To: **Holly Coon, Chair, MTC Uniformity Committee**

From: **Tommy Hoyt, Chair, MTC Uniformity Committee**
Wayfair Implementation &
Marketplace Facilitator Work Group; Richard Cram

Re: **White Paper**

Date: **November 7, 2018**

INTRODUCTION

The Uniformity Committee established a work group to consider issues in the implementation of the *Wayfair* decision and, especially, how marketplace facilitators might be treated, including the imposition of a tax collection and remittance obligation on those sellers. The work group was instructed to identify issues that having marketplace facilitators collect and remit tax might raise, and also determine if there were agreed upon best practices to address those issues. This white paper provides both an executive summary and a detailed discussion of the issues identified and the recommended practices for addressing those issues.

EXECUTIVE SUMMARY OF FINDINGS

Provided below is a summary of the guidance developed by the Marketplace Facilitator Work Group for states considering enacting laws requiring marketplace facilitators to collect sales/use tax on facilitated sales, provided to the Uniformity Committee for its consideration. This summary represents the positions that a majority of the taxing agency staff of the states participating in the work group agreed with.

Issue #1 – Definitions

The work group recommended definitions for "marketplace" and "marketplace seller," along with optional bracketed language to consider. Definitions for "referral" and "referrer" were deemed outside the scope of the work group, so are not

provided. Narrow and broad definitions for "marketplace facilitator" are provided as examples for consideration.

Issue #2 – Registration

The work group concluded that a marketplace facilitator should be required to register, collect, and remit sales/use tax on all facilitated sales, without exception. The marketplace seller will not need to register, collect and remit sales/use tax on those facilitated sales.

Issue #3 – Audit

If the marketplace facilitator is required to register, collect and remit sales/use tax on sales it is facilitating, then the marketplace facilitator should be the entity subject to audit, with possible relief for situations in which the marketplace facilitator can show that its failure to collect tax was due to reliance on erroneous information provided by the marketplace seller. See Issue #6.

Issue #4 – Economic Nexus Threshold

When a marketplace facilitator that lacks physical presence in a state has both facilitated and direct sales in that state, both types of sales should be counted in determining whether that marketplace facilitator has exceeded the state's economic nexus threshold, and is therefore required to register, collect and remit sales/use tax on those sales.

When a marketplace seller that lacks physical presence in a state makes direct sales and sales through one or more marketplace facilitators who are required to register, collect, and remit sales/use tax, both types of sales should be counted in determining if the seller has exceeded the state's economic nexus threshold and is required to register, collect and remit sales/use tax on its direct sales.

States considering adoption of economic nexus thresholds for requiring a remote seller without physical presence to register, collect, and remit sales/use tax should consider adopting an economic nexus threshold that is based only on sales volume per year, or on sales volume and the number of transactions per year.

Issue #5 – Exemption certificate

If the marketplace facilitator is required to register, collect, and remit sales/use tax on sales it is facilitating, then the marketplace facilitator is responsible for obtaining and

maintaining exemption certificates from purchasers claiming exemptions for any of those sales.

Issue #6 – Liability protection from marketplace seller errors

Legislation requiring marketplace facilitators to register, collect, and remit sales/use tax on facilitated sales should include provisions that relieve the marketplace facilitator from liability when the marketplace facilitator's failure to collect sales/use tax is caused by reliance on erroneous information provided by the marketplace seller. In that situation, the marketplace seller could be held liable for the uncollected tax. See Issue #3.

Issue #7 – Protection from risk of class action lawsuits

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 lawsuits.

FINDINGS

Objective of the Work Group

The work group was formed to consider the issues in implementing *Wayfair* that might benefit from a uniform state approach. The imposition of tax collecting and reporting duties on marketplace facilitators was determined to be of the highest priority. Therefore, the objective of the work group is to identify issues and develop and discuss concepts or ideas for consideration by states desiring to require marketplace facilitators to collect and remit sales/use tax on marketplace sales, in order to maximize compliance while minimizing the burden on marketplace facilitators and marketplace sellers.

Background

Growth in the volume of online sales facilitated through a marketplace continues to accelerate. Online marketplace sellers number in the millions, although most are quite small.

In order to increase sales/use tax collection compliance levels, several states are imposing requirements on marketplace facilitators to collect and remit the sales/use tax on their marketplace sales. Following the *Wayfair* decision, more states are likely to increase this trend. The following states have enacted legislation requiring marketplace

facilitators to collect and remit sales/use tax on marketplace sales, or in some states, giving marketplace facilitators the option to collect and remit tax or comply with notice and reporting requirements:

- Minnesota (2017 HF 1, marketplace provider must have physical presence and is only required to collect and remit on behalf of a marketplace seller having >$10,000 taxable retail sales in the 12-month period ending on the last day of the most recently completed calendar quarter, collect eff. 10/1/18)
- Washington (2017 HB 2163, >$10,000 gross receipts from retail sales/yr., option to collect or notice/report eff. 1/1/18; >$100,000 gross retail sales or 200+ separate transactions, remote sellers must collect on all non-marketplace sales, and marketplace facilitators must collect on own sales and sales by all marketplace sellers through marketplace (eff. 10/1/18); for remote sellers and marketplace facilitators $10,000 and at or below $100,000 of sales, they must make an election to do notice and reporting or collect)
- Rhode Island (2017 H 5175A, >$100,000 sales or 200 or more separate transactions/yr., option to collect or notice/report eff. 6/27/17)
- Pennsylvania (2017 Act 43, $10,000 sales/yr., option to collect or notice/report eff. 4/1/18)
- Alabama (2018 HB 470, $250,000 sales/yr., option to collect or notice/report eff. 1/1/19)
- Oklahoma (2018 HB 1019XX, $10,000 sales/yr., option to collect or notice/report eff. 7/1/18)
- Iowa (2018 SF 2417, $100,000 sales or 200 separate transactions/yr., collect eff. 1/1/19)
- Connecticut (2018 SB 417, $250,000 and 200 separate transactions/yr., collect eff. 12/1/18)
- New Jersey (2018 A4496, $100,000 sales or 200 separate transactions/yr., collect eff. 11/1/18)
- South Dakota (2018 SB2, $100,000 sales or 200 separate transactions/yr., collect eff. 3/1/19).

These enacted statutes are currently 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 Retail Industry Leaders Association (RILA) submitted to the work group a model statute for imposing a collection duty on marketplace facilitators entitled "Economic Nexus and Marketplace Collection for Sales Tax." This document is also available for download from the MTC website on the same webpage as above.

The MTC Uniformity Committee established the work group at its meeting in Boston, Massachusetts on July 24, 2018 to accomplish the objective stated above, with the goal of developing necessary guidance for states prior to the commencement of their 2019 legislative sessions. The work group was tasked to provide that guidance to the Uniformity Committee for consideration at its meeting in Orlando, FL on November 7, 2018. The work group includes staff of interested state tax agencies, as well as a wide variety of industry participants. Tommy Hoyt (Office of Texas Comptroller of Public Accounts) is the work group chair. The work group met by telephone conference on the following dates: August 29, September 12, 19, 26, October 10, 17, 24 and 31 of 2018. Work group calls often included over 100 participants. The work group conducted a survey to initially establish a prioritized list of seven issues to be considered. Several additional surveys were conducted in order to measure the level of support from the participating states, as well as industry participants, for concepts addressing those issues. All survey results and comments received are available for download on the MTC website. Those surveys related to specific issues are attached as appendixes, as indicated below.

The work group submits this White Paper to address each issue listed below in order of priority. The results of surveys concerning each issue are analyzed. Whenever the survey results show a strong consensus position among participating states on an issue, that position is provided as the work group's guidance. When the survey results showed a lack of consensus among participating states concerning an issue, alternative approaches for addressing the issue are suggested. Comments received are also provided.

Examples of statutory language (with reference to the source for such language) are provided for the issues considered. These are not offered as model provisions, but only suggestions for consideration. A state interested in enacting legislation imposing a marketplace facilitator collection obligation should carefully develop the appropriate statutory language to meet its circumstances. Any examples provided herein should be considered only as a starting point for that process. Review of legislation enacted by

other states imposing marketplace facilitator collection obligations, listed above, may also be helpful.

Issues

1. Definition: Should there be common definitions for the terms such as "marketplace," "marketplace seller," "marketplace facilitator," referral," "referrer" or equivalent terms?

The work group agreed that common definitions for the above terms needed to be developed, except for "referral" or "referrer," which were deemed outside the work group's scope.

States participating in the work group responded to a survey dated September 13, 2018 to indicate their preferences for definitions of "marketplace," "marketplace seller," and "marketplace facilitator." The results of that survey and comments received are attached as Appendix A.

The results of the survey did not establish a consensus for the definitions of "marketplace" or "marketplace seller," although these are essentially generic terms. Sample definitions for those terms are provided below. The bracketed provisions (with footnotes referencing the states that have already enacted marketplace facilitator collection laws using those provisions in their definitions) were included as options to consider.

Marketplace[1]

> **A physical or electronic place [including but not limited to, a store, booth, Internet website, catalog, television or radio broadcast, or a dedicated sales software application][2] where [a marketplace seller sells or offers for sale][3] tangible personal property [taxable services, digital goods] is/are offered for sale [for delivery in this state][4] [regardless of**

[1] Some states used the term "forum" in their definition. *See* CT 2018 SB 417, PA 2017 HB 542.
[2] *See* CT 2018 SB 417, KY Section 139.010, OK 2018 HB 1019xx, PA 2017 HB 542.
[3] *See* SD 2018 SB 2.
[4] *See id.*

> **whether the tangible personal property, digital property, marketplace seller, or marketplace has a physical presence in the state].**[5]

Marketplace seller

> **A person [not a related party to a marketplace facilitator]**[6] **who has an agreement with a marketplace facilitator [regarding sales of such person]**[7] **and makes retail sales of tangible personal property [taxable services, digital goods] through a marketplace owned, operated, or controlled by a marketplace facilitator [whether or not such person is required to register . . .]**[8] **[even if such person would not have been required to collect and remit sales and use tax had the sale not been made through such marketplace].**[9]

Marketplace facilitator[10]

States responding to the survey split into two groups: those supporting a narrow definition (GA, KY, MN, OK, PA), and those supporting a broad definition (AL, IA, LA, MI, ID, WA). States using the narrow definition limit it to include a requirement that the marketplace facilitator handle or process the customer payment. The broad definition does not have that limitation.

An example of the narrow definition is provided below, with optional bracketed provisions that some states that have already enacted marketplace facilitator collection laws have included in their definitions, as indicated:

> **Any person who facilitates a retail sale by a marketplace seller by:**
>
> **(1) listing or advertising for sale by a marketplace seller in a marketplace, tangible personal property [, services, or digital goods that are subject to tax under this chapter] [rendering services in connection with such sales**

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[5] *See* KY Section 139.010, SD 2018 SB 2.
[6] *See* AL 2018 HB 470.
[7] *See* CT 2018 SB 417.
[8] *See* CT 2018 SB 417, WA 2017 HB 2163.
[9] *See* IA 2018 SF 2417.
[10] Some states use the term "provider" in their definition. *See, e.g.,* MN 2017 HF 1, SD 2018 SB 2.

> **or otherwise enhancing or enabling such sales for compensation, other than merely providing payment processing services];[11] and**
>
> **(2) either directly or indirectly through agreements or arrangements with third parties collecting payment from the customer and transmitting that payment to the marketplace seller [for compensation][12] [regardless of whether the marketplace facilitator receives compensation or other consideration in exchange for its services].[13]**

Those supporting the narrow definition argue that if the marketplace facilitator is going to be required to collect and remit the sales/use tax, the marketplace facilitator must have access to the payment in order to collect the tax on the transaction. Also, the marketplace facilitator must have access to the relevant information concerning the sale in order to properly report the transaction on a return.

Steve DelBianco (NetChoice) suggested the following additional statement:

Absent a requirement for marketplace sellers to provide instantaneous and automated access to this sale and payment information, the broad definition would not be workable for marketplace facilitators.

An example of the broad definition[14] is provided below:

> **"Marketplace facilitator" means a person that contracts with 2 sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the seller's products through a physical or electronic marketplace operated by the person, and engages:**
>
> **(a) Directly or indirectly, through one or more affiliated persons in any of the following:**
>
> **(i) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller;**

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[11] GA recommended this language in its survey response.
[12] *See* CT 2018 SB 417.
[13] *See* MN 2017 HF 1; SD 2018 SB 2.
[14] This definition is taken from WA 2017 HB 2163.

(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 products from the seller; or

(iv) Software development or research and development activities related to any of the activities described in (b) of this subsection [ ], if such activities are directly related to a physical or electronic marketplace operated by the person or an affiliated person; and

(b) In any of the following activities with respect to the seller's products:

(i) Payment processing services;

(ii) Fulfillment or storage services;

(iii) Listing products for sale;

(iv) Setting prices;

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

(vi) Order taking;

(vii) Advertising or promotion; or

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

Alabama suggested that if more than one entity falls within the definition, a hierarchy be established to determine which entity should have the registration/collection obligation.

Washington Department of Revenue staff, in support of the broad definition, stated that it minimizes "loopholes" and should prevent businesses that would otherwise be considered marketplace facilitators under the narrow definition from changing their business models so as to fall outside that narrow definition. Also, the broad definition is intended to more effectively accommodate future changes in the industry and technology.

Diane Yetter (Yetter Consulting) commented that small, specialized marketplaces could end up falling within the broad definition, even though they only provide the platform infrastructure and are not processing payments, and may also not have access to the information on the actual sales transaction. She raised the concern that the broad definition might apply to too many platforms that lacked the ability to comply with collection and remittance requirements.

