator should be able to post the information on the seller portal.

The above comments express the need for clear guidelines on the specific information each party (marketplace seller or marketplace facilitator/provider) must provide to the other in order for the obligated party to correctly collect and report the sales/use tax. Several comments suggest that information requirements from the marketplace seller should be limited to that needed for the marketplace facilitator/provider to properly "map" or categorize products.

5. Collection responsibility determination

Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax, etc.), be able to contractually agree which party has the sales/use tax collection obligation?

The following states have included provisions in their marketplace facilitator/provider collection statutes permitting the marketplace facilitator/provider and the marketplace seller to negotiate which party has the collection obligation: Maine, Minnesota, Nevada. Examples are provided below:

Maine 2019 HP 1064 provides:

> A. Except as provided in paragraph B, a marketplace facilitator facilitating sales to buyers in the State shall collect and remit the sales or use tax on all taxable sales to buyers in the State.
>
> B. A marketplace facilitator is not required to collect and remit sales or use tax on a sale from a marketplace seller to a buyer in the State if the marketplace facilitator requests and maintains a copy of the marketplace seller's registration certificate to collect sales and use tax in the State issued under section 1754-B, subsection 2.

Minnesota 2019 HF 5 provides:

> Except as provided in paragraph (d), a marketplace provider maintaining a place of business in this state and a marketplace provider not maintaining a place of business in this state who facilitates retail sales in Minnesota or to a destination in Minnesota shall collect sales and use taxes and remit them to the commissioner under section 297A.77 unless:
>
> (1) the retailer provides a copy of the retailer's registration to collect sales and use taxes in this state to the marketplace provider; and
>
> (2) the marketplace provider and retailer agree that the retailer will collect and remit the sales and use taxes on marketplace sales facilitated by the marketplace provider.

Nevada 2019 AB 445 provides:

> 2. The provisions of this chapter relating to the imposition, collection and remittance of sales tax and the collection and remittance of use tax do not apply to a marketplace facilitator described in subsection 1 if:
>
> (a) The marketplace facilitator and the marketplace seller have entered into a written agreement whereby the marketplace seller assumes responsibility for the collection and remittance of the sales tax, and the collection and remittance of the use tax, for retail sales made by the marketplace seller through the marketplace facilitator; and
>
> (b) The marketplace seller has obtained a permit pursuant to NRS 372.125 or registered pursuant to NRS 360B.200.
>
> Upon request of the Department, a marketplace facilitator shall provide to the Department a report containing the name of each marketplace seller with whom the marketplace facilitator has entered into an agreement pursuant to this subsection and such other information as the Department determines is necessary to ensure that each marketplace seller with whom the marketplace facilitator has entered into an agreement pursuant to this subsection has obtained a permit pursuant to NRS 372.125 or registered pursuant to NRS 360B.200.

The NCSL draft working model Section 1. D. (Appendix A) includes the following provision:

> Nothing herein shall prohibit the marketplace facilitator and marketplace seller from contractually agreeing to have the marketplace seller collect and remit all applicable taxes and fees where the marketplace seller:
>
> 1. Has annual U.S. gross sales over [$1 billion], including the gross sales of any related entities, and in the case of franchised entities, including the combined sales of all franchisees of a single franchisor;
> 2. Provides evidence to the marketplace facilitator that it is registered under [cite code section] in this state; and,
> 3. Notifies [the Department] in a manner prescribed by [the Department] that the marketplace seller will collect and remit all applicable taxes and fees on its sales through the marketplace and is liable for failure to collect or remit applicable taxes and fees on its sales.

Comments:

Anonymous response (Appendix B) supported allowing agreement between a marketplace facilitator and marketplace seller regarding the fulfillment of their tax collection and remittance responsibilities.

John Cmelak (Verizon, telecommunications company) commented in favor of marketplace facilitator/provider collection laws containing a provision that would allow the marketplace facilitator/provider and marketplace seller to agree as to which party has the tax collection obligation.

Beth Sosidka (AT&T) agreed that there needs to be language allowing the marketplace seller and marketplace facilitator to agree who collects and notifies the state tax agency when that happens. See AT&T written comments (Appendix C) supporting such language.

Charter Communications written comments (Appendix D) support Nevada's and New Jersey's language allowing the parties to negotiate who has the tax collection obligation.

NRF (Appendix F) supports language allowing the parties to negotiate who has the tax collection obligation.

The Travel Technology Association (Appendix K) and Airbnb (Appendix L) both support language allowing the parties to negotiate who has the tax collection obligation.

Should the state tax agency have the authority to waive the marketplace facilitator/provider collection requirement in certain limited circumstances?

The marketplace facilitator/provider collection laws in the following states allow the head of the state tax agency to waive the marketplace facilitator/provider collection requirement in certain circumstances: Maryland, Massachusetts, Ohio, Texas, Virginia, Wisconsin.

Examples of states with "waiver" provisions are provided below:

Maryland 2019 HB 1301 provides:

> (H) (1) a marketplace facilitator and marketplace seller may apply to the comptroller for a waiver of the collection requirement under this section if:
>
> (i) the marketplace seller is a communications company that is publicly traded or is controlled, directly or indirectly, by a company that is publicly traded;

(ii) the marketplace facilitator and marketplace seller enter into an agreement that the marketplace seller will collect and remit all applicable sales and use taxes imposed under this title; and

(iii) the marketplace seller provides evidence to the marketplace facilitator that the marketplace seller is licensed under § 11–702 of this title to engage in the business of an out–of–state vendor in the state or a retail vendor in the state.

(2) if the waiver under paragraph (1) of this subsection is authorized:

(i) the marketplace seller subject to the agreement under paragraph (1) of this subsection shall collect and remit the sales and use tax imposed under this title;

(ii) the marketplace facilitator is not required to collect or remit the sales and use tax imposed under this title; and

(iii) the marketplace facilitator is not liable for the failure of a marketplace seller to collect and remit any sales and use tax imposed under this title.

(3) the comptroller shall adopt regulations that establish:

(i) the criteria for obtaining a waiver under this subsection; and

(ii) the process and procedure to apply for a waiver.

The Maryland "waiver" provision requires that both the marketplace facilitator and marketplace seller that is a communications company must apply for the waiver and have entered into an agreement that the marketplace seller will take on the sales/use tax collection obligation.

Massachusetts 2019 H 4000 provides:

(f) A marketplace facilitator may request and may be granted a waiver from the requirements of this section, at the discretion of the commissioner, if the following requirements are met:

(1) the marketplace facilitator submits a waiver application to the commissioner substantiating that, based on the facts and circumstances of the marketplace transaction, the marketplace facilitator can presume in good faith that the applicable taxes are collected and remitted by a marketplace seller required to be registered to collect tax under this section;

(2) the marketplace facilitator collects the applicable tax registration numbers of marketplace sellers transacting on the marketplace platform; provided, that said registration numbers shall be kept in the books and records of the marketplace facilitator and may be examined by the commissioner upon request;

(3) the marketplace seller is required to register to collect sales tax; and

(4) any other requirement established by the commissioner by regulation.

(g) For telecommunications services that are taxable under this chapter and chapter 64I, the commissioner may, at the commissioner's discretion, grant a waiver to allow a marketplace seller to collect and directly remit the applicable taxes on sales of such services to the department.

(h) If a waiver is granted pursuant to subsection (f) or (g):

(1) the tax levied under this section shall be (i) collected directly by the marketplace seller or by the marketplace facilitator on behalf of the marketplace seller and (ii) remitted by the marketplace seller(s);

(2) except as otherwise provided in paragraph (1), the marketplace facilitator shall not be required to collect and remit any applicable taxes or fees;

(3) the marketplace facilitator is relieved of liability for remittance of tax on the applicable sales made through the marketplace platform on behalf of those marketplace sellers; and

(4) a marketplace seller shall be subject to audit by the commissioner with respect to all retail sales for which it is required to remit tax.

The Massachusetts Department of Revenue has promulgated emergency regulations, 830 CMR 64H.1.9(6), to implement the above "waiver" provisions. The emergency regulations provide that the marketplace facilitator can request the waiver. Also, a marketplace seller that is providing taxable telecommunications services can request a waiver.

Ohio 2019 HB 166 provides:

Sec. 5741.071.

(A) A marketplace seller may request and shall obtain a waiver from the tax commissioner for a marketplace facilitator not to be treated as a seller pursuant

to division (E) of section 5741.01 of the Revised Code with respect to a specific marketplace seller if the following conditions are met:

(1) The marketplace seller certifies it has annual gross receipts within the United States, including the gross receipts of any affiliate, as defined in section 122.15 of the Revised Code, of at least one billion dollars;

(2) The marketplace seller or its affiliate, as defined in section 122.15 of the Revised Code, is publicly traded on at least one major stock exchange;

(3) The marketplace seller is current on all taxes, fees, and charges administered by the department of taxation that are not subject to a bona fide dispute;

(4) The marketplace seller has not, within the past twelve months, requested that a waiver related to the marketplace facilitator at issue be canceled nor has the waiver been revoked by the commissioner; and

(5) The marketplace seller has not violated division (B) of section 5739.30 of the Revised Code.

(B) A marketplace seller shall request a waiver on the form prescribed by the commissioner. A request for a waiver shall contain a signed declaration from the marketplace facilitator acquiescing to the request for a waiver. A waiver request that is not ruled upon by the commissioner within thirty days of the date it was filed is deemed granted. A waiver that is granted by the commissioner or deemed to be granted is effective on and after the first day of the first month that begins at least thirty days after the commissioner grants the waiver or the waiver is deemed granted. The waiver is valid until the first day of the first month that begins at least sixty days after it is revoked by the commissioner or cancelled by the marketplace seller.

(C)(1) If a waiver is granted by the commissioner, the commissioner shall notify the marketplace seller and the seller shall be considered the vendor pursuant to division (C) of section 5739.01 of the Revised Code or a seller pursuant to division (E) of section 5741.01 of the Revised Code, as applicable.

(2) A marketplace seller is required to notify the marketplace facilitator of the status of the waiver of the marketplace seller. However, if a waiver is denied by the commissioner, a copy of the denial shall be provided to the marketplace facilitator.

> (3) A marketplace seller that has been issued a waiver under this section may cancel the waiver by sending notice to the commissioner and to the marketplace facilitator identified in the waiver application. The commissioner may revoke a waiver if the commissioner determines that any of the conditions described in divisions (A)(1) to (5) of this section are no longer met by the marketplace seller. The commissioner shall notify the marketplace seller and the marketplace facilitator upon revoking a waiver.
>
> (D) Notwithstanding section 5703.21 of the Revised Code, the commissioner may divulge information related to the status of the waiver sought by or granted to the marketplace seller for a particular marketplace facilitator to either the impacted marketplace seller or marketplace facilitator.
>
> (E) The commissioner may promulgate rules the commissioner deems necessary to administer this section.

The Ohio "waiver" provision allows the marketplace seller to request the waiver, if it meets certain conditions: gross annual receipts of one billion dollars or more, publicly traded, and current on tax obligations

Texas 2019 HB 1525 provides:

> (k) The comptroller may adopt rules and forms to implement this section and by rule except certain marketplace providers from some or all of the requirements of this section.

Texas Comptroller staff advised that 2019 HB 1525 does give the Comptroller some flexibility in determining collection responsibility.

Virginia 2019 H 1722 provides:

> 3. Notwithstanding the provisions of subdivisions 1 and 2, the Department shall allow for a waiver from the requirements of subdivisions 1 and 2 if a marketplace facilitator demonstrates, to the satisfaction of the Commissioner, that either (i) all of its marketplace sellers already are registered dealers under § 58.1-613 or (ii) the marketplace seller has sufficient nexus to require registration under § 58.1-613 and that collection of the tax by the marketplace facilitator for such marketplace seller would create an undue burden or hardship for either party. If such waiver is granted, the tax levied under this chapter shall be collectible from the marketplace seller. The Department shall develop guidelines that establish (a) the criteria for obtaining a waiver pursuant to this section, (b) the process and procedure for a marketplace facilitator to apply for a waiver,

> and (c) the process for providing notice to an affected marketplace facilitator and marketplace seller of a waiver obtained pursuant to this subdivision.

Wisconsin 2019 AB 251 provides:

> (b) A marketplace provider whose only activities are facilitating sales of tangible personal property or services described in Sub. (2) (a) 1. on behalf of marketplace sellers operating under a hotel, motel, or restaurant brand name shared with the marketplace provider may submit an application to the department to request a waiver from collecting and remitting tax on sales facilitated on behalf of marketplace sellers. The application shall include the name and address of all marketplace sellers selling or furnishing such tangible personal property or services in this state, the marketplace seller's sales or use tax permit number obtained under Sub. (7) or s. 77.53 (9), and any other information the department requires. The department may grant the waiver if it is satisfied that the tax due under this chapter is collected and remitted by the marketplace sellers. A marketplace provider that is granted the waiver must, within 60 days from a written request by the department, provide the name and address of all marketplace sellers selling or furnishing such tangible personal property or services in this state, the marketplace seller's sales or use tax permit number obtained under Sub. (7) or s. 77.53 (9), and any other information the department requires.
>
> (c) The department may grant waivers under Par. (b) for other types of marketplace providers if there is evidence that the marketplace sellers have a history of reliably collecting and remitting to the department the tax on sales or there is other evidence that the marketplace sellers will reliably collect and remit to the department the tax on sales.

NCSL working draft model Section 1. C. (Appendix A) contains the following provision:

> [The Department] may grant a waiver from the requirements of this section if a marketplace facilitator demonstrates, to the satisfaction of [the Department] that substantially all of its marketplace sellers already are [registered sellers] under [cite code section]. If such waiver is granted, the tax levied under [cite code section] shall be collectible from the marketplace seller. [The Department] shall develop guidelines that establish the criteria for obtaining a waiver pursuant to this section, the process and procedure for a marketplace facilitator to apply for a waiver, and the process for providing notice to an affected marketplace facilitator and marketplace seller of a waiver obtained pursuant to this subsection.

Under this language, the marketplace facilitator can request a waiver if it can show that "substantially all" of its marketplace sellers are already registered and collecting.

Comments:

John Cmelak (Verizon) expressed support for a "waiver" provision.

Stephanie Gilfeather stated that Instacart supports either "waiver" language or language allowing the parties to contractually agree who has the collection obligation. However, she opposed including any minimum business size requirements (such as the one billion dollars business size requirement contained in some of the waiver provisions), as this was too restrictive. She supported maximum flexibility, so that a marketplace facilitator could collect for some marketplace sellers and not others, depending on their agreement. Stephanie suggested that when the waiver is sought and granted, the state should issue a permit, so the parties can rely on that permit to establish who is responsible for collecting the tax. It could function like an exemption certificate. See Instacart's written comments (Appendix E).

Scott Peterson (Avalara, CSP) seconded Stephanie's comments. He noted that thousands of legitimate taxpayers (remote sellers) were already collecting tax before these marketplace facilitator collection laws came into existence. He felt that the exclusions in the definition of marketplace facilitator collection laws, such as for advertising, were too narrow. He opposed the idea of a business size requirement in waiver provisions, arguing that such a requirement should be left out entirely, so that small marketplace sellers could qualify.

Richard Dobson (Kentucky Department of Revenue) suggested that if a waiver provision is in place, then all parties need to be involved in that process: marketplace facilitator/provider, marketplace seller, and the state tax agency. It should not be something that operates unilaterally. He asked: for jurisdictions where a waiver is an option, does the business community believe that a waiver should require both parties (marketplace provider and marketplace seller) to sign off to allow the seller to maintain responsibility for tax collections, filing and remittance? For example, what if the marketplace provider is not willing to sign off because it prefers to collect tax on all facilitated sales rather than tracking piecemeal? Also, is the consensus that a valid waiver must have state sign off to be valid?

Beth Sosidka (AT&T) emphasized that a marketplace seller that has already been collecting should be allowed to continue. She also agreed that all 3 parties, state, marketplace facilitator and marketplace seller need to be involved in the waiver process. See AT&T's written comments (Appendix C) supporting waiver provisions.

Anonymous response (Appendix B) comments:

> At the request of the marketplace facilitator/provider, states should have the authority to waive marketplace facilitator/providers collection requirement for a short transitional period in limited circumstances (including if the marketplace seller agrees in writing to assume the collection responsibility during the waiver period). Waiver limitations and requirements should be published by the tax agency and applied in a uniform manner to all marketplaces.

Booking Companies (Appendix J, p. 3) supports for waiver language that would include OTCs, if there is no exclusion for them provided in the definition of "marketplace facilitator/provider."

Airbnb (Appendix L) also supports such waiver language.

Charter Communications written comments (Appendix D) supports a waiver provision, subject to certain limitations.

States considering provisions that would allow the parties to negotiate who has collection responsibility or to seek a waiver from the collection obligation should exercise care to achieve the proper balance. On one hand, special situations may exist where the marketplace facilitator/provider collection model is not practical and waiver or agreement between the parties that the collection obligation remain with the marketplace seller may be appropriate. On the other hand, broadening too far the availability of a waiver or agreement between the parties to change the collection obligation could undermine the overall effectiveness of the marketplace facilitator/provider collection model.

Should marketplace facilitator/provider collection requirements exclude certain services?

States that have enacted marketplace facilitator/provider collection requirements generally apply those to the full extent of their tax bases: retail sales of tangible personal property and taxable services (and digital products, if taxed). However, a few states have limited the marketplace facilitator/provider collection requirements only to retail sales of tangible personal property.

Alabama Rule 810-6-2-.90.04 limits the marketplace facilitator option to collect or comply with notice requirements to retail sales of tangible personal property exceeding the annual $250,000 sales volume threshold.

California, at 2019 AB 147, limits the sales volume threshold for its marketplace facilitator collection requirement only to retail sales of tangible personal property.

New York and Oklahoma define a marketplace facilitator/provider only with respect to retail sales of tangible personal property, thus appearing to limit any collection requirement to such sales.

New York 2019 S. 1509 Part G provides:

> Marketplace provider. A person who, pursuant to an agreement with a marketplace seller, facilitates sales of tangible personal property by such marketplace seller or sellers.

Oklahoma 2018 HB 1019 provides:

> "Marketplace facilitator" means a person that facilitates the sale at retail of tangible personal property.

South Carolina, at 2019 SB 214, limits the marketplace facilitator collection requirement only to retail sales of tangible personal property.

Comments:

Diane Yetter commented that marketplace facilitator/provider collection statutes should not have carve-outs and limit the collection requirement only to sales of tangible personal property. The collection requirement should apply to all items included in the state's sales/use tax base.

Anonymous response (Appendix B) states that the sales/use tax base for the collection requirement imposed on a marketplace facilitator/provider should mirror that of a retailer/vendor making direct sales.

When the sales transaction involves other applicable taxes, besides sales/use tax, which party (marketplace facilitator/provider or marketplace seller) should be responsible to collect?

Generally, state laws requiring marketplace facilitators/providers to collect tax limit that collection requirement only to sales/use tax. At least one state (Indiana) has extended marketplace facilitator/provider collection requirements to include certain other excise taxes (food & beverage taxes, innkeeper taxes).

Indiana 2019 HEA 1001, p. 137 provides:

> (f) A marketplace facilitator who is considered a retail merchant under section 18 of this chapter for a transaction to which this section applies shall collect and remit innkeeper's taxes imposed under IC 6-9 on the retail transaction.

Indiana 2019 HEA 1001, p. 155 provides:

> Sec. 6. (a) A marketplace facilitator (as defined in HEA 1001 — CC 1 155 IC 6-2.5-1-21.9) of rooms, lodgings, or accommodations subject to taxation under this article is considered the person engaged in the business of renting or furnishing the rooms, lodgings, or accommodations and is required to collect and remit any taxes imposed under this article.

Indiana 2019 HEA 1001, p. 156 provides:

> Sec. 2. (a) A marketplace facilitator (as defined in IC 6-2.5-1-21.9) subject to the requirements HEA 1001 — CC 1 156 to collect sales tax on its own transactions or on behalf of its sellers inaccordancewithIC6-2.5-4-18 is also required to collect any taxes imposed under this article [food and beverage tax] on a transaction that it facilitates.

The NCSL working draft model Section 1. D. (Appendix A) contains a provision that would allow the parties to negotiate which party will collect and remit other applicable taxes, subject to certain limitations.

Comments:

Beth Sosidka (AT&T) noted that customer confusion results if the customer receives two different invoices for the same transaction in situations where different taxes are collected by different parties. She emphasized that local taxes also add complexity. She further commented that requiring the marketplace facilitator to collect sales/use tax but requiring the marketplace seller to collect other taxes will not work. This would require multiple invoices. Whoever bills the customer should bill for all taxes and fees applicable. If the marketplace facilitator collects, the marketplace facilitator should bill for all such taxes and fees. See AT&T's written comments (Appendix C) pointing out the various special excise taxes and fees that apply to telecommunications services and the resulting problems if more than one party is involved in collecting them.

