To: Marketplace Facilitator Work Group  
From: Richard Cram, Multistate Tax Commission Staff  
Date: October 17, 2018  

Survey Request—Comments Received  

**Issue #3:** Should the person registering, collecting, remitting tax and filing returns be the person that the state should audit and require compliance with the state’s record keeping requirements?  

*Alabama DOR response:* Alabama’s statute requires collection and remittance by marketplace facilitators for all sales made by or on behalf of third party sellers through the marketplace and for a single audit of these sales at the marketplace facilitator level. This is ADOR’s preferred method of audit to streamline the audit process and protect small marketplace sellers from the potential administrative burdens associated with audits by multiple states.  

*Anonymous comment:* Yes  

**Issue #4:** If a state establishes an economic nexus threshold for requiring collection of sales/use tax, does it clearly indicate when that threshold is met, triggering a registration obligation with respect to a marketplace seller or marketplace facilitator? Should states consider a sales volume economic nexus threshold, without an alternative separate number of transactions threshold, or include both sales volume and separate number of transactions in the threshold?  

*Anonymous comment:* economic nexus threshold only  

During the Work Group call yesterday concerning the above Issues #3 and 4 from the prioritized issues list, the discussion focused on the alternatives listed below. Please indicate your preference by marking “X” next to one of the alternatives listed below for each of the three questions. Also, please feel free to add any comments. Email your response (one response per state, other work group participants are welcome to submit responses as well) to rcram@mtc.gov by COB of Tuesday, October 16, 2018. The results of this survey will be summarized and distributed to the Work Group prior to the next Work Group telephonic meeting, to be held on October 17, 2018 at 2:30 pm EDT (call-in number 1-719-234-0214, passcode# 102826).
1. When the state requires the marketplace facilitator to register, collect and remit sales/use tax on facilitated sales for a marketplace seller, who should be responsible for the correct “mapping” of the taxability of the marketplace seller’s products to be sold?

A. ____ the marketplace seller

B. ____ the marketplace facilitator

PA Comment: The facilitator administers taxability but is not held responsible if the seller provides incorrect information on the item.

C. ____ it should depend on the following: [please insert facts]

Alabama DOR response: This is an issue that should be resolved in the marketplace via agreements between facilitators and third-party sellers. This said, as indicated in the response above regarding issue number three, under Alabama law ADOR will look to the marketplace to determine audit/compliance issues.

Georgia comment: Placing “mapping” responsibility on the seller while the marketplace facilitator is responsible for collecting, remitting, and audits would be an administrative nightmare; the burden is lessened in some statutes by providing limited liability relief if the seller gives the facilitator erroneous information about the product.

Idaho comment: It should depend on the following: Idaho would prefer that the entity with the best information necessary to “map” as seller’s products be the one to complete this task. Idaho does not know whether the facilitator or the seller can be in the best position to accomplish this task and would expect the situation may vary based on the sophistication of the seller and the capabilities of the facilitator.

Kentucky comment: The marketplace seller should provide sufficient information about the product for the marketplace facilitator to correctly map the taxability of the product. If sufficient information is not provided by the marketplace seller, the marketplace facilitator should assume the product is subject to tax. If the marketplace facilitator treats a product as exempt based upon the seller’s erroneous classification, then the marketplace seller is responsible. Mapping must ultimately be the seller’s responsibility.
Louisiana comment: We believe a facts and circumstances test should be developed and used to determine whether the seller or facilitator should be responsible for mapping of the taxability of the products.

Minnesota note: Minnesota’s marketplace law requires the marketplace provider to collect sales and use taxes and remit them to the commissioner for all facilitated sales for a retailer unless certain exceptions apply. Minn. Stat. § 297A.66, subd. 4b(a). While this naturally places the responsibility for “mapping” on the marketplace provider, Minnesota law provides relief from liability if the marketplace provider demonstrates that the error was due to incorrect or insufficient information given to the marketplace provider by the marketplace seller. Minn. Stat. § 297A.66, subd. 4b(c). Further, Minnesota law specifically provides that nothing in the Minnesota marketplace law shall be construed to interfere with the ability of a marketplace provider and a retailer to enter into an agreement regarding fulfillment of the requirements of Minnesota’s sales and use tax laws. Minn. Stat. § 297A.66, subd. 4b(b).

Mazerov/CBPP Comment: But the marketplace facilitator should be held harmless against uncollected tax, penalties, and interest if the facilitator can show that the marketplace seller provided inaccurate information about the nature of the product being sold. The facilitator should also be fully responsible for meeting exemption certificate collection and maintenance requirements on sales it facilitates.