Scott Talbott (Electronic Transactions Association [ETA]) raised the concern that the broad definition of marketplace facilitator might inadvertently be construed to include businesses that are only payment processors. He did not indicate that Washington Department of Revenue currently considered those businesses to be marketplace facilitators. Mr. Talbott submitted a written statement (included in Appendix A) recommending that language be added to the broad definition of marketplace facilitator expressly excluding payment processors from the definition.

Scott DelBianco (NetChoice) suggested the following additional statement:

Under either the broad or narrow definitions of marketplace facilitator, states should consider extending vendor and/or service provider compensation to Marketplace Facilitators who are performing duties on behalf of the seller, including tax calculation, collection, remittance, and audit.

2. Registration: Are registration and return filing requirements in conflict or duplicative? If the marketplace facilitator is required to register, collect, and remit the sales/use tax on facilitated sales, then is there a need for the marketplace seller to register or report those same sales?

One of the administrative savings from states requiring marketplace facilitators to register, collect, and remit sales/use tax should be elimination of the need to register the large volume of marketplace sellers. If a marketplace seller is making direct sales or using other marketplace facilitators that are not collecting, the marketplace seller may have a registration, collection, and remittance obligation. A multichannel retailer may have a brick and mortar store, make direct online sales over its own website, use one or a marketplace facilitators, or itself act as a marketplace facilitator selling its own and others' products. States should establish clear rules for determining the

multichannel retailer's registration, collection, and remittance responsibilities, so as to avoid conflicting or duplicative requirements.

States and industry representatives participating in the work group responded to a survey seeking their preferences for three options: (1) requiring the marketplace facilitator to register and collect on all facilitated sales, but allowing the marketplace facilitator discretion to let the marketplace seller take on that responsibility; (2) requiring the marketplace facilitator to register and collect on all facilitated sales, but allowing the marketplace seller the option to take on that responsibility by providing a copy of its registration to the marketplace facilitator; and (3) requiring the marketplace facilitator to register and collect on all facilitated sales, without exception. The results of that survey (dated September 28, 2018) and comments received are attached as Appendix B.

No states and three industry participants (Microsoft, TaxCloud and Diane Yetter) preferred Option 1. Two states preferred Option 2 (KS and MN). Ten states (AL, GA, IA, ID, KY, MS, OK, PA, TX, WA) and two industry participants (Amazon and Walmart) preferred Option 3. Thus, Option 3 clearly garnered the strongest support in the work group.

Example language from the survey for Option 3 is provided below.

> **A marketplace provider shall collect state and local sales and use tax on all sales made through the marketplace to purchasers in this state whether or not the marketplace seller:**
>
> **(1) has or is required to have a sales and use tax permit, or**
>
> **(2) would have been required to collect and remit state and local sales and use tax had the sale not been made through the marketplace provider.**

Kentucky suggested that a requirement be added to the language in Option 3 that the marketplace facilitator provide a certificate to the marketplace seller advising that the marketplace facilitator is registering and collecting on facilitated marketplace sales.

Alex Oxford (The Tax Butler.com), representing internet sellers, suggested that marketplace facilitators be required to provide proof to sellers that tax is being

collected. Sellers need a way to prove to the state that tax has been collected by the marketplace facilitator.

Robert Plattner (Amazon) also suggested the marketplace facilitator certification requirement and provided language from the proposed marketplace provisions in the 2018 New York Executive Budget Bill (which was not enacted), attached as Appendix C.

Tommy Hoyt (TX) indicated support for the marketplace facilitator certification requirement. The following is an example of such certification language drafted by Texas:

> **A marketplace provider shall certify to its marketplace sellers that it will collect and remit state and local 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 report under [applicable statute].**

The work group conducted an additional survey on Issue #2 in response to a request received from Jerry Johnson (TaxCloud, a Certified Service Provider[CSP]). Mr Johnson indicated that when a multichannel retailer makes direct remote sales and uses the services of a CSP for handling its sales tax administration responsibilities, but also has sales through a marketplace facilitator that the marketplace facilitator is required to collect and remit tax on, the multichannel retailer needs to receive sufficient information from the marketplace facilitator on those facilitated sales, in order to properly reconcile the tax remitted and collected on retailer's direct sales vs. facilitated sales. Mr. Johnson provided suggested language for Options 2 and 3, which would impose those information-providing requirements on the marketplace facilitator. The additional survey (dated October 18, 2018) sought input from work group participants on whether they would support Mr. Johnson's suggested language. The results of that survey and comments received are attached as Appendix D.

Regarding Mr. Johnson's suggested language for Option 2, two states supported it (ID and MS) and eight states did not (AL, CO, ID, KY, MN, ND, OK, TX). Six industry participants (Etsy, NetChoice, TaxCloud, Taxometry, Intuit, Diane Yetter) supported that language and two (anonymous, Amazon) did not. Regarding Mr. Johnson's suggested language for Option 3, five states (AL, IA, ID, KY, MS) supported it and

six (CO, KS, MN, ND, OK, TX) did not. Six industry participants (Michael Mazerov/CBPP, Etsy, TaxCloud, Taxometry, Intuit, and Diane Yetter) supported the language and three (Amazon, NetChoice, and Walmart) did not.

Additional comments received from work group participants on Issue #2, either during meetings, or submitted separately, are summarized and attached as Appendix E.

3. Audit: 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?

Work group participants reached general consensus that if the state imposes the obligation on the marketplace facilitator to register, collect, and remit sales/use tax on facilitated sales it handles, then the marketplace facilitator should also be the one subject to audit by the state on those transactions. This is generally consistent with most of the current marketplace facilitator collection statutes already in place. However, these statutes also typically contain provisions that if the marketplace facilitator can establish its failure to properly collect sales/use tax on a transaction was due to erroneous information provided to the marketplace facilitator by the marketplace seller, then the marketplace seller could be held liable for such error and the marketplace facilitator relieved of such liability.

During discussion of this issue, the question arose: who should be responsible for correct mapping[15] of the taxability of products listed on the marketplace, the marketplace seller or the marketplace facilitator? Work group participants responded to the following survey question: 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?

The responses and comments received on the Issue #3 survey are attached as Appendix F. Three states (KY, OK, TX) and two industry participants (Walmart, Diane Yetter) responded that mapping responsibility should fall on the marketplace

[15] "Mapping" refers to the process of determining whether the product being sold is exempt for sales tax under the applicable state's laws, or whether the state has imposed sales tax on that product.

seller. Seven states (CO, GA, IA, KS, MN, MS, PA) and two industry participants (Michael Mazerov/CBPP, anonymous) responded that such responsibility should belong to the marketplace facilitator. However, some of those states qualified their responses by commenting that if the marketplace facilitator can show that the marketplace seller provided it incorrect information that it relied upon in failing to collect, then the marketplace seller could be held liable, instead of the marketplace facilitator. Two states (ID, LA) responded that a "facts and circumstances" test should be developed to determine who should have the mapping responsibility.

The majority of participating states in the work group supported the position that the marketplace facilitator should be responsible for correct mapping of taxability of products being sold on the marketplace, with the caveat that the marketplace facilitator could be relieved of liability for failure to collect by showing that it relied on erroneous information provided by the marketplace seller. In that situation, the state could look to the marketplace seller for liability.

Example (NJ 2018 A. 4496):

> **A marketplace facilitator shall be subject to audit by the division with respect to all retail sales for which it is required to collect and pay the tax imposed under [applicable statute]. Where the division audits the marketplace facilitator, the division is prohibited from auditing the marketplace seller for the same retail sales unless the marketplace facilitator seeks relief under [applicable statute].**
>
> **If the marketplace facilitator demonstrates to the satisfaction of the division that the marketplace facilitator has made a reasonable effort to obtain accurate information from the marketplace seller about a retail sale and that the failure to collect and pay the correct amount of tax imposed under [applicable statute] was due to incorrect information provided to the marketplace facilitator by the marketplace seller, then the marketplace facilitator shall be relieved of liability of the tax for that retail sale. This subsection does not apply with regard to a retail sale for which the marketplace facilitator is the seller or if the marketplace facilitator and seller are affiliates. Where the marketplace facilitator is relieved under this subsection, the seller is liable for the tax imposed under [applicable statute].**

4. Economic Nexus Threshold: 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, 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?

The work group participants responded to two survey questions related to the first question in this issue, dealing with how an economic nexus threshold should apply to multichannel retailers that are marketplace sellers, marketplace facilitators or both. The work group participants responded to one survey question related to the second question within this issue, dealing with whether the economic nexus threshold should be based on sales volume alone, sales volume or transactions, or both. The survey results and comments received on the Issue #4 survey are also included in Appendix F.

The first survey question provided:

> **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?**

Eleven states (AL, CO, GA, IA, KS, KY, LA, MS, OK, PA, TX) and three industry participants (Michael Mazerov/CBPP, Walmart, anonymous) responded in favor of the following response: 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. Those responses indicated strong consensus.

Robert Plattner (Amazon) emphasized that once the marketplace facilitator without physical presence has exceeded that economic nexus threshold, the marketplace facilitator would be required to collect on all facilitated sales, regardless of the sales volume or number of transactions for a particular marketplace seller using that marketplace facilitator.

No states and one industry participant (Diane Yetter) responded in favor of the following response: 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.

The second survey question provided:

> **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?**

Eight states (ID, KS, KY, LA, MN, MS, OK, PA) and one industry participant responded in favor of the following: total of all of the multichannel remote seller's sales or transactions into the state, including direct sales and marketplace sales. These responses indicated that a majority of participating states supported this position.

Five states (AL, CO, GA, IA, TX) and three industry participants (Michael Mazerov/CBPP, Diane Yetter, anonymous) responded in favor of the following: total of only direct sales or transactions by the multichannel remote seller.

The survey question related what the economic nexus threshold should consist of stated:

> **What type of economic nexus threshold for imposing sales/use tax collection duties on remote sellers should states adopt?**

Responders were given the options of (1) sales volume; (2) sales volume or number of transactions; or (3) sales volume and number of transactions.

Seven states (AL, GA, IA, ID, MS, OK, TX) and two industry participants (Michael Mazerov/CBPP, anonymous) responded in favor of the following: annual sales volume economic nexus threshold only.

One state (PA) and one industry participant (Walmart) responded in favor of the following: annual sales volume or number of separate transactions threshold only.

Three states (CO, KY, LA) and one industry participant (Diane Yetter) responded in favor of the following: annual sales volume and number of separate transactions economic nexus threshold.

Based on the survey results, a majority of states supported for the following positions:

When a marketplace facilitator that lacks physical presence in a state has both facilitated and direct sales in that state, both types of sales should be counted in determining whether that marketplace facilitator has exceeded the state's economic nexus threshold, and is therefore required to register, collect and remit sales/use tax on those sales.

When a marketplace seller that lacks physical presence in a state makes direct sales and sales through one or more marketplace facilitators who are required to register, collect, and remit sales/use tax, both the marketplace seller's direct sales and facilitated sales should be counted in determining if the seller has exceeded the state's economic nexus threshold and is required to register, collect and remit sales/use tax on its direct sales.

A strong consensus in the work group supported the position that states consider adopting economic nexus thresholds for imposing sales/use tax collection duties that are based on sales volume alone, or sales volume and number of separate transactions.

Additional comments received on Issue#4 from work group participants, either during the meetings or submitted separately, are summarized and attached as Appendix G.

5. Exemption Certificates: How should remote sellers/facilitators handle sales to exempt persons/entities? For instance, for tribal members purchasing products in their Indian country, those sales are exempt in WA, but how should sellers/facilitators handle those transactions?

Sales tax administration laws generally provide that if a seller fails to collect sales/use tax on a transaction, then if the seller later is audited and the seller cannot produce a valid exemption certificate from the purchaser who claimed the exemption, the seller will be held liable for the uncollected tax. The consensus of states participating in the work group is that if state law requires the marketplace facilitator to register, collect, and file returns on its facilitated transactions, and would subject the marketplace facilitator to audit on those transactions, then it should also be the marketplace facilitator's duty to obtain and maintain exemption certificates so they are on hand at the time of audit. Without those exemption certificates, the marketplace facilitator will not be protected from liability for uncollected tax.

Diane Yetter (Yetter Consulting) submitted several questions to the work group concerning how marketplace facilitators should handle exemption certificates. These are attached as Appendix H. Due to time constraints, the work group did not address these questions. However, these are questions state tax administrators likely will receive in implementing requirements for marketplace facilitators to handle exemption certificates.

Steve DelBianco (NetChoice) suggested the following additional statement:

To be workable for marketplace facilitators, a purchaser's exemption certificate should be applicable to all transactions of that purchaser in the state, for all marketplace sellers and for all categories of products.

Provided below are example provisions for imposing the duty on the marketplace facilitator to obtain and maintain exemption certificates.

Example from CT 2018 SB 417:

> **A marketplace facilitator shall be considered the retailer of each sale such facilitator facilitates on its forum for a marketplace seller. Each marketplace facilitator shall (1) be required to collect and remit for each**

> **such sale any tax imposed under [applicable statute], (2) be responsible for all obligations imposed under [applicable statute] as if such marketplace facilitator was the retailer of such sale, and (3) in accordance with the provisions of [applicable statute], keep such records and information as may be required by the Commissioner of Revenue Services to ensure proper collection and remittance of said tax.**

Example from Texas (in proposal form):

> **Except as otherwise provided in [applicable statute], a marketplace provider has the rights and duties of a seller under this chapter with regard to sales made through the marketplace, including collection and reporting duties.**

Example from marketplace provisions in 2018 New York Budget Bill (not enacted--suggested by Robert Plattner [Amazon]):

> **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 [applicable statute] 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 [applicable statute] and the credit allowed by [applicable statute]; 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 [applicable statute]**

6. Should states provide liability protection to marketplace facilitators when errors in collection and remittance are due to marketplace seller providing erroneous information to the marketplace facilitator?