Diane Yetter stated that when other taxes apply to a transaction, the marketplace facilitator should only be responsible for collecting sales/use tax—unless the state has expressly enacted a marketplace facilitator collection requirement for that specific type of tax. She noted that for utilities taxes and telecommunications taxes, the marketplace seller may be the better party to collect the tax, due to expertise in those areas. She

agreed that whoever bills the customer must also bill for all the applicable taxes. But what if the marketplace facilitator does not have the functionality to be able to collect these other taxes and fees? If the marketplace facilitator has the functionality, the marketplace facilitator could collect the fees and turn them over to the seller to remit. It is a problem if the marketplace facilitator lacks the infrastructure to handle that.

Anonymous response (Appendix B) states that the marketplace facilitator's collection/remittance responsibilities should only extend to sales and use tax. Other excise taxes should continue to be the responsibility of the marketplace sellers (who are currently collecting and remitting these more complex industry-specific taxes and are better equipped to do so).

Stephanie Gilfeather (Instacart) suggested that the statute should specifically enumerate which types of taxes the marketplace facilitator is required to collect. Stephanie also brought up complexity with collection of local sales/use taxes. Stephanie mentioned bottle deposits with grocery stores. Those are based on bottle counts, not price. The grocery store collects them. Instacart does not want handle these. Requiring the marketplace facilitator to collect those will add confusion. See Instacart's written comments (Appendix E).

See Charter Communications written comments (Appendix D) also pointing out the difficulties if several types of excise taxes or fees apply to a telecommunication services transaction and different parties are required to collect them.

6. Marketplace seller economic nexus threshold calculation

Should the marketplace seller, in determining whether it has exceeded the state's economic nexus threshold and is obligated to register and collect sales/use tax on its direct remote sales, be able to exclude its facilitated sales (for which the marketplace facilitator/provider is responsible for collecting tax on) and only count its direct remote sales?

Most states that have enacted marketplace facilitator/provider collection requirements include in the marketplace seller's economic nexus threshold facilitated sales, even though the marketplace facilitator/provider is required to collect on those sales. However, the following states allow the marketplace seller to exclude facilitated sales from its economic nexus threshold determination when the marketplace facilitator/provider is collecting on those sales: Arkansas, Colorado, Illinois, Indiana, Massachusetts, Texas, Utah, Virginia. This avoids requiring marketplace sellers to register and file returns when those sellers only have a small volume (or even zero) of direct remote sales into a state and minimal tax liability, but would otherwise exceed the economic nexus threshold, if both direct sales and facilitated sales are counted. Examples are shown below.

Arkansas 2019 SB 576 provides:

> 26-52-111. Remote sellers and marketplace facilitators.
>
> (a) A remote seller or a marketplace facilitator that sells or facilitates the sale of tangible personal property, taxable services, a digital code, or specified digital products for delivery into Arkansas shall collect and remit the applicable sales tax levied under this chapter or the applicable compensating use tax levied under the Arkansas Compensating Tax Act of 1949, § 26-53-101 et seq., if in the previous calendar year or in the current calendar year, the remote seller or the marketplace facilitator had aggregate sales of tangible personal property, taxable services, digital codes, or specified digital products subject to Arkansas sales or use tax within this state or delivered to locations within this state exceeding:
>
> (1) One hundred thousand dollars ($100,000); or
>
> (2) Two hundred (200) transactions.
>
> (b) A sale made through a marketplace facilitator:
>
> (1) Is a sale of the marketplace facilitator for purposes of determining whether a person satisfies the criteria stated in subsection (a) of this section; and
>
> (2) Is not a sale of the marketplace seller for purposes of determining whether a person satisfies the criteria stated in subsection (a) of this section.

Colorado HB 19-1240 provides:

(II) Beginning October 1, 2019, for purposes of determining whether the thresholds set forth in subsection (3)(c)(i) of this section are met:

(A) A marketplace facilitator shall include all sales made by marketplace sellers in and through its marketplace; and

(B) A marketplace seller shall not include any sales made in or through a marketplace facilitator's marketplace.

Illinois 2019 SB 689 provides:

> Beginning January 1, 2020, neither the gross receipts from nor the number of separate transactions for sales of tangible personal property to purchasers in Illinois that a retailer makes through a marketplace facilitator and for which the retailer has received a certification from the marketplace facilitator pursuant to

> Section 2d of this Act shall be included for purposes of determining whether he or she has met the thresholds of this paragraph (9).
>
> Beginning January 1, 2020, neither the gross receipts from nor the number of separate transactions for sales of service to purchasers in Illinois that a serviceman makes through a marketplace facilitator and for which the serviceman has received a certification from the marketplace facilitator pursuant to Section 2d of this Act shall be included for purposes of determining whether he or she has met the thresholds of this paragraph (9).

Indiana 2019 HEA 1001, p. 143 provides:

> (d) A marketplace facilitator must include both transactions made on its own behalf and transactions facilitated for sellers under IC6-2.5-4-18 for purposes of establishing the requirement to collect gross retail or use tax without having a physical presence in Indiana for purposes of subsection (c). In addition, except in instances where the marketplace facilitator has not met the thresholds in subsection (c), the transactions of the seller made through the marketplace are not counted toward the seller for purposes of determining whether the seller has met the thresholds in subsection (c).

Massachusetts 2019 H 4000 provides:

> (d) If a marketplace facilitator reports, collects and remits tax on sales made by the marketplace facilitator on behalf of a remote marketplace seller, such sales shall not be counted as a part of the remote marketplace seller's sales within the commonwealth and the remote marketplace seller shall not be liable to report those sales.

Utah 2019 SB 168 provides:

> (8) A marketplace seller shall pay or collect and remit sales and use taxes imposed by this chapter for a sale of tangible personal property, a product transferred electronically, or a service that the marketplace seller makes other than through a marketplace facilitator if:
>
> (a) the sale is sourced to this state; and
>
> (b) the marketplace seller's sales in this state, other than through a marketplace facilitator, in the previous calendar year or the current calendar year:
>
> (i) exceed $100,000; or

(ii) occur in 200 or more separate transactions.

Virginia 2019 H 1722 provides:

> H. When a marketplace seller that is not otherwise required to register for the collection of the tax under any of the provisions contained in subdivisions C 1 through 9 of § 58.1-612 makes both direct sales and sales on a marketplace facilitator's marketplace, only the marketplace seller's direct sales shall be considered in determining whether the marketplace seller is required to register for the collection of the tax under subdivision C 10 or 11 of § 58.1-612. I.

Comments:

Texas Comptroller staff explained that Texas law excludes the facilitated sales from the marketplace seller's economic nexus threshold when the marketplace provider is collecting on those sales.

Josh Pens (Colorado Department of Revenue) advised that Colorado counts facilitated sales towards the facilitator's nexus threshold. Only direct sales are included in the marketplace seller's nexus threshold. The philosophy of the Colorado statute is that the facilitator is (with respect to facilitated sales) the retailer. Measuring nexus in this way is consistent with that principle.

Richard Dobson (Kentucky Department of Revenue) commented that the whole question of what sales are to be counted should at least be partially contingent on whether a state holds the marketplace provider liable for reporting and remittance on all taxable sales. The marketplace provider should be reporting all the sales made on its platform. If the marketplace provider is responsible to collect, then all of those sales should be reported on the marketplace provider's return, and the marketplace provider's direct and facilitated sales should be included in its economic nexus threshold.

Diane Yetter suggested that facilitated sales should not be included in the marketplace seller's economic nexus threshold, because when the marketplace seller has only a small amount of direct sales, the marketplace seller ends up having to file "zero" returns with many states, a waste of time and resources.

NRF commented (Appendix F):

Small brick and mortar sellers must collect tax on their first dollar of sales. To provide the most level playing field for these small businesses, the threshold needs to be as low as possible, which would argue for including facilitated sales in determining the threshold. For this reason, the laws need to be as simple as possible.

Professor Charles McLure (Hoover Institute, Stanford University) (Appendix I) supports including only direct sales in the marketplace seller's economic nexus threshold, in order to avoid imposing excessive compliance and administrative costs on marketplace sellers.

Robert D. Plattner argues in his article (Appendix G, pp. 4-5) that including only direct sales in the marketplace seller's economic nexus threshold, not facilitated sales, will minimize the filing burden on small remote sellers and the administrative burden on the revenue agencies, without forgoing substantial revenue.

7. Remote Seller sales/use tax economic nexus threshold issues

Should the remote seller sales volume economic nexus threshold be limited only to retail sales, or even further limited to taxable sales?

Many states that have enacted economic nexus thresholds for sales/use tax base those on gross sales. Such a threshold appears to include wholesale sales. The following states provide that only retail sales are included in their economic nexus thresholds: Alabama, Arizona, Colorado, Georgia, Minnesota, Nebraska, New Mexico, Nevada, Virginia, Washington. Those would exclude wholesale sales. North Dakota and Oklahoma limit their sales/use tax economic nexus thresholds to taxable sales.

Comments:

Professor Charles McLure (Appendix I) cautions against limiting the remote seller sales volume economic nexus threshold to taxable sales, because that would require the remote seller to know the tax law of the market state in question, in order to know whether its sales are taxable and whether these sales exceed the threshold.

Should the "transactions" economic nexus threshold be eliminated?

Most states that have enacted sales/use tax economic nexus provide that if either a sales volume threshold or a transactions volume threshold is exceeded, then nexus exists, and the remote seller is required to register and commence collecting and remitting sales/use tax. However, several states do not include a transactions threshold in their sales/use tax economic nexus statutes: Arizona, California, Colorado, Idaho, Iowa, Massachusetts, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Washington. Of those, California and Texas use a $500,000 sales volume threshold. New York has a $500,000 sales volume threshold and 100 transactions threshold. Arizona has a $200,000 sales volume threshold for remote sellers that decreases by $50,000 per year until it reaches $100,000 in 2021, but marketplace facilitators are subject to the $100,000 sales volume threshold as of 2019. Connecticut uses a $100,000 sales volume and 200 transactions threshold. By regulation, Tennessee uses a

$500,000 sales volume threshold, and Alabama and Mississippi use a $250,000 sales volume threshold.

Comments:

NACSP (Appendix H) suggests that all states should provide clear guidance to retailers on when their obligation begins and should adopt uniform policies and definitions for application of thresholds concerning: (a) whether exempt sales are included in the threshold or not; (b) when the collection begins after the threshold is met during the calendar year; and (c) what is the measuring period: calendar or fiscal year, or prior 12 months.

Richard Dobson (Kentucky Department of Revenue) commented that Kentucky has "200 transactions" as an "or" threshold, but has not had any issues develop yet as a result of it. Richard was curious whether any other states had experienced issues with it. None responded that they had.

Terry Ryan (Apple, technology company) commented that if there is a threshold, it should be in dollars of sales volume, not units (transactions).

Anonymous Response (Appendix B) prefers a threshold based solely on sales volume, as it represents better tax policy and is easier to administer.

NRF (Appendix F) states that the transactions economic nexus threshold should not be eliminated. Retailers that sell high priced items like jewelry, precious metals, collectibles, etc. may have very few transactions before they reach the dollar threshold for economic nexus, but they may still be a small business that would have trouble navigating their way through many state and local sales tax rules. This was a concern in *Wayfair* and is an important factor to retain.

Professor Charles McLure (Appendix I) states that sales volume is a better indicator of whether compliance and administrative costs may be excessive for the remote seller. An alternative transactions threshold is mutually inconsistent with a sales volume threshold, but requiring both a sales volume and transactions threshold to be met, such as New York's law, would make sense.

Robert Plattner (Appendix G, p. 4) opposes an economic nexus threshold based on the number of transactions, either as an "and" or an "or" threshold. He compares the high administrative cost of requiring collection by a remote seller selling a large volume of inexpensive items exceeding an "or" transactions threshold to the high revenue loss to the state when the remote seller may be an art dealer selling a small number of extremely valuable paintings and staying underneath the "and" transactions threshold.

8. Certification requirement

Should states develop a certification process for marketplace facilitator/providers, to establish that they can correctly handle the sales/use tax collection and remittance responsibilities on their facilitated sales?

To date, no state has adopted competency certification requirements for marketplace facilitators. States that are members of the Streamlined Sales and Use Tax Agreement (SSUTA) have adopted such certification requirements for CSPs. However, a marketplace facilitator would not need to go through that certification process unless it wanted to become a CSP under the SSUTA.

Comment:

NACSP (Appendix H) suggests that nonmember SSUTA states should certify comprehensive software solutions and make them available to remote sellers.

How does the marketplace seller know if the marketplace facilitator/provider has collected? Should the marketplace facilitator/provider be required to provide a certification or report to the marketplace seller?

Several states require the marketplace facilitator/provider to certify to the marketplace seller that it is collecting on facilitated sales: Colorado, Connecticut, Illinois, Maine, Massachusetts, North Dakota, New York, Rhode Island, Texas, Vermont, Wisconsin. The marketplace seller can then rely on that certificate to verify to the taxing authority that the marketplace facilitator/provider, not the marketplace seller, is responsible for collect sales/use tax on the facilitated transactions. It functions like an exemption certificate. The 2018 White Paper (p. 12) suggested certification language.

Examples of state requirements for the marketplace facilitator/provider to issue a certificate to marketplace seller are provided below:

Colorado HB 19-1240 provides:

> (c) except as provided in subsection (3)(b) of this section, a marketplace seller, with respect to sales of tangible personal property, commodities, or services made in or through a marketplace facilitator's marketplace, does not have the liabilities, obligations, or rights of a retailer or vendor under subsection (1) of this section and this article 26 if the marketplace seller can show that such sale was facilitated by a marketplace facilitator:

(I) with whom the marketplace seller has a contract that explicitly provides that the marketplace facilitator will collect and remit sales tax on all sales subject to tax under this article 26; or

(II) from whom the marketplace seller requested and received in good faith a certification that the marketplace facilitator is registered to collect sales tax and will collect sales tax on all sales subject to tax under this article 26 made in or through the marketplace facilitator's marketplace.

Illinois 2019 SB 689 provides:

(d) A marketplace facilitator shall:

(1) certify to each marketplace seller that the marketplace facilitator assumes the rights and duties of a retailer under this Act with respect to sales made by the marketplace seller through the marketplace; and

(2) collect taxes imposed by this Act as required by Section 3-45 of this Act for sales made through the marketplace.

New York 2019 H 4000 provides:

(3) The commissioner may, in his or her discretion:

(A) develop a standard provision, or approve a provision developed by a marketplace provider, in which the marketplace provider obligates itself to collect the tax on behalf of all the marketplace sellers for whom the market- place provider facilitates sales of tangible personal property, with respect to all sales that it facilitates for such sellers where delivery occurs in the state; and

(B) provide by regulation or otherwise that the inclusion of such provision in the publicly-available agreement between the marketplace provider and marketplace seller will have the same effect as a marketplace seller's acceptance of a certificate of collection from such marketplace provider under paragraph two of this subdivision.

North Dakota 2019 SB 2338 provides:

d. Certify to its marketplace sellers that it will collect and remit state and local sales and use tax on sales of tangible personal property or other products or services subject to tax under section 57 - 39.2 - 02.1 made through the marketplace. A marketplace seller that accepts a marketplace facilitator's collection

> certificate in good faith may exclude sales made through the marketplace from the marketplace seller's return of gross receipts under section 57 - 39.2 - 11 .

Rhode Island 2019 S 251 provides:

> (ii) A marketplace facilitator shall certify to its marketplace sellers that it will collect and remit sales and use tax on sales of taxable items made through the marketplace. A marketplace seller that accepts a marketplace provider's collection certificate in good faith may exclude sales made through the marketplace from the marketplace seller's returns under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws.

Texas 2019 HB 1525 provides:

> (c) A marketplace provider shall:
>
> (1) certify to each marketplace seller that the marketplace provider assumes the rights and duties of a seller or retailer under this chapter with respect to sales made by the marketplace seller through the marketplace;

Vermont 2019 H 536 provides:

> (b) A marketplace facilitator shall certify to its marketplace sellers that it will collect and remit the sales tax under this chapter on the sale of taxable items made through its marketplace. A marketplace seller that accepts a certification from a marketplace facilitator in good faith shall exclude sales made through the marketplace from its obligation as a vendor under this chapter.

Wisconsin 2019 AB 251 provides:

> (2) A marketplace provider who collects and remits tax on a sale under Sub. (1) shall notify the marketplace seller that the marketplace provider is collecting and remitting the tax. Only the marketplace provider may be audited and held liable for the tax on the sale. Except for transactions for which a marketplace provider seeks relief under Sub. (4), a marketplace seller shall not be subject to audit or held liable on marketplace provider transactions.

Comments:

Texas Comptroller staff stated that the under the Texas certification requirement, the marketplace provider must certify to the marketplace seller that it is collecting the tax, and once that certification is received, the marketplace seller no longer needs to collect on the sales facilitated by that marketplace provider.

Josh Pens (Colorado Department of Revenue) commented that the Colorado marketplace facilitator collection statute requires that the marketplace facilitator/provider-marketplace seller contract either explicitly state that the marketplace facilitator/provider is collecting the Colorado sales/use tax, or alternatively, that the marketplace facilitator/provider issue a certificate to the marketplace seller, in order for the marketplace seller to document that it is not obligated to collect the tax on facilitated sales. Josh further advised that the department has prepared a certificate form, but does not require marketplace facilitators/providers to use it.

Alabama Department of Revenue and Minnesota Department of Revenue oppose the certification requirement.

Anonymous response (Appendix B) opposes it as "unnecessary and burdensome," and something that should be covered in the contract between the marketplace facilitator/provider and marketplace seller. Electronic notice (such as an email or direct message on the marketplace facilitator/provider's website/platform) would also be an option to notify the marketplace seller that tax is being collected in a less formalistic/burdensome manner.

NRF (Appendix F) also opposes the certification requirement.

John Delano (UberEats, technology company providing food delivery services) stated that there are thousands of restaurants, and it is a heavy administrative burden if the marketplace facilitator/provider must issue a certificate to each marketplace seller (restaurant), enter the restaurant's taxpayer identification number on it, and retain copies. He stated the certification process needs to be standardized, but a form should not be needed. The contract between the marketplace facilitator/provider and marketplace seller should be sufficient. The statute already imposes the collection obligation on the marketplace facilitator/provider.

Instacart (Appendix E) supports the certificate requirement, because it gives marketplace seller a document to show an auditor why the marketplace seller is not collecting tax, like an exemption certificate. Stephanie Gilfeather (Instacart) agreed that the certification is not necessary if the collection obligation is made clear in the contract. She emphasized that the marketplace facilitator needs to be able to rely on something. She favors the certificate requirement, but stated that as alternative, a waiver permit issued by the state would be acceptable.

Airbnb (Appendix L) suggests that if there is a certification requirement, the marketplace facilitator should be permitted to make the certification electronically.

Diane Yetter (Yetter Tax) commented that as a best practice, the marketplace facilitator/provider should be required to the customer making a purchase that the marketplace facilitator/provider is collecting and remitting the sales/use tax on the transaction.

9. Information sharing

Should states develop information sharing networks to assist in identifying noncompliant remote sellers and marketplaces?

A mechanism currently exists for state tax agencies to share or exchange taxpayer information. State tax agencies that are members of the Federation of Tax Administrators (FTA) and that have entered into the FTA's Uniform Exchange of Information Agreement, can request from other participating state tax agencies taxpayer information for the purpose of facilitating state tax administration, as authorized by each participating states' confidentiality laws. The Agreement contemplates voluntary exchange of requested taxpayer information (subject to certain exclusions) that includes, but is not limited to:

lists of taxpayers or potential taxpayers including identifying data; tax or information returns or documents including supporting schedules, attachments, and lists; nexus information and questionnaires; research and revenue estimating materials; audit reports and other information regarding audit; collection and enforcement activities; appeals and criminal tax matters with respect to any taxpayer or group of taxpayers.

Agreement, Article IV. The Agreement specifies the procedures to be followed in making such requests. Participating state tax agencies are required to provide the FTA updated lists of staff who are authorized to make or receive such requests. Participating state tax agencies can access those lists and the Agreement on the FTA website.

However, information sharing among the states targeted specifically to identify those remote sellers who have registered in one state but not others could deter remote sellers from coming forward to register.

10. Taxability determination

Should states publish clear guidance identifying their sales/use tax impositions and exemptions, so remote sellers and marketplaces can more easily determine the taxability of their products?

Such guidance is obviously needed and helps to reduce the compliance burden on remote sellers and marketplace facilitators/providers.

Examples concerning this issue are provided below:

New Mexico HB 6:

> "Authority to establish standards for certified service providers.--
>
> A. The secretary is authorized to provide information, upon which taxpayers may rely, as to the taxability of gross receipts from particular transactions, including taxability matrices, and is further authorized to establish standards for the certification of certified service providers that offer software-based systems to enable taxpayers to properly determine the taxability of gross receipts from particular transactions.
>
> B. As used in this section, "certified service provider" means "certified service provider" as defined in the Streamlined Sales and Use Tax Administration Act."

Virginia H 1722:

> B. In administering the collection of state and local sales and use taxes from remote sellers, the Tax Commissioner shall: 1. Provide adequate information to remote sellers to enable them to identify state and local sales and use tax rates and exemptions; 2. Provide adequate information to software providers to enable them to make software and services available to remote sellers; 3. Ensure that if the Department requires a periodic audit the remote seller may complete a single audit that covers the state and local sales and use taxes in all localities; and 4. Require no more than one sales and use tax return per month be filed with the Department by any remote seller or any software provider on behalf of such remote seller.

