



MEMORANDUM

To: Uniformity Committee

From: Richard Cram

**Re: Survey Results: Prioritization of Draft Issues List—*Wayfair*
Implementation and Marketplace Facilitators**

For: MTC Uniformity Committee Meeting

Date: August 6, 2019

Provided below are the Summary of Results of the survey circulated to Uniformity Committee members on July 11, 2019 requesting prioritization of the Draft Issues List on *Wayfair* implementation issues and marketplace facilitator laws. The results reflect the rankings received to date from responding states prioritizing those issues. States were asked to identify and rank the “top 12” issues by priority, from the list of 19 issues provided. The Uniformity Committee needs to determine the “top 12” issues by priority and refer those to the *Wayfair* implementation and marketplace facilitator work group to develop recommendations to be considered by the Committee at its next in-person meeting in San Antonio in November.

Please be advised that the National Conference of State Legislatures (NCSL) SALT Task Force is currently working on considering proposed model statutory provisions to address some of these issues, and is meeting in Nashville, TN on August 4-5 for discussions. Attached at the end of this document are draft model statutory provisions dated July 16, 2019 proposed by the Retail Industry Leaders Association (RILA) to the NCSL SALT Task Force. The Uniformity Committee *Wayfair* implementation and marketplace facilitator work group’s efforts ideally will dovetail with the work of the NCSL SALT Task Force.

Summary of Results

22 States participated in the survey, each ranking the “top 12” of the 19 issues listed. For each of the issues, the number of states ranking that issue in the “top 12” is shown, as well as the average ranking of that issue among those states.



“Top 12” Issues

1. Definition of marketplace facilitator/provider
22 States Average rank: 4.14 (91/22)
2. Who is the retailer?
21 States Average rank: 5.29 (111/21)
3. Remote seller and marketplace seller vs. marketplace facilitator/provider
recordkeeping, audit exposure and liability protection
21 States Average rank: 5.9 (124/21)
4. Marketplace seller-marketplace facilitator/provider information
requirements
20 States Average rank: 6.45 (129/20)
5. Collection responsibility determination
22 States Average rank: 6.64 (146/22)
6. Marketplace seller economic nexus threshold calculation
18 States Average rank: 4.83 (87/18)
7. Remote Seller sales/use tax economic nexus threshold issues
18 States Average rank: 6.83 (123/18)
8. Certification requirement
14 States Average rank: 5.71 (80/14)
9. Information sharing
14 States Average rank: 6 (84/14)
10. Taxability determination
14 States Average rank: 6.64 (93/14)
11. Return simplification
15 States Average rank: 7.47 (112/15)
12. Foreign sellers
13 States Average rank: 8.15 (106/13)

Other Issues

_____Retroactivity

10 States Average rank: 8.1 (81/10)

_____Local sales/use taxes



9 States Average rank: 7.11 (64/9)

_____Registration

9 States Average rank: 9.89 (Total 89/9)

_____Overall Information on Implementation

6 States Average ranking: 6.67 (40/6)

_____Class action lawsuit protection

6 States Average rank: 9.67 (58/6)

_____Assessments and Notices

6 States Average rank: 8.33 (50/6)

_____Security Protocols

5 States Average ranking: 8.6 (43/5)

The contents of the previously circulated survey (including attachments), along with the ranking by each responding state, is provided below. (Note: a few states provided rankings for all 19 issues. However, rankings after 12 were not included in the vote totals shown in the Summary of Results.)

Background

At its April 25, 2019 meeting in Denver, CO, the Uniformity Committee approved a new project to reconvene the *Wayfair* Implementation and Marketplace Facilitator Work Group, to address any follow-up issues arising from the recent enactment by many states of sales/use tax economic nexus laws and laws requiring marketplace facilitators/providers to collect sales/use tax. I have solicited participants in that work group for their input on identifying such issues, with the goal that the Uniformity Committee would consider and prioritize those issues at its August 6 meeting. The work group will thereafter commence regular teleconference meetings to address the prioritized issues list and develop recommendations to present back to the Committee in time for those, if approved, to be available by commencement of 2020 state legislative sessions.



The list below was developed from input I have received from various parties. Please note that the National Association of Certified Service Providers (NACSP) suggestions referenced below are contained in the document entitled “Implementation Issues Related to Remote Collection Authority,” which was included with their letter dated July 8, 2019 (attached).