The work group reached general consensus that a statute imposing a duty on marketplace facilitators to register, collect, and remit sales/use tax on their facilitated sales, and be subject to audit on those sales, should also provide liability protection to marketplace facilitators when the marketplace facilitator's failure to collect the tax is

due to reliance on erroneous information provided by the marketplace seller. This issue was also addressed as part of Issue #3.

Example from OK 2018 HB 1019xx:

> **A marketplace facilitator is relieved of liability under [applicable statutory provision] if the marketplace facilitator can show to the satisfaction of the [taxing authority] that the failure to collect the correct amount of tax was due to incorrect information given to the marketplace facilitator by a marketplace seller or remote seller.**

See also example provided for Issue #4

7. Liability Protection: Should states include statutory provisions concerning protection of collecting marketplace facilitators against the risk of class action lawsuits?

The work group reached general consensus that a statute imposing a duty on marketplace facilitators to register, collect, and remit sales/use tax on their facilitated sales, and be subject to audit on those sales, should also provide protection against the risk of class action lawsuits. Several enacted marketplace facilitator statutes that contain such provisions.

Diane Yetter suggested that protection against *qui tam* lawsuits should also be included.

Example from OK 2018 HB 1019xx:

A class action may not be brought against a marketplace facilitator on behalf of purchasers arising from or in any way related to an overpayment of sales or use tax collected by the marketplace facilitator, regardless of whether such action is characterized as a tax refund claim. Nothing in this subsection shall affect a purchaser's right to seek a refund from the [taxing authority] pursuant to [applicable statutory cite].

ADDITIONAL COMMENTS RECEIVED

Attached as Appendix I are three additional comments received from different anonymous sources, each relating to several of the issues addressed herein, as indicated.

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

Definition Survey Results by State		AL	GA	IA	ID	KY	LA	MI	MN	OK	PA	WA	Total
Marketplace													
1	A physical or electronic place, including, but not limited to, a store, a booth, an Internet web site, a catalog or a dedicated sales software application, where tangible personal property or taxable services are offered for sale.				X					X	X see comment		3
2	Any physical or electronic means through which one (1) or more retailers may advertise and sell or lease tangible personal property or digital property, such as a catalog, Internet Web site, or television or radio broadcast, regardless of whether the tangible personal property, digital property, or retailer is physically present in this state.		X			X		X					3
3	Any means by which any marketplace seller sells or offers for sale tangible personal property, products transferred electronically, or services for delivery into this state, regardless of whether the marketplace seller has a physical presence in this state.			X			X see suggested additional language						2
4 Other									X see comment			X see suggested language	2
Marketplace Seller													
1	Any person who has an agreement with a marketplace facilitator regarding retail sales of such person, whether or not such person is required to obtain a permit		X see comment		X								2
2	A person that has an agreement with a marketplace facilitator and makes retail sales of tangible personal property or digital property through a marketplace.					X		X		X			3
3	A retailer is represented by a marketplace provider in this state if the retailer makes sales in this state facilitated by a marketplace provider that maintains a place of business in this state.										X see comment		1
4 Other		X see suggested language		X see comment			X see Iowa's statutory definition		X see comment			X see suggested language	5
Marketplace Facilitator													
1	Any person who (A) facilitates retail sales [insert state's applicable sales volume threshold] by marketplace sellers by providing a [marketplace] that lists or advertises tangible personal property subject to tax . . . or taxable services, including digital goods, for sale by such marketplace sellers, (B) directly or indirectly through agreements or arrangements with third parties, collects receipts from the customer and remits payments to the marketplace sellers, and (C) receives compensation or other consideration for such services.					X see comment							1
2	Any person that facilitates a sale for a marketplace seller through a marketplace by: (1) Offering for sale by the marketplace seller, by any means, tangible personal property, products transferred electronically, or services for delivery into this state; and (2) Directly, or indirectly through any agreement or arrangement with third parties, collecting payment from a purchaser and transmitting the payment to the marketplace seller, regardless of whether the person receives compensation or other consideration in exchange for facilitating the sale or providing any other service.								X see comment	X	X see comment		3
3	Washington definition	X see suggested language		X	X		X	X				X	6
4 Other			X see comment										1

State Comments Regarding Definitional Alternatives in Survey
Marketplace Facilitator Work Group
September 18, 2018

"**Marketplace**"

1.___ A physical or electronic place, including, but not limited to, a store, a booth, an Internet web site, a catalog or a dedicated sales software application, where tangible personal property or taxable services are offered for sale. (example from Connecticut's definition of "forum"; see New Jersey and Oklahoma definitions of "forum")

PA comment: Like the formal inclusion of 'taxable services.' If the definition of 'tangible personal property' does not include digital property, it should also should be separately stated in the definition.

2.___ Any physical or electronic means through which one (1) or more retailers may advertise and sell or lease tangible personal property or digital property, such as a catalog, Internet Web site, or television or radio broadcast, regardless of whether the tangible personal property, digital property, or retailer is physically present in this state. (example from Kentucky definition; see also definition in latest draft of MTC Model Use Tax Reporting Statute)

3.___ Any means by which any marketplace seller sells or offers for sale tangible personal property, products transferred electronically, or services for delivery into this state, regardless of whether the marketplace seller has a physical presence in this state. (example from South Dakota definition)

LA comment: add language to the effect: regardless of whether the marketplace, the marketplace facilitator, or the marketplace seller is physically present in the state.

4.___Other: [insert suggested language; if taken from existing statutory language, please provide the source]

MN suggested language: "A retailer is represented by a marketplace provider in this state if the retailer makes sales in this state facilitated by a marketplace provider that maintains a place of business in this state." Minn. Stat. § 297A.66, subd. 1(a)(2).

"(c) 'Marketplace provider' means any person who facilitates a retail sale by a retailer by:

(1) listing or advertising for sale by the retailer in any forum, tangible personal property, services, or digital goods that are subject to tax under this chapter; and

(2) either directly or indirectly through agreements or arrangements with third parties collecting payment from the customer and transmitting that payment to the retailer regardless of whether the marketplace provider receives compensation or other consideration in exchange for its services." Minn. Stat. § 297A.66, subd. 1(c).

WA suggested language: A physical or electronic place, including, but not limited to, a store, a booth, an Internet web site, a catalog or a dedicated sales software application, where tangible personal property, digital codes and digital products, or taxable services are offered for sale. [Using Connecticut definition of "forum" but clarifying that we digital codes and digital products are included in the definition.]

"Marketplace seller"

1.___Any person who has an agreement with a marketplace facilitator regarding retail sales of such person, whether or not such person is required to obtain a permit . . . . (example from Connecticut definition)

2.___ A person that has an agreement with a marketplace facilitator and makes retail sales of tangible personal property or digital property through a marketplace. (example from Kentucky definition of "marketplace retailer")

3.___ A retailer is represented by a marketplace provider in this state if the retailer makes sales in this state facilitated by a marketplace provider that maintains a place of business in this state. (example from Minnesota defining marketplace seller as included in definition of "retailer")

PA comment: no need to limit to marketplace provider ('facilitator') that has a 'place of business in this state.' Recommend this phrase's removal. Our suggested wording (overall) would be:

> A retailer ~~is~~ represented by a marketplace provider in this state if the retailer makes sales in this state facilitated by a marketplace provider that maintains a place of business in this state.

4.___Other [insert suggested language; if taken from existing statutory language, please provide the source]

IA suggested language: "A seller that makes retail sales through any physical or electronic marketplace owned, operated, or controlled by a marketplace facilitator, even if such seller would not have been required to collect and remit sales and use tax had the sale not been made through such marketplace." Iowa Code section 423.14A(1)(c) (from Senate File 2417, 87th G.A.).

LA comment: Iowa's statutory definition .

AL suggested language: Ala. Act No. 2018 539 – "MARKETPLACE SELLER. A seller that is not a related party, as prescribed in Section 40-23-190(c), to a marketplace facilitator and that makes sales through any physical or electronic marketplaces operated by a marketplace facilitator."

MN comment: Minnesota does not define this term. Rather, Minnesota law refers to retailers and describes retailers within the appropriate context. For example, a retailer that "made sales through one or more marketplace providers." See, e.g., Minn. Stat. § 297A.66, subd. 2(b).

WA suggested language: A seller that makes retail sales through any physical or electronic marketplaces operated by a marketplace facilitator, regardless of whether the seller is required to be registered . . . . (example from Washington definition in RCW 82.13.010(4)).

"Marketplace facilitator"

1.___Any person who (A) facilitates retail sales [insert state's applicable sales volume threshold] by marketplace sellers by providing a [marketplace] that lists or advertises tangible personal property subject to tax . . . or taxable services, including digital goods, for sale by such marketplace sellers, (B) directly or indirectly through agreements or arrangements with third parties, collects receipts from the customer and remits payments to the marketplace sellers, and (C) receives compensation or other consideration for such services. (narrow definition example from Connecticut)

KY comment: See suggested revision--Any person who (A) facilitates retail sales [insert state's applicable sales volume threshold] by marketplace sellers by providing a [marketplace] that lists or advertises tangible personal property subject to tax . . . or taxable services, including digital goods, for sale by such marketplace sellers, (B) directly or indirectly through agreements or arrangements with third parties, collects

receipts from the customer and remits payments to the marketplace sellers, or ~~and~~ (C) receives compensation or other consideration for such services.

2.___Any person that facilitates a sale for a marketplace seller through a marketplace by: (1) Offering for sale by the marketplace seller, by any means, tangible personal property, products transferred electronically, or services for delivery into this state; and (2) Directly, or indirectly through any agreement or arrangement with third parties, collecting payment from a purchaser and transmitting the payment to the marketplace seller, regardless of whether the person receives compensation or other consideration in exchange for facilitating the sale or providing any other service. (narrow definition example from South Dakota; see Minnesota definition of "marketplace provider")

MN comment: From Minn. Stat. § 297A.66, subd. 1(c):

(c) "Marketplace provider" means any person who facilitates a retail sale by a retailer by:

(1) listing or advertising for sale by the retailer in any forum, tangible personal property, services, or digital goods that are subject to tax under this chapter; and

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

3.___A business that does the following three activities:

A. Facilitates the sale of a marketplace seller's product through a marketplace for payment.

B. Engages, directly or indirectly, in **any** of the following with respect to bringing the buyer and seller together:

- Transmitting or otherwise communicating the offer or acceptance between the buyer and seller
- Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together
- Providing a virtual currency that buyers can use to purchase products from the seller

- Software development or research and development activities related to any activities with respect to the seller's products listed below, if such activities are directly related to a marketplace operated by the person or an affiliated person.

C. Does **any** of the following activities with respect to the seller's products:

- Payment processing services
- Fulfillment or storage services
- Listing products for sale
- Setting prices
- Branding sales as those of the marketplace facilitator
- Order taking
- Advertising or promotion
- Providing customer service or accepting or assisting with returns or exchanges

A marketplace facilitator facilitates sales of a seller's products through a marketplace and engages in other specified activities as provided by the law and outlined above. Websites that merely advertise goods for sale and do not handle transactions do not meet the definition of a marketplace facilitator.

(broad definition example from Washington; see also Iowa and Alabama definitions)

AL comment: Alabama variance Ala. Act 2018-539: "A person that contracts with marketplace sellers to facilitate for a consideration, regardless of whether deducted as fees from the transaction, the sale of the marketplace seller's products through a physical or electronic marketplace."

Because this definition is broad, there is the possibility that multiple parties to a transaction may fall under our definition of a marketplace facilitator. As a result, the department's proposed rule 810-6-2-.90.04 *Requirements for Certain Marketplace Facilitators and Marketplace Sellers* provides an ordering rule in these circumstances.

4.___Other: [insert suggested language; if taken from existing statutory language, please provide the source]

GA suggested language: Any person who (A) facilitates retail sales of tangible personal property or taxable services by marketplace sellers on a marketplace by rendering services in connection with such sales or otherwise enhancing or enabling such sales for compensation, and (B) directly, or indirectly through agreements or arrangements

with third parties, collects receipts from the customer and remits payments to the marketplace sellers.

PA comment: Suggest consideration for a definition of a seller who sells independently into a state and not just in a marketplace/through a marketplace facilitator. Most states will want language like this to tie into any economic nexus language they may have. In PA's statute this term is 'remote seller.'

Payment Processors Are Not Marketplace Facilitators

Comments Submitted by the Electronic Transactions Association to the Multistate Tax Commission's Wayfair Implementation & Marketplace Facilitator Work Group
November 2, 2018

Dear Mr. Cram:

The Electronic Transactions Association submits these comments to the Multistate Tax Commission's Wayfair Implementation & Marketplace Facilitator Work Group draft definitions of a "marketplace facilitator" and the related White Paper. ETA appreciates the opportunity to provide comments on behalf of the payments industry and hopes the MTC takes the following into consideration.

ETA is the leading trade association for the payments industry, representing more than 500 companies that offer electronic transaction processing products and services. ETA's members include all parts of the electronic payments ecosystem including financial institutions, acquiring banks, merchant service providers and processors, and payment card networks. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient, secure, and rewarding payment solutions.

Executive Summary

Under one option proffered by the MTC Work Group, "marketplace facilitator" would be defined to require payment processors that are passive intermediaries to collect and remit sales taxes on behalf of states or merchants. Payment processors do not have the information or the infrastructure necessary to collect and remit sales taxes. In fact, payment processors have no role in the sale of goods or services other than to facilitate payment between the parties. They do not provide a physical or virtual marketplace, they do not advertise or market the sale of taxable goods or services to customers, and they play no role in setting the seller's terms of sale to their customer.