Comments:

See NACSP suggestions (Appendix H) under "Determination of Taxability:"

NRF (Appendix F) written comments support states publishing clear guidance with respect to taxability.

AT&T written comments (Appendix C) suggest that taxability matrices like those used by SSUTA member states are helpful to all taxpayers for collecting and remitting tax and simplifying the process.

Craig Johnson (Streamlined Sales Tax Governing Board Executive Director) advised that any state could access the SSUTA taxability matrix form template required to be used by member states and would be welcome to use that in developing its own

taxability matrix. Also, SSUTA states are working on developing an expanded, more comprehensive taxability matrix. Interested states should feel free to contact Craig directly regarding this.

Stephanie Gilfeather (Instacart) commented that if a state does not publish a taxability matrix, it should have in place a quick process for taxpayers to receive guidance from the state taxing agency on what it considers is or is not subject to sales/use tax in the state. If can take months to years to obtain rulings, otherwise.

11. Return simplification

Can the sales reporting on returns and recordkeeping requirements, as between the marketplace facilitator/provider and marketplace seller, be simplified and clarified?

This question overlaps somewhat with Issue No. 3 concerning recordkeeping requirements, although Issue No. 3 concerns recordkeeping for audit purposes. Issue No. 11 concerns recordkeeping for return preparation purposes. For states that include marketplace facilitators/providers within their definition of "retailer" for sales/use tax purposes, the "retailer" return and recordkeeping requirements would apply to marketplace facilitators/providers.

How does the marketplace seller properly report facilitated sales: taken as a deduction, claimed as an exemption, or not reported at all on return?

Examples of provisions concerning marketplace seller returns are provided below. Nebraska requires the marketplace seller to report the facilitated sales on its return and take a credit for the tax collected/remitted by the marketplace facilitator/provider (multivendor marketplace platform). New Mexico requires the marketplace seller to take a deduction for those facilitated sales on its return when it has the necessary documentation that the marketplace facilitator/provider is registered and collecting on those sales. Wisconsin also requires facilitated sales to be reported on the marketplace seller's return and taken as a deduction. New York allows the marketplace seller to exclude from its return receipts for facilitated sales when the marketplace seller has a certificate from the marketplace facilitator/provider that the facilitator/provider is collecting. Texas provides treatment similar to New York's.

Nebraska 2019 LB 284 provides:

> (e) A retailer that makes sales into Nebraska using a multivendor marketplace platform is relieved of its obligation to collect and remit sales taxes to Nebraska with regard to any sales taxes collected and remitted by the multivendor

> marketplace platform. Such a retailer must include all sales into Nebraska in its gross receipts in its return, but may claim credit for any sales taxes collected and remitted by the multivendor marketplace platform with respect to such retailer's sales. Such retailer is liable for the sales tax due on sales into Nebraska as provided in section 77-2704.35.

New Mexico 2019 HB 6 provides:

> "Deduction--gross receipts--marketplace seller.--
>
> A. A marketplace seller may deduct receipts for sales, leases and licenses of tangible personal property, sales of licenses and sales of services or licenses for use of real property that are facilitated by a marketplace provider; provided that the marketplace seller obtains documentation from the marketplace provider indicating that the marketplace provider is registered with the department and has remitted or will remit the taxes due on the gross receipts from those transactions. . . ."

New York 2019 S. 1509, Part G provides:

> The return of a marketplace seller shall exclude the receipts from a sale of tangible personal property facilitated by a marketplace provider . . . .

Texas 2019 HB 1525 provides:

> (d) A marketplace seller who in good faith accepts a marketplace provider 's certification under Subsection (c)(1) shall exclude sales made through the marketplace from the marketplace seller 's report under Subchapter I, notwithstanding Section 151.406.

Wisconsin 2019 AB 251 provides:

> 77.585 (11) A marketplace seller may claim as a deduction on a return under s. 77.58 the amount of the sales price for which the marketplace seller received notification under s. 77.523 (2).

States should consider whether it is necessary for the marketplace seller to report facilitated sales on its return, if the marketplace facilitator/provider is registered, reporting and collecting sales/use tax on those sales. Eliminating that reporting requirement would reduce the compliance burden on marketplace sellers.

Can the marketplace facilitator/provider return be simplified and consolidated?

Can the marketplace facilitator/provider report all of its sales (direct and facilitated) on one consolidated or combined return, or must the marketplace facilitator/provider report direct sales on one return and facilitated sales on another? Examples of provisions concerning marketplace facilitator/provider returns are provided below.

Arizona 2019 HB 2575 (allowing either combined or separate returns) provides:

> E. A marketplace facilitator shall report the tax due under this section from transactions facilitated on behalf of marketplace sellers. A marketplace facilitator may report the tax due under this section with the tax collected from transactions made directly by the marketplace facilitator on a combined tax return or on a separate return.

Maine 2019 HP 1064 (separate return required for facilitated sales) provides:

> F. A marketplace facilitator shall report the sales and use tax collected and remitted under this section separately from any sales or use tax collected on taxable retail sales made directly by the marketplace facilitator or affiliates of the marketplace facilitator to buyers in the State using a separate marketplace facilitator form to be provided by the State Tax Assessor.

Maryland 2019 HB 1301 (separate return required for facilitated sales, but allowing a consolidated return, if approved by the Comptroller) provides:

> (D) a marketplace facilitator shall report the sales and use tax collected under this section separately from the sales and use tax collected by the marketplace facilitator on taxable sales made directly by the marketplace facilitator, or an affiliate of the marketplace facilitator, to buyers in this state.
>
> . . . .
>
> (C) if the comptroller approves, a marketplace facilitator engaging in more than one business in which the marketplace facilitator facilitates retail sales or sales for use may file a consolidated return covering the activities of the businesses.

Texas 2019 HB 1525 (marketplace facilitator/provider return subject to same requirements as other registered sellers) provides:

> (c) A marketplace provider shall:

> (1) certify to each marketplace seller that the marketplace provider assumes the rights and duties of a seller or retailer under this chapter with respect to sales made by the marketplace seller through the marketplace;
>
> (2) collect in the manner provided by Subchapters C and D the taxes imposed by this chapter on sales of taxable items made through the marketplace; and
>
> (3) report and remit under Subchapter I the taxes imposed by this chapter on all sales made through the marketplace.

Utah 2019 SB 168 (marketplace facilitator/provider return subject to same requirements as other registered sellers, but facilitated sales must be segregated in its records) provides:

> (4) A marketplace facilitator shall comply with the procedures and requirements in this chapter and Chapter 1, General Taxation Policies, for sellers required to pay or collect and remit sales and use taxes except that the marketplace facilitator shall segregate, in the marketplace facilitator's books and records: (a) the sales that the marketplace facilitator makes on the marketplace facilitator's own behalf; and (b) the sales that the marketplace facilitator makes or facilitates on behalf of one or more marketplace sellers.

Virginia 2019 H1722 provides:

> The Tax Commissioner shall not require that more than one sales and use tax return per month be filed with the Department by any remote seller or any software provider on behalf of such remote seller.

NCSL working draft model Section 2. D. (Appendix A) currently provides the following regarding marketplace facilitator/provider returns:

> A marketplace facilitator shall either:
>
> 1. Report the sales and use tax described in [this section] separately from any sales or use tax collected on taxable [retail sales] made directly by the marketplace facilitator, or affiliates of the marketplace facilitator, to customers in this state using a separate marketplace facilitator [return/report/form] to be published by the [department]; or,
>
> 2. Report the sales and use tax described in [this section] combined with any sales or use tax collected on taxable [retail sales] made directly by the marketplace facilitator, or affiliates of the marketplace facilitator.

Comments:

Anonymous response (Appendix B) states:

Marketplace facilitators should have the ability to report the third-party sales (on behalf of marketplace sellers) and related tax on the same tax return as the marketplace facilitator's direct sales. Failing to permit such "combined" reporting of direct and third-party sales by a marketplace facilitator will result in a significant administrative burden to marketplace facilitators that have historically collected and remitted sales tax on behalf of third-party sellers that sell through their platforms and disrupt current tax collection and remittance practices of these taxpayers.

AT&T written comments (Appendix C) suggest:

Marketplace facilitators should report all sales on one return, with recordkeeping requirements to reconcile facilitated sale with direct sales. Marketplace sellers should not have to report facilitated sales at all, only sales for which tax has been collected. Separate recordkeeping can reconcile facilitated sales from direct sales, if any, for which tax was collected from the customer.

NRF written comments (Appendix F) recommend that marketplace facilitators report facilitated sales and direct sales on separate returns.

See NACSP suggestions (Appendix H) under "Return Filings" and "Remittances."

Some business participants support marketplace facilitators/providers reporting direct sales and facilitated sales separately and others prefer to report them on one return.

12. Foreign sellers

Should states publish clear guidance for foreign sellers with economic nexus needing to register to collect?

Foreign sellers are subject to states' sales/use tax laws, although U.S. treaties may protect them from income taxes. States need to provide guidance to foreign sellers and marketplace facilitators/providers on their registration procedures. Foreign sellers without a permanent establishment in the U.S. encounter obstacles in attempting to register with some states for sales/use tax when they lack FEINs. Some states also require SSNs for officers or responsible persons during registration. States will need to have a process for registering foreign sellers or marketplace facilitators/providers when such entities lack FEINs and the officers or responsible persons are not U.S. citizens.

Comments:

Diane Yetter commented obstacles to registering a foreign seller in a state for sales/use tax remain in some states. She indicated that Arizona requires a U.S. email domain. In addition, some states require that any officers of the foreign entity report SSN's.

Scott Letourneau (tax practitioner, Sales Tax System) stated that Arizona and DC require responsible parties to have federal tax ID numbers.

Craig Johnson (Streamlined Sales Tax Governing Board) stated that foreign sellers can register through the Streamlined Sales Tax centralized registration system with the twenty-four SSUTA member states without having FEINs. The system assigns a registration number to the account that SSUTA member states can accept.

Should states develop enforcement strategies concerning noncompliant foreign sellers?

Marketplace facilitator/provider collection laws do provide an obvious compliance tool concerning foreign marketplace sellers using a domestic marketplace facilitator/provider. The marketplace facilitator/provider is required to collect sales/use tax on facilitated sales, whether the marketplace seller is foreign or domestic.

Brian Hamer, MTC Senior Counsel, recently provided the following information to the Uniformity Committee regarding enforcement of state tax judgments against foreign sellers (PowerPoint presentation at November 7, 2018 meeting in Orlando, FL, in the Uniformity Committee archives at www.mtc.gov):

"The Revenue Rule" provides: "No country ever takes notice of the revenue laws of another." *Holmes v. Johnson*, 98 Eng. Rep. 1120, 1121 (1775). The U.S. Supreme Court continues to acknowledge the revenue rule, most recently in *Pasquantino v. United States*, 544 U.S. 349 2005.

Generally, U.S. tax treaties do not address enforcement of foreign tax judgments. Tax treaties primarily concern income and capital taxes. Brian suggested the following tools to achieve tax compliance from foreign sellers:

1. Many foreign sellers sell to U.S. customers through marketplaces. States can impose tax collection responsibilities on marketplaces.
2. Obtain purchase data from the U.S. Customs Bureau and (if the state imposes an individual income tax) deduct unpaid use taxes from state income tax refunds.

3. Avoid application of the revenue rule by pursuing non-tax civil actions against sellers that collect but do not remit use taxes.
4. Impose Colorado-style reporting requirements on sellers that do not collect and remit tax. Impose penalties on those sellers that do not comply.
5. Levy credit card and similar payment receipts in the possession of U.S. entities that provide payment processing services to foreign sellers.

When devising tools to address non-compliance by foreign sellers, states must be careful not to discriminate against foreign commerce. If a state imposes requirements that are different from the requirements that are imposed on domestic sellers, it must be prepared to identify a compelling local interest and to show that there is no less discriminatory way to achieve that result.

Comments:

NRF written comments (Appendix F) state:

[T]he only way to assure that there is a level playing field with respect to collection of taxes on sales is to assure that tax collection is enforced on all sales to customers in states that impose sales and use taxes. This requires both clear guidance for foreign sellers, as well as enforcement strategies for noncompliant foreign sellers.

13. Local sales/use taxes

Collection of local sales/use taxes adds a layer of complexity to tax compliance for remote sellers and marketplaces.

What measures could states adopt to simplify some of that complexity?

SSUTA member states are required to include the following simplification/uniformity features in their sales tax laws concerning local sales tax administration: state-level administration of local sales/use taxes; uniform state vs. local tax base (with a few exceptions); provision of databases for local rates and boundaries; time limitations and notice requirements for local rate and boundary changes; and destination sourcing.

Some states have local jurisdictions with "home rule" authority to impose and administer local sales/use taxes. Local sales tax administration may not be centralized at the state level. The state and local tax bases may differ. A remote seller could be required to register and file returns both at the state and local levels. The local jurisdiction may seek to apply economic nexus at the local jurisdiction level.

Some "home rule" states have undertaken efforts to simplify administration of their local sales/use taxes for remote sellers.

Alabama has adopted the Alabama Simplified Sellers Use Tax Remittance Program under Reg 810-6-2-90.02. The program provides that the remote seller can collect and remit a flat 8% combined state and local use tax rate. The remote seller receives 2% discount as compensation. The purchaser can claim a refund from the Department for the difference between a lower local sales tax rate and the local portion of the flat combined rate. There is a statutory formula for sharing the revenue among local taxing jurisdictions (which administer their own local sales taxes, unless they have agreed to have the state administer them).

Louisiana and Texas have adopted programs similar to Alabama's.

Sourcing becomes an issue in those states enacting economic nexus for sales/use tax but applying origin sourcing to intrastate sales. The remote sales will be destination-sourced. In those states, given the same purchaser, the local rate collected by an in-state seller may differ from the local rate collected by the remote seller sourcing the sale to the purchaser's delivery address.

In *Associated Industries v. Lohman*, 511 U.S. 641 (1994), Missouri's statewide "additional use tax" (1.5%) on goods purchased outside the state and stored, used, or consumed within the state was purportedly designed to "compensate" for the taxes imposed by local jurisdictions within the state on in-state sales of goods. The local sales tax rates varied widely, and in many jurisdictions the "additional use tax" rate exceeded the local sales tax rate (ranging from 0-3.5%). The U.S. Supreme Court held that this scheme was an unconstitutional discrimination against interstate commerce in local jurisdictions with local sales tax rates below the statewide "additional use tax" rate.

Adoption of destination sourcing for both intrastate and interstate sales is a solution to the *Associated Industries* Commerce Clause concern. With destination sourcing for both intrastate and interstate sales, the same local rate will apply for an item delivered to the purchaser's address, whether the purchase is made from an in-state seller or a remote seller. As part of their sales/use tax economic nexus legislation, Colorado and New Mexico are phasing in adoption of destination sourcing for intrastate sales.

Comments:

Texas Comptroller staff stated that remote sellers can voluntarily use a flat local rate that the Comptroller will adjust annually. There is also a refund mechanism for the consumer, if the actual local rate is lower than the flat rate. The Texas flat local rate is only available to remote sellers—not in-state sellers. The local rate that the marketplace provider with physical presence in Texas should use is based on the destination of the sale.

Josh Pens (Colorado Department of Revenue) stated that Colorado has seventy-two "home rule" cities. Legislation (SB 6) was passed earlier this year appropriating funds to procure a centralized return filing system for local jurisdictions to voluntarily agree to use. Appropriations were also included for the department to develop geographic information system to correctly identify local rates, based on address or longitude/latitude information. The department is in the early stage of these processes.

Luke Morris (Louisiana Department of Revenue) stated that Louisiana is also a "home rule" state. A program has been established for remote sellers to voluntarily use a flat combined state and local rate. This program also has a refund feature when the actual local rate is less than the local portion of the combined rate. This is a transitional approach. The Louisiana Sales and Use Tax Commission for Remote Sellers is working on a mandatory simplified local sales tax administration system with a target implementation date of July 1, 2020. Luke believes that the Commission is on track to meet that deadline.

Tim Sanders (Alabama Department of Revenue) advised that Alabama is a "home rule" state. The department has developed the Simplified Sellers Use Tax Program with a flat combined 8% rate that remote sellers can use. The Program also has a refund feature when the local rate is below the local portion of the combined rate.

Diane Yetter indicated that there is a problem with origin sourcing states, such as Texas, which provides for a flat local tax rate only for remote sellers. There are different local rates, depending on whether the seller is considered remote or not. Diane commented that if the marketplace seller is fulfilling its own orders outside the state with its own inventory, but only has inventory in the state in the marketplace facilitator's warehouse, it makes things very complicated for the marketplace seller to track the destination local rate for its direct sale customers, and it would be much preferable if the marketplace seller could use the flat local rate instead.

Beth Sosidka (AT&T) suggested that local taxes should be simplified for all sellers—not just remote sellers.

NRF (Appendix F) commented that in-state sellers should be able to opt-in to use the blended local rate if a home rule state creates such a rate, so they, too, can take advantage of the simplified compliance.

Airbnb (Appendix L) recommended that if the marketplace facilitator is required to collect, then the legislation should permit the marketplace facilitator to collect and remit all applicable local taxes. Airbnb also noted that non-uniformity of local taxes imposes an extreme compliance burden on marketplace facilitators.

Diane Yetter also commented that Nome, Alaska appears to be attempting to assert economic nexus, based on a state-level economic nexus threshold. Diane argued that "home rule" local jurisdictions should only be able to assert economic nexus based on the local jurisdiction level, not the state-level.

Conclusion

Thank you to all of the staff of state taxing agencies, as well as interested industry groups and businesses participating in the work group for their comments and other input to the discussions concerning each the issues considered.

APPENDIX A

Marketplace Facilitator Sales Tax Collection Model Legislation

Draft Date: November 22, 2019

Approved Unanimously by the National Conference of State Legislatures
Executive Committee Task Force on State and Local Taxation

Section 1. Nexus Standard for Sales and Use Tax Collection

Notwithstanding any other provision of law, any _____ [vendor, seller, marketplace facilitator, or appropriate state-law term] selling or facilitating the sale of tangible personal property _____ [and/or other property or services subject to sales tax in the State] for delivery into [State] is ["doing business in this state"], is subject to _____ [pertinent sales tax code sections], shall [collect and remit/pay] applicable sales or use tax[1], and shall follow all applicable procedures and requirements of law, provided the [seller, vendor, marketplace facilitator] meets the following criteria in the previous calendar year:

A. If a [seller], the [seller] makes sales of tangible personal property [and/or other property or services subject to sales or use tax in the State] for delivery into this state exceeding [100,000] dollars.

B. If a [marketplace facilitator], the [marketplace facilitator] makes or facilitates the sale of tangible personal property [and/or other property or services subject to sales tax in the State], on its own behalf or on behalf of one or more marketplace sellers, for delivery into this State exceeding [100,000] dollars.

C. [The Department] may grant a waiver from the requirements of this section if a marketplace facilitator demonstrates, to the satisfaction of [the Department] that substantially all of its marketplace sellers already are [registered sellers] under [cite code section]. If such waiver is granted, the tax levied under [cite code section] shall be collectible from the marketplace seller. [The Department] shall develop guidelines that establish the criteria for obtaining a waiver pursuant to this section, the process and procedure for a marketplace facilitator to apply for a waiver, and the process for providing notice to an affected marketplace facilitator and marketplace seller of a waiver obtained pursuant to this subsection.

D. Nothing herein shall prohibit the marketplace facilitator and the marketplace seller from contractually agreeing to have the marketplace seller collect and remit all applicable taxes and fees where the marketplace seller:

   1. Has annual U.S. gross sales over [$1 billion], including the gross sales of any related entities, and in the case of franchised entities, including the combined sales of all franchisees of a single franchisor;

[1] To the extent a state imposes other taxes and fees on the consumer for sales of products and services included in their marketplace facilitator legislation the state needs to determine whether, when, to what extent, and how such other taxes and fees should be incorporated into marketplace collection requirements.

2. Provides evidence to the marketplace facilitator that it is registered under [cite code section] in this state; and,

3. Notifies [the Department] in a manner prescribed by [the Department] that the marketplace seller will collect and remit all applicable taxes and fees on its sales through the marketplace and is liable for failure to collect or remit applicable taxes and fees on its sales.

Section 2. Imposition of Sales and Use Tax Collection on Marketplace Facilitators

A. "Marketplace facilitator" means a person, including any affiliate of the person, that:

1. Contracts or otherwise agrees 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 physical or electronic marketplace operated, owned, or otherwise controlled by the person; and,

2. Either directly or indirectly through contracts, agreements, or other arrangements with third parties, collects the payment from the purchaser and transmits all or part of the payment to the marketplace seller.

3. A “marketplace facilitator” does not include: a) a platform or forum that exclusively provides advertising services, including listing products for sale, so long as the advertising service platform or forum does not also engage directly or indirectly through one or more affiliated persons in the activities described in A.1. and A.2. of this section; (b) a person whose principal activity with respect to marketplace sales is to provide payment processing services between two parties; or (c) a derivatives clearing organization, a designated contract market, foreign board of trade or swap execution facility, registered with the Commodity Futures Trading Commission (“CFTC registered platforms”), and any clearing members, futures commission merchants or brokers when using the services of CFTC registered platforms.