From the topics listed in bold below, please identify the top 12 in priority, ranked “1” for the highest in priority and “12” for the lowest in priority, and return your ranking by email to rcram@mtc.gov by COB July 26, 2019 (one response per state). If you have an issue not listed that you believe should be considered, please add that in the space at the bottom of the form (or as a separate attachment) and rank it. I will compile the results for consideration by the Committee at the August 6 meeting.

_____ Remote Seller sales/use tax economic nexus threshold issues

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

Should the “transactions” economic nexus threshold be eliminated?

See NACSP suggestions under “Thresholds for Collection Obligation for Small Retailers.”

AL: 14

AR: 12

GA: 1

ID: 9

KS: 3

KY: 12

MD: 2

NC: 1

ND comment: ND removed the transaction threshold in 2019.

NJ: 11



NM: 12

MA: 10

MI: 3

MT: 3

OK: 3

TN: 2

TX: 12

UT: 12

WA: 4

WI: 11

 Marketplace seller economic nexus threshold calculation

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

AL: 13

AR: 10

GA: 2

ID: 4

KS: 2

KY: 10

LA: 4

MD: 1



MI: 4

MT: 4

NC: 3

ND comment: ND law does not require the seller to use facilitated sales to determine if thresholds are met.

NJ: 10

NM: 11

OK: 2

TN: 3

TX: 1

UT: 1

WA: 3

WI: 12

Definition of marketplace facilitator/provider

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

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

AL: 10

AR: 3

CO: 9

GA: 3



ID: 1

KS: 1

KY: 1

LA: 2

MA: 8

MD: 10

MI: 5

MT: 1

NC: 6

ND: 2; Comments: ND adopted the broad definition. ND's ranking of this issue relates only to the treatment of OTC's, advertising, etc.

NJ: 1

NM: 2

OK: 1

TN: 1

TX: 2

UT: 11

WA: 1

WI: 10

Collection responsibility determination

Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax,



etc.), be able to contractually agree which party has the sales/use tax collection obligation?

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

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

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

AL: 9

AR: 5

CO: 4

GA: 12

ID: 6

KS: 9

KY: 6

LA: 6

MA: 5

MD: 9

MI: 8

MT: 8

NC: 11



ND: 7

NJ: 4

NM: 4

OK: 4

TN: 4

TX: 11

UT: 3

WA: 2

WI: 9

_____ **Who is the retailer?**

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

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

AL: 1

AR: 2

CO: 3

GA: 5

ID: 3

KS: 6

KY: 2

LA: 9



MA: 9

MI: 2

MT: 2

NC: 7

ND: 5

NJ: 12

NM: 9

OK: 5

TN: 5

TX: 7

UT: 6

WA: 6

WI: 5

 Registration

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

See NACSP suggestions under “Registration.”

AL: 11

AR: 11

KS: 11

KY: 11

LA: 7



MD: 5

MI: 9

OK: 10

WA: 12

Return simplification

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

See NACSP suggestions under “Return Filings” and “Remittances.”

AL: 12

AR: 9

CO: 1

GA: 8

KS: 12

KY: 3

LA: 3

MA: 2

MD: 6

MI: 10

MT: 7

NC: 12



OK: 9

UT: 9

WA: 9

_____ Certification requirement

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

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

See NACSP suggestions under “Providing Software to Remote Sellers.”

AL: 6

AR: 4

CO: 8

KS: 10

KY: 4

LA: 5

MA: 1

NC: 4

ND: 6

NJ: 2

NM: 6

TN: 12

TX: 8



UT: 4

 Taxability determination

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

See NACSP suggestions under “Determination of Taxability.”

AL: 5

AR Comment: SST

GA: 9

ID: 2

KS: 7

KY Comment: SST

LA: 8

MD: 8

MI: 11

MT: 5

NC: 8

ND: 10

NM: 3

OK: 7

TN: 7

TX: 3



_____Marketplace seller-marketplace facilitator/provider information requirements

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

AL: 4

AR: 8

CO: 7

ID: 8

KS: 8

KY: 9

MA: 3

MD: 11

MI: 6

MT: 9

NC: 2

ND: 4

NJ: 3

NM: 7

OK: 12

TN: 8

TX: 9



UT: 2

WA: 7

WI: 2

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

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

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

See NACSP suggestions under “Maintaining Records” and “Audit Issues.”