We understand that the MTC Work Group is considering two definitions for the term "marketplace facilitator"– one which the Work Group characterizes in its White Paper as "narrow" and the other as "broad". The first definition supported by Georgia, Kentucky, Minnesota, Oklahoma, and Pennsylvania recognizes the issues associated with payment processors and expressly excludes persons that "merely provide[] payment processing services" from the definition of a "marketplace facilitator." The second definition supported by Alabama, Iowa, Louisiana, Michigan, Idaho, and Washington is much broader, casting a sweeping net that could be interpreted to require payment processors to collect and remit tax on transactions of which the lack the necessary information to collect sales or use taxes.

The MTC Work Group's deliberations suggest that the inclusion of payment processors may be inadvertent However, given the impossible situation that payment processors would be placed in if they

were required to collect sales and use taxes, we believe that both the narrow and broad definitions should include an express exclusion for payment processors. To support our concerns, below are arguments of why payment processors are not and should not be considered marketplace facilitators.

ETA Recommendation: Given that the effort of the MTC Work Group is focused on other entities to be marketplace facilitators and not on payment processors, ETA respectfully requests that language be added in the white paper to the "broad" definition to specifically exclude payment processors as marketplace facilitators. The added language can mirror language currently contained in the "narrow" definition, namely that the narrow definition expressly excludes persons that "merely provide payment processing services" from the definition of a "marketplace facilitator."

Potential Application of the Broad Definition to Payment Processors

1) Overview of the Issue

The payments ecosystem has been developed over the last 50 years for quickly, safely and accurately processing and settling transactions. The electronic payments industry includes thousands of companies ranging in size from public Fortune 500 companies to small, local sales organization and tech firms. The current payments ecosystem does not contemplate calculating and remitting taxes owed by merchants to the state or any other parties.

Given the inherent complexities of the electronic payments industry, the absence of a statutory exclusion for payment processors may lead to unnecessary and time-consuming controversies for businesses and state tax administrators alike. Among the many reasons this is the case, payment processors do not have and may be prohibited from obtaining the necessary information to collect tax. Moreover, payment processors are not in privity of contract with the purchaser of the good or service sold in the transaction. In most cases, payment processors do not know what is being sold or the sales price of an item. For example, if a person buys tangible property and a service contract on an on-line marketplace for $100, the processor only knows that the cardholder spent $100. The processor would not know what type of property was purchased, what the prices of the item and the service contract were or when or where the item was delivered.

2) Actual Impediments to Collection and Remittance by Payment Processors

As a practical matter, payment processors cannot and should not be required to collect and remit sales tax on the transactions for which they process payments for the following reasons:

- Payment processors lack sufficient information to correctly collect tax.
  - Although payment processors know the bill-to location, they do not know ship-to location, which is generally used to determine the jurisdiction in which a sale is taxable.
  - Payment processors do not have information about the item that is sold to determine whether or not the item is taxable in its destination jurisdiction.

- Payment processors do not have exemption certificate or other acceptable exemption information from the buyer, as that information is provided to the seller rather than the payment processor.
- States might argue that marketplace facilitators do not have the necessary information to collect tax if they use a third-party payment processor, and therefore the processor is in the position to collect tax. For example, in Washington, marketplace facilitators that use PayPal to process payments may have the necessary information to process payments and have used PayPal to collect tax. In that situation, PayPal remits the tax to the marketplace facilitator, who then remits the tax to the state. This collection arrangement is a contractual arrangement between the marketplace facilitator and PayPal.

- By using the broad definition of the term, there is a chance that multiple persons could be considered a "marketplace facilitator" with respect to any one transaction. This creates a risk of duplicate collection if the marketplace operator, the seller, and the payment processor are all required to collect tax.
- Requiring payment processors to collect and remit tax will be financially burdensome on the payment processing industry and will increase overall transaction costs. Payment processors will need to update software systems to comply with a tax collection requirement. This will be unnecessarily costly for the industry. It is also likely that the payment processors will pass those increased costs through to their customers. Although many states (approximately 24 of the 45 states that impose sales taxes) provide vendors' compensation or a collection allowance, such amounts are typically capped and would otherwise barely negate new compliance costs.
- Furthermore, states would likewise need to adopt parallel audit strategies and policies adopting this new regime. Such adoption would require training hours and multiple, duplicative audits as suggested above.
- Refunds and chargebacks will create further complications for payment processors, especially where the retailer may provide such refund in cash or store credit. If a seller issues a refund or charges back an amount, the full amount will go back to the customer. However, the portion of that amount that was sales tax would have already been remitted to the state. In this case, the seller will effectively owe the payment processor the sales tax refund, should the seller pursue a refund (or claim a bad debt deduction from sales). If the seller does not claim a refund or deduction and therefore does not pay it over to the payment processor, then the processor will not be made whole and will bear the tax cost of a transaction that was not taxable.

<u>Problematic Issues for Payment Processors and Administrators absent Statutory Exclusion</u>

1) Current State Laws on Marketplace Sales Tax Collection

The following states have already enacted marketplace facilitator legislation: Alabama, Connecticut, Iowa, Minnesota, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Washington, and Wisconsin. There are 34 states and the District of Columbia that have not yet passed marketplace facilitator legislation. The potential that all 34 states and DC could adopt the broad MTC definition creates significant exposure for payment processors. Indeed, following the *Wayfair* decision,[1] we anticipate a flurry of marketplace bills during the 2019 state legislative sessions in these 34 states.

[1] *South Dakota v. Wayfair, Inc.*, 585 US ___, ___, 138 S. Ct. 2080 (2018).

Further, statutes that had previously adopted marketplace collection provision may amend their statutes to reflect any potential MTC model.[2]

A Statutory Exclusion for Payment Processors Would Effectuate Intent and Add Much-Needed Clarity

The MTC's Draft White Paper dated October 31, 2018 suggests that the MTC Work Group does not intend to include payment processors within the defined term "marketplace facilitators." As a threshold matter, a "stand-alone" payment processor does not operate or facilitate an online "marketplace" –

> A physical or electronic place [including but not limited to, a store, booth, Internet website, catalog, television or radio broadcast, or a dedicated sales software application] where [a marketplace seller sells or offers for sale] tangible personal property [taxable services, digital goods] is/are offered for sale [for delivery in this state] [regardless of whether the tangible personal property, digital property, marketplace seller, or marketplace has a physical presence in the state].

MTC White Paper at 6.

As additional support, statements in the White Paper support this position. Specifically, there are several statements that indicate payment processing is only one of the several activities in the broad definition for qualifying an online marketplace operator as a "marketplace facilitator." Or in the narrow definition, the marketplace's payment processing services as a "limitation." In both cases, the White Paper suggests that the operation of the marketplace and the facilitation of sales thereon is **the primary criterion** of tax collection. Specific examples include:

- "States using the narrow definition limit it to include a requirement that the marketplace facilitator handle or process the customer payment. The broad definition does not have the limitation." MTC White Paper at 7.
- "Those supporting the narrow definition argue that if the marketplace facilitator is going to be required to collect and remit the sales/use tax, the marketplace facilitator must have access to the payment in order to collect the tax on the transaction. Also, the marketplace facilitator must have access to the relevant information concerning the sale in order to properly report the transaction on a return." *Id*.

Both of the above statements suggest, at a minimum by negative inference, that the broad definition expands that requirement that that a marketplace engage in an activity beyond payment processing as well as marketplace operation – not that payment processing, by itself, causes a payment processor to be a "marketplace facilitator."

But, as with many broad statutes, alternative interpretations exist. For example, while the broad definition of "marketplace facilitator" requires that operation of a "marketplace" is a prerequisite and the three-part test is conjunctive, an aggressive interpretation may yet arise that the mere *absence* of a payment processor exclusion in the broad definition – but inclusion in the narrow definition – may leave open the possible argument that processors should fall within the marketplace facilitator class of

[2] In addition, the National Conference of State Legislatures has previously approved a model law that mirrors the Washington marketplace facilitator statute.

persons. Opening up the model statute to this lack of clarity, which is easily resolved through an overt payment processor exclusion, may result in unnecessary and avoidable controversies.

In conclusion, the current "broad" definition is overly inclusive, as was its intent. *See* MTC White Paper at 9 ("the broad definition … minimizes 'loopholes' … [and] is intended to more effectively accommodate future changes in the industry and technology"). However, as explained, we do not believe the MTC Work Group's intent in drafting a model marketplace facilitator statute is to loop-in classes of person that do not operate marketplaces, namely payment processors. Therefore, the MTC should effectuate the MTC Work Group's explicit and implicit intent that payment processors ought to be excluded from any recommended "marketplace facilitator" definition submitted to the Uniformity Committee.

* * *

We appreciate you taking the time to consider these important issues. If you have any questions or wish to discuss any issues, please contact me at Stalbott@electran.org.

APPENDIX B

9-28-18 Survey Results
Who is required to register?

		AL	GA	IA	ID	KS	KY	MN	MS	OK	PA	TX	WA	Amazon	Microsoft	TaxCloud	Walmart	D Yetter	Total
1	The marketplace facilitator is required to register, collect and remit sales/use tax on behalf of all of its marketplace sellers, without exception. However, the marketplace facilitator, at its discretion, can enter into an agreement with a marketplace seller allowing that marketplace seller to register, collect and remit sales/use tax on that seller's sales.														X	X see comments		X see comments	3
2	The marketplace facilitator is required to register, collect and remit sales/use tax on behalf of all of its marketplace sellers, unless a marketplace seller has opted to register, collect and remit sales/use tax on its sales made through that marketplace facilitator and has provided to the marketplace facilitator a copy of its registration with the state.					X		X see comments								see comments			2
3	The marketplace facilitator is required to register, collect and remit sales/use tax on behalf of all of its marketplace sellers, without exception.	X	X see comments	X	X		X see comments		X	X	X see comment	X	X	X		see comments	X		12
4 Other																see comments			0

To: Marketplace Facilitator Work Group
From: Richard Cram, Multistate Tax Commission Staff
Date: September 28, 2018

Revised Survey Request—Issue #2 : **Are registration and return filing requirements in conflict or duplicative? If the marketplace facilitator is required to register, collect and remit the sales/use tax on facilitated sales, then is there a need for the marketplace seller to register or report those same sales?**

TaxCloud Comments- It would be helpful if the question made it clear that this applies to sales that are processed by that individual facilitator. Possibly change "on facilitated sales" to "on sales made through that facilitator".

Please indicate your preference by marking "X" next to one of the alternatives listed below, or please provide your own suggestion under "No. 4 Other." 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 Monday, October 8, 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 10, 2018 at 2:30 pm EDT (call-in number 1-719-234-0214, passcode# 102826).

1.___ The marketplace facilitator is required to register, collect and remit sales/use tax on behalf of all of its marketplace sellers, without exception. However, the marketplace facilitator, at its discretion, can enter into an agreement with a marketplace seller allowing that marketplace seller to register, collect and remit sales/use tax on that seller's sales.

TaxCloud Comments- We think it is appropriate that if a marketplace seller and a marketplace facilitator agree to let the seller collect and pay the tax that it should be allowed. It would be helpful if the response were modified so that it is clear that this applies to sales made through that individual facilitator. It is especially important to make this clarification since the language below refers to "all taxable sales to customers in this state."

Example (RILA model statute):

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 to customers in this state. However, a marketplace facilitator is not required to [collect and remit/pay] sales or use tax on a sale from a marketplace seller to a customer in this state if the marketplace facilitator elects to request and maintain a copy of the seller's registration to collect sales and use tax in this state. Nothing in this Section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with each other regarding fulfillment of the requirements of this [Chapter].

TaxCloud Comments- suggest replacing "all taxable sales to customers in this state" with "all taxable sales made through the facilitator to customers in this state".

2.___ The marketplace facilitator is required to register, collect and remit sales/use tax on behalf of all of its marketplace sellers, unless a marketplace seller has opted to register, collect and remit sales/use tax on its sales made through that marketplace facilitator and has provided to the marketplace facilitator a copy of its registration with the state.

TaxCloud Comments- no objection to giving a marketplace seller this option.

Example (Minnesota):
(a) A marketplace provider shall collect sales and use taxes and remit them to the commissioner under [applicable statute] for all facilitated sales for a retailer, and is subject to audit on the retail sales it facilitates unless either:
(1) the retailer provides a copy of the retailer's registration to collect sales and use tax in this state to the marketplace provider before the marketplace provider facilitates a sale; or (2) upon inquiry by the marketplace provider or its agent, the commissioner discloses that the retailer is registered to collect sales and use taxes in this state.
(b) Nothing in this subdivision 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 this chapter.

Minnesota Comments:

NOTE: Minn. Stat. § 297A.83 requires anyone required to collect and remit sales taxes to obtain a sales tax permit by registering with the Minnesota Department of Revenue. A marketplace provider must collect and remit sales taxes for all facilitated sales for a marketplace seller unless the marketplace seller is already registered to collect and remit. The marketplace provider can ask either the marketplace seller or the Minnesota Department of Revenue for confirmation of the marketplace seller's

registration status. But note that the marketplace provider and a registered marketplace seller can also agree that the marketplace provider will collect and remit sales taxes on all sales facilitated through the marketplace provider.

3.___ The marketplace facilitator is required to register, collect and remit sales/use tax on behalf of all of its marketplace sellers, without exception.

Example:

A marketplace provider shall collect state and local sales and use tax on all sales made through the marketplace to purchasers in this state whether or not the marketplace seller:

(1) has or is required to have a sales and use tax permit, or

(2) would have been required to collect and remit state and local sales and use tax had the sale not been made through the marketplace provider.