4. [OPTIONAL—If sales tax in state applies to hotel/lodging, consider adding following language to exclude from definition of “marketplace facilitator”: “A person is not a marketplace facilitator with respect to the sale or charges for rooms, lodgings or accommodations described in (cite code section) if the rooms, lodgings or accommodations are provided by a hotel, motel, inn, or other place that is a [registered seller] under (cite code section) and the [registered seller] provides the rooms, lodgings or accommodations for occupancy under a brand belonging to such person.][2]

B. "Marketplace seller" means a seller that makes sales through any physical or electronic marketplace operated, owned, or controlled by a marketplace facilitator.

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[2] According to the National Conference of State Legislatures, the following state impose statewide sales taxes on lodging: AR, CO, FL, GA, HI, ID, IN, KS, KY, LA, MD, MI, MN, MS, MO, MT, NE, NJ, NM, NY, NC, ND, OH, OK, RI, SC, SD, TN, UT, VA, WA, WV, WI, and WY.

C. Except as provided in Section 1.C. and 1.D., a marketplace facilitator [doing business in the state under Section 1] is required to [collect and remit/pay] the [sales or use tax] on all taxable sales made by the marketplace facilitator or facilitated for marketplace sellers to customers in this state regardless of whether the marketplace seller for whom sales are facilitated has a sales tax permit or would have been required to collect sales or use tax had the sale not been facilitated by the marketplace facilitator. For the purposes of [cite this law or appropriate sales and use tax code], a marketplace facilitator has the same rights and duties as a seller. Marketplace facilitators and marketplace sellers may enter into agreements with each other regarding fulfillment of the requirements of this [Chapter]; however, the marketplace facilitator remains the party that is liable to the state for fulfilling these requirements.

D. A marketplace facilitator shall either:

1. Report the sales and use tax described in [this section] separately from any sales or use tax collected on taxable [retail sales] made directly by the marketplace facilitator, or affiliates of the marketplace facilitator, to customers in this state using a separate marketplace facilitator [return/report/form] to be published by the [department]; or,

2. Report the sales and use tax described in [this section] combined with any sales or use tax collected on taxable [retail sales] made directly by the marketplace facilitator, or affiliates of the marketplace facilitator.

E. No class action may be brought against a marketplace facilitator in any court of this state on behalf of customers arising from or in any way related to an overpayment of sales or use tax collected on sales facilitated by the marketplace facilitator, regardless of whether that claim is characterized as a tax refund claim. Nothing in this subsection affects a customer's right to seek a refund as provided under section [cite code section].

F. Nothing in this section affects the obligation of any consumer to remit sales or use tax for any taxable transaction for which a marketplace facilitator or seller does not collect and remit sales or use tax.

G. The [department] shall solely audit the marketplace facilitator for sales made by marketplace sellers but facilitated by the marketplace facilitator, except with respect to transactions that are subject to Section 1.C or 1.D. The [department] will not audit or otherwise assess tax against marketplace sellers for sales facilitated by a marketplace facilitator except to the extent the marketplace facilitator seeks relief under section (H) or with respect to transactions that are subject to Section 1.C or 1.D.

H. A marketplace facilitator shall be relieved of liability under this [section] for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect or insufficient information on the nature of the product or service given to the marketplace facilitator by the marketplace seller, provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain correct and sufficient information from the marketplace seller. Provided, however, this [subsection] shall not

apply if the marketplace facilitator and the marketplace seller are related as defined in [cite code section].

I. The [department] may waive penalties and interest if a marketplace facilitator seeks liability relief and the department rules that a reasonable cause exists.

J. A marketplace facilitator shall be relieved of liability under this [section] if it can prove, to the satisfaction of the [department], that the tax levied under this [chapter/title/article] on a sale facilitated by the marketplace facilitator was paid to the [department] by the marketplace seller.

Section 3. No Retroactive Application

No obligation to collect the sales and use tax required by this Act may be applied retroactively.

Section 4. Severability

If any provision of this act, or the application of such provision to any person or circumstance, is held to be unconstitutional, then the remainder of this act, and the application of the provisions of such to any person or circumstance, shall not be affected thereby.

APPENDIX B

9-12-2019

Anonymous Response to MTC Prioritized Issues List

Provided below are comments and recommendations for consideration in developing the white paper for the Uniformity Committee.

Issue #1 - Definition of marketplace facilitator/provider

MTC Background Information: State statutory definitions of "marketplace facilitator/provider" fall into two roughly equal categories: the "narrow" definition vs. the "broad" definition. Nineteen States and DC have adopted a narrow definition of marketplace facilitator/provider (AR AZ CO CT DC HI IL MD ME MN NE NM NY OK PA SC SD TX WI WY). Fifteen States have adopted a broad definition of marketplace facilitator/provider (CA IA ID KY MA ND NJ NV OH RI UT VA VT WA WV).

MTC Question: Can more uniformity be achieved in this definition?

Anonymous Response: Yes. The adoption of a uniform and narrow definition by states is necessary. The varied definitions being adopted by states creates confusion among marketplace facilitators/providers, marketplace sellers, and the revenue departments responsible for administering the tax.

The narrow definitions that have been enacted provide the greatest degree of clarity. A narrow definition in no way limits the amount of tax that is collected by a state. The broad definitions that have been enacted are ambiguous and create confusion. Anonymous recommends a definition in line with that developed by the Council on State Taxation "COST"). Anonymous suggests the following narrow definition:

"Marketplace facilitator/provider" means a person who facilitates a retail sale by a marketplace seller by:

(1) Listing or advertising for sale by the marketplace seller in any forum tangible personal property or services that are subject to tax under this chapter; and

(2) Collecting payment from the customer and transmitting that payment to the marketplace seller, either directly or indirectly, through agreements or arrangements with third parties, regardless of whether the marketplace facilitator/provider receives compensation or other consideration in exchange for its services.

A marketplace facilitator/provider does not include a person who provides internet advertising services, or product listing, and does not collect payment from the purchaser and transmit payment to the marketplace seller.

Rationale for Narrow Definition: Under the broad definition adopted by some states, a person may fall within the definition of a marketplace facilitator/provider and be required to collect and remit sales/use tax even though the person does not have access to any of the information necessary to fulfill these responsibilities.

As an example, a person who (Part A) simply "owns or operates the infrastructure . . . which brings buyers and sellers together" and who (Part B) also "lists products for sale" or "advertises or promotes" can be drawn in the definition of a marketplace facilitator/provider. As such, it creates the need for a separate clause that explicitly excludes a provider of Internet advertising services.

Merely owing or operating the infrastructure or performing software development related to activities in Part B, and listing/advertising/promoting should not put a person in the position of having to collect and remit sales tax. Frequently, Internet advertising service providers do not process payments or have knowledge of whether a sale of the advertised product or service was even completed. This language is unnecessary and should not be part of the marketplace facilitator/provider definition.

- **Issue #2 – Marketplace Facilitator/Provider as the Retailer**

MTC Background Information: The following states consider the marketplace facilitator/provider to be the seller/retailer/vendor concerning facilitated sales: AR CA CO CT DC HI IL MA ME ND NE NJ NY OH RI SD TX UT VT WA WI WV WY.

MTC Question: Should marketplace facilitator/providers have the same rights as retailers under state law, such as claiming price adjustments, bad debt deductions, vendor compensation (if provided by the state), etc.?

Anonymous Response: Yes, but only as it relates specifically to the sales and use tax law. Specifically, any blanket rights and responsibilities provision should be carefully limited to ensure that other areas of state law (such as products liability, etc.) are not inadvertently impacted. States should thoughtfully consider whether specifically addressing certain rights and responsibilities is needed to alleviate uncertainty for taxpayers, such as adding explicit language/guidance indicating that the marketplace facilitator/provider is able to accept tax exemption certificates in the name of either the marketplace facilitator or the marketplace seller for whom they are facilitating the sale.

- **Issue #3 - Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection**

MTC Background Information: Enacted marketplace facilitator/provider collection laws generally provide that the marketplace facilitator/provider is the party to be audited, not the marketplace seller, on facilitated sales transactions. However, some of those laws also impose recordkeeping requirements on marketplace sellers for facilitated sales and subject the marketplace seller to audit under certain circumstances (such as when the marketplace facilitator/provider can establish that its failure to collect was due to erroneous information provided by the marketplace seller). Such laws may include liability protection for the marketplace facilitator/provider when the failure to collect is due to incorrect or insufficient

information provided by the marketplace seller, in which case the marketplace seller assumes the liability for failure to collect. Some of those laws only include such liability protection for "incorrect" information provided by the marketplace seller.

MTC Question: Do clearer, simpler standards need to be put in place (such as defining the specific information the marketplace facilitator/provider can rely on for the marketplace seller to provide, and vice versa) in assigning liability for failure to collect between the marketplace facilitator/provider and the marketplace seller and in determining which party is subject to audit under what circumstances?

Anonymous Response (Audit Responsibility): Yes. It is Anonymous's view that whoever collects and remits the tax should be the primarily responsible for responding to audit inquiries by the taxing jurisdiction. Anonymous supports the following proposed language proposed by RILA as part of the NCSL work group process and COST:

> **RILA** - The [department] shall solely audit the marketplace facilitator for sales made by marketplace sellers but facilitated by the marketplace facilitator, except with respect to transactions that are subject to Section 1.C. The [department] will not audit or otherwise assess tax against marketplace sellers for sales facilitated by a marketplace facilitator except to the extent the marketplace facilitator seeks relief under section (H) or with respect to transactions that are subject to Section 1.C or 1.D. H.
>
> **COST** - The [department] will only audit and assess marketplace facilitators for transactions where they are required to collect and remit the tax. Except for transactions for which a marketplace facilitator seeks relief under Subsection (C) or (I), a marketplace seller shall not be subject to audit or assessment on marketplace facilitator transactions.

Anonymous Response (Liability Protection): Anonymous agrees with the following language proposed by RILA and COST:

> **RILA** - A marketplace facilitator shall be relieved of liability under this [section] for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect or insufficient information given to the marketplace facilitator by the marketplace seller, provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain correct and sufficient information from the marketplace seller. Provided, however, this [subsection] shall not apply if the marketplace facilitator and the marketplace seller are related as defined in [cite code section].
>
> **COST** - A marketplace facilitator shall be relieved of liability under this [section] for failure to collect and remit sales or use tax on sales facilitated for marketplace sellers, excluding related entities as defined in [cite code section], when the marketplace facilitator demonstrates to the satisfaction of [the department] that the facilitator relied on insufficient or incorrect information from the marketplace seller that was necessary to determine taxability or proper sourcing of a transaction. A marketplace seller is not relieved of liability under this subsection for transactions for which it provides

insufficient or incorrect information provided the marketplace facilitator demonstrates a reasonable attempt to obtain the information from the marketplace seller.

Additionally, Anonymous supports states including liability relief for potentially applicable interest and penalties when a vendor, seller or marketplace facilitator demonstrates that a good-faith effort has been made to implement systems and make process changes in order to comply with the new marketplace facilitator collection, remittance, and reporting responsibilities.

- **Issue #4 - Marketplace seller-marketplace facilitator/provider information requirements**

  MTC Question: In situations when the marketplace seller retains responsibility for tax compliance, should the marketplace seller receive adequate information from the marketplace facilitator on marketplace transactions to allow for compliance with other tax laws?

  Anonymous Response: A marketplace facilitator/provider should not be *required* to provide any data or information beyond what is required for the facilitator/provider to collect and remit sales and use (or applicable transaction) tax.

  MTC Question: Should clear guidelines exist as to the information each party must provide to the other in order for the obligated party to correctly collect and report tax?

  Anonymous Response: Yes. Guidelines should be established to enable the party responsible for collection and remittance to fulfill its obligation. The data requirements should be uniform, and the data format should be standardized. The provider of the data should be allowed no less than 15 days.

- **Issue #5 - Collection/Remittance Responsibility Determination**

  MTC Background Information: The following states have included provisions in their marketplace facilitator/provider collection statutes permitting the marketplace facilitator/provider and the marketplace seller to negotiate which party has the collection obligation: ME, MN, NV, NJ.

  MTC Question: Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax, etc.), be able to contractually agree which party has the sales/use tax collection obligation?

  Anonymous Response: Yes, the taxing jurisdiction should respect the terms of the agreement between a marketplace facilitator & marketplace seller regarding the fulfillment of their tax collection and remittance responsibilities.

MTC Background Information: The following states allow the head of the state tax agency to waive the marketplace facilitator/provider collection requirement in certain circumstances: MD MA OH TX VA WI.

MTC Question: Should the state tax agency have the authority to waive the marketplace facilitator/provider collection requirement in certain limited circumstances?

Anonymous Response: At the request of the marketplace facilitator/provider, states should have the authority to waive marketplace facilitator/providers collection requirement for a short transitional period in limited circumstances (including if the marketplace seller agrees in writing to assume the collection responsibility during the waiver period). Waiver limitations and requirements should be published by the tax agency and applied in a uniform manner to all marketplaces.

MTC Background Information: States that have enacted marketplace facilitator/provider collection requirements generally apply those to the full extent of their tax bases: retail sales of tangible personal property, taxable services, and taxable digital products. However, some states have limited the marketplace facilitator/provider collection requirements only to retail sales of tangible personal property.

MTC Question: Should marketplace facilitator/provider collection requirements exclude certain services?

Anonymous Response: No, the sales and use tax base of the collection requirement imposed on a marketplace facilitator/provider should mirror that of a retailer/vendor making direct sales.

MTC Background: At least one state (IN) has extended marketplace facilitator/provider collection requirements to include certain other excise taxes (food & beverage taxes, innkeeper taxes).

MTC Question: When the sales transaction involves other applicable taxes, besides sales/use tax, which party (marketplace facilitator/provider or marketplace seller) should be responsible to collect?

Anonymous Response: The marketplace facilitator's collection/remittance responsibilities should only extend to sales and use tax. Other excise taxes should continue to be the responsibility of the marketplace sellers (who are currently collecting and remitting these more complex industry-specific taxes and are better equipped to do so).

- **Issue #7 - Remote Seller sales/use tax economic nexus threshold issues**

  MTC Background Information: Most states that have enacted sales/use tax economic nexus provide that if either the sales volume threshold or the transactions volume threshold is exceeded, then nexus exists, and the remote seller is required to register and commence collecting and remitting sales/use tax. The following states do not include a transactions threshold in their sales/use tax economic nexus statutes: SC ND WA CO ID IA NM PA MA OK CA TX AZ. Of those, CA and TX use a $500,000 threshold. New York has a $500,000 threshold and 100 transactions threshold. Arizona has a $200,000 sales volume threshold for remote sellers that decreases by $50,000 per year until it reaches $100,000 in 2021, but marketplace facilitators are subject to the $100,000 sales volume threshold as of 2019. Connecticut uses a $100,000 sales volume and 200 transactions threshold. By regulation, TN uses a $500,000 sales volume threshold, and AL and MS use a $250,000 sales volume threshold.

  MTC Question: Should the "transactions" economic nexus threshold be eliminated?

  Anonymous Response: Yes, a threshold based solely on sales volume is preferred, such as that enacted in WA State. A single threshold based on sales volume represents better tax policy and is easier to administer.

- **Issue #8 - Certification Requirement**

  MTC Background Information: To date, it does not appear that any state has adopted such certification requirements for marketplace facilitators. States that are members of the Streamlined Sales and Use Tax Agreement (SSUTA) have adopted certification requirements for certified service providers. However, a marketplace facilitator would not need to go through that certification process unless it wanted to become a certified service provider under the SSUTA.

  MTC Question: Should the marketplace facilitator/provider be required to provide a certification or report to the marketplace seller?

  Anonymous Response: No, this is unnecessary and unduly burdensome to the marketplace facilitator/provider. If the marketplace facilitator/provider is collecting and remitting tax and generally assuming responsibility for the liability, it should not need to certify or report tax or sales related information to the marketplace seller above and beyond what the parties agree to by contract.

  MTC Question: How does the marketplace seller know if the marketplace facilitator/provider has collected?

  Anonymous Response: As long as the marketplace facilitator notifies the marketplace seller in the agreement between the two parties that the facilitator will collect and remit the sales

tax on the marketplace seller's sales, there should be no additional requirement for the facilitator to provide a separate document or written notification to the seller. Electronic notice (such as an email or direct message on the marketplace facilitator/provider's website/platform) would also be an option to notify the marketplace seller that tax is being collected in a less formalistic/burdensome manner.

OTHER ISSUES OF INTEREST TO MICROSFT

1. Class Action & *Qui Tam* Protection

MTC Background Information & Questions: Many marketplace facilitator/provider collection statutes include for marketplace facilitator/providers protection against class action lawsuits for overcollection of tax. Should this protection be extended to marketplace sellers, or sellers in general? Also, should protection against *qui tam* lawsuits be included (if the state otherwise permits *qui tam* lawsuits)?

Anonymous Response: Legislation requiring marketplace facilitators to register, collect, and remit sales/use tax on facilitated sales should include provisions protecting the marketplace facilitator from the risk of class action and *qui tam* lawsuits. Anonymous agrees with the proposed language below developed by COST.

> **COST** - Notwithstanding any other limitations, no claim for making a class action or *qui tam* or false claims action may be brought against a marketplace facilitator or marketplace seller in any court of this state on behalf of customers, the state, or any other party arising from or in any way related to an overpayment or underpayment of sales or use tax collected on sales upon which a marketplace facilitator was required to collect and remit the tax, regardless of whether that claim is characterized as a tax refund claim. Nothing in this subsection affects a customer's right to seek a refund as provided under section [cite code section] or the right of the [department] to conduct an audit.

2. Retroactivity

MTC Question: Should marketplace facilitator/provider collection laws include a provision prohibiting retroactive enforcement?

Anonymous Response: Yes, the laws should be clear that no obligation to collect the sales and use tax required by the marketplace facilitator/provider law will be applied retroactively.

3. Tax Returns/Tax Reporting

Anonymous Comment: Marketplace facilitators should have the ability to report the third-party sales (on behalf of marketplace sellers) and related tax on the same tax return as the marketplace facilitator's direct sales. Failing to permit such "combined" reporting of direct and third-party sales by a marketplace facilitator will result in a significant administrative burden to marketplace

facilitators that have historically collected and remitted sales tax on behalf of third-party sellers that sell through their platforms and disrupt current tax collection and remittance practices of these taxpayers.

APPENDIX C

Submission to Multistate Tax Commission Uniformity Committee – Wayfair Implementation and Marketplace Facilitator Work Group

To: Richard Cram

From: AT&T

Date: September 30, 2019

AT&T appreciates the opportunity to participate in the MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group. We hope this effort will lead to an understanding of the issues in a white paper to be considered by the Uniformity Committee. We also hope that the white paper will be helpful in the efforts of NCSL as they develop model framework and uniformity in the enactment and/or updating of marketplace facilitator collection legislation in the states.

At your request we are submitting in writing the issues we have related to the "Prioritized Issues List" and have included number in which they were ordered in AT&T's letter of 8/28/19. Each of the categories had multiple issues laid out within them, so we've copied the MTC language first and then addressed the relevant concerns within them. Many of the issues noted were also raised to the NCSL Taskforce also.

1. *The Definition of a Marketplace Facilitator (AT&T #2)*

State statutory definitions of "marketplace facilitator/provider" fall into two roughly equal categories: the "narrow" definition vs. the "broad" definition. Can more uniformity be achieved in this definition?

Should the definition of "marketplace facilitator/provider" contain exclusions for: advertising, payment processing, food delivery services, online travel companies, others?

Several of the bills enacted in states contain a very broad definition of a marketplace facilitator such that they may capture companies merely because they own internet backbone infrastructure, communications or broadcasting networks over which advertising is provided. They may also potentially define more than one marketplace facilitator per transaction.

The definition does not require the facilitator to have either a direct or indirect connection to the payment for any transaction that ultimately may occur. More recent legislation has started to address this concern with respect to internet advertising but does not necessarily address advertising over the communications and broadcasting networks that do not use the internet.

2. *Who is the retailer? (AT&T #7)*

Should marketplace facilitator/providers have the same rights as retailers under state law, such as claiming price adjustments, bad debt deductions, vendor compensation (if provided by the state), etc.?

Should refund procedures be outlined? Who does the customer file a refund claim with and who handles the refund claim?

Marketplace facilitators should have the same rights and obligations as the sellers and in fact should "step into the shoes" of the marketplace seller.

3. *Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection (AT&T #5)*

Enacted marketplace facilitator/provider collection laws generally provide that the marketplace facilitator/provider is the party to be audited, not the marketplace seller, on facilitated sales transactions. However, some of those laws also impose recordkeeping requirements on marketplace sellers for facilitated sales and subject the marketplace seller to audit under certain circumstances (such as when the marketplace facilitator/provider can establish that its failure to collect was due to erroneous information provided by the marketplace seller). Such laws may include liability protection for the marketplace facilitator/provider when the failure to collect is due to incorrect or insufficient information provided by the marketplace seller, in which case the marketplace seller assumes the liability for failure to collect. Some of those laws only include such liability protection for "incorrect" information provided by the marketplace seller. Do clearer, simpler standards need to be put in place (such as defining the specific information the marketplace facilitator/provider can rely on for the marketplace seller to provide, and vice versa) in assigning liability for failure to collect between the marketplace facilitator/provider and the marketplace seller and in determining which party is subject to audit under what circumstances?

