

Marketplace Facilitators

Discussion of NCSL SALT Task Force Workgroup Draft Model

MTC Meeting – November 6, 2019

Jackson Brainerd, NCSL

Fred Nicely, COST

Addressing the Issues – Is Uniformity Needed & Obtainable?

NCSL Workgroup Draft Model Legislation - Comparison with MTC Draft White Paper

- Purpose of the Workgroup
- MTC White Paper Issues Covered in Draft Model
 - Definition of Marketplace Facilitator
 - Who is the Retailer?
 - Record and Audit Exposure
 - Facilitator & Seller Information Requirements
 - Collection Responsibility
 - Economic Nexus Threshold Calculation
 - Certification Requirement & Return Simplification

Purpose of NCSL Workgroup

- Formed to address concerns expressed by SALT task force members and sponsors.
- Intended to provide guidance to states should they seek to revise their marketplace facilitator laws in 2020 and beyond.
- Promotes uniformity and provides language consistent with the most recent thinking.
- Part of a continuing conversation between affected taxpayers and legislators.
- Seeking Task Force approval of model language in late November, Executive Committee approval in early January.

MTC White Paper Issues Covered in Draft Model

Definition of Marketplace Facilitator

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

1. Contracts or otherwise agrees with marketplace sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the marketplace seller's products through a physical or electronic marketplace operated, owned, or otherwise controlled by the person; and,
2. Either directly or indirectly through contracts, agreements or other arrangements with third parties, collects the payment from the purchaser and transmits all or part of the payment to the marketplace seller.

Definition of Marketplace Facilitator

Exclusion for Ads, Payment Processors & CFTCs

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

Marketplace Facilitator Definition - Issues

- Does the short (narrow) version of a marketplace facilitator definition work?
- What if facilitator does a hybrid of both? It facilitates sales for a seller but it also allows same seller to post banner ads where the seller, not the facilitator, transacts a sale.

Who is the Retailer?

Except as provided in Section 1.C., a marketplace facilitator [doing business in the state under Section 1] is required to [collect and remit/pay] the [sales or use tax] on all taxable sales made by the marketplace facilitator or facilitated for marketplace sellers to customers in this state regardless of whether the marketplace seller for whom sales are facilitated has a sales tax permit or would have been required to collect sales or use tax had the sale not been facilitated by the marketplace facilitator. **For the purposes of [cite this law or appropriate sales and use tax code], a marketplace facilitator has the same rights and duties as a seller.** 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].

Who is the Retailer?

- **What about other taxes/fees imposed on the transaction required to be collected by seller?**

Noted as a Comment: the communications companies recommended requiring marketplaces to collect other transactions taxes and fees in addition to sales and use tax. To date, no state has implemented marketplace collection of other taxes and fees, although Washington State has adopted a statute which would require such collection in the future.

Who is the Retailer? - Issues

- Is more clarity needed on facilitator having same “rights and duties”?
- Focus has been on sales/use tax collection
 - What about other taxes
 - Telecom fees such as 911 charges
 - Environmental fees such as paint/oil
 - Tire fees
- Should marketplace seller be liable for other taxes/fees, or should the facilitator be liable?

Record and Audit Exposure

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

Record and Audit Exposure

H. **A marketplace facilitator shall be relieved of liability** under this [section] for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect or insufficient information given to the marketplace facilitator by the marketplace seller, **provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain correct and sufficient information from the marketplace seller.** Provided, however, this [subsection] shall not apply if the marketplace facilitator and the marketplace seller are related as defined in [cite code section].

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

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

Record and Audit Exposure - Issues

- Should the liability only fall on the facilitator or should it be joint and several?
- What is a “reasonable effort to obtain correct and sufficient information”?
- Any audit concerns?
- Should there be a transition period?

Collection Responsibility

- **Exclusion 1 – Substantially all sellers registered**

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

Collection Responsibility

■ Exclusion 2 – Large Seller Waiver

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

1. Has annual U.S. gross sales over \$XX billion, including the gross sales of any related entities;
2. Provides evidence to the marketplace facilitator that it is registered under [cite code section] in this state and also registered to collect sales and use tax in every state where the product or service can be sold; and,
3. Notifies [the Department] in a manner prescribed by [the Department] that the marketplace seller will collect and remit all applicable taxes and fees on its sales through the marketplace and is liable for failure to collect or remit applicable taxes and fees on its sales.

Collection Responsibility

■ Exclusion 3 – Hotel/Lodging Vendors

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

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

Collection Responsibility - Issues

- Should more or less flexibility be given for the exclusions to the state tax/revenue departments?
- Are any of the exclusions problematic?
- What about food deliveries? Car rentals?
- What documentation is needed for facilitator/seller to claim an exclusion?
- Will exclusions be timely granted/provided?

Economic Nexus Threshold Calculation

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

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

Economic Nexus Threshold Calculation - **Issues**

- Should a threshold vary by state population/complexity?
- Should the dollar threshold be based on gross sales, retail sales (exclude sales for resale), or taxable sales?
- Should a transactional threshold also be used?
- Should the threshold create a presumption or automatically require collection?
- Are there due process concerns?

Certification Requirement & Return Simplification

■ Reporting Tax

A marketplace facilitator shall either:

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

Certification Requirement & Return Simplification - Issues

- Draft model does not require certification – is it needed?
- Should marketplace sellers also have to do some reporting?
- Model allows facilitator option to report all sales on one return or separate marketplace seller sales – does that create any problems?

Questions?

Jackson Brainerd, NCSL, jackson.brainerd@ncsl.com

Fred Nicely, COST, fnicely@cost.org