AL: 3

AR: 1

CO: 5

GA: 7



ID: 5

KS: 5

KY: 5

LA: 10

MA: 4

MD: 12

MI: 1

MT: 6

NC: 5

ND: 3

NJ: 6

NM: 5

OK: 6

TN: 9

TX: 10

UT: 6

WA: 10

_____ **Class action lawsuit protection**

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

AL: 8



CO: 10

KS: 13

LA: 11

MT: 10

ND: 11

WI: 8

 Retroactivity

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

AL: 7

GA: 4

ID: 12

KS: 14

LA: 12

MD: 7

MI: 7

MT: 11

OK: 8

TN: 6

UT: 7

 Local sales/use taxes

For “home rule” states that have locally administered local sales/use taxes, what is the best approach to address Due Process/Commerce Clause concerns: (a) use of a



“blended” state and local rate that remote sellers can use (such as the Alabama Simplified Sellers Use Tax System); or (b) destination sourcing of both interstate and intrastate sales? For (a), how should “remote seller” entitled to use the blended rate be defined, and do in-state sellers have any discrimination claim? Should the economic nexus threshold apply at the local jurisdiction level?

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

AL: 2

CO: 6

GA: 11

KS: 4

LA: 1

MA: 12

MT: 12

ND: 12

TX: 4

Assessments and Notices

See NACSP suggestions under this topic.

AL: 15

CO: 11

KS: 15

MA: 7

ND: 8

NJ: 8



NM: 10

WI: 6

_____ **Security Protocols**

See NACSP suggestions under this topic.

AL: 16

CO: 12

GA: 6

KS: 16

NJ: 7

OK: 11

WI: 7

_____ **Foreign sellers**

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

AL: 17

AR: 7

ID: 7

KS: 17

KY: 8

MA: 11

MI: 12

NC: 10



ND: 9

NJ: 9

TN: 10

TX: 5

UT: 10

WA: 5

WI: 3

 Information sharing

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

AL: 18

AR: 6

CO: 2

ID: 10

KS: 18

KY: 7

MA: 6

MD: 4

NC: 9

ND: 1

NJ: 5

TN: 11



TX: 6

UT: 8

WA: 8

WI: 1

_____ Overall Information on Implementation

See NACSP suggestions under this topic.

AL: 19

GA: 10

ID: 11

KS: 19

MD: 3

NM: 1

WA: 11

WI: 4

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

Richard,

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

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

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

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

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

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

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

Submitted by Russ Brubaker and Scott Peterson on behalf of NACSP

Implementation Issues Related to Remote Collection Authority

Overall Information on Implementation

All States

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

Thresholds for Collection Obligation for Small Retailers

All States

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

Registration

Non SST States

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

Determination of Taxability

Non SST States

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

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

Tax Rates

Non SST States

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

Local Jurisdiction Boundary Tables

Non SST States

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

Return Filings

Non SST States

- Adopt simpler sales tax returns for remote sellers that exclude unnecessary fields and do not address taxes that aren't applicable to remote sellers.
- Adopt filing protocols developed by the FTA TIGERS group and adopted by Streamlined.
- Accept the Simplified Electronic Return used in the Streamlined States.

Remittances

Non SST States

- Adopt payment protocols developed by the FTA TIGERS group and adopted by Streamlined.
- Clearly outline payment requirements and deadlines and make them available in a online database that covers all sales tax states.
- Work with CSPs on payment options and test and implement bulk payments.

Maintaining Records

Non SST States

- Provide clear guidelines outlining the data that remote retailers should maintain and how long that data should be retained.

Audit Issues

Non SST States

- Develop audit standards and procedures that recognize the unique situation of remote sellers.
- When auditing a seller that utilizes a CSP, direct audit inquiries to the CSP.
- Consider participating with the Streamlined States when conducting audits of CSPs.

Assessments and Notices

All States

- Develop procedures to prevent sending erroneous assessment notices to remote sellers.
- Develop expedited procedures for resolving assessments of tax, penalties and interest for remote sellers. Coordinate this process with third parties that represent remote sellers.
- Limit the notices that are sent to remote sellers.
- Provide electronic notices.
- Coordinate with third party providers that represent remote sellers on where notices are to be sent.
- Accept the Uniform Power of Attorney form that has been adopted by Streamlined.

Providing Software to Remote Retailers

Non SST States

- Consider addressing most of the issues above by certifying comprehensive software solutions and making them available to remote sellers.

Security Protocols

All States

- Review security and confidentiality measures to ensure protection of seller and consumer information.