If liability protection for errors is provided to marketplace facilitator/providers, should it also be extended to marketplace sellers?

See NACSP suggestions under "Maintaining Records" and "Audit Issues."

Audit exposure and liability should be limited to the party responsible for collecting and remitting the taxes. Absent a contractual agreement or a waiver, this would be with the marketplace facilitator. The marketplace facilitator also has the burden to show states that it attempted to collect accurate and sufficient information needed to remit taxes imposed. Without these limits there can be lengthy audits and costly litigation with multiple parties and the states.

Marketplace sellers have additional recordkeeping requirements to reconcile when marketplace facilitators have remitted the tax on each of their transactions. See the response to the section regarding standards of information that the seller must provide versus what the facilitator must determine.

4. *Marketplace seller-marketplace facilitator/provider information requirements (AT&T #3)*

In situations when the marketplace seller retains responsibility for tax compliance, should the marketplace seller receive adequate information from the marketplace facilitator on marketplace transactions to allow for compliance with other tax laws? Should clear guidelines exist as to the information each party must provide to the other in order for the obligated party to correctly collect and report tax?

Standards for Information that Seller Must Provide Versus What Facilitator Must Determine

Many of the bills relieve the marketplace facilitator of liability if the seller provides incorrect, or insufficient information. There are no standards on what constitutes "incorrect or insufficient information". There are also no standards on what determinations are solely the responsibility of the marketplace facilitator. This is in contrast with the strict standards that apply to Certified Services Providers (CSPs) in many of the same states. Under those arrangements the seller is required to provide detailed information about their product and service and map that to the CSPs product codes/categories. Once that mapping has been completed, it is the CSPs responsibility to know the taxability rules that apply to each of those classifications in the various taxing jurisdictions. This would include, whether it is taxable or exempt, and the jurisdictions taxing rates, boundaries and sourcing

rules. The same clarity and certainty should be set forth in these bills so that the sellers know the information they need to supply to ensure they will not be held liable for any errors that may occur after that information has been provided.

5. Collection Responsibility Determination (AT&T #1)

Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax, etc.), be able to contractually agree which party has the sales/use tax collection obligation?

Should the state tax agency have the authority to waive the marketplace facilitator/provider collection requirement in certain limited circumstances? Would such an authorization raise any "unlawful delegation" concerns?

Should marketplace facilitator/provider collection requirements apply to certain services (such as telecommunications services, which may involve other applicable taxes that the marketplace seller is better situated to handle compliance for)?

When the sales transaction triggers other applicable taxes, besides sales/use tax, which party (marketplace facilitator/provider or marketplace seller) should be responsible to collect?

The Inclusion of Services Subject to Multiple Tax Types and/or Simultaneously Occurring in Multiple Jurisdictions

One primary concern of the telecommunications industry is that current legislation addresses only state sales/use taxes and does not address other government imposed federal, state, or local taxes and fees.

Legislation that includes services that are subject to multiple types of federal, state or local transaction taxes and fees can create issues when only state and local sales taxes are covered by these requirements. These issues include:

- Determination of the proper sales tax base. Other taxes or fees may be required to be calculated and included in the sales tax base;
- The potential loss of the ability to collect the special taxes and fees from the customer, such as 911 fees and federal and state universal service fund charges may be jeopardized when the seller no longer has a connection to the financial transaction;
- Potential customer confusion and administrative complexity will result if two different entities are responsible for collecting various taxes and fees on the same transaction.
- Further confusion and complexity for business invoices with recurring charges for services that are received in multiple states when all states don't have marketplace facilitator legislation, or the legislation varies. Currently a business customer receives one invoice with all state and local transaction taxes and fees listed for multiple states.

For these reasons, we believe that only one entity – either the facilitator or seller – should be responsible for collection and remittance of all the taxes and fees on the transactions covered by marketplace facilitator legislation.

Contractual Arrangements Between the Facilitator and the Seller

Currently businesses can enter into contractual arrangements when they are partnering on the delivery of products and services that specify who will have responsibility for the collection, remittance and

ultimate liability for federal, state and local taxes. Many of the current marketplace facilitator bills do not allow for the assignment of the tax responsibility to the sellers even when such contractual arrangements are in place. This is especially problematic when the facilitator's billing system can only collect sales and use taxes because it has the effect of barring the communications industry and facilitators from entering into what could otherwise be beneficial business arrangements for selling products over a marketplace.

While we understand the concern raised that facilitators could force sellers to agree to retain responsibility and skirt the intent of the bill, we believe that the laws need to provide for limited instances when the responsibility could remain with the seller under a mutual contractual arrangement with the facilitator. These contractual agreements should be respected when sellers meet certain requirements. These requirements could include sales over certain thresholds, a requirement that the seller is registered in every jurisdiction where the product and service can be sold by the facilitator, and that the seller is in good standing with the impacted taxing jurisdictions.

Waiving the Collection Requirements

The intent of marketplace facilitator laws is to ensure the states can collect tax on all of its online transactions, thereby ensuring state revenue and a level playing field among retailers. States do not wish to impose an undue burden on taxpayers who already collect and remit tax in the state, nor jeopardize efficient remittance of existing taxes and fees to local or other jurisdictions. Lastly, states do not wish to cause confusion to customers on their invoices for services.

In certain instances, when agreed to by both the marketplace facilitator and the marketplace seller, it may be best to implement an automatic, objective waiver process whereby if the marketplace seller:

1. Has annual U.S. gross sales over $1 billion, including the gross sales of any related entities;[1]

2. Provides evidence to the marketplace facilitator that it is registered under [cite code section] in this state and also registered to collect sales and use tax in every state where the product or service can be sold; and,

3. Notifies [the Department] in a manner prescribed by [the Department] that the marketplace seller will collect and remit all applicable taxes and fees on its sales through the marketplace and is liable for failure to collect or remit applicable taxes and fees on its sales.

6. *Marketplace seller economic nexus threshold calculation*

Should the marketplace seller, in determining whether it has exceeded the state's economic nexus threshold, be able to exclude its facilitated sales (which the marketplace facilitator/provider is responsible for collecting tax on) and only count its direct remote sales?

AT&T has no comment related to economic nexus threshold calculation.

7. Remote Seller sales/use tax economic nexus threshold issues (AT&T #5)

[1] Note: InstaCart objected to this subsection at the last NCSL meeting. AT&T is indifferent to the removal of a company size threshold.

Should the sales volume economic nexus threshold be limited only to taxable sales?

Should the "transactions" economic nexus threshold be eliminated?

See NACSP suggestions under "Thresholds for Collection Obligation for Small Retailers."

AT&T has no comment related to remote seller economic nexus threshold issues.

8. Certification requirement

Should states develop a certification process for marketplace facilitator/providers?

How does the marketplace seller know if the marketplace facilitator/provider has collected? Should the marketplace facilitator/provider be required to provide a certification or report to the marketplace seller?

See NACSP suggestions under "Providing Software to Remote Sellers."

AT&T has no comment related to the certification requirement.

9. *Information sharing*

Should states develop information sharing networks to assist in identifying noncompliant remote sellers and marketplaces?

AT&T has no comment related to information sharing.

10. *Taxability determination (AT&T #9)*

Should states publish clear guidance identifying their sales/use tax impositions and exemptions, so remote sellers and marketplaces can more easily determine the taxability of their products?

See NACSP suggestions under "Determination of Taxability."

Yes, the taxability matrices like those found for Streamlined Sales Tax member states are helpful to all taxpayers for collecting and remitting tax and simplifying the process.

11. Return simplification (AT&T #8)

Can the sales reporting on returns and recordkeeping requirements, as between the marketplace facilitator/provider and marketplace seller, be simplified and clarified? How does the marketplace seller properly report facilitated sales: taken as a deduction, claimed as an exemption, or not reported at all on return? Can the marketplace facilitator/provider return be simplified and consolidated?

See NACSP suggestions under "Return Filings" and "Remittances."

Returns should be simplified as much as possible. Marketplace facilitators should report all sales on one return, with recordkeeping requirements to reconcile facilitated sale with direct sales. Marketplace sellers should not have to report facilitated sales at all, only sales for which tax has been collected. Separate recordkeeping can reconcile facilitated sales from direct sales, if any, for which tax was collected from the customer.

12. *Foreign sellers*

Should states publish clear guidance for foreign sellers with economic nexus needing to register to collect? Should states develop enforcement strategies concerning noncompliant foreign sellers?

AT&T has no comment regarding foreign sellers.

13. Local sales/use taxes (AT&T #6)

For "home rule" states that have locally administered local sales/use taxes, what is the best approach to address Due Process/Commerce Clause concerns: (a) use of a "blended" state and local rate that remote sellers can use (such as the Alabama Simplified Sellers Use Tax System); or (b) destination sourcing of both interstate and intrastate sales? For (a), how should "remote seller" entitled to use the blended rate be defined, and do in-state sellers have any discrimination claim? Should the economic nexus threshold apply at the local jurisdiction level?

See NACSP suggestions under "Tax Rates" and "Local Jurisdiction Boundary Tables."

To the extent that a state simplifies its local sales/use tax filing for marketplace facilitator transactions, that same simplification should be extended to marketplace sellers. It would vastly improve filing simplicity to have local taxes and fees remitted on one state return.

14. Other - *Class action lawsuit protection (AT&T #4)*

Many marketplace facilitator/provider collection statutes include for marketplace facilitator/providers protection against class action lawsuits for overcollection of tax. Should this protection be extended to marketplace sellers, or sellers in general? Also, should protection against qui tam lawsuits be included (if the state otherwise permits qui tam lawsuits)?

State laws, including marketplace facilitator laws, press private parties into the service of the state by requiring them to collect and remit taxes due from customers involuntarily. The law contains an efficient and clear method of enforcing the tax laws, by allowing taxing authorities to audit taxpayers, issue assessments and impose interest and penalties if they discover an under-collection of tax. In the event of an over-collection of tax, state laws permit taxpayers to file refund claims and return refunded amounts to the customers from whom the tax was collected. These procedures allow taxing authorities to determine tax policy as they enforce the tax laws and ensure fairness to taxpayer by providing them with an avenue to appeal assessments or refund denials to administrative tribunals and courts.

Marketplace facilitator legislation should preserve this efficient and fair structure that allows taxing authorities to enforce tax laws and determine tax policy. Such bills should not cede control of tax enforcement and tax policy to plaintiffs' attorneys whose primary interest is in obtaining large contingency fees through costly, disruptive and time-consuming class action or qui tam lawsuits rather than efficient tax administration. Marketplace facilitator bills should preclude both class action lawsuits and qui tam lawsuits (to the extent otherwise permitted by state law) against either facilitators or sellers.

15. *Retroactivity*

Should marketplace facilitator/provider collection laws include a provision prohibiting retroactive enforcement?

AT&T has no comment.

16. *Registration*

Does the state have a simple process for the marketplace seller to de-register once the marketplace facilitator/provider is collecting?

See NACSP suggestions under "Registration."

AT&T has no comment.

17. *Assessments and Notices*

See NACSP suggestions under this topic.

AT&T has no comment.

18. *Security Protocols*

See NACSP suggestions under this topic.

AT&T has no comment.

APPENDIX D

Charter Submission to the Multistate Tax Commission Uniformity Committee
Wayfair Implementation and Marketplace Facilitator Work Group

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To: Richard Cram
From: Charter Communications
: October 3, 2019

Charter Communications is the second largest cable operator in the United States and a leading broadband communications services company providing video, Internet, and voice services to approximately 28.1 million residential and small- to medium business customers. We sell video and online advertising inventory to local, regional, and national advertising customers. We also sell fiber-delivered communications and managed information technology solutions to large enterprise customers. In addition, we own and operate regional sports networks and local sports, news, and community channels, as well a high-capacity, two-way telecommunications network which passes over 50 million households and small and medium businesses across the United States.

Charter appreciates the opportunity to provide feedback to the MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group. The company hopes that these comments will provide a useful perspective on the issues most salient to communications taxpayers like Charter and others.

The following discussion responds to the issues raised in the Work Group's memorandum of August 29, 2019 regarding the "Prioritized Issue List." This memorandum limits the discourse to the issues viewed as the highest priority: first, the definition of marketplace facilitator, and second, the determination of tax collection responsibility. Note that roman numeral I corresponds to MTC Priority Issue #1, and roman numeral II corresponds to MTC Priority Issue #5.

I. <u>Definition of Marketplace Facilitator</u>

Some states have enacted legislation that broadly defines "marketplace facilitators." Aside from the burden of interstate inconsistency created by these bills, a broad statutory definition of marketplace facilitator risks capturing companies that state legislatures and tax administrators may not have intended to reach. Such broad definitions could impose the collection requirement on communications companies simply because the company owns or operates the internet infrastructure or broadcasting network over which advertising is provided and a transaction occurs.

Consider Nevada's law, which defines, in part, a marketplace facilitator as one who "[d]irectly or indirectly … [o]wns, rents, licenses, makes available or operates any electronic or physical infrastructure or any property, process, method, copyright, trademark or patent that connects marketplace sellers to purchasers for the purpose of making retail sales of tangible personal property …". There, the words "infrastructure" and "method" suggest the statute could apply to a broadband internet provider that offers advertising and connects the seller and buyer through its internet service, even though the internet provider has little to no visibility to their interaction.

Similarly, the broad definition could create issues for some companies who merely advertise the sale of goods. Most providers offering advertising service are compensated on a "per-click" or per-time-slot basis. Thus, the provider only knows, at most, whether a potential buyer clicked on the link to the advertising seller's website. The provider does not know if the buyer completes a purchase, what items or services were purchased, or even the shipping address of the ultimate consumer. The provider never collects or processes payments, nor does it know the total of any sale completed on the third-party seller's website. It would be impossible for such a "facilitator" to collect and remit the tax when they are not party to the taxable transaction, but the laws may require it to do so nonetheless.

Although it would be unreasonable for a state to apply such a broad reading—without narrow tailoring—these broad definitions include companies without any real connection to a transaction, who would be put in jeopardy in the event others don't collect. In addition, a broad definition may potentially create more than one marketplace in a unique transaction, which may create confusion about which entities must collect or present the risk of double taxation. These potential collection quagmires highlight the practical need for a more concise "facilitator" definition, limited only to the key parties to the transaction. Though we appreciate the efforts of certain legislatures to ensure that their statutory language precludes any attempt by true facilitators to avoid the collection requirement, simplified language can achieve the same result. Maryland's statute is a good example. Its statute defines a marketplace facilitator as one who "[f]acilitates a retail sale by a marketplace seller by listing or advertising tangible personal property for sale in a marketplace, and [d]irectly or indirectly through agreements with third parties collects payment from a buyer and transmits the payment to the marketplace seller." Paired with a few statutory exclusions, this narrow definition targets only those actors directly involved in the buyer-seller exchange.

We strongly advocate for the narrower definition so that companies that are only tangentially associated with a particular transaction are not inadvertently swept into collection, audit, and assessment responsibilities and risks.

II. <u>Determination of Collection Responsibility</u>

Communications companies are subject to a complex regime of federal, state, and local taxes and fees. Unlike sales of tangible personal property, which are usually only subject to sales tax administered by a department of revenue, communications services are subject to multiple taxes and fees, often administrated outside the department of revenue. In consideration of these complex regimes, the industry is concerned that enacted marketplace facilitator legislation applies only to state sales and use taxes and does not address other taxes. Moreover, the legislation has no flexibility in crafting alternative collection models when it comes to applying sales tax to complicated services where the seller has specialized knowledge on the application of sales tax. The failure to address these questions can create numerous complications:

First, facilitators may not be able to determine the proper sales tax base. Many states require that other taxes and fees be included in the sales tax base, but a facilitator may not be able to do so if it is responsible only for the sales tax.

Second, facilitators may not be able to collect special taxes and fees (such as 911 fees or universal service fund charges) when the marketplace is not connected to the financial transaction.

Third, administration will become inordinately complex. Certain transactions may trigger other applicable taxes beyond sales and use taxes that an entity other than the facilitator must collect. If two or more different entities are responsible for collecting the various taxes and fees arising from a single transaction, the entities will struggle to develop coordinated collection systems and customers will be confused. Many business customers of communications companies, for example, receive a single bill detailing all state and local transaction fees payable to multiple states. This billing norm will become impossible where a jurisdiction requires the seller to collect some taxes and fees, but requires a facilitator to collect sales tax.

To address these issues, it may be simpler if the parties could assign or waive out of responsibility. Yet most of the current marketplace facilitator legislation does not allow for assignment of tax responsibility to sellers, even where the sellers have traditionally collected or have agreed with the facilitator to collect the tax.

In sum, the purpose of marketplace facilitator legislation is not to unduly burden taxpayers, foster miscommunication between businesses and consumers, or compromise the efficiency of the collection system. The following suggestions could work independently or concomitantly to solve such problems.

a. Single-party collection responsibility

To alleviate some of the issues described above, the default rule should be that a single entity—either the seller *or* facilitator—must collect and remit all applicable taxes and fees related to the transactions covered by marketplace facilitator laws. Yet exceptions to the default rule should be available where appropriate, and the following subsections suggest mechanisms to provide such exceptions.

b. Contractual agreement between facilitator and seller

Prior to the enactment of the marketplace facilitator collection framework, businesses had great flexibility to contractually assign tax collection and remittance liability to a specific entity involved in the sale and delivery of products and services. Entities often executed such contracts because only one of the parties had the capability to collect and remit complex and specialized taxes, such as communications taxes. However, almost none of the current marketplace facilitator bills allow these contracts, and the laws would render invalid those contracts already in existence. This approach effectively bars the communications industry and facilitators from entering into otherwise-beneficial business arrangements conducive to selling products and services in new and novel marketplaces.

Although we understand the concern that facilitators could force sellers to agree to retain responsibility and skirt the intent of the legislation, we believe that the laws must provide for limited instances when the responsibility could remain with the seller pursuant to a mutual contractual arrangement. A few states (namely, Nevada and New Jersey) have taken the sensible approach and provided such a statutory contractual exemption. These contractual agreements should be respected when

sellers meet certain requirements. These requirements could include: 1) the seller makes sales generating revenue over certain thresholds; 2) that the seller is registered in every jurisdiction where the product and service can be sold by the facilitator; and 3) that the seller is in good standing with the impacted taxing jurisdictions. Note, however, that New Jersey's statute suggests that even an acquiescent approach is reasonable: it states simply that "[n]othing in this section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into an agreement with each other regarding the collection and payment of tax imposed under [the Sales and Use Tax Act]."

c. Waiver of collection requirement

Another option would be to implement an automatic, objective waiver process that would exempt the facilitator from collecting and remitting applicable taxes if the marketplace seller meets certain requirements. Such a waiver could require that the seller: 1) reach a mutual agreement with the facilitator to collect and remit applicable taxes; 2) has annual U.S. gross sales over $1 billion, including the gross sales of any related entities; 3) provides evidence to the marketplace facilitator that it is registered under [cite code section] in the state and is registered to collect sales and use tax in every state where the product or service can be sold; and 4) notifies [the Department] in a manner prescribed by [the Department] that the marketplace seller will collect and remit all applicable taxes and fees on its sales through the marketplace and is liable for failure to collect or remit applicable taxes and fees on its sales.

APPENDIX E

Maplebear, Inc., d/b/a Instacart
50 Beale Street
Suite 600
San Francisco, CA 94105

September 12, 2019

Richard Cram
Multistate Tax Commission
444 North Capitol Street NW, Ste 425
Washington DC 20001

RE: Wayfair Implementation & Marketplace Facilitator Working Group Comments on Prioritized Issue List

Dear Mr. Cram,

Maplebear Inc. DBA Instacart (hereinafter "Instacart" or the "Company") would like to thank the Multistate Tax Commission ("MTC") for reopening its Wayfair Implementation & and Marketplace Facilitator Working Group (the "Working Group"). We believe creating a requirement for marketplace facilitators to remit the tax is a significant change to the sales & use tax law and believe such a monumental change deserves a robust stakeholder process to ensure a smooth implementation. Under Instacart's model, both Instacart and the Marketplace Seller have physical presence nexus. As a result, our comments will focus on Marketplace Facilitator related issues rather than economic nexus.

The Company believes the current approach taken in the model statute, and oft adopted by the states, oversimplifies the Marketplace Facilitator industry. By contemplating only marketplace platforms that allow both non-registered and registered Marketplace Sellers to sell tangible personal property or taxable services throughout the U.S. market, the model legislation failed to address industry specific considerations that apply to only a sub-set of marketplaces. Instacart falls squarely into one of those sub-sets – namely food delivery marketplaces where the food, whether groceries for home consumption or prepared food, is ordered online and picked and/or packed at brick-and-mortar retail location. Due to inventory, loss prevention, and cash management reasons, an in-store, administrative transaction is completed at the store's point of sale system even though the true tax sale occurs on the online marketplace – Instacart.com or the Instacart Application ("App"). Guidance on how to document that in-store, administrative transaction as tax-free has not yet been fully contemplated by any state making compliance extremely difficult. In addition, it is often limitations to the systems used by these brick-and-mortar Marketplace Sellers that make remittance from the Marketplace Providers challenging.