D Yetter comment: The seller knows what they are selling and should be responsible for the mapping. However, the facilitator must provide appropriate categories including definitions so the seller can do this. And the facilitator must provide ability for seller to override if they disagree or have state provide advice specific to their business about the taxability.

2. If the state has adopted a remote seller economic nexus threshold for imposing a sales/use tax collection duty (such as South Dakota’s $100,000 gross sales volume or 200 transactions/yr. threshold) and has also adopted legislation requiring marketplace facilitators to register, collect and remit sales/use tax on sales they are facilitating, how should that threshold be applied to a marketplace facilitator that lacks physical presence in the state and is making direct remote sales in the state on its own website, as well as facilitating sales for multiple remote marketplace sellers?
A. total of all of the marketplace facilitator’s sales or transactions into the state, including direct sales and sales of marketplace sellers facilitated by the marketplace facilitator

B. the economic nexus threshold is applied separately to total direct sales or transactions of the marketplace facilitator vs. total sales or transactions facilitated by the marketplace facilitator

Georgia comment: Choice “A” is consistent with treating the facilitator as the seller for all sales on its platform. On the other hand, it would be inconsistent to make a seller aggregate its own direct sales with sales of its products over someone else’s platform for purposes of the threshold.

Minnesota note: Minnesota’s marketplace law requires the marketplace provider to have a physical presence in Minnesota. Minn. Stat. § 297A.66, subd. 1(a)(2).

Mazerov/CPBB Comment: This seems like a pretty unlikely scenario; most marketplace facilitators are large and have a large number of sellers and will easily exceed likely thresholds in every state regardless of how their own sales or facilitated sales are counted.

D Yetter comment: For Question 2, I was torn on which way to answer and decided to be consistent between the rules for marketplace facilitators and marketplace sellers. However, I could agree to Option A for Question 2 that if a marketplace facilitator has exceeded the threshold for the combined types of sales that they have an obligation to collect on their direct sales.

Example: The state has adopted a remote seller economic nexus threshold of over $100,000 gross sales volume or 200 transactions/yr. and has also adopted legislation requiring marketplace facilitators to register, collect and remit sales/use tax on facilitated sales in the state. During the prior year, a marketplace facilitator without physical presence in the state has made $50,000 in direct gross sales and 50 separate transactions into the state (from the marketplace facilitator’s own website) and has also facilitated $75,000 in gross sales into the state for two remote marketplace sellers ($40,000 gross sales and 100 transactions for one marketplace seller and $35,000 and
100 transactions for the other marketplace seller) who are collecting and remitting on those sales. Under A, the economic nexus threshold has been exceeded for the marketplace facilitator, and that marketplace facilitator is required to commence registering, collecting and remitting sales/use tax on its direct sales as well as marketplace sales it is facilitating. Under B, the economic nexus threshold has not been met for the marketplace facilitator’s direct sales, and that marketplace facilitator is not required to register, collect and remit on those direct sales. However, the “200 transactions” economic nexus threshold has been met for the sales facilitated by the marketplace facilitator, so the marketplace facilitator is required to commence registering, collecting and remitting sales/use tax on facilitated sales.

3. If the state has adopted a remote seller economic nexus threshold for imposing a sales/use tax collection duty (such as South Dakota’s $100,000 gross sales volume or 200 transactions/yr. threshold) and has also adopted legislation requiring marketplace facilitators to register, collect and remit sales/use tax on all facilitated sales in the state, how should that threshold be applied to a multichannel remote seller who has direct remote sales in the state on its own website, and also has sales in the state through multiple marketplace facilitators?

A. ___ total of all of the multichannel remote seller’s sales or transactions into the state, including direct sales and marketplace sales
B. ___ total of only direct sales or transactions by the multichannel remote seller

Alabama DOR Comment: If a state’s economic threshold is in excess of the $100,000 threshold at issue in Wayfair, an alternative means of calculating the threshold for multi-channel sellers would be to impose the higher threshold for aggregated sales (both direct and those made through a marketplace), along with a minimum amount of direct sales in excess of $100,000.

Georgia comment: Choice “B” is consistent with treating the facilitator as the seller for marketplace sales. There may be a number of small sellers that generally sell over platforms, but have modest direct remote sales. Not requiring them to aggregate their direct remote sales with their platform sales would also be consistent with not overburdening relatively small sellers, while still obtaining collection of sales tax on sales of their products on platforms that meet the threshold.
Minnesota note: This question is beyond the scope of this work group as the question relates to determining when a remote seller must begin collecting and remitting versus when a marketplace provider must begin collecting and remitting. Nevertheless, here is the guidance Minnesota has provided pursuant to Minnesota’s existing law (Minn. Stat. § 297A.66, subd. 3(d)).

