

MARKETPLACE FACILITATORS WORK GROUP WHITE PAPER



MULTISTATE TAX COMMISSION

Richard Cram
National Nexus Program Director

Uniformity Committee
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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.

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].

MARKETPLACE SELLER

- A person [not a related party to a marketplace facilitator] who has an agreement with a marketplace facilitator [regarding sales of such person] 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 . . .] [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].

MARKETPLACE FACILITATOR

- “Broad” definition (based on WA 2017 HB 2163)
- (AL, IA, LA, MI, ID, WA support)

- “Narrow” definition
- (GA, KY, MN, OK, PA support)

WASHINGTON DEFINITION

A marketplace facilitator is a business that does the following **three** activities: ([RCW 82.13.010\(3\)](#)):

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

WASHINGTON DEFINITION (CONT.)

2. 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.

WASHINGTON DEFINITION (CONT.)

3. 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.

MARKETPLACE FACILITATOR – NARROW DEFINITION EXAMPLE

- 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 or otherwise enhancing or enabling such sales for compensation, other than merely providing payment processing services]; 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] [regardless of whether the marketplace facilitator receives compensation or other consideration in exchange for its services].

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.
- (AL, GA, IA, ID, KY, MS, OK, PA, TX, WA supported)
- (KS and MN supported requiring marketplace facilitator to collect but giving marketplace seller the option to take on that responsibility.)

ISSUE #2--REGISTRATION

- 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.

ISSUE #2--REGISTRATION

- Suggested certification requirement: Marketplace facilitator issues certificate to marketplace seller (or provide in the contract) that marketplace facilitator will register, collect and remit sales/use tax, and be responsible for being audited on facilitated sales.

ISSUE #2--REGISTRATION

- Certified Service Providers (CSP) request for information from marketplace facilitators on facilitated sales
- No consensus

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 also Issue #6.

ISSUE #3--AUDIT

- 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].

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, only the marketplace seller's direct 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 CERTIFICATES

- 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 purchases claiming exemptions for any of those sales.

ISSUE #5 – 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.

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.

ISSUE #6 – LIABILITY PROTECTION FROM MARKETPLACE SELLER ERRORS

- 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.**

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.
- 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].**