Comments on MTC Prioritized List of Issues

Issue #5 (Also Relates to Issue #1): Collection Responsibility Determination

This issue is the highest priority for Instacart. Simply put, Instacart would like the flexibility to allow our Marketplace Sellers to elect whether they want Instacart to remit tax on the transaction or continue remitting themselves. The two policy reasons that states have provided for requiring the Marketplace to be the remitting party simply do not exist under Instacart's Marketplace model:

1. without legislation, sales and use tax was not being collected and remitted for transactions occurring through marketplace facilitation websites; and,
2. it is more efficient for the state to process one tax return and audit the Marketplace Facilitator rather than many Marketplace Sellers.

While flexibility in defining who is the remitting party is the core issue, there are a number of palatable solutions to resolve our concerns, many of which were addressed in response to the survey and are discussed below.

Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax, etc.), be able to contractually agree which party has the sales/use tax collection obligation

Instacart believes the Marketplace Facilitator and the Marketplace Seller, who by definition are registered brick-and-mortar grocery stores, should be able to contractually agree which party has the sales and use tax obligation. In fact, our bilateral agreements entered into with each Marketplace Seller explicitly confirm that the burden of remitting tax remains with the Marketplace Seller. How such flexibility is defined is less important, and the solutions listed by the states and the Retail Industry Leaders Association ("RILA") in the August 30, 2019 memo are all palatable with exceptions noted below.

Whether the statute allows Instacart to collect certain information (i.e. the Marketplace Seller's Permit) to support that the Marketplace Seller is registered similar to Maine, Minnesota, and Nevada or has a general clause indicating "nothing in this section shall be construed to interfere with the ability of the marketplace facilitator and marketplace seller into agreements with each other regarding fulfillment of the requirements", both provide the flexibility that allow Instacart's Marketplace Seller to retain remittance control at their election.

Specifically, Instacart is supportive of RILA's model with one exception. Any requirement that the Marketplace Seller have a significant sales threshold before agreement can be made appears arbitrary. The real concern should be whether the Marketplace Seller is registered and capable of remitting. Thus, we would advocate for the position that a bilateral agreement between a Registered Marketplace Facilitator and Registered Marketplace Seller should be sufficient to shift the burden in all cases, and if a threshold is included, it should be commensurate with the economic nexus threshold adopted by the state in response to *Wayfair*.

In addition, we would encourage any state that allows the parties to agree on who will fulfill the tax remittance requirements to develop standard language and procedures for the non-remitting party to document the arrangement to avoid contentious audits in the future. Of upmost concern are documentation requirements that require one taxpayer to produce the confidential records of another taxpayer to support its position on audit. See Certification Requirements discussion below for further information.

Should the state tax agency have the authority to waive the marketplace facilitator/provider collection requirement in certain limited circumstances? Would such an authorization raise any "unlawful delegation" concerns?

The waiver is a second alternative that is palatable to Instacart. In fact, the recommendation of allowing a "waiver" was partially developed by Instacart in conjunction with other companies in the technology industry to address the very issue before the MTC. As such, we are generally supportive of such waiver language, but we would encourage the implementation of the waiver that allows flexibility for the Marketplace to remit on behalf of certain Marketplace Sellers.

While we are generally supportive of a waiver, like with many things in sales & use tax, the devil is in the details. We have concerns when the statutory language or interpretation of the statute limits what type of Marketplace Providers may request the waiver.

For Instacart, there are two principles that should apply to any waiver process: 1) the ability to apply for such a waiver should be based on the Marketplace Sellers already being registered and auditable by the state rather than trying to define certain industries that can request a waiver, and 2) there should be a mechanism for the Marketplace Facilitator to remit tax on some, but not all, of the Marketplace Sellers.

Examples of language or interpretations of the waiver that would be problematic for Instacart are as follows:

- If the waiver is "all or nothing", meaning Instacart needs to remit tax on 100% of sales through the platform or the Marketplace Sellers need to remit tax on 100% of the sales, the waiver option becomes unworkable. This lack of flexibility may lead to absurd results. For example, if all small Marketplace Sellers want Instacart to remit but one large national chain wants to continue remitting, the large national chain will effectively be making the decision for all local merchants. Alternatively, if most of our Marketplace Sellers want to continue remitting themselves, but one small local chain with unsophisticated systems wants Instacart to remit, the small local chain will be making the decision for large, sophisticated Marketplace Sellers. In either case, the operation of such a strict waiver allows a Marketplace Seller's competitor to make a business decision that binds that Marketplace Seller when the two companies have diverging interests.
- Maryland's waiver has three prongs, the first of which is "the Marketplace Seller is a communications company that is publicly traded or is controlled directly or indirectly by a company that is publicly traded." This waiver, therefore, only applies to the communications industry and does not address the concerns raised by Instacart and the other Delivery Network Companies ("DNCs") that deal in food delivery.

- Ohio's waiver can be applied for only by the Marketplace Seller. This seems both inefficient and insufficient as the Marketplace Facilitator is the company with the obligation under the statute. We believe it is more efficient for the state to allow the Marketplace Facilitator to also request a waiver.
- Wisconsin's waiver lists three types of companies that can apply for a waiver: a hotel, a motel, or a restaurant. Again, by limiting the list of Marketplace Facilitators that can request a waiver, the statute does not contemplate all of the Marketplace Facilitators that may have similar issues.

Instacart is supportive of RILA's model but would encourage any state that allows for such waiver to allow for flexibility so that the Marketplace Facilitator can remit tax on behalf of some, but not all, of the Marketplace Sellers selling goods on the marketplace platform. We believe the proper implementation of a waiver program would issue a "Waiver Permit" or something similar that can be used by the non-remitting party to document that the remitting party has agreed to be responsible. For more discussion of the "Waiver Permit" see Certification Requirements.

When the sales transaction involves other applicable taxes, besides sales/use tax, which party (marketplace facilitator/provider or marketplace seller) should be responsible to collect?

The taxes or fees at issue for Instacart include bottle fees, litter or environmental fees, and sugary-sweetened beverage fees.

Instacart is supportive of RILA's Model but would encourage an express list from the state of what taxes/fees are included versus excluded rather than a general clause. Moreover, a larger concern is clarity on whether the local governments can require the marketplace to collect local taxes or fees. For administrative feasibility, we prefer the local governments be unable to require the Marketplace to remit unless those taxes/fees can be reported on the state return.

Definition of a Marketplace Facilitator (Issue #1)

While not wholly related to Issue #5, we believe there is an alternative related to Issue #1 that could also resolve our concerns. Statutorily excluding a marketplace facilitator that that facilitates "food delivery" or is a "delivery network company" from the definition of a marketplace facilitator would also provide the necessary flexibility. For example, California excluded DNCs form its definition of Marketplace Facilitator. A DNC is defined as "a business entity that maintains an internet website or mobile application used to facilitate delivery services for the sale of local products."[1]

The effect of excluding food delivery or DNCs from the definition similarly allows Instacart to continue passing the tax to the Marketplace Sellers for remittance. However, we once again believe having flexibility to remit for the Marketplace Sellers or allowing them to continue remitting is crucial to a successful resolution.

[1] Cal. AB 147 (2019).

Issue #8: Certification Requirement

Instacart encourages the states to provide clear guidance for how the non-remitting party will document that its failure to remit tax was proper and in turn avoid unnecessary issues on audit. This issue is of particular importance for transactions where there is an in-store, administrative transaction that will run through the Marketplace Seller's system just like non-marketplace transactions.

The preferred approach is for the states to provide guidance on what notice or agreement language will be accepted by the state. In the alternative, certification can also be handled similar to an entity or transition-based exemption. Similar to exemptions, the Marketplace Facilitator legislation allows one party, generally the Marketplace Seller, to avoid remitting sales tax on sales that would otherwise be subject to tax. Moreover, we encourage the state to be accurate in developing its certification requirements and consider the tax "excluded" rather than "exempt".

Finally, if a state chooses the waiver route, we encourage that the implementation of the waiver process includes a "Waiver Permit" that is issued by the state to the Marketplace Facilitator. If the Marketplace Facilitator is willing to remit tax for some Marketplace Sellers but allows others to continue remitting, we believe such a waiver can clarify the agreement between the parties. Attached is an example "Waiver Permit" to demonstrate what we believe would be a reasonable format.

The above solutions will ensure that both the Marketplace Facilitator and the Marketplace Seller will be clear on who has the obligation to remit. In addition, the state will be able to audit the certification language or certificate and apply a similar process for testing exemption certificates. This will ensure that the confidential records of one taxpayer will not be required to support another taxpayer's audit. Finally, any variances in a statutes of limitation or document retention periods for the two parties will become moot under a certification regime.

Conclusion

In summary, we believe there are three critical considerations to address Marketplace Facilitators, like Instacart, where the Marketplace Sellers are registered brick-and-mortar stores who have agreed to remit tax. First, there should be a mechanism for the Marketplace Facilitator to shift the tax remittance burden back to a registered Marketplace Seller. This mechanism can be in the form of a clause allowing for the registered Marketplace Facilitator and Marketplace Seller to enter into a bilateral agreement determining who will remit the tax, through a waiver application with the state, or by definitionally excluding certain Marketplace Facilitators from the statutory definition. The key for Instacart is the mechanism should allow for flexibility so that the Marketplace Facilitator can remit on the sales of some Marketplace Sellers but allow others to continue remitting themselves. Finally, we believe a well-defined certification process, whether with defined language or an actual certificate, is crucial to ensuring compliance.

Instacart would like to partner with the states to resolve these issues as the laws are being implemented rather than waiting for protracted audits due to lack of clarity. We are happy to answer any questions the MTC or its member states may have. Thank you again for your

attention to these important policy questions as we adjust to Marketplace Facilitation legislation and requirements.

Sincerely,

Stephanie Gilfeather
Head of Tax – Instacart
stephanie.gilfeather@instacart.com
(206) 491-7423

Attachments

Marketplace Facilitation
Waiver Permit

This permit allows the Marketplace Facilitator to shift the burden of remitting sales & use tax to a registered marketplace seller.

Marketplace Facilitator Information:

ABC Marketplace Facilitator, INC
1234 Main Street
City, State ZIP
Registration No.: xxxxxxxxxxxxx

Permit Number: xxxxxxxxxxx
Effective Date: xx/xx/xxxx
Expiration Date: xx/xx/xxxx

❑ Option 1: Marketplace Facilitator is the Remitting Party

Marketplace Facilitator and Marketplace Seller listed below have agreed that Marketplace Facilitator will remit sales & use tax to the State of/Commonwealth of XXX. A copy of this permit documents that the Marketplace Seller is not required to remit sales & use tax on any transactions facilitated through the marketplace platform. If the marketplace transaction is documented in the Marketplace Seller's Point of Sale or billing system(s), this permit shall document the tax-free treatment of that administrative transaction.

❑ Option 2: Marketplace Seller Remitting Party

Marketplace Facilitator and Marketplace Seller listed below have agreed that Marketplace Seller will remit sales & use tax to the State of/Commonwealth of XXX. A copy of this permit documents that Marketplace Facilitator is not required to remit sales & use tax on any transactions facilitated through the marketplace platform because the Marketplace Seller has agreed to remit tax to the state. If the marketplace transaction is documented in the Marketplace Seller's Point of Sale or billing system(s), this permit shall document the tax-free treatment of that administrative transaction because the marketplace transactions will be reported based on the Marketplace Report issued to the Seller.

Marketplace Seller's information

Business Name:_____ Account ID: _____

Address:_____

City:_____ State:_____ Zip:_____

Telephone Number:_____ Email Address: _____

The undersigned parties, as Marketplace Facilitator and Marketplace Seller, certify the election made above. The non-remitting party may keep a copy of this permit in its records in order to document this agreement in case of an audit.

_____
Printed Name – Marketplace Seller Authorized Signer

_____
Printed Name – Marketplace Facilitator Authorized Signer

_____
Signature *Date*

_____
Signature *Date*

APPENDIX F

NATIONAL RETAIL FEDERATION

NATIONAL RETAIL FEDERATION COMMENTS ON MTC QUESTIONNAIRE ON MARKETPLACE LEGISLATION

1. Definition of marketplace facilitator/provider

State statutory definitions of "marketplace facilitator/provider" fall into two roughly equal categories: the "narrow" definition vs. the "broad" definition. Can more uniformity be achieved in this definition?

Should the definition of "marketplace facilitator/provider" contain exclusions for: advertising, payment processing, food delivery services, online travel companies, others?

Concerns/suggestions: _____

NRF supports state adoption of a "narrow" definition of "marketplace facilitator," with as much uniformity as possible among the states, in order to ease the compliance burden for both marketplace facilitators and marketplace sellers. We are concerned that the "broad" definitions could inadvertently characterize certain businesses as "facilitators" because a seller contracts with them to perform, or assist with, some of the listed functions. It is also conceivable that some of the broad definitions could be interpreted to characterize more than one party as a facilitator on the same sale.

Specifically, NRF recommends that the definition of "marketplace facilitator should exclude advertising, payment processing, and franchisors.

Advertising – The definition of marketplace facilitator should exclude advertising services. Retailers engage with various advertising service platforms, like shopping comparison platforms, where their products may be listed for sale and the advertiser may provide a link where the customer can click through to the retailer's website to make the purchase. We are concerned that under some of the broad definitions these platforms could be considered a marketplace facilitator because they own and operate technology that brings the buyer and seller together, and they list the property for sale. We believe these types of platforms should be exempt from the definition of

marketplace facilitator in all states because the sale, payment and shipping are all handled by the seller/retailer. It would seem impossible for the platform to be given the responsibility for collecting tax if they are not collecting the payment and do not know where the item is being shipped.

- Payment Processing – The definition of marketplace facilitator should exclude payment processor businesses that are appointed by the merchant to handle payment transactions from various channels, such as credit cards, debit cards and stored value cards, and whose sole activity with respect to marketplace sales is to handle these transactions between two parties. This exclusion is similar to the exclusion included in several states' statutes for payment processing, with the addition of stored value cards as an additional type of payment transaction that the payment processor might handle on behalf of the merchant. (A stored value card stores the monetary value on the card itself, not in an external account.)
- Franchisors – Many franchisors have mobile apps or websites whereby a customer will order food from the brand, and the order will be referred to the local franchisee who fulfills the order. In some cases, the payment for the food may be made on the website. In other cases, the customer may make payment when he picks up the food in the store or when it is delivered. The purpose of the marketplace laws is to make sure the state is able to collect sales taxes on remote sales made through a marketplace. Franchisees make their sales locally and collect the local sales tax. With the exception of delivery situations (discussed separately), customers pick up their orders at the franchisee's location, and the tax is assessed on the sale based on the location. Although mobile apps may be used to expedite the purchase, the sale is still local. This is a different fact pattern from the third-party remote seller that sells on a marketplace. In addition, under terms of existing contracts between franchisors and franchisees, the franchisees collect and remit taxes for the sales in their stores.
- Food Delivery Services – Food delivery raises several complex issues. There are several variations of third-party food delivery service business models, ranging from some that have existed for decades to state of the art business models that are still being developed and continue to advance in complexity and technological sophistication. Across the spectrum, applicable taxes are already being collected and remitted industry wide. Each model and each individual delivery service provider and restaurant creates unique issues and

complexities, making a one size fits all approach impossible at this time. Factual and legal complexities include but are not limited to the existence of local meal taxes in some jurisdictions, limited customer data available to restaurants due to business practices and legal restrictions governing personally identifiable information, and associated sourcing issues. NRF has no objection to state marketplace facilitator laws that require third-party food delivery service providers to collect the applicable taxes due on food deliveries if they otherwise meet the definition of a marketplace facilitator, so long as they allow for existing tax compliance practices and unique factual and legal complexities specific to the restaurant industry to be taken into consideration. Specifically, state marketplace facilitator laws should be clear that, although food delivery companies have the responsibility to collect all taxes, restaurant and food delivery companies may contractually enter into an agreement whereby the restaurant agrees to remit the applicable taxes collected on sales made through the food delivery service.

2. **Who is the retailer?**

Should marketplace facilitator/providers have the same rights as retailers under state law, such as claiming price adjustments, bad debt deductions, vendor compensation (if provided by the state), etc.?

Concerns/suggestions: _____

A marketplace facilitator should have the same rights as the retailer under state law since the facilitator has responsibility for collecting the tax.

3. **Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection**

Enacted marketplace facilitator/provider collection laws generally provide that the marketplace facilitator/provider is the party to be audited, not the marketplace seller, on facilitated sales transactions. However, some of those laws also impose recordkeeping requirements on marketplace sellers for facilitated sales and subject the marketplace seller to audit under certain circumstances (such as when the marketplace facilitator/provider can establish that its failure to collect was due to erroneous information provided by the marketplace seller). Such laws may include liability protection for the marketplace facilitator/provider when the failure to collect is due to incorrect or insufficient information provided by the marketplace seller, in which case

the marketplace seller assumes the liability for failure to collect. Some of those laws only include such liability protection for "incorrect" information provided by the marketplace seller. Do clearer, simpler standards need to be put in place (such as defining the specific information the marketplace facilitator/provider can rely on for the marketplace seller to provide, and vice versa) in assigning liability for failure to collect between the marketplace facilitator/provider and the marketplace seller and in determining which party is subject to audit under what circumstances?

If liability protection for errors is provided to marketplace facilitator/providers, should it also be extended to marketplace sellers?

See NACSP suggestions under "Maintaining Records" and "Audit Issues."

Concerns/suggestions: _____

Facilitators need to be protected from audit assessments caused by inaccurate information/mapping from the seller.

4. Marketplace seller-marketplace facilitator/provider information requirements

In situations when the marketplace seller retains responsibility for tax compliance, should the marketplace seller receive adequate information from the marketplace facilitator on marketplace transactions to allow for compliance with other tax laws? Should clear guidelines exist as to the information each party must provide to the other in order for the obligated party to correctly collect and report tax?

Concerns/suggestions: _____

We suggest that the facilitator be able to post the information on the Seller Portal.

5. Collection responsibility determination

Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax, etc.), be able to contractually agree which party has the sales/use tax collection obligation?

> Marketplace facilitators and sellers should be able to contractually agree with respect to which party will bear the sales/use tax collection obligation, so long as the seller is registered to collect taxes in the state. The examples above dealing with shopping comparison platforms, franchisors and franchisees and

delivery services are all situations where it may be more appropriate for the seller to bear the responsibility than a marketplace facilitator, and so long as there is a contractual agreement between the parties, and the seller is registered to collect taxes and has a history of tax compliance in the state, the state should be protected, and the parties will know who is bearing the responsibility. This type of clause in marketplace statutes will help to assure that other fact patterns that may later arise that seem best handled by the seller can be addressed without requiring an amendment to the statute.

6. Marketplace seller economic nexus threshold calculation

Should the marketplace seller, in determining whether it has exceeded the state's economic nexus threshold, be able to exclude its facilitated sales (which the marketplace facilitator/provider is responsible for collecting tax on) and only count its direct remote sales?

Small brick and mortar sellers must collect tax on their first dollar of sales. To provide the most level playing field for these small businesses, the threshold needs to be as low as possible, which would argue for including facilitated sales in determining the threshold. For this reason, the laws need to be as simple as possible.

7. Remote Seller sales/use tax economic nexus threshold issues

Should the sales volume economic nexus threshold be limited only to taxable sales?

Should the "transactions" economic nexus threshold be eliminated?

The transactions economic nexus threshold should not be eliminated. Retailers that sell high priced items like jewelry, precious metals, collectibles, etc. may have very few transactions before they reach the dollar threshold for economic nexus, but they may still be a small business that would have trouble navigating their way through many state and local sales tax rules. This was clearly a concern of the Supreme Court in their decision in *Wayfair* and is an important factor to retain.

8. Certification requirement

Should states develop a certification process for marketplace facilitator/providers?

How does the marketplace seller know if the marketplace facilitator/provider has collected? Should the marketplace facilitator/provider be required to provide a certification or report to the marketplace seller?

See NACSP suggestions under "Providing Software to Remote Sellers."

Concerns/suggestions: _____

We agree with the need for facilitators to make information available to sellers that would be needed to support compliance and audit(see answer to 4, above); however we would disagree with the suggestion for a certification process.

10. Taxability determination

Should states publish clear guidance identifying their sales/use tax impositions and exemptions, so remote sellers and marketplaces can more easily determine the taxability of their products?

See NACSP suggestions under "Determination of Taxability."

Concerns/suggestions: _____

Yes, it is important that states publish clear guidance with respect to taxability. It is critical for both small and larger businesses that are confronted with new tax collection responsibilities that the rules be as simple and straightforward as possible.

11. Return simplification

Can the sales reporting on returns and recordkeeping requirements, as between the marketplace facilitator/provider and marketplace seller, be simplified and clarified? How does the marketplace seller properly report facilitated sales: taken as a deduction, claimed as an exemption, or not reported at all on return? Can the marketplace facilitator/provider return be simplified and consolidated?

See NACSP suggestions under "Return Filings" and "Remittances."