Georgia Comments:

Georgia is in favor of Option 3 – a platform being required to collect on behalf of all of its sellers. If optional, the burden of keeping track of who's in and who's out would be considerable. Requiring a platform to collect for all sellers is also important for the international compliance issue, which affects domestic compliance. If I as a seller suspect that I'm competing with overseas sellers that should be collecting but are not, I'll weigh compliance risk against the competitive disadvantage and perhaps be less likely to opt to register and collect.

Kentucky Comments:

Kentucky would also recommend that there be additional language:

1. Requiring the marketplace facilitator to provide its marketplace seller a certificate documenting the amount of tax remitted on behalf of the marketplace seller; and
2. Requiring the marketplace seller to also collect and remit the tax if the marketplace seller also makes sales through another website and gross receipts from all sales to the state exceed $100,000 or 200 or more transaction occur in the state.

Pennsylvania Comments: This requirement is for marketplace facilitators who have nexus (maintain a place of business) in the state. This standard for physical presence nexus could likely be extended to application for marketplace facilitators with (just) economic nexus.

TaxCloud Comments- we support the ability of a seller and a facilitator to agree to have the seller collect. We have concerns with a state prohibiting two private parties from entering into an agreement regarding these responsibilities.

4.___Other: [insert suggested language; if taken from existing statutory language, please provide the source]

TaxCloud- it is critical that the responsibilities regarding collecting and remitting tax on transactions through different platforms be clear. The suggestions above clarify that marketplace facilitators are only responsible for transactions that they process.

Even if it is clear that marketplace facilitators only collect and remit for the transactions that they process, the marketplace seller needs to know which transactions the facilitator is reporting (it should be noted that an individual seller may utilize multiple facilitators with each facilitator having a reporting requirement). This will enable the seller ensure that tax is being reported correctly and to only self report on transactions that have not been reported by a facilitator.

We are currently working with marketplace facilitators to see if we can agree on language to 1) clarify who is responsible for the collection and remittance of tax on transactions made through all platforms, and 2) ensure that a seller receives the information it needs to accurately file returns on the transactions that they are responsible for.

We recognize that this needs to be completed quickly and are hoping to have language available for the next meeting of the committee.

Submitted by Jerry Johnson on behalf of TaxCloud

Diane Yetter Comments:

- If a state requires marketplace facilitator to collect the tax, marketplace seller shall not be required to include sales reported by the marketplace facilitator in its periodic sales and use tax returns with the state.
- If a state requires marketplace facilitator to collect tax, these sales dollars and transactions shall be excluded from the determination as to whether the marketplace seller's sales exceed any economic nexus threshold standards for registration requirements.

APPENDIX C

Statement of Robert Plattner (on behalf of Amazon) regarding Issues 2 and 5:

I've attached a copy of the first few pages of the NY Executive Budget proposed marketplace bill. I've done so because there are a few sections of the bill where the statutory language speaks to an issue the working group is working on. One issue on our list deals with exempt sales/exemption certificates. I think our answer will be the marketplace facilitator is the party to whom the certificate should be provided if the marketplace facilitator is the tax collector.
To make that point clear, and to establish the broader underpinnings of the statute, the NY legislation states that with respect to sales on its site the marketplace facilitator facilitates, THE MARKETPLACE FACILITATOR SHALL HAVE ALL THE OBLIGATIONS AND RIGHTS of a VENDOR ....
Some states might find similar language helpful in defining and describing the inherent authority of marketplace facilitators.

Second, on p.3, line 18, p.4 line 15 and again on page 5 line 16 there is language about a standard document(a certificate of collection)that marketplace facilitators could provide to sellers in which the marketplace obligates itself to collect and pay the tax and which sellers could keep on hand to prove they were not under a duty to collect.There have been conversations about the need for such a certificate, and here is an example of its appearance in bill language.

A BUDGET BILL submitted by the Governor in
Accordance with Article VII of the Constitution

AN ACT to amend the tax law to require marketplace providers to collect sales tax and to require non-collecting sellers to provide specified information to New York purchasers and to the commissioner of taxation and finance

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 1101 of the tax law is amended by adding a new
2 subdivision (e) to read as follows:
3 (e) When used in this article for the purposes of the taxes imposed under
4 subdivision (a) of section eleven hundred five of this article and by section
5 eleven hundred ten of this article, the following terms shall mean:
6 (1) Marketplace provider. A person who, pursuant to an agreement with a
7 marketplace seller, facilitates sales of tangible personal property by such
8 marketplace seller or sellers. A person "facilitates a sale of tangible
9 personal property" for purposes of this paragraph when the person meets both of
10 the following conditions: (A) such person provides the forum in which, or by
11 means of which, the sale takes place or the offer of sale is accepted, including
12 a shop, store, or booth, an internet website, catalog, or similar forum; and (B)
13 such person or an affiliate of such person collects the receipts paid by a
14 customer to a marketplace seller for a sale of tangible personal property, or
15 contracts with a third party to collect such receipts. For purposes of this
16 paragraph, two persons are affiliated if one person has an ownership interest of
17 more than five percent, whether direct or indirect, in the other, or where an
18 ownership interest of more than five percent, whether direct or indirect, is
19 held in each of such persons by another person or by a group of other persons

that are affiliated persons with respect to each other. Notwithstanding anything in this paragraph, a person who facilitates sales exclusively by means of the internet is not a marketplace provider for a sales tax quarter when such person can show that it has facilitated less than one hundred million dollars of sales annually for every calendar year after 2016.

Natural

(2) Marketplace seller. Any person, whether or not such person is required to obtain a certificate of authority under section eleven hundred thirty-four of this article, who has an agreement with a marketplace provider under which the marketplace provider will facilitate sales of tangible personal property by such person within the meaning of paragraph one of this subdivision.

§ 2. Subdivision (1) of section 1131 of the tax law, as amended by chapter 576 of the laws of 1994, is amended to read as follows:

(1) "Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; [~~and~~] every operator of a hotel, and 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. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article; and any member of a partnership or limited liability company. Provided, however, that any person who is a vendor solely by reason of clause (D) or (E) of subparagraph (i) of paragraph (8) of subdivision (b) of section eleven hundred one shall not be a "person required to collect any tax imposed by this article" until twenty days

1 after the date by which such person is required to file a certificate of
2 registration pursuant to section eleven hundred thirty-four.
3 § 3. Section 1132 of the tax law is amended by adding a new subdivision
4 (l) to read as follows:
5 (l)(1) A marketplace provider with respect to a sale of tangible personal
6 property it facilitates: (A) shall have all the obligations and rights of a
7 vendor under this article and article twenty-nine of this chapter and under any
8 regulations adopted pursuant thereto, including, but not limited to, the duty to
9 obtain a certificate of authority, to collect tax, file returns, remit tax, and
10 the right to accept a certificate or other documentation from a customer
11 substantiating an exemption or exclusion from tax, the right to receive the
12 refund authorized by subdivision (e) of this section and the credit allowed by
13 subdivision (f) of section eleven hundred thirty-seven of this part subject to
14 the provisions of such subdivisions; and (B) shall keep such records and
15 information and cooperate with the commissioner to ensure the proper collection
16 and remittance of tax imposed, collected or required to be collected under this
17 article and article twenty-nine.
18 (2) A marketplace seller who is a vendor is relieved from the duty to
19 collect tax in regard to a particular sale of tangible personal property subject
20 to tax under subdivision (a) of section eleven hundred five of this article and
21 shall not include the receipts from such sale in its taxable receipts for
22 purposes of section eleven hundred thirty-six of this part if, in regard to such
23 sale: (A) the marketplace seller can show that such sale was facilitated by a
24 marketplace provider from whom such seller has received in good faith a properly
25 completed certificate of collection in a form prescribed by the commissioner,
26 certifying that the marketplace provider is registered to collect sales tax and
27 will collect sales tax on all taxable sales of tangible personal property by the
28 marketplace seller facilitated by the marketplace provider, and with such other
29 information as the commissioner may prescribe; and (B) any failure of the

1 marketplace provider to collect the proper amount of tax in regard to such sale
2 was not the result of such marketplace seller providing the marketplace provider
3 with incorrect information. This provision shall be administered in a manner
4 consistent with subparagraph (i) of paragraph one of subdivision (c) of this
5 section as if a certificate of collection were a resale or exemption certificate
6 for purposes of such subparagraph, including with regard to the completeness of
7 such certificate of collection and the timing of its acceptance by the
8 marketplace seller. Provided that, with regard to any sales of tangible personal
9 property by a marketplace seller that are facilitated by a marketplace provider
10 who is affiliated with such marketplace seller within the meaning of paragraph
11 one of subdivision (e) of section eleven hundred one of this article, the
12 marketplace seller shall be deemed liable as a person under a duty to act for
13 such marketplace provider for purposes of subdivision one of section eleven
14 hundred thirty-one of this part.
15 (3) The commissioner may, in his or her discretion: (A) develop a standard
16 provision, or approve a provision developed by a marketplace provider, in which
17 the marketplace provider obligates itself to collect the tax on behalf of all
18 the marketplace sellers for whom the marketplace provider facilitates sales of
19 tangible personal property, with respect to all sales that it facilitates for
20 such sellers where delivery occurs in the state; and (B) provide by regulation
21 or otherwise that the inclusion of such provision in the publicly-available
22 agreement between the marketplace provider and marketplace seller will have the
23 same effect as a marketplace seller's acceptance of a certificate of collection
24 from such marketplace provider under subparagraph (ii) of this paragraph.
25 § 4. Section 1133 of the tax law is amended by adding a new subdivision
26 (f) to read as follows:
27 (f) A marketplace provider is relieved of liability under this section for
28 failure to collect the correct amount of tax to the extent that the marketplace
29 provider can show that the error was due to incorrect information given to the

1 marketplace provider by the marketplace seller. Provided, however, this
2 subdivision shall not apply if the marketplace seller and marketplace provider
3 are affiliated within the meaning of paragraph one of subdivision (e) of section
4 eleven hundred one of this article.
5 § 5. Paragraph (4) of subdivision (a) of section 1136 of the tax law, as
6 added by chapter 93 of the laws of 1965, is amended to read as follows:
7 (4) The return of a vendor of tangible personal property or services
8 shall show such vendor's receipts from sales and the number of gallons of any
9 motor fuel or diesel motor fuel sold and also the aggregate value of tangible
10 personal property and services and number of gallons of such fuels sold by the
11 vendor, the use of which is subject to tax under this article, and the amount of
12 tax payable thereon pursuant to the provisions of section eleven hundred thirty-
13 seven of this part. The return of a recipient of amusement charges shall show
14 all such charges and the amount of tax thereon, and the return of an operator
15 required to collect tax on rents shall show all rents received or charged and
16 the amount of tax thereon. The return of a marketplace seller shall exclude the
17 receipts from a sale of tangible personal property facilitated by a marketplace
18 provider if, in regard to such sale: (i) the marketplace seller has timely
19 received in good faith a properly completed certificate of collection from the
20 marketplace provider or the marketplace provider has included a provision
21 approved by the commissioner in the publicly-available agreement between the
22 marketplace provider and the marketplace seller as described in subdivision one
23 of section eleven hundred thirty-two of this part, and (ii) the information
24 provided by the marketplace seller to the marketplace provider about such
25 tangible personal property is accurate.
26 § 6. Section 1142 of the tax law is amended by adding a new subdivision
27 (15) to read as follows:
28 (15) To publish a list on the department's website of marketplace
29 providers whose certificates of authority has been revoked and, if necessary to

APPENDIX D

10-18-18 Survey Results	AL	CO	IA	ID	KS	KY	MN	MS	ND	OK	TX	Anon	Amazon	Etsy	Mazerov	NetChoice	TaxCloud Taxometry Intuit	Walmart	D Yetter	Total States	Total Other	Total All
1. Do you support the additional underlined language:(a) A marketplace provider shall collect sales and use taxes and remit them to the commissioner under [applicable statute] for all facilitated sales for a retailer, and is subject to audit on the retail sales it facilitates unless either: (1) the retailer provides a copy of the retailer's registration to collect sales and use tax in this state to the marketplace provider before the marketplace provider facilitates a sale; or (2) upon inquiry by the marketplace provider or its agent, the commissioner discloses that the retailer is registered to collect sales and use taxes in this state. (b) Nothing in this subdivision 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 this chapter. (c) If a marketplace provider is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary for the retailer to identify the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales. (d) If a retailer is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary on facilitated sales to enable the retailer to verify the correct amount of tax was collected for each applicable taxing jurisdiction and to accurately and timely meet it's obligations for reporting and remitting sales and use taxes.																						
yes				x				x						x see comments		x see comments	xxx see comments		x	2	6	8
no	x see comments	x see comments	x		x	x see comments	x see comments		x	x	x	x see comments	x see comments							9	2	11
other															see comments			see comments			2	2
2. Do you support the additional underlined language: (A) A marketplace provider shall collect state and local sales and use tax on all sales made through the marketplace to purchasers in this state whether or not the marketplace seller: (1) has or is required to have a sales and use tax permit, or (2) would have been required to collect and remit state and local sales and use tax had the sale not been made through the marketplace provider. (B) The marketplace provider shall provide to the marketplace seller such information as necessary for the retailer to identify the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales.																						
yes	x		x	x		x		x						x see comments	x see comments		xxx		x	5	6	11
no		x see comments			x		x see comments		x	x	x see comments		x see comments			x see comments		x		6	3	9
other												x see comments									1	1

To: Marketplace Facilitator Work Group
From: Richard Cram, Multistate Tax Commission Staff
Date: October 24, 2018

Comments received with responses to Follow-up Survey Request re Issue #2 and proposed language (underlined) submitted by Jerry Johnson (TaxCloud)

Responses received are shown on a separate spreadsheet.