I am a remote seller and sell through a Marketplace, my own website and through other sources; what are my sales tax responsibilities?

If all retail sales into Minnesota combined—including your sales made through any Marketplace, your own website, and through other sources—exceed the Small Seller Exception, then sales tax must be collected and remitted to Minnesota. You must collect and remit sales tax on your taxable sales through your website and other sources. If the Marketplace is not collecting Minnesota sales tax on your behalf, then you must also collect Minnesota sales tax on your taxable sales made through that Marketplace.

http://www.revenue.state.mn.us/Pages/FAQ.aspx?WebId=5e2267cd-5aa2-479e-916e-bfe0731c9623&Owner=Sales%20and%20Use%20Tax&Topic=Tax%20Information&SubTopic=Streamlined%20sales%20tax%20information#FAQ264

Mazerov/CBPP Comment: I would be fine having the MTC recommend option B in all circumstances, but I wouldn’t be troubled from a tax policy/fairness standpoint if a state that pays the cost of using a Certified Service Provider chose option A. I think the example is close to what is likely to be most common in the real world, and option B is completely appropriate in that circumstance. It should be acknowledged, however, that a company could have many tens of millions of dollars of marketplace sales nationally, and therefore be perfectly capable of complying with nationwide collection on its own direct sales and yet be freed from that obligation in some or potentially all states under option B.

Example: The state has adopted a remote seller sales/use tax collection economic nexus threshold of over $100,000 gross sales volume or 200 transactions/yr. and has also adopted legislation requiring marketplace facilitators to register, collect and remit sales/use tax on all facilitated sales. During the prior year, a multichannel remote seller has made $50,000 in direct gross sales and 50 separate transactions into the state (from the seller’s own website) and has also made $75,000 in gross sales into the state through two marketplace facilitators ($40,000 gross sales and 100 transactions through one marketplace facilitator and $35,000 and 100 transactions through the other marketplace facilitator) who are collecting and remitting sales/use tax on those sales. Under A, the economic nexus threshold has been exceeded for the multichannel remote seller, and that seller is required to commence registering, collecting and remitting on its direct sales. Under B, the economic nexus threshold has not been met, and that seller is not required to register, collect and remit on direct sales.
4. What type of economic nexus threshold for imposing sales/use tax collection duties on remote sellers should states adopt?

A. ___ annual sales volume economic nexus threshold only

Alabama DOR comment: ADOR recommends that the threshold be calculated on a calendar year basis for the previous calendar year, rather than current year sales.

B. ___ annual sales volume or number of separate transactions threshold only

C. ___ annual sales volume and number of separate transactions economic nexus threshold

Georgia comment: Choice “A” helps avoid the problem of requiring registration of sellers who have many low dollar transactions but who by definition (or else we wouldn’t be dealing with the question) have less than $100,000 (for example) of gross sales into the state. Although the number of transactions threshold was also “blessed” by Wayfair, NOT having this number of transactions threshold would also show that a state was trying to avoid overburdening small sellers.

Kansas comment: This question assumes some type of economic nexus threshold is necessary or required. Should there be an option of, “no economic nexus threshold?”

Kentucky comment: Our answers in #’s 3-4, provide the clearest and least complicated means to ensure compliance with the new economic nexus standards. To the extent there are extenuating circumstances with specific remote sellers, we can resolve on a case by case basis.

Minnesota note: This question is also beyond the scope of this work group since this question relates to remote sellers only. Nevertheless, here is the guidance Minnesota has provided pursuant to Minnesota’s existing law (Minn. Stat. § 297A.66, subd. 3(d)):

What is the Small Seller Exception?

Minnesota law provides a Small Seller Exception, which does not require remote sellers to collect sales tax until their sales during a period of 12 consecutive months total either:
100 or more retail sales shipped to Minnesota

10 or more retail sales shipped to Minnesota that total more than $100,000

**Note:** When calculating this exception, do not include any sales where the purchaser is buying for resale.

The purchaser may give you a completed [Form ST3, Certificate of Exemption](http://www.revenue.state.mn.us/Pages/FAQ.aspx?WebId=5e2267cd-5aa2-479e-916e-bfe0731c9623&Owner=Sales%20and%20Use%20Tax&Topic=Tax%20Information&SubTopic=Streamlined%20Sales%20Tax%20Information#FAQ262) claiming an exemption for resale.