Concerns/suggestions: _____

For marketplace facilitators that also have direct sales, we recommend that the facilitated sales be reported on a separate return.

12. Foreign sellers

Should states publish clear guidance for foreign sellers with economic nexus needing to register to collect? Should states develop enforcement strategies concerning noncompliant foreign sellers?

Concerns/suggestions: _____

Yes. Again, the only way to assure that there is a level playing field with respect to collection of taxes on sales is to assure that tax collection is enforced on all sales to customers in states that impose sales and use taxes. This requires both clear guidance for foreign sellers, as well as enforcement strategies for noncompliant foreign sellers.

13. Local sales/use taxes

For "home rule" states that have locally administered local sales/use taxes, what is the best approach to address Due Process/Commerce Clause concerns: (a) use of a "blended" state and local rate that remote sellers can use (such as the Alabama Simplified Sellers Use Tax System); or (b) destination sourcing of both interstate and intrastate sales? For (a), how should "remote seller" entitled to use the blended rate be defined, and do in-state sellers have any discrimination claim? Should the economic nexus threshold apply at the local jurisdiction level?

See NACSP suggestions under "Tax Rates" and "Local Jurisdiction Boundary Tables."

Concerns/suggestions: _____

We believe that in-state sellers should be able to opt-in if a home rule state creates a "blended" state rate so that they, too, can take advantage of the simplified compliance.

APPENDIX G

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Marketplace Facilitator Laws: Looking Out for the Little Guys

Posted on Oct. 14, 2019

Robert D. Plattner is the former deputy commissioner for tax policy in the New York State Department of Taxation and Finance and works as a part-time senior adviser for the New York State Senate Finance Committee Chair Liz Krueger (D).

In this installment of The Plattner Perspective, the author argues in favor of provisions in marketplace facilitator legislation that can significantly reduce the compliance burden on small remote sellers.

Background

In January *Tax Notes State* published an article I had written at its request titled “MTC Issues White Paper on Drafting Marketplace Legislation.”[1] In large part it was descriptive, explaining why and how the Multistate Tax Commission’s work group tasked with drafting the white paper got started, describing the process used to get its work done, and summarizing in some detail the content of the white paper it produced, which was submitted to and approved by the MTC’s Uniformity Committee at its November 2018 meeting in Orlando.[2] In the final pages of the article, I engaged in some commentary, noting in one instance my disagreement with a consensus position of the states. The key takeaway from the article, however, was that the white paper should be “required reading” for those who would be shaping the future of remote vendor sales tax collection in the post-*Wayfair* era.

The white paper, completed in less than three months, offered a great deal of valuable guidance to the states across a broad range of issues. In some instances, when there was near unanimity on an issue, the white paper recommended one alternative over others as, in effect, a best practice. One best practice recommended by the white paper was that a marketplace facilitator should be solely responsible for collection on its platform.[3] To my mind, this was the single most important policy choice facing the states when they drafted their legislation, and the work group got it right. On this issue, there emerged one clearly preferable path forward. The alternatives considered and rejected would have resulted in unnecessary complexity and posed serious compliance risks.

On one critical issue, opinions were split evenly between two choices, and the white paper could only report the two options and give examples of each from statutes already enacted. The issue was the definition of marketplace facilitator. The division was between states favoring a narrow definition that required a marketplace to be directly or indirectly involved in processing purchasers’ payments to be considered a marketplace facilitator, and those favoring a broad definition under which involvement in payment processing was not an absolute requirement.[4] Adding to the uncertainty, there was no single broad definition of marketplace facilitator that won clear favor.[5]

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As predicted, the first half of 2019 was a whirlwind of legislative activity, as state after state enacted marketplace facilitator legislation in rapid succession.[6] The common thread was the shift in the burden of collection on third-party marketplace sales to marketplace facilitators. This fundamental shift has now been completed by most sales tax states, and there will be no turning back. But there was little uniformity among the states beyond this core issue, and a host of concerns have emerged with new ones continuing to surface.

In response, various stakeholders asked the MTC to reconvene the work group to address the most important of the concerns raised. The MTC accepted the assignment and the work group is now moving ahead, addressing a prioritized list of 13 issues constructed by MTC staff from comments received.[7]

The group will once again be working under significant time constraints. The Uniformity Committee has asked the group to present its new report to the committee at its November 2019 meeting, almost exactly one year after the first white paper was finalized and less than two months from now.

Reducing the Compliance Burden for Small Remote Sellers

Rather than report on the contents of the white paper after its completion as I did last time, my goal is to influence the content of the upcoming report on two issues. Regarding the first, tax liability protection for marketplace facilitators, my thinking runs contrary to a consensus of the states as reported in the white paper.[8] Regarding the second, setting the nexus threshold for multichannel sellers, most voting states (8 of 13) shared my view,[9] but there was not a strong consensus.

I believe the states should recognize and give substantial weight to the impact of their decisions on these two issues on small remote sellers, and I am concerned that the voices of these sellers may not be adequately heard in the reconvened work group. I know that I initially failed to recognize the significance of these issues, describing them as secondary in my January article.

I have now come around to the opinion that both issues offer the states significant opportunities to reduce the burden on small remote sellers with minimal revenue losses. Failing to seize these opportunities would constitute a serious error given the states' narrow victory in *Wayfair* and the concern expressed by the Supreme Court and Congress that states will unduly burden these small remote sellers with *Quill* overruled.

Tax Liability Protection for Marketplace Facilitators

In 2015, when New York Gov. Andrew Cuomo (D) first introduced "marketplace provider" legislation in his 2015-2016 executive budget,[10] the arguments made in support of the legislation stressed that there was nothing new about the legislation in terms of sales tax administration. What was new was the internet business model, enabled by technology, to which existing principles of sales tax administration were being applied. Requiring Amazon and other marketplaces to collect on third-party sales was not a leap made without looking, but rather the logical extension of existing law.[11]

From the very beginning of its sales tax, New York had not limited its definition of vendor to the transferor of title. Take, for example, the low-tech consignment shop. The seller brings items it wishes to sell to the consignment shop, establishes the prices, and turns the items over to the consignment

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shop owner for display. Under the terms of their agreement, the consignment shop owner would make sales on behalf of the seller and receive a commission on those sales. Since the consignment shop owner displayed the goods for sale and operated the cash register, the New York state tax department looked first to the consignment store owner, who was treated exactly like any other vendor, for the tax. The business model, not the title holder, dictated whom the state would look to as its collection agent.

Other fact patterns were explicitly addressed by regulation.[12] One involved a department store that leased its floor space to unaffiliated vendors operating concessions. For example, Macy's might lease prime floor space in its store to a company that sold cosmetics. If the lessee accepted Macy's credit cards for payment or otherwise operated as if it were part of Macy's, Macy's was treated as a vendor responsible for tax. The cosmetics company was also a vendor liable for the tax, but the state would look to Macy's first if a problem arose. The state imposed no special rule requiring the concession owner to supply sales tax information to Macy's and offered no special help to Macy's in securing tax information from the concession owner. Again, the business arrangement between the parties dictated the tax collection consequences, and a vendor who was not the transferor of title was treated like any other vendor.

Nonetheless, New York's 2015 proposed marketplace legislation included language providing an out to marketplace providers when they had been given incorrect tax information by sellers, making the sellers liable for the tax instead.[13] Many other states have included similar provisions in their statutory scheme.[14]

The inclination to offer such protection is understandable (I was so inclined in 2015) but misguided. There are persuasive arguments that small remote sellers should not be placed at risk for sales tax liability on marketplace sales even when they are guilty of providing erroneous or insufficient information.

But first, let's come at the issue from the opposite direction. Why this special "get out of jail free" provision for marketplace facilitators? Is it because they are unique in being held responsible for collection when they do not hold title to the goods purchased? Not in New York, which provided this preferential treatment nonetheless. It is certainly not because marketplace facilitators are not up to the task. The marketplace facilitators I know come in one size — extra large — and they are fully capable of arranging their relationships with their sellers to receive the information they require.

Nonetheless, the real misjudgment here is the failure to look at how this rule undermines other features in a statutory scheme designed to minimize the burden on small remote sellers. The states do not want the marketplace facilitator and small seller to be co-vendors, jointly and severally liable for the tax. They want instead a framework under which the remote seller gets certification from the marketplace facilitator that absolves the seller from any responsibility for sales tax collection on marketplace sales. In fact, if a remote seller sold only on marketplaces, a state might not even require the remote seller to register as a vendor. That is, the collection burden on small, third-party remote sellers on marketplace sales should approach and potentially reach zero. But zero goes out the window if, under circumstances in which the seller gives the marketplace facilitator erroneous information, the seller is reincarnated as a vendor liable for the tax.

I am reasonably confident that if the statute chooses not to address issues regarding the exchange of information between sellers and facilitators, the marketplace facilitators will address these issues in fixing the terms of their commission agreements with sellers. If, for example, a seller provides

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erroneous information once too often, it may lose its privilege to sell on the site. Also, the marketplace facilitator has the advantage of access to the payments from a purchaser to a seller before the seller does. The agreement between the parties might give the marketplace facilitator the right to redirect those payments to recover sales tax it paid as a result of a seller's failure to provide correct information.

A secondary but nonetheless significant argument is that this statutory protection for marketplace facilitators requires the revenue agency to do a second audit, with the target of that audit likely to have limited resources to pay an assessment. This strikes me as an inherently inefficient use of resources.

Given the respective interests and resources of the remote sellers, the states, and marketplace facilitators, I conclude that marketplace facilitators are the best equipped to help themselves and the least in need of special protection. The MTC work group should embrace this position.

Setting the Threshold on Multichannel Sellers

A second issue important to small remote sellers that I fear may not receive the attention it warrants is how to calculate the nexus threshold on multichannel sellers. Should it be with reference to both their direct sales and their marketplace sales, or their direct sales only? This policy choice represents another opportunity for the states to significantly reduce the sales tax collection burden on small remote sellers at a minimal cost in lost revenue.

First, I would point out that there is no reason to have a "number of transactions" test as either an alternative to or an addition to a sales volume test in setting the threshold. Using the number of transactions as an alternative test may bring in a few tax dollars from sellers with a high volume of sales transactions at very low prices, but it hardly seems worth the bother since both the sellers and the states must then keep track of the number of sellers' transactions on their own websites and on one or more marketplaces.

If the number of transactions is a second, additional threshold, a state could find itself losing out on sales it really ought to tax. For example, assume State A requires a minimum of $500,000[15] in sales and 100 transactions. Let's say I own an art gallery in Santa Fe and routinely ship works of art into State A with a value of approximately $100,000. I could sell close to $10 million in art without crossing the de minimis threshold. That's not good policy. Under the alternative, a volume threshold only, the gallery would be on the hook to collect State A tax if it made only five sales, each at a purchase price of $100,000. I am not troubled by that result.

Now let's assume we have a statute under consideration that is based solely on sales, but these sales include both marketplace sales and sales on the seller's own website. If the goal is to register as many small remote sellers as possible consistent with the *Wayfair* decision, this way of counting sales makes sense. But this way of counting results in significant burdens on both small remote sellers and revenue agencies. It would be smarter to focus on minimizing the filing burden on small remote sellers and the administrative burden on the revenue agencies (without forgoing substantial revenue). The right answer, then, is to count only sales on the seller's own website in calculating the threshold.

Let's say State X has a minimum sales volume threshold of $300,000. Both marketplace sales and

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sales on the seller's website count toward the $300,000. Let's say the sales break 90 percent marketplace(s)/10 percent seller's own site on total sales of $500,000. The state will collect every penny of tax on the $450,000 of sales the seller makes through the marketplace — the only nexus threshold that applies on these sales is the marketplace facilitators', which will always be surpassed by any established marketplace facilitator. What's left to deal with is the $50,000 that the seller sells on its own site. Because of marketplace sales and its own sales count, the seller is over the threshold and must collect tax on the $50,000. At, say, 8 percent, that's $4,000; not pocket change but not worth chasing very hard either. The revenue agency will also need to tie together the retailer's sales on one or more marketplaces and on its home site to determine the small seller's total sales. If the vendor is law abiding, it will collect and remit on the $50,000. To do so, it will need to know the law and file as the law applies to its sales. Now take this scenario and multiply it by the 40 states in which the remote seller makes substantial marketplace sales and modest sales on its own website. The seller must now file in 40 states on sales levels only half the amount of the $100,000 threshold that passed constitutional muster in *Wayfair*. It will be burdensome for the seller to collect tax in some 40 states, and the temptation not to file may be substantial if the tax amount is small.

Alternatively, some small sellers might give up selling on their own websites if the volume of sales is too low to justify the headaches. In the same vein, revenue agencies are not keen to devote significant resources without a commensurate return on investment, and in this instance the audit staff will first need to crosscheck marketplace sales with the seller's website sales to determine if the threshold has been met.

In contrast, if each of those 40 states counted only the sales made on a remote seller's own website in setting its sales threshold, a seller's filing responsibility in the example would be reduced from 40 states to none. That would be a very big win for the little guys,[16] coupled with significant administrative savings for the states.

Conclusion

I encourage the states not to lose sight of the big win they achieved in *Wayfair* by the slimmest of margins. The discomfort of the Court in exposing small remote businesses to the potential whim of 45 sales tax states was palpable, and for good reason. To preserve the victory in *Wayfair*, when the lost revenue is modest and the simplification for small sellers is significant, the states should make the cause of remote sellers, aka the little guys, their own cause.

FOOTNOTES

[1] Robert Plattner, "MTC Issues White Paper on Drafting Marketplace Legislation," *State Tax Notes*, Jan. 14, 2019, p. 155.

[2] MTC Uniformity Committee *Wayfair* Implementation and Marketplace Facilitator Work Group, final white paper (Nov. 20, 2018).

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[3] *Id.* at 10. The white paper made the recommendation of sole responsibility for marketplace facilitators in the context of whether typical third-party sellers should be allowed to collect or not. The work group did not consider whether some very large, sophisticated sellers should be allowed to collect under specific circumstances. That issue has now been raised in work group discussions.

[4] *Supra* note 2, at 7.

[5] Given this history it's no surprise that the definition of marketplace facilitator is the first issue on the prioritized list of the reconvened work group.

[6] A minority of states use the term "marketplace provider" rather than "marketplace facilitator," including New York, South Dakota, and Texas.

[7] Prioritized issues list: 1. Definition of marketplace facilitator/provider2. Who is the retailer?3. Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection4. Marketplace seller-marketplace facilitator/provider information requirements5. Collection responsibility determination6. Marketplace seller economic nexus threshold calculation7. Remote Seller sales/use tax economic nexus threshold issues8. Certification requirement9. Information sharing10. Taxability determination11. Return simplification12. Foreign sellers13. Local sales/use taxesMemo from Richard Cram to Tommy Hoyt, Chair, MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group, August 30, 2019.

Memo from Richard Cram to Tommy Hoyt, chair of the MTC Uniformity Committee *Wayfair* Implementation and Marketplace Facilitator Work Group (Aug. 30, 2019).

[8] *Supra* note 2, at 19.

[9] *Supra* note 2, at 16.

[10] N.Y. State Division of the Budget, 2015-16 N.Y. State Executive Budget, Article VII Revenue Bill, Part X.

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[11] 20 NYCRR Section 526.10(a).

[12] 20 NYCRR 526.10(f).

[13] *Supra* note 10.

[14] I was a consultant for Amazon.com during the period the white paper was written. Amazon, the biggest marketplace facilitator of them all, was unenthusiastic regarding liability protection provisions that threw the liability back on the small seller and did not advocate for such provisions during the work group's deliberations.

[15] I do not believe *Wayfair* requires a state with a lot more people than South Dakota to establish a de minimis threshold greater than the $100,000 in sales established in South Dakota law. Presumably the sales threshold is the "economic presence" equivalent of the physical minimum contacts threshold. For obvious good reasons, the Supreme Court has never contemplated a "sliding scale" for minimum contacts that requires greater contacts for states with larger populations or more square miles. These reasons would apply to a sliding scale of sales as well.

More populated states may of course choose to set a higher threshold for practical reasons involving the best use of limited tax enforcement resources.

[16] When I was little, my grandfather called me "the little guy" because I had an older brother who was, no surprise here, taller than me when we were growing up. He said one day I would be bigger than my brother, and I got close but never passed him. But the term "little guy," was generally more about station and power, or the lack thereof, than height, and it applied not just to guys. Whole families could collectively be little guys who played their part in the community and played by the rules. I believe the term is out of fashion, but it conveyed the sympathetic image I had in mind.

END FOOTNOTES

APPENDIX H

National Association of Certified Service Providers
Input for MTC Wayfair Implementation Work Group
July 8, 2019

Richard,

Thank you for the opportunity to provide feedback to the Uniformity Committee. We believe Certified Service Providers (CSPs) are an integral part of any modern sales tax system, and ever more so post Wayfair. Whether a state is considering adoption of marketplace facilitator legislation or an amendment to their existing marketplace facilitator legislation, it is a good opportunity to consider the benefits of complimentary CSP certification measures. We think it is also important for non-SST states to consider adopting uniformity or simplification measures in order to address the direction of the Court concerning potential remaining burdens on remote commerce. The Uniformity Committee can play an important role in facilitating a review of a number of tax administration/compliance issues and to hopefully develop some best practices that states may wish to adopt.

Some things to consider as you review the role for CSPs in Wayfair implementation include:

1. We are far from and will likely never see the day when sellers only sell via a marketplace. In a post-Wayfair world all those sellers need states to provide accurate and reliable sales tax compliance solutions.
2. CSPs provide software solutions that work in all sales tax states. Certification of CSPs eliminates the compliance burden for sellers and assures accurate collections for the states.
3. Those who oppose the Wayfair decision are actively searching for legal weaknesses they can exploit to slow the adoption of Wayfair style economic nexus. Those groups don't see the Supreme Court's comment about SST as dicta, but instead as an opening to bring the next court challenge.
4. The Streamline states believe they are in a good place to withstand those challenges, and this year four non-SST states recently moved to provide CSP services as part of their sales tax collection structure (Pennsylvania, New Mexico, Connecticut, Illinois).
5. The Pennsylvania model, adopted by rule, began July 1 with four authorized CSPs calculating and remitting sales tax from remote sellers for the state. They structured their system so that CSPs effectively become the administrative arm for the state, allowing them to implement quickly and realize revenues sooner without large systems and staff investments.
6. The members of the NACSPs believe state revenue can be enhanced with appropriate CSP provisions in place. SST states and Pennsylvania accomplish this by providing CSP services for free or at a reduced cost for taxpayers. Many taxpayers will choose to remit to all states, regardless of thresholds, to eliminate the challenge of managing where they must collect.

7. Imposing a sales tax collection obligation on marketplace facilitators undoubtedly simplifies sales tax collection for many small sellers and states, but it doesn't guarantee sales tax collection accuracy. CSPs provide the accuracy solution for marketplaces and for sellers who do not primarily sell on marketplaces or sell through several platforms.
8. Marketplaces too can benefit from CSP certification as many are not prepared to accurately and timely collect sales tax for all states. Some would benefit from being able to use CSPs to make the collections and remittances in their stead.
9. CSPs have successfully experienced the certification processes of 25 states and know how to deal with a variety of implementation issues. These include certification of taxability rules, liability relief provisions, local taxing jurisdiction boundary information, state provided taxability information, registration of remote sellers, simplified administrative requirements for remote sellers, returns and remittances, certification of tax compliance systems, and payment for services.

The National Association of Certified Service Providers (NACSP) has developed model draft legislation that states can use as a starting point in evaluation what a legislative solution could look like for them.

We are also providing a list of administrative issues that should be considered as possible topics of review for the Committee. We understand that states approach these issues in different ways and it will likely not be possible to develop proposals that all states can or will adopt. In some instances, it may be best to formulate multiple proposals for states to consider.

Again, thank you for the opportunity to provide input and we look forward to working with the Committee to improve sales tax administration.

Submitted by Russ Brubaker and Scott Peterson on behalf of NACSP

Implementation Issues Related to Remote Collection Authority

Overall Information on Implementation

All States

- Participate with other states on creating a single website that outlines how each state is implementing remote collection authority.

Thresholds for Collection Obligation for Small Retailers

All States

- Provide clear guidance to retailers on when their obligation begins.
- Adopt uniform policies and definitions for application of thresholds.
    - Include or exclude exempt sales?
    - When does the collection obligation begin if the threshold is met during a year?
    - Use calendar year or fiscal year or trailing 12 months?

Registration

Non SST States

- A simpler registration form that excludes unnecessary information.
- Waiving registration fees.
- Separately identifying remote sellers in the registration process so that they can be subject to alternative procedures regarding fees, notices, audits and other administrative matters.
- Participate in the Streamlined Sales Tax Governing Board's registration system or a similar system that allows remote sellers to register in multiple states at the same time.

Determination of Taxability

Non SST States

- Provide taxability tables that specify if commonly sold items are exempt from taxation. The Streamlined Governing Board has developed a template for states to fill out that does not require conformity to specific product definitions.
- Review the Streamlined Taxability Matrix and provide as much information as possible on the tax treatment of the defined terms. States may also consider adjusting their product exemptions to conform to the defined terms.
- Provide explanations of how entity and use exemptions apply.

