

Memorandum

To: Tommy Hoyt, Uniformity Committee Chair

From: Richard Cram, Director, National Nexus Program

Re: Status Report for *Wayfair* Implementation and Marketplace Facilitator Work Group

Date: April 22, 2020

At the Uniformity Committee meeting on November 6, 2020 in San Antonio, Texas, the *Wayfair* Implementation and Marketplace Facilitator Work Group presented its White Paper concerning issues arising from states' implementation of sales/use tax economic nexus laws and marketplace facilitator sales/use tax collection laws. The White Paper is available for download on the MTC website at www.mtc.gov. The Uniformity Committee directed the Work Group to continue to address such issues.

The Work Group met via teleconference on February 5, 2020 to receive the request of Beth Sosidka, AT&T, for the Commission to send a letter to state tax commissioners endorsing the National Conference of State Legislatures (NCSL) model marketplace facilitator collection statute (attached). Work Group Chair Tommy Hoyt requested that participating states express their positions concerning the request by responding to a survey request to be sent via email by Richard Cram. The survey was sent to participating states by email, seeking responses as to whether the request should be forwarded for consideration to the Uniformity Committee, not forwarded to the Uniformity Committee, or kept at the Work Group level for further study. Attached are the responses received to that survey request: 3 states recommending that the request be forwarded to the Uniformity Committee, 4 states recommending that the request not be forwarded to the Uniformity Committee, and 8 states recommending that the request stay with the Work Group for further study. The consensus of the responding states was to keep the request at the Work Group level for further study.

No further meetings of the Work Group have been scheduled since the February 5, 2020 teleconference.

The Uniform Law Commission (ULC) has recently formed the Online Sales Tax Collection Committee to study the need for and feasibility of state legislation on state taxation of online sales and collection of taxes. Richard will be participating in this study committee in "observer" status and will keep the Work Group and Uniformity Committee informed of the study committee's activities. More information is available at the ULC's website www.uniformlaws.org.

Marketplace Facilitator Sales Tax Collection Model Legislation

Approved Unanimously by the National Conference of State Legislatures Executive Committee Task Force on State and Local Taxation

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 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 [\$1 billion], including the gross sales of any related entities, and in the case of franchised entities, including the combined sales of all franchisees of a single franchisor;
 2. Provides evidence to the marketplace facilitator that it is registered under [cite code section] in this state; and,

¹ To the extent a state imposes other taxes and fees on the consumer for sales of products and services included in their marketplace facilitator legislation the state needs to determine whether, when, to what extent, and how such other taxes and fees should be incorporated into marketplace collection requirements.

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.

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

- A. "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.
 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 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.
 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 sales through any physical or electronic marketplace operated, owned, or controlled by a marketplace facilitator.
- C. Except as provided in Section 1.C. and 1.D., a marketplace facilitator [doing business in the state under Section 1] is required to [collect and remit/pay] the [sales or use tax] on

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.

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. Marketplace facilitators and marketplace sellers may enter into agreements with each other regarding fulfillment of the requirements of this [Chapter]; however, the marketplace facilitator remains the party that is liable to the state for fulfilling these requirements.

- 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.
- 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 or 1.D. 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.
- 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 on the nature of the product or service 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.

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.

From: Richard L. Cram

Sent: Monday, March 2, 2020 9:17 AM

To: Nexus Committee; Uniformity Committee; Aishah Hashmi (aishah.hashmi@dc.gov); Adam Wolfson; Alison Jares; Amy Hamilton; Amy Oneacre; Anitha Chakravarthi; Anna-