Issue #2: Are registration and return filing requirements in conflict or duplicative? If the marketplace facilitator is required to register, collect and remit the sales/use tax on facilitated sales, then is there a need for the marketplace seller to register or report those same sales?

Option 2

2. The marketplace facilitator is required to register, collect and remit sales/use tax on behalf of all of its marketplace sellers, unless a marketplace seller has opted to register, collect and remit sales/use tax on its sales made through that marketplace facilitator and has provided to the marketplace facilitator a copy of its registration with the state.

Proposed language (underlined) for Option 2:

(a) A marketplace provider shall collect sales and use taxes and remit them to the commissioner under [applicable statute] for all facilitated sales for a retailer, and is subject to audit on the retail sales it facilitates unless either:

(1) the retailer provides a copy of the retailer's registration to collect sales and use tax in this state to the marketplace provider before the marketplace provider facilitates a sale; or (2) upon inquiry by the marketplace provider or its agent, the commissioner discloses that the retailer is registered to collect sales and use taxes in this state.

(b) Nothing in this subdivision 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 this chapter.

<u>(c) If a marketplace provider is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary for the retailer to identify</u>

the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales.

(d) If a retailer is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary on facilitated sales to enable the retailer to verify the correct amount of tax was collected for each applicable taxing jurisdiction and to accurately and timely meet it's obligations for reporting and remitting sales and use taxes.

Please indicate whether you would support the proposed underlined language:

___yes

___no

Alabama comment:

The Department's preferred approach is that collection and remittance by the MPF on behalf of the marketplace seller is not optional.

Colorado comment:

The information sharing arrangements between these two private parties seems like something the parties themselves should provide for and manage via their contractual relationship. The seller is in a better position than the state to know whether the facilitator is providing the information needed to meet its reporting obligations. Furthermore, it is the seller that is directly harmed by any failure of the facilitator in this respect—although the state may be harmed indirectly. If this language is retained, the rule should also spell out the consequences for facilitators who fail or refuse to provide adequate information.

Kentucky comment:

The group overwhelmingly supported Option 3, instead of Option 2, in the September 28 survey responses. Kentucky believes that this should not be included as an option in the white paper.

Minnesota comment:

Paragraph (b) above, which allows marketplace providers and marketplace seller to enter into agreement to fulfill their respective sales and use tax obligations, would allow marketplace providers and marketplace sellers to agree to provide the type of information contemplated in paragraphs (c) and (d) to one another. Thus, paragraphs (c) and (d) are unnecessary and make the law more complex when simplicity should be sought.

See Amazon comment below

Anonymous comment:

We do not endorse Option 2. Additionally, with regard to the recommended changes reflected in the underline of the doc, following are our comments:

Option 2(1)(c) is unnecessary. If facilitator is responsible for collecting and remitting, seller doesn't need any information to meet is own obligations for collecting and remitting "non-facilitated" sales. Unless the changes assume the seller has ALL the sales information and must deduct from their facilitated sales, but we do not think any seller operates that way so we think the proposed language is unnecessary. Also 2(1)(d) doesn't make sense. First it says if the seller is responsible for collecting and remitting, then goes on to say the seller needs info to verify the correct amount was COLLECTED BY THE FACILITATOR. It would make sense if it said seller reports and remits and not collected. Wouldn't the facilitator always collect? Otherwise, the facilitator would just be a referrer.

Mazerov Comment:

I am not responding to this question because I oppose Option 2 in its entirety. There is good reason to be concerned about proper compliance from non-US marketplace sellers and marketplaces therefore must have the collection responsibility.

NetChoice comment:

NetChoice notes that most sellers list items on multiple marketplaces, in addition to making sales on their own website, over the phone, at their own stores, at craft fairs, etc. Tax collection by a marketplace facilitator does not relieve these multi-channel sellers of having to administer, collect, and file in up to 46 states (and possibly hundreds of local tax authorities in states like Louisiana and Colorado).

This makes it clear that states should not include marketplace sales when

determining if a small seller has reached the small business threshold. Sales where the platform handles sales tax should not count towards the small seller threshold for the seller's own sales, where they have to handle all tax administration burdens.

Walmart comment:

In lieu of answering Option 2, we have provided the RILA language that we are in favor of regarding collecting and remitting tax to the state. RILA Marketplace Model bill language states "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 to customers in this state. However, a marketplace facilitator is not required to [collect and remit/pay] sales or use tax on a sale from a marketplace seller to a customer in this state if the marketplace facilitator elects to request and maintain a copy of the seller's registration to collect sales and use tax in this state. Nothing in this Section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with each other regarding fulfillment of the requirements of this [Chapter]."

We do not mind providing the transaction level detail reports but the marketplace facilitator should be the entity electing to accept the marketplace seller's registration certificates.

Option 3

3. The marketplace facilitator is required to register, collect and remit sales/use tax on behalf of all of its marketplace sellers, without exception.

Proposed language (underlined) for Option 3

(A) A marketplace provider shall collect state and local sales and use tax on all sales made through the marketplace to purchasers in this state whether or not the marketplace seller:

(1) has or is required to have a sales and use tax permit, or

(2) would have been required to collect and remit state and local sales and use tax had the sale not been made through the marketplace provider.

(B) The marketplace provider shall provide to the marketplace seller such information as necessary for the retailer to identify the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales.

Please indicate whether you would support the proposed underlined language:

___yes

___no

Colorado comment:

Our comments on this question are similar to the above.

Minnesota comment:

To the extent marketplace providers provide this information to their marketplace sellers for accounting and income tax purposes, the language in paragraph (B) creates unnecessary complexity.

Texas comment:

We in Texas do not support either option in the survey. For Option 3, we would add the following comment:

The proposed language is unclear as to what type of information the marketplace provider shall provide to the marketplace seller. It is better to require the marketplace provider to provide a collection certificate to each marketplace seller to certify that the marketplace provider will collect and remit sales and use tax on a marketplace seller's sales through the marketplace. If a marketplace seller accepts the marketplace provider's collection certificate in good faith, the marketplace seller must exclude marketplace sales from its sales and use tax report. A marketplace seller should still be required to retain records for marketplace sales according to the state's recordkeeping requirements.

In addition, a marketplace seller should give the marketplace provider enough information to allow the marketplace provider to collect and remit sales and use tax correctly, including certifying that the item being sold is taxable, nontaxable, or exempt from taxation.

Amazon Comments:

Robert Plattner (10/22/18 email response to 10/18/18 survey request):

As you know, the states voted strongly in favor of having the marketplace facilitator be the sole tax collector with respect to all marketplace sales. My understanding is this policy will be recommended as a best practice to the Uniformity Committee.

While I do not think it is the intent of the current survey to reopen that issue, the first of the two survey questions ties Jerry's language regarding reporting of certain information by marketplace facilitators to sellers(the underlined language) to language that would allow third-party sellers to collect the tax. It then asks whether the state would support the proposed underlined language.

I think it is hard to answer yes to that question without the implication that the yes answer indicates approval of the non-underlined language(allowing third-party sellers to collect)as well.

As stated above, we believe the states have spoken out clearly against anything other than exclusive collection by the facilitators on this issue, and we do not want any confusion on this point.

That being said, Amazon strongly recommends the state reject the proposed language in both survey questions.

In order for a third-party seller to fulfill its own tax collection responsibilities, it needs only to know which sales it made on its own website. Surely, a third-party seller can determine this without imposing unnecessary additional reporting burdens on marketplaces. More than that, a third-party seller can easily determine from its own books and records on which platforms it made all of its sales. Such information is routinely shared among the parties as sales are made in order to determine how the funds flow.

It would be a waste of money, time and effort for small sellers to engage in an exercise to "square up" their sales tax liabilities across different channels every tax filing.

That would needlessly restore burdens on third-party sellers that are being shifted to Amazon and other marketplace facilitators under the new marketplace statutes.

Melissa Smith (10/23/18 email):

I couldn't agree more. By enacting marketplace laws, states are making the marketplace the responsible taxpaying entity. Along those lines, the marketplace shouldn't be required to provide information on those sales to the marketplace seller. It is incredibly and unnecessarily burdensome on both the marketplaces and the marketplace sellers and is inconsistent with the goal of the legislation.

Anonymous comment:

Option 3. With regard to the recommended changes reflected in the underline of the doc, following is our comment:
The seller does not need information from the facilitator in order for the seller to report and remit non-facilitated sales. The information for these first-party sales made by the seller

outside of the marketplace is already available to the seller. The only reason the seller might need info from the marketplace is if the seller's threshold for registering and collecting includes both the sales made on the marketplace and the seller's first-part sales (sales made outside of the marketplace) and for gross receipts tax purposes.

Etsy Comment:

My name is Michael Mincieli, and I am a Tax Director here Etsy. We wanted to weigh in on the amendment options circulated after last week's discussion, and support the amendments in both options. However, we strongly favor option 3 (with the amendment) over option 2, since as a marketplace facilitator currently calculating, collecting, and remitting state sales tax on behalf of purchases made in four states, we believe the amendment will help multichannel sellers in their accounting mechanisms.

The majority of Etsy sellers sell or promote their goods in other venues, including their own websites, craft fairs, and other marketplace platforms. Yet, they are still microbusinesses—87% of whom are women, and 97% of whom work from home. We believe the sales made on marketplace platforms should not count towards the various small seller exemption thresholds for economic nexus in the states. When marketplaces like Etsy comply with the marketplace provider laws, we are handling the administrative burdens that accompany the rules. Therefore, the the transactions made through marketplaces should not count towards the total small seller exemption thresholds for economic nexus purposes. This amendment would allow a seller to show that the tax on purchases made through the marketplaces has been accounted for, and provide a clearer picture of their multichannel business.

Mazerov Comment:

My "yes" response is tentative. I would have liked to have more input from a) marketplace facilitators regarding how burdensome they believe such information provision would be; b) marketplace sellers and CSPs regarding how difficult compliance has been thus far for marketplace sellers in states imposing collection on marketplace facilitators because the latter are not currently required to provide this type of information to marketplace sellers; and c) from state sales tax auditors regarding the extent to which this information would be useful/necessary in auditing marketplace sellers with regard to their direct sales.

NetChoice comment:

NetChoice notes that legal challenges are likely against states that impose sales tax liability on marketplace facilitators who are not the seller-of-record. There are particular legal questions regarding laws imposing tax liability on a facilitator who does not process the purchase transaction.

Response of Robert Plattner (on behalf of Amazon) to proposed TaxCloud language concerning revised survey request dated 9-28-18 re Issue #2 :

TaxCloud has proposed language under Options 2 and 3 on the prior survey that would require a marketplace facilitator to report to every third-party seller the amount of tax collected by the marketplace facilitator on each sale made by that seller on the marketplace platform. The requirement would apply under Option 3 even though the marketplace facilitator has exclusive responsibility for collecting tax on marketplace sales under Option 3. The rationale given is that the information is required for third-party sellers to meet their tax reporting and filing obligations.

Option 2

Amazon fundamentally disagrees with Option 2, which would allow third-party sellers to opt to serve as the tax collector on their sales on the marketplace provider's platform. This feature deviates from the policy strongly favored by the states and Amazon that marketplace facilitators would, without exception, serve as the exclusive tax collector on all marketplace sales.

Allowing third-party sellers to take responsibility for tax collection on their marketplace sales would be the single most egregious mistake states could make in designing a marketplace collection statute, undermining compliance and imposing huge administrative burdens on taxpayers and revenue agencies alike.

The fact that the reporting described above would be needed under Option 2 is just one reason among many Option 2 should be rejected by the states as a viable policy choice.

Option 3

Amazon opposes any requirement, as set out in Tax Cloud's proposed language under Option 3, that a marketplace provider provide third-party sellers with information on the millions of individual transactions executed on the marketplace for which the marketplace facilitator has the sole obligation to collect tax. This proposed requirement reflects a serious misunderstanding of how sales tax collection on marketplace sales would be accomplished under Option 3.

There is simply no need for sellers to receive this information under Option 3. The marketplace facilitator will be solely responsible for tax collection on all marketplace sales, and will be required to provide third-party sellers with a certification stating that it is solely responsible. This certification will shield sellers from any tax liability on these sales.
Third-party sellers collecting tax for sales on its own website do not need information from the marketplace to fulfill its tax collection responsibility with respect to sales on its own website.

With well over a million sellers, these clear cut divisions of responsibility are essential to make the system work.

To: MTC Uniformity Committee
From: TaxCloud, Jerry Johnson
Taxometry, Bruce Johnson
Intuit, Anna-mary Geist

Comments on Facilitator Issue #2

Three options were presented regarding how a state may establish the collection obligation between a marketplace facilitator and a marketplace seller.

Briefly the options are-

1. The facilitator is required to collect unless the facilitator and the seller both agree to let the seller be the responsible party.
2. The facilitator is required to collect but a seller would have the option of unilaterally deciding that it is the responsible party.
3. The facilitator is obligated to collect for all of its marketplace sellers without exception.

While we understand that the preference for a majority of the states participating in this effort is option #3, we think it is appropriate to give state policymakers options regarding this important issue. We would point out that under Option #1 no facilitator would be required to allow a seller to have the collection obligation. We think it is appropriate that individual facilitators be given the option of entering into agreements with sellers to establish tax responsibilities.

For any options included in the final work product of this group, we think it is critical to include language that addresses the responsibility of facilitators to provide information to sellers that allow the seller to fulfill it's obligations to a state. Our proposal can be summarized as follows.

- If the facilitator is the responsible party for calculating, collecting and remitting the tax on facilitated sales, they need to provide to the seller enough information for the seller to accurately and timely report on non facilitated sales. The facilitator will not be required to provide information on tax determinations for individual transactions.
- If the seller is the responsible party for calculating, collecting and remitting the tax on facilitated sales, the facilitator shall provide to the seller enough information for the seller to ensure the accuracy of tax determinations on individual transactions for facilitated sales and to accurately and timely report on non facilitated sales.