- Review the taxability rules of third party providers for accuracy. Consider certifying these rules and providing liability relief to retailers and providers that use the certified determinations.

Tax Rates

Non SST States

- Limit the dates on which state or local rates can change. Streamlined limits local rate changes to the first day of each calendar quarter.
- Publish tables of the all state and local rates within the state. Consider providing liability relief to retailers and providers that use these rates.
- Provide tables that assign the appropriate tax rate to each taxing jurisdiction. Consider using the format developed by the FTA Tigers group and adopted by Streamlined.

Local Jurisdiction Boundary Tables

Non SST States

- Provide tables that assign individual addresses to the correct taxing jurisdictions. Consider using the format developed by the FTA Tigers group and adopted by Streamlined. The National Association of Certified Service Providers will provide initial tables free of charge to states wishing to provide this information. States may also consider providing liability relief for retailers and providers using this information.

Return Filings

Non SST States

- Adopt simpler sales tax returns for remote sellers that exclude unnecessary fields and do not address taxes that aren't applicable to remote sellers.
- Adopt filing protocols developed by the FTA TIGERS group and adopted by Streamlined.
- Accept the Simplified Electronic Return used in the Streamlined States.

Remittances

Non SST States

- Adopt payment protocols developed by the FTA TIGERS group and adopted by Streamlined.
- Clearly outline payment requirements and deadlines and make them available in a online database that covers all sales tax states.
- Work with CSPs on payment options and test and implement bulk payments.

Maintaining Records

Non SST States

- Provide clear guidelines outlining the data that remote retailers should maintain and how long that data should be retained.

Audit Issues

Non SST States

- Develop audit standards and procedures that recognize the unique situation of remote sellers.
- When auditing a seller that utilizes a CSP, direct audit inquiries to the CSP.
- Consider participating with the Streamlined States when conducting audits of CSPs.

Assessments and Notices

All States

- Develop procedures to prevent sending erroneous assessment notices to remote sellers.
- Develop expedited procedures for resolving assessments of tax, penalties and interest for remote sellers. Coordinate this process with third parties that represent remote sellers.
- Limit the notices that are sent to remote sellers.
- Provide electronic notices.
- Coordinate with third party providers that represent remote sellers on where notices are to be sent.
- Accept the Uniform Power of Attorney form that has been adopted by Streamlined.

Providing Software to Remote Retailers

Non SST States

- Consider addressing most of the issues above by certifying comprehensive software solutions and making them available to remote sellers.

Security Protocols

All States

- Review security and confidentiality measures to ensure protection of seller and consumer information.

APPENDIX I

To: Tommy Hoyt, Chair, MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group
From: Charles McLure (Hoover Institution, Stanford University)
Date: October 10, 2019
Re: **Thoughts on three questions in defining nexus standards**

It seems to me that the choice of nexus standards for marketplace sellers should depend on the putative purpose of nexus standards. Nexus standards could serve two different purposes, both of which the Supreme Court mentioned in *Wayfair*:

a) to indicate purposeful availment of the state's market, and

b) to avoid the need to incur compliance and administrative costs in situations where the revenue at stake is not sufficient to justify these costs. Below I refer to this as the need to avoid excessive compliance and administrative costs.

These two criteria do not necessarily suggest the same thresholds, and the alternative thresholds many states have adopted conflict. I believe that, where conflict occurs, the need to avoid excessive compliance and administrative costs should dominate.

Item 6: Should economic nexus for marketplace sellers depend on both direct and facilitated sales, or only on direct sales?

a) The purposeful availment doctrine suggests that the threshold for marketplace sellers should include marketplace sales.

b) The need to avoid excessive compliance and administrative costs suggests that the threshold for marketplace sellers should depend only on direct sales. (If facilitated sales are included in determining whether a marketplace seller has nexus, the amount of direct sales the seller could make without being deemed to have nexus would be reduced to the statutory threshold minus facilitated sales. This could be as low as zero; that is, the seller could be required to collect tax on the first dollar of direct sales. That clearly would conflict with the objective of avoiding excessive costs of compliance and administration.)

Item 7. Should the remote sellers' sales volume economic nexus threshold be limited only to retail sales, or even further limited to taxable sales?

a) Any of these measures in excess of a given amount could show purposeful availment.

b) Taxable sales might seem to be most consistent with the objective of avoiding excessive costs of compliance and administration. After all, why count sales that may not produce tax revenue in the determination of whether a vendor has nexus? But basing nexus on taxable sales involves circular reasoning. (A vendor must know the tax law of the market state in question, in order to know whether its sales are taxable and whether these sales exceed the threshold.) This leads me to

conclude that nexus should not be based on taxable sales. Query: can a way be found to avoid counting sales that are not taxable, without defining it in terms of taxable sales?

Should the "transactions" economic nexus threshold be eliminated?

a) Either sales or transactions in excess of given figures can show purposeful availment.

b) Sales is the much better indicator of whether costs of compliance and administration are excessive. The average value of online transactions is probably a bit less than $100. A transactions-based threshold of 200 thus implies that sales of about $20,000 (or less) could create nexus. But this is only 20% of the ubiquitous $100,000 threshold based on sales. It thus makes no sense to provide alternative thresholds of $100,000 in sales or 200 transactions, which are, on average mutually inconsistent. (On the other hand, requiring that both types of thresholds be satisfied, as New York does in both its basic economic nexus legislation and its marketplace legislation and Connecticut does for the former is not nonsensical.

APPENDIX J

BOOKING HOLDINGS

Tommy Hoyt
Chair, Multistate Tax Commission Uniformity Committee
Wayfair Implementation and Marketplace Facilitator Work Group
Texas Comptroller of Public Accounts
111 East 17th St.
Austin, TX 78774

Dear Chairman Hoyt:

Booking Holdings, Inc. and its subsidiaries (the "Booking Companies") thank the Multistate Tax Commission for considering our comments as its Wayfair Implementation & Marketplace Facilitator Work Group (the "Work Group") finalizes its 2019 White Paper. We wish to comment on Issue 1: Definition of Marketplace Facilitator/Provider.

Booking Holdings is a holding company with no business operations and is the parent company of several online travel companies ("OTCs") that provide online travel and related services, including the companies that operate the Booking.com, BookingGO (rentalcars.com and rideways.com), Agoda, Priceline, and Rocketmiles online travel platforms. Booking Holdings also owns Kayak Software Corporation ("KAYAK"), a non-OTC fare aggregator that operates the KAYAK fare comparison platform. Persons searching for travel services ("Consumers") make a reservation request with a travel service provider (e.g. a hotel, motel, short-term rental or other lodging operator, a rental car company, or an airline) (collectively, an "Operator") via one of the OTC's online platforms, which refers that reservation request to the Operator and relays any confirmation back to the Consumer.

The OTCs conduct two types of transactions. In "Agency Model" transactions, the Operator directly charges the Consumer the total charge for the travel service. The Operator then pays a commission to the OTC. The Operator collects and remits any state and local sales or use tax ("Sales Tax") due on the charges, along with any other hotel or rental car-specific taxes, and remits those taxes directly to the taxing authority. In "Merchant Model" transactions, the OTC charges the Consumer the total charge for the travel service (rather than the Operator). The total charge is composed of the Operator's net rate (which is discounted from its retail rate) ("Net Rate") plus the OTC's margin or markup ("Margin"). The total charge also includes a charge for taxes and fees, which is composed of the OTC's service fee plus any taxes owed on the transaction. In most states, the OTC passes the Sales Tax (and any other applicable tax) collected from the Consumer on the Net Rate on to the Operator, who is then responsible for remitting that tax to the taxing authority, and if required under the state or local law, the OTC pays any Sales Tax (or other applicable tax) due on its margin or service fees directly to the taxing authority.[1] In a limited number of states, the law requires the OTC to remit Sales Tax on the full charge directly to the taxing authority instead of sending the tax on the Net Rate back to the Operator to remit.[2] In all instances, the applicable Sales Tax and other state and local tax laws, including those that extend to OTCs, apply to the Operators, as the Operators are physically located in and operating accommodation or rental car businesses within the state. This existing landscape is in place following years of litigation regarding the tax collection and remittance responsibilities of OTCs.

[1] This type of collection and remittance is known as dual remittance.
[2] This type of collection and remittance is known as single remittance.

Marketplace facilitator legislation has the ability to disrupt current tax collection and remittance models for OTCs, accommodations and rental cars in ways that do not appear to have been foreseen by state legislatures, and the application of marketplace facilitator legislation to OTCs is not necessary to fulfill the legislative purposes of the marketplace facilitator statutes. As noted, the specific tax obligations of OTCs have been considered by many states through litigation and OTC-specific legislation; thus, there is already an established system of compliance in place in the OTC context. Moreover, as explained below, Operators are already paying (or required to pay) any required Sales Tax on the transactions they complete. Therefore, there is no reason to now upset those settled issues and pull OTCs into the broad scope of marketplace facilitator legislation. Marketplace facilitator legislation is intended to increase tax compliance with respect to sales by remote sellers. OTCs, by their very nature, are facilitating sales *only* for brick and mortar in-state sellers. There is thus no legislative purpose accomplished, and prior legislative purposes are in fact frustrated, by shifting tax collection and remittance obligations from solely in-state registered sellers to an OTC (who, in most instances, is out-of-state or even outside the U.S.).

We believe there are two critical considerations in the wake of marketplace facilitator legislation for OTCs such as the Booking Companies, who are providing online travel and reservation services to in-state, brick and mortar Operators:

- First, OTCs should be excluded from the definition of a marketplace facilitator in the first instance, or at a minimum, state tax agencies should be authorized to waive application of the marketplace facilitator requirements with respect to OTCs. The purpose behind marketplace facilitator legislation is simply not fulfilled by requiring remote OTCs to collect and remit on behalf of in-state brick and mortar hotels and rental car companies.

- Second, states' definitions of a marketplace facilitator must be clarified to expressly exclude all persons (including OTCs or other platforms, such as fare aggregators) that do not directly or indirectly process or collect payment for the transaction. While we believe Agency Model transactions and fare aggregators are clearly excluded from (and intended to be excluded from) the scope of most states' marketplace facilitator statutes (because platforms and fare aggregators do not facilitate "sales"), the definition of "marketplace facilitator" in some states is potentially over broad leaving room for confusion.

Issue 1: Definition of Marketplace Facilitator/Provider

One of the issues being considered by the Work Group is whether certain industries, including OTCs, should be excluded from the application of the states' marketplace facilitator laws. The Booking Companies strongly support this precise exclusion.

We understand that one of the main purposes behind the enactment of the marketplace facilitator laws after *Wayfair* is to increase tax collections on sales made by out-of-state sellers to in-state residents. When those sales are facilitated by an online marketplace, states believe that it is easier and more efficient to require the marketplace to collect and remit the tax, rather than trying to enforce its tax collection and/or remittance requirements on in-state purchasers or out-of-state sellers. Thus, in situations where remote sellers are making sales through a marketplace, the responsibility for collecting the sales or use tax associated with that online sale could be shifted from the out-of-state seller, who may have less ability or incentive to register with the state and could oftentimes be difficult for the taxing authority to locate and audit, to the marketplace.

However, OTCs, due to the very nature of their business, are *only* facilitating sales for in-state sellers—e.g., the brick and mortar accommodations and rental car companies providing rooms and rental cars within the state. Thus, the concerns underlying marketplace facilitator legislation simply are not present in the OTC context. States can easily audit and already require tax collection and remittance from in-state accommodations and rental car Operators. Shifting the collection and remittance responsibilities from the Operator to the OTC actually *increases* collection complexity for the states. For example, accommodation Operators keep track of additional purchases

made by guests on site at the accommodation or guests adding on a day or two to their reservations after the initial transaction is facilitated by an OTC. Any extension of the guest's stay purchased at the hotel is treated as a separate transaction between the guest and the hotel beyond the original reservation facilitated by the OTC. Likewise, rental car Operators keep track of items such as extra mileage fees, fueling charges, and other add-ons purchased by the Consumer. The OTC has no knowledge or involvement in such post-reservation transactions, and thus any audit of the OTC by the state taxing authority would not resolve questions about these post-reservation transactions.

Instead, because Operators are both located within the state and are the only ones who can provide complete information about the taxable transaction, it is less burdensome for the states to keep the Sales Tax obligations with the Operator. Furthermore, accommodation and rental car operators are often subject to myriad complex taxes outside of the state-level sales tax on the same transactions, such as state and local hotel occupancy taxes, tourism taxes, and/or airport pickup surcharges, among others. Because marketplace facilitator laws are often applicable to the state-level sales tax only, categorizing OTCs as marketplace facilitators may result in the OTC (who may be out-of-state or outside the U.S.) collecting and remitting the state-level sales tax, while the Operator remains liable for collecting and remitting other taxes on the same transaction, thereby increasing complexities for both the taxpayers and the taxing authority.

Certain states have already effectively excluded OTCs from their marketplace facilitator laws. For example, Washington, which adopted marketplace facilitator legislation in 2018, amended its marketplace facilitator statute in July 2019 to expressly exclude from the definition of a marketplace facilitator any "person with respect to the provision of travel agency services or the operation of a marketplace or that portion of a marketplace that enables consumers to purchase a transient lodging accommodation in a hotel or other commercial transient lodging facility."[3] "Travel agency services" is defined as "arranging or booking, for a commission, fee or other consideration, . . . rental car or other travel reservations or accommodations."[4] The Booking Companies support a proposal that would follow the Washington model and expressly exclude OTCs from the scope of marketplace facilitator laws, both with respect to accommodations and rental car transactions. An alternative, though less efficient, would be statutory language granting the state tax agency authority to waive application of the law to OTCs facilitating in-state accommodations or rental car sales.

The Booking Companies also support a definition of "marketplace facilitator" that expressly clarifies that a facilitator must collect or process the payment for the Operator before it can be subject to tax collection and remittance responsibilities with respect to the transaction. While we believe that Agency Model transactions (and fare aggregators) should not be included within the scope of most states' marketplace facilitator laws, because neither an OTC conducting Agency Model transactions nor a fare aggregator "facilitate the sale" (i.e., facilitate the exchange of consideration for a good or service). Nevertheless, this point is not entirely clear in some states. Because fare aggregators and OTCs conducting Agency Model transactions do not ever receive payment from the Consumer, they cannot possibly collect and remit the associated Sales Tax—it is impossible to "collect" Sales Tax from a Consumer on a payment that is never received. Thus, at the very least, the Booking Companies request that the Work Group support a clarification to the definition of marketplace facilitator that expressly requires a person to directly or indirectly process or collect payment before it can be considered a marketplace facilitator.

Conclusion

The Booking Companies appreciate the opportunity to work with the states to consider these issues before the laws are implemented rather than waiting for protracted audits due to lack of clarity. We are happy to answer any questions the MTC or its member states may have. Thank you again for your attention to these important policy questions.

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[3] *See* Wash. Rev. Code §82.08.010(15), as added by 2019 Wash. S.B. 5581, effective July 1, 2019.
[4] Wash. Rev. Code § 82.08.010(15)(b).

Sincerely,

Jack Berkowitz
VP, Tax
Booking Holdings Inc.

cc: Richard Cram, Director, MTC National Nexus Program

APPENDIX K

TRAVEL TECH
The Travel Technology Association

November 1, 2019

Richard Cram
Director, National Nexus Program
Multistate Tax Commission
444 North Capitol Street, N.W., Suite 425
Washington, DC 20001

Dear Mr. Cram:

On behalf of our members, the Travel Technology Association (Travel Tech) writes to express support for the exclusion of marketplace facilitators—including short-term rental platforms and online travel agents—from tax liability with respect to marketplace sellers, in this case, homeowners, property managers, hotels and car rental companies, that are registered under applicable law and providing accommodations under their own brand or under their management or control.

We write today to suggest several minor amendments to Section 2(A)(4) of the National Conference of State Legislatures' Model Legislation in order to effectuate this goal, ensuring that states can strike a balance between generating tax revenue to support local communities and enabling businesses and professional property managers to comply with their tax obligations efficiently and without undue hardship.

Our amendments, detailed below, are designed to clarify that the exclusion applies to providers of accommodations who may not have an official brand and to allow the exclusion to apply based on representations of whether a marketplace seller is a registered seller.

Our suggested amendments are as follows:

> A person is not a marketplace facilitator with respect to the sale or charges for rooms, lodgings, ~~or~~ accommodations, vehicle rentals, or destination experiences described in (cite code section) if the rooms, lodgings, ~~or~~ accommodations, vehicle rentals, or destination experiences are provided by a hotel, motel, inn, or other place of accommodation or business that is or that represents to be a [registered seller] under (cite code section). ~~and the [registered seller] provides the rooms, lodgings or accommodations for occupancy under a brand belonging to such person.]~~

For states that have already enacted marketplace facilitator laws, MTC should recommend amendment of those laws to include this language. Alternatively, in cases where states do not adopt Section 2(A)(4), we urge MTC to recommend that existing and future marketplace

facilitator laws allow marketplace facilitators and marketplace sellers in general to allocate tax collection responsibility and liability in accordance with their business objectives. This is necessary to avoid disruption of established tax compliance models.

Travel Tech appreciates MTC's work in considering model legislation and stands ready to assist the *Wayfair* Implementation and Marketplace Facilitator Work Group in the further development of this document as needed.

Sincerely,

Stephen Shur
President

The Travel Technology Association is the trade association representing the leading innovators in travel technology, including global distribution systems, online travel agencies, metasearch companies, and short-term rental platforms. We promote transparency and competition in the marketplace to encourage innovation and preserve consumer choice.

APPENDIX L

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November 5, 2019

Richard Cram
Director, National Nexus Program
Multistate Tax Commission
444 North Capitol Street, N.W., Suite 425
Washington, DC 20001

Dear Mr. Cram:

On behalf of Airbnb, Inc., thank you for accepting comments for the Multistate Tax Commission's (MTC) 2019 draft white paper on *Wayfair* implementation and marketplace facilitators. We appreciate both your thoughtful work on this topic and the transparency of your drafting process. We are writing today to highlight several issues that should be addressed in order to maximize revenue for states, streamline compliance for businesses, and preserve choice and transparency for consumers.

Definition of Marketplace Facilitator/Provider

Minor Modifications to Section 2.A.4.

We agree with the changes to Section *2.A.4.* of the National Conference of State Legislatures' (NCSL) Model Legislation recommended by the Travel Technology Association (Travel Tech) in their letter dated November 1, 2019:

> A person is not a marketplace facilitator with respect to the sale or charges for rooms, lodgings, ~~or~~ accommodations, vehicle rentals, or destination experiences described in (cite code section) if the rooms, lodgings, ~~or~~ accommodations, vehicle rentals, or destination experiences are provided by a hotel, motel, inn, or other place of accommodation or business that is or that represents to be a [registered seller] under (cite code section). ~~and the [registered seller] provides the rooms, lodgings or accommodations for occupancy under a brand belonging to such person.]~~

These changes provide necessary certainty in the business dealings between platforms and sellers and avoid placing the burden on platforms to independently verify the registration status of sellers. For states that have already enacted marketplace facilitator laws, MTC should recommend amendment of those laws to include the amended Section *2.A.4*.

Promoting Fair Competition, Preserving the Tax Base, and Protecting Consumers

In addition, while we understand that the "broad" definition of marketplace

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facilitator may pose practical challenges for platforms that do not collect or process payments, we believe that, in order to serve the interests of fair competition and preservation of the tax base, consideration should be given to legislation requiring that all platforms, even those not captured as a "marketplace facilitator", display the applicable sales and use tax as part of the total price of the goods or services, or take other steps to ensure that consumers are aware of the applicable taxes due on a transaction.

Flexibility to Determine Compliance Obligations and Liability Between Marketplace Facilitators and Marketplace Sellers

Airbnb agrees with the recommendation that marketplace facilitators and marketplace sellers be permitted to determine whether the facilitator or the seller will be liable and responsible for tax collection, remittance, and reporting and enter into agreements accordingly. Businesses are in the best position to understand their compliance capabilities and should be permitted to allocate their responsibility in accordance with their respective business objectives. Where marketplace facilitators and marketplace sellers have reallocated liability and/or compliance obligations among themselves, states should have the authority to waive the statutory collection and reporting requirements for marketplace facilitators, in order to avoid disruption of established tax compliance models.

Central Administration of Local Taxes

To the extent a state requires a marketplace facilitator to collect tax, model legislation should likewise permit the marketplace facilitator to collect any applicable local tax and remit to the state taxing authority. In addition, there should be an attempt to make such taxes uniform among the local jurisdictions. The non-uniformity of local taxes creates an extreme compliance burden for marketplace facilitators, particularly in the accommodations space.

Electronic Certification

In the interest of efficiency and security, if the model legislation requires that a marketplace facilitator certify to the marketplace seller that it has commenced collection of tax on facilitated sales, the marketplace facilitator should be permitted to make such certification electronically.

Conclusion

Airbnb believes that these changes will serve the interests of governments, businesses, and consumers alike. Again, we thank you for this opportunity to submit comments on your draft white paper, and we look forward to working with you to promote a fair and simple tax system for online sales.

Sincerely,

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airbnb

DocuSigned by:
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Erich Tschopp
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