Marketplace Facilitator Sales Tax Collection Model Legislation

Draft Date: July 16, 2019

Section 1. Nexus Standard for Sales and Use Tax Collection

Notwithstanding any other provision of law, any _____ [vendor, seller, marketplace facilitator, or appropriate state-law term] selling or facilitating the sale of tangible personal property _____ [and/or other property or services subject to sales tax in the State] for delivery into [State] is [“doing business in this state”], is subject to _____ [pertinent sales tax code sections], shall [collect and remit/pay] applicable sales or use tax¹, and shall follow all applicable procedures and requirements of law, provided the [seller, vendor, marketplace facilitator] meets the following criteria in the previous calendar year:

- A. If a [seller], the [seller] makes sales of tangible personal property [and/or other property or services subject to sales or use tax in the State] for delivery into this state exceeding [100,000] dollars.
- B. If a [marketplace facilitator], the [marketplace facilitator] makes or facilitates the sale of tangible personal property [and/or other property or services subject to sales tax in the State], on its own behalf or on behalf of one or more marketplace sellers, for delivery into this State exceeding [100,000] dollars.
- C. [The Department] may grant a waiver from the requirements of this section if a marketplace facilitator demonstrates, to the satisfaction of [the Department] that substantially all of its marketplace sellers already are [registered sellers] under [cite code section]. If such waiver is granted, the tax levied under [cite code section] shall be collectible from the marketplace seller. [The Department] shall develop guidelines that establish the criteria for obtaining a waiver pursuant to this section, the process and procedure for a marketplace facilitator to apply for a waiver, and the process for providing notice to an affected marketplace facilitator and marketplace seller of a waiver obtained pursuant to this subsection.

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

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

Commented [A1]: Recommended by communications companies.

¹In their comments, 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 2021. This issue is worthy of additional discussion to determine whether, when, to what extent, and how such other taxes and fees should be incorporated into marketplace collection.

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

- A. "Marketplace facilitator" means a person that:
1. Contracts 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 by the person; and,
 2. Either directly or indirectly through agreements or arrangements with third parties, collects the payment from the purchaser and transmits the payment to the marketplace seller.
 3. A "marketplace facilitator" does not include: a) a platform or forum that exclusively provides advertising services, including listing products for sale, so long as the advertising service platform or forum does not also engage directly or indirectly through one or more affiliated persons in the activities described in A.1. and A.2. of this section; (b) a payment processor business appointed by a merchant to handle payment transactions from various channels, such as credit cards and debit cards, and whose sole activity with respect to marketplace sales is to handle transactions between two parties; or (c) a derivatives clearing organization, a designated contract market, foreign board of trade or swap execution facility, registered with the Commodity Futures Trading Commission ("CFTC registered platforms"), and any clearing members, futures commission merchants or brokers when using the services of CFTC registered platforms.
 4. [OPTIONAL—If sales tax in state applies to hotel/lodging, consider adding following language to exclude from definition of "marketplace facilitator": "A person is not a marketplace facilitator with respect to the sale or charges for rooms, lodgings or accommodations described in (cite code section) if the rooms, lodgings or accommodations are provided by a hotel, motel, inn, or other place that is a [registered seller] under (cite code section) and the [registered seller] provides the rooms, lodgings or accommodations for occupancy under a brand belonging to such person."²
- B. "Marketplace seller" means a seller that makes retail sales through any physical or electronic marketplace operated by a marketplace facilitator.
- C. 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

Commented [A2]: Recommended by communications companies.

Commented [A3]: Recommended by communications companies.

Commented [A4]: Recommended by law firm on behalf of client(s).

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

had the sale not been facilitated by the marketplace facilitator. 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].

Commented [A5]: Recommended by multiple parties. Clarifies that the marketplace facilitator is treated as the seller and has the same rights and duties as a seller.

D. A marketplace facilitator shall either:

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

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

Commented [A6]: Recommended by multiple parties.

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

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

G. The [department] shall solely audit the marketplace facilitator for sales made by marketplace sellers but facilitated by the marketplace facilitator, except with respect to transactions that are subject to Section 1.C. 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.

Commented [A7]: Conforming change.

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].

Commented [A8]: Recommended (in different forms) by multiple parties.

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

J. A marketplace facilitator shall be relieved of liability under this [section] if it can prove, to the satisfaction of the [department], that the tax levied under this

[chapter/title/article] on a sale facilitated by the marketplace facilitator was paid to the [department] by the marketplace seller.

Section 3. No Retroactive Application

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

Section 4. Severability

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