Including language that addresses this issue is critical so that sellers will be able to accurately file their tax returns and to avoid under or over reporting of sales or use taxes.

Below is suggested language for each of the options the workgroup is considering.

Proposed language for Option 1

Example (RILA model statute):

(a) 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 through the facilitator to customers in this state. However, a marketplace facilitator is not required to [collect and remit/pay] sales or use tax on a sale from a marketplace seller to a customer in this state if the marketplace facilitator elects to request and maintain a copy of the seller's registration to collect sales and use tax in this state.

(b) Nothing in this Section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with each other regarding fulfillment of the requirements of this [Chapter].

(c) If a marketplace provider is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary for the retailer to identify the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales.

(d) (d) If a retailer is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary on facilitated sales to enable the retailer to verify the correct amount of tax was collected for each applicable taxing jurisdiction and to accurately and timely meet it's obligations for reporting and remitting sales and use taxes.

Proposed language for Option 2

(a) A marketplace provider shall collect sales and use taxes and remit them to the commissioner under [applicable statute] for all facilitated sales for a retailer, and is subject to audit on the retail sales it facilitates unless either:
(1) the retailer provides a copy of the retailer's registration to collect sales and use tax in this state to the marketplace provider before the marketplace provider facilitates a sale; or (2) upon inquiry by the marketplace provider or its agent, the commissioner discloses that the retailer is registered to collect sales and use taxes in this state.
(b) Nothing in this subdivision 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 this chapter.

(c) If a marketplace provider is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary for the retailer to identify the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales.
(d) If a retailer is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary on facilitated sales to enable the retailer to verify the correct amount of tax was collected for each applicable taxing jurisdiction and to accurately and timely meet it's obligations for reporting and remitting sales and use taxes.

Proposed language for Option 3

(A) A marketplace provider shall collect state and local sales and use tax on all sales made through the marketplace to purchasers in this state whether or not the marketplace seller:
(1) has or is required to have a sales and use tax permit, or
(2) would have been required to collect and remit state and local sales and use tax had the sale not been made through the marketplace provider.
(B) The marketplace provider shall provide to the marketplace seller such information as necessary for the retailer to identify the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales.

APPENDIX E

Issue #2—Industry Participant Comments

Scott Peterson (Avalara, Certified Service Provider[CSP]) recommends that the marketplace seller and facilitator have the flexibility to agree on which one has the registration/collection obligation. He noted that sellers may sell on multiple channels (seller's own website, marketplace facilitator, etc.), and errors and confusion are created when the marketplace facilitator collects in that situation.

Diane Yetter, (Yetter Consulting), agreed with Mr. Peterson's comments, adding that mandating marketplace facilitator collection creates unnecessary complexity for sellers that were previously registered. They will need to create separate books and records for each marketplace facilitator. Providing an option for the seller to collect is best If seller takes responsibility, then that should be good.

Craig Johnson (Executive Director, Streamlined Sales Tax Governing Board, Inc.) commented that certified service providers are having issues related to marketplace facilitators when they have clients that sell both on the marketplace as well as their own website/store, etc. and being able to differentiate between those sales.

Paul Rafelson (Online Merchants Guild) recommends that the collection obligation be imposed on the marketplace facilitator, without exception, due to the risk that marketplace sellers could establish fraudulent accounts and collect but not remit the tax. Also, this would require compliance by foreign marketplace sellers.

Eric Carstens, (McDermott, Will & Emery), represents a number of marketplace facilitators, stated that marketplace facilitator tax collection should be mandatory, all or nothing. Audits should be of marketplaces, not of sellers. With respect to marketplace sales, there should be no exemption for small sellers.

Rob Plattner (Amazon) urged that it has to be the marketplace facilitator collecting with exclusive responsibility on facilitated sales. Sellers get a certificate from the marketplace facilitator and they are off the hook for collecting. The seller would collect only on direct sales on the seller's own website. Any other approaches will cause compliance problems.

Ariel McDowell (Walmart) also recommended that the marketplace facilitator be required to collect and remit on all facilitated sales. Otherwise, there is a concern from an audit and reconciliation perspective. It will get a lot more complicated if states take another approach.

Jerry Johnson (TaxCloud, CSP) felt that the potential for fraud sellers have the option to collect is being overstated. CSPs have to pick up all the sales on the sellers website. There is no ability of sellers to manipulate. CSP systems have been working for many years. They take responsibility for making sure that mapping is correct. The states certify that mapping is correct. Sellers should have the option to collect. CSPs are willing to work through the issues of who is responsible for reporting what. There are good reasons for states to use CSPs.

To: Uniformity Committee of the Multistate Tax Commission

Thank you for your work on issues related to the implementation of the recent Supreme Court decision regarding remote collection authority. Part of the work of the committee focuses on issues related to marketplace facilitators. In the list of issues developed by the committee, item #2 addresses specific problems associated with seller registration, the preparation and filing of returns, and the remittance of tax funds.

> 2. Are registration and return filing requirements in conflict or duplicative? If the marketplace facilitator is required to register, collect and remit the sales/use tax on facilitated sales, then is there a need for the marketplace seller to register or report those same sales?

Recognizing that sellers may, and do, sell through many platforms, coordination on who is responsible for reporting and remitting tax on all categories of sales is critical. For example, there are marketplace sellers that 1) use multiple facilitators who each may be required to report and remit tax; 2) make in-store sales on which they traditionally report and remit the tax directly; and 3) make on-line sales outside of any facilitator on which they self-report or have hired a third party, such as a Certified Service Provider, to file returns and remit payments.

It is important that facilitator laws recognize these alternative ways of transactions occurring in a single business and clearly outline filing and remittance responsibilities prior to any filings being submitted. It is much more difficult to "undue" erroneous or duplicative filings and refund tax payments than it is to clarify these obligations upfront.

We will be working on suggested legislative language to address this issue and will engage facilitators to see if we can develop possible solutions that work for everyone.

Beyond the issues concerning facilitator laws, there are many other issues related to implementing remote collection authority that we hope the committee will consider addressing. As remote sellers work to comply with new sales and use tax responsibilities across the states, it would be extremely helpful if states coordinate their efforts. The attached list outlines issues that states should consider when looking for ways to reduce the burden faced by remote sellers in collecting sales and use taxes. We ask the committee to review these issues and encourage states to take coordinated action when appropriate.

Thank you for your work and for considering this request. We look forward to working together and are available to answer any questions you may have or expand upon any of this content.

TaxCloud, Intuit

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.

To: MTC Uniformity Committee
From: TaxCloud, Jerry Johnson
Taxometry, Bruce Johnson
Intuit, Anna-mary Geist

Comments on Facilitator Issue #2

Three options were presented regarding how a state may establish the collection obligation between a marketplace facilitator and a marketplace seller.

Briefly the options are-

1. The facilitator is required to collect unless the facilitator and the seller both agree to let the seller be the responsible party.
2. The facilitator is required to collect but a seller would have the option of unilaterally deciding that it is the responsible party.
3. The facilitator is obligated to collect for all of its marketplace sellers without exception.

While we understand that the preference for a majority of the states participating in this effort is option #3, we think it is appropriate to give state policymakers options regarding this important issue. We would point out that under Option #1 no facilitator would be required to allow a seller to have the collection obligation. We think it is appropriate that individual facilitators be given the option of entering into agreements with sellers to establish tax responsibilities.

For any options included in the final work product of this group, we think it is critical to include language that addresses the responsibility of facilitators to provide information to sellers that allow the seller to fulfill it's obligations to a state. Our proposal can be summarized as follows.

- If the facilitator is the responsible party for calculating, collecting and remitting the tax on facilitated sales, they need to provide to the seller enough information for the seller to accurately and timely report on non facilitated sales. The facilitator will not be required to provide information on tax determinations for individual transactions.
- If the seller is the responsible party for calculating, collecting and remitting the tax on facilitated sales, the facilitator shall provide to the seller enough information for the seller to ensure the accuracy of tax determinations on individual transactions for facilitated sales and to accurately and timely report on non facilitated sales.

Including language that addresses this issue is critical so that sellers will be able to accurately file their tax returns and to avoid under or over reporting of sales or use taxes.

Below is suggested language for each of the options the workgroup is considering.

Proposed language for Option 1

Example (RILA model statute):

(a) 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 through the facilitator to customers in this state. However, a marketplace facilitator is not required to [collect and remit/pay] sales or use tax on a sale from a marketplace seller to a customer in this state if the marketplace facilitator elects to request and maintain a copy of the seller's registration to collect sales and use tax in this state.

(b) Nothing in this Section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with each other regarding fulfillment of the requirements of this [Chapter].

(c) If a marketplace provider is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary for the retailer to identify the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales.

(d) (d) If a retailer is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary on facilitated sales to enable the retailer to verify the correct amount of tax was collected for each applicable taxing jurisdiction and to accurately and timely meet it's obligations for reporting and remitting sales and use taxes.

Proposed language for Option 2

(a) A marketplace provider shall collect sales and use taxes and remit them to the commissioner under [applicable statute] for all facilitated sales for a retailer, and is subject to audit on the retail sales it facilitates unless either:
(1) the retailer provides a copy of the retailer's registration to collect sales and use tax in this state to the marketplace provider before the marketplace provider facilitates a sale; or (2) upon inquiry by the marketplace provider or its agent, the commissioner discloses that the retailer is registered to collect sales and use taxes in this state.
(b) Nothing in this subdivision 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 this chapter.

(c) If a marketplace provider is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary for the retailer to identify the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales.
(d) If a retailer is the responsible party for collecting and remitting the sales and use tax under paragraph (a) of this subdivision, the marketplace provider shall provide to the retailer such information as is necessary on facilitated sales to enable the retailer to verify the correct amount of tax was collected for each applicable taxing jurisdiction and to accurately and timely meet it's obligations for reporting and remitting sales and use taxes.

Proposed language for Option 3

(A) A marketplace provider shall collect state and local sales and use tax on all sales made through the marketplace to purchasers in this state whether or not the marketplace seller:
(1) has or is required to have a sales and use tax permit, or
(2) would have been required to collect and remit state and local sales and use tax had the sale not been made through the marketplace provider.
(B) The marketplace provider shall provide to the marketplace seller such information as necessary for the retailer to identify the transactions on which the marketplace provider is reporting to enable the retailer to accurately and timely meet it's obligations for reporting and remitting for non facilitated sales.

APPENDIX F

10-11-18 Survey Results	AL	CO	GA	IA	ID	KS	KY	LA	MN	MS	OK	PA	TX	Mazerov	Walmart	D Yetter	Anon	Total
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. marketplace seller							x				x		x		x	x		5
B. marketplace facilitator		x	x	x		x			x	x		x		x			x	9
C. other					x			x										2
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	x	x	x	x	x	x	x	x		x	x	x	x	x	x		x	15
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																x		1
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					x	x	x	x	x	x	x	x			x			9
B.___total of only direct sales or transactions by the multichannel remote seller	x	x	x	x									x	x		x	x	8
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	x		x	x	x					x	x		x	x			x	9
B.___annual sales volume or number of separate transactions threshold only												x			x			2
C.___annual sales volume and number of separate transactions economic nexus threshold		x					x	x								x		4

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 claiming an exemption for resale.
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

APPENDIX G

Issue #4—Work Group Participant Comments

These are comments on Issue #4 made by Work Group participants during meetings or separately submitted:

Diane Yetter (Yetter Consulting) urged that the economic nexus sales volume threshold, when applied to a marketplace seller in a state that requires the marketplace facilitator to collect on facilitated sales, should not include those facilitated sales. Otherwise, the small marketplace seller who has only a few direct sales (which would fall below the $100,000 gross sales/yr. in the state threshold) but is making a large volume of marketplace sales (say over $1 million) will be burdened with having to comply with multiple state collection requirements on a very small volume of sales. This is too large a burden for a small seller.

Michael Mazerov (CBPP) and Rob Plattner (Amazon) echoed those concerns, recommending that states not include facilitated marketplace sales being collected upon by a marketplace facilitator when determining whether a remote marketplace seller must register and collect on its direct sales.

Bruce Johnson (Taxometry) commented: if those facilitated marketplace sales being collected upon by a marketplace facilitator are not included in the economic nexus threshold for a marketplace seller, then all states will be driven to enact marketplace facilitator collection requirements.

Richard Dobson (Kentucky Department of Revenue) commented that if those facilitated marketplace sales are not included in the economic nexus sales volume threshold for a marketplace seller, then a state will lose to another state the tax on marketplace seller's direct sales falling below the threshold.

Robert Plattner (Amazon) commented that when the state has enacted marketplace facilitator collection requirements, there is zero burden on the marketplace seller as to its facilitated marketplace sales: the marketplace facilitator is going to handle the registration, collection, return filing and audit responsibilities as to those sales. However, there could be a significant burden on the small marketplace seller in having to comply with those responsibilities as to its direct remote sales. Even though states could assert economic nexus as to the marketplace seller, practical considerations should dictate considering only the volume of the marketplace seller's direct remote sales in determining whether the marketplace seller should be required to register, collect and remit on those sales. From an administrative point of view, is it worth it for the state to have to deal with such small sellers?

Robert ___ (a small marketplace seller) commented that most small marketplace sellers making a few direct sales will simply shut down their websites if states insist on requiring them to register and collect on those few direct sales. Robert noted: "Remember, Wayfair is a very large remote seller, and there are a lot of small sellers making remote sales who also have brick and mortar stores. Those will be among the ones forced to shut down their websites."

Diane Yetter echoed those concerns, recommending that a separate sales volume economic nexus threshold be applied to direct sales by marketplace sellers, not including facilitated marketplace sales that are already being collected upon by the marketplace facilitator.

Richard Dobson (Kentucky Department of Revenue) commented that for states that have already enacted economic nexus thresholds, under current law, those make no distinction between a marketplace seller's direct remote sales vs. facilitated marketplace sales.

Adam Humes (IA) echoed that comment, indicating that Iowa's economic nexus statute has no flexibility on excluding facilitated marketplace sales.

Robert Plattner (Amazon) suggested that states consider administratively allowing small marketplace sellers a separate sales volume threshold for their direct sales before being required to register and collect on those sales—even though the marketplace seller may clearly have economic nexus with the state when all of its sales (direct and marketplace facilitated) are considered.

Regarding the question in Issue #4 as to whether the economic nexus threshold should be limited to sales volume only, Diane Yetter commented that she strongly recommended that states not include a "separate transaction" threshold and limit to the economic threshold to sales volume only, or at least make the threshold include both sales volume and number of separate transactions.

Sylvia Dion, tax practitioner, echoed that recommendation. She represents international remote sellers and commented that several of her clients are in situations where their remote sales hit the 200 transactions/yr. threshold, but their annual sales volume is only $5,000 or less.

Rachel ___, another practitioner, also supported that recommendation.

Washington points out the difficulty with attempting to define the term "transaction." Also, the sales volume threshold measurement needs to defined: retail sales? Wholesale sales? Both? Taxable sales? Washington also suggests that the thresholds need to apply to the prior or current year, and guidance needs to be provided for sellers reaching the threshold during the current year as to when the seller must register and commence filing returns. Washington suggests the 1st day of the calendar month at least 30 days after the threshold is reached.

Scott Letourneau (SalesTaxSystem.com) suggested getting rid of the "transaction" threshold and using only a sales volume threshold.

Paul Rafelson (Online Merchants Guild) also supports getting rid of the "transaction" threshold.

APPENDIX H

Issue #5—Questions submitted by Diane Yetter (Yetter Consulting)

If the purchaser provides the exemption certificate to the marketplace seller, can the marketplace facilitator rely on that exemption certificate?

If the marketplace facilitator is responsible for collection of the tax, should the purchaser provide the exemption certificate to the facilitator?

If so, will that certificate apply to all sellers on that marketplace?

If the certificate is issued as a blanket certificate to what extent will the facilitator be required to know to which seller transactions to apply the certificate?

Will the buyer be required to list specific products on the certificate and then the facilitator applies based on product categories (or tax content categories)?

Or does the certificate apply only to select sellers?

Will the buyer be required to identify which sellers the certificate applies to?

What if there are multiple sellers, will the exemption certificate provided to the marketplace facilitator cover purchases from them?

What if the certificate only applies to certain products from the given seller and the facilitator doesn't provide for this functionality to set up the certificate properly? Who is liable under audit for under collecting tax?

What happens if the facilitator doesn't permit customer-based exemptions but only refunds? Who is responsible for approving the refund?

APPENDIX I

MTC Uniformity Committee Comments

Wayfair Implementation and Marketplace Facilitator Work Group

Referrer Provisions:

The "referrer" provisions are unnecessary at this point in light of the *Wayfair* decision because marketplace facilitators or sellers will be required to collect and remit. Furthermore, a company whose role does not involve handling the money/wallet should not have tax collecting and/or reporting obligations. Therefore, the referrer provisions should be excluded entirely from state legislation or regulations implementing *Wayfair*. If "referrer" provisions are included, there should be an explicit exemption for providers of internet advertisers, without any conditions (*i.e.*, no requirement that the referrer not display the seller's shipping terms or advertise whether the seller charges sales tax to be entitled to the exemption).

Interest & Penalties:

A vendor, seller, marketplace facilitator, and referrer should be entitled to a waiver of interest and penalties if a good-faith effort is made to implement systems and make process changes in order to comply with the new sales tax collection, remittance, and reporting responsibilities.

Economic Nexus Threshold:

A single threshold based on annual sales is preferred. In the case where the marketplace facilitator is the party responsible for collecting and remitting the tax, then the threshold(s) should apply to the marketplace facilitator only and not to each marketplace seller.

- It is not possible for the marketplace facilitator to know the level of total sales by 3rd-party marketplace sellers if the sellers are also using sales channels outside of their marketplace.
- It should also not every be incumbent upon the marketplace facilitator to notify sellers when they pass established thresholds.
- It would be extremely costly and inefficient for a marketplace facilitator to configure a tax calculation environment for each seller of record.
    - For example, the provision in the proposed New Jersey legislation that a marketplace facilitator shall not be required to collect and remit tax if the marketplace seller holds a certificate of registration and provides a copy to the marketplace facilitator prior to the retail sale should be avoided as it creates confusion and/or an unneeded administrative burden to the marketplace facilitator. It would be preferable if the marketplace facilitator is always required to collect on all third-party sales as the default, regardless of whether the seller is registered. If the marketplace seller is permitted to collect in certain instances (such as when a certificate of registration is provided to the marketplace facilitator), it should be subject to the terms of the agreement between the marketplace facilitator and marketplace seller or at the election of

the marketplace facilitator (but never an affirmative requirement that the marketplace facilitator not collect on a seller-by-seller basis).

Limited Liability – Incorrect Information from Marketplace Seller:

A marketplace facilitator should be relieved of any liability for failure to collect and remit the correct amount of the tax to the extent that the marketplace facilitator can demonstrate that the error was due to incorrect information given to the marketplace facilitator by a marketplace seller. This should include (but not be limited to) incorrect coding or product characterization by the marketplace sellers on the marketplace platform. There should be no limit on the amount of liability, interest, and penalty relief to the marketplace facilitator since the error is attributable to the marketplace seller. There should also be no sunset on this provision.

Exemption Certificates:

A marketplace facilitator should be able to accept tax exemption certificates in the name of either the marketplace facilitator or the marketplace seller.

Respecting the Terms of the Marketplace Facilitator-Seller Agreement:

The taxing jurisdiction should be required to respect the terms of the agreement between the marketplace facilitator and marketplace seller regarding tax nexus footprint, tax collection/remittance responsibility, and tax audit responsibilities.

- *Nexus Footprint* - As an example, the contract might stipulate whether tax is calculated based on the marketplace facilitator's nexus foot print or that of the seller.
- *Tax Collection & Remittance Responsibility* - As an example, the contract might identify whether the marketplace facilitator or marketplace seller has collection and remittance responsibility.
- *Tax Audit Responsibilities* - As an example, the contract might identify whether the marketplace facilitator or the marketplace seller will be primarily responsible for managing audits by taxing jurisdictions. Whomever collects and remits the tax should be the primarily responsible for responding to audit inquiries by the taxing jurisdiction.

No Separate Tax Returns Required for Marketplace Seller Transactions:

A marketplace facilitator should be allowed to combine first-party sales and related tax with the third-party sales and related tax on one tax return filed by the marketplace facilitator. However, upon audit, the marketplace facilitator may be required to separate the first-party sales from the third-party sales for tax auditors.

Anonymous Comment 11-2-18

Regarding Issue 1 – Regardless of which definition is used, it should be clear that the responsibility to collect and remit is made on a transaction basis. Some marketplaces facilitate transactions as described in the definitions but also include other forms of traditional advertising on their marketplace. These transactions might involve the introduction of a buyer and seller and an offer to sell but the conclusion of the transaction and, more importantly, the payment, occurs off the platform. These marketplaces have concerns about the broad definition as they could be held responsible for sales tax on transactions when there is no absolute knowledge that the transaction was ultimately concluded or whether it was concluded at an amount that was different than the advertised amount. For this reason, the more narrow definition seems more appropriate. This should not open a "loop hole" as noted by one of the other members of the working group. Many sellers use marketplaces so that sales can be concluded on the marketplace. This is one of the important values of a marketplace. If a marketplace chooses to modify their business such that sales are NOT concluded on the marketplace, many sellers may decide to leave that marketplace.

Regarding Issue 4 – It is appropriate to only use a marketplace seller's direct when determining if they have exceed the threshold. Sales attribute to a marketplace which they are responsible for should not also count toward a seller's threshold. However, there should be clarity and uniformity on ***how*** this will work. If the measurement period is a calendar year (whatever the measurement period is it would be best if it was the same in every state) then there needs to be a gap between the end of the measurement period/year and when a remote seller is required to start (or allowed to stop) collecting tax. This is because some sellers might reach the threshold at or very near the end of the measurement period/year and need to start collecting tax at the beginning of the next measurement period/year. For example, if a seller crosses the threshold on December 31st, they would need to start collecting tax a few hours later on January 1st. I think Minnesota's rule says that the seller needs to start collecting tax starting the first day of the quarter AFTER the seller crosses the threshold. This makes sense. This would also work in reverse when a seller who had exceeded the threshold in a previous year has a decrease in sales and falls below the threshold – they should only be allowed to stop collecting at the start of the quarter AFTER the measurement period ends.

- Another issue with the threshold is whether or not it should be based on taxable sales, sales of tangible personal property or "gross revenue." Unfortunately, the SD statute (which seems to be the model for

other states) uses "gross revenue" but they are one of the few states that imposes sales tax "all sales" unless specifically exempted and they have few exemptions. This means that in SD, "gross revenue" is relatively close to "taxable sales." If "gross revenue" is used in other states that exempt all or most services, this could lead to a registration requirement for service providers with significant sales of exempt services who happen to sell a small amount of taxable tangible personal property. These service providers should be entitled to use the registration threshold for these taxable sales.

Regarding Issue 5 – It does seem appropriate that a marketplace should have an exemption certificate (or equivalent) from a buyer to document an exempt sale. It would be ideal if exemption certificates previously issued to a marketplace seller could be "transferred" to a marketplace facilitator but this might not be feasible. This may not be a big issue for most marketplaces as I don't there may not have been a significant number of exemption certificates issued to marketplace sellers at this point. This will likely become a bigger issue as we move forward. In addition, it should be made clear that a buyer can issue an exemption to a marketplace for ALL purchases from all marketplace sellers. A marketplace should not need to get a separate exemption certificate from a buyer for each marketplace seller – after all, these new rules are deeming the marketplace facilitator to be the seller. If a buyer is purchasing items on a marketplace under an exemption certificate and also purchasing other items that are not exempt – the buyer should manage this individual item-by-item taxability and not the marketplace. The buyer should either pay tax on all items purchased and take a credit/apply for a refund for items that are exempt or issue an exemption certificate for all items and self-accrue tax for items that are not exempt. Marketplaces should be able to apply tax to all items purchased by a buyer or no items. If a buyer pays tax on items purchased on a marketplace and those items qualify for an exemption the buyer should be able to seek a refund directly from the state rather than from the marketplace. Along these lines, At the bottom of page 17 of the white paper there is a reference to the Texas proposed language that says "a marketplace provider has the rights and duties of a seller" – this means that the marketplace facilitator/provider should be able to take into account various adjustments such as discounts, coupons, bad debts and similar items. If a state is going to deem a marketplace facilitator to be the seller then the marketplace facilitator needs to be entitled to the adjusts and other credits available to a seller.

Regarding Issue 6 – It should be clear that "information" provided by a marketplace seller that a marketplace facilitator relies on for tax purposes includes the classification or categorization of the items listed by the

marketplace seller. If a seller list a taxable item as something that it is not or in a category that would be exempt (e.g., listing a coffee mug in the coffee beans category) then that should be considered an error of the marketplace seller.

Compensation – I do not recall if the working group considered compensation or cost reimbursement for marketplace facilitators but there is a case for this. Marketplace facilitators are not the sellers of the items sold on marketplaces (other than for sales tax purposes in the states that have adopted marketplace facilitator rules) and the marketplace facilitator does not recognize revenue for the items sold on the marketplace. A marketplace facilitator's revenue is only a small portion of the selling price of the items sold. Yet the marketplace facilitator will responsible for sales tax on the selling price of the items sold. The cost of collecting this tax will be significant and will be a much greater percentage of a marketplace facilitator's actual revenue. Compensation is available for retailers in some states today which should be available to marketplace facilitators as well. IN many cases, there is a maximum amount allowed per return. Given that marketplace facilitators will be filing on behalf of hundreds or thousands of sellers, these limitations on the compensation should be adjusted accordingly. Perhaps the maximum compensation should allowed on a per seller basis.

Comments from an anonymous large national retailer:

Marketplace Facilitator (MF)
Marketplace Seller (MS)
Issue 2 – Registration

- Requiring MFs to register raises a concern for those large retailers that are registered everywhere (or nearly everywhere) that put product on a marketplace. Currently, these are our sales and the remittance responsibility is ours. Removing the sales tax from our systems while still providing information to the MF to collect/remit is proving to be a challenge.
- We would recommend some documentation of between MF and MS of the collection responsibility for each state. It may not be practical if the MF has thousands of MS, but there is a concern of liability to the MS because the MF didn't follow through.

Issue 3 – Audit

- Responsibility for mapping taxability. I'm uncertain how a MF would consume taxability mapping from dozens or thousands of MS. Taxable, not taxable may be relatively simple, but what about reduced rates, sales tax holidays, partial exemptions (Home rule)?
- I'm also struggling with how a MS identifies that a transaction was in a MF-remitting state four or five years down the road during an audit to properly identify the responsible party for the tax. (to avoid taxing a transaction twice).

Issue 6 – Liability protection

- Has there been any discussion of liability protection for the MS? Is that implied or covered somewhere else that I missed, perhaps in Issue 2 – Registration?

Issue 7 – Class Action

- I agree with the comment on adding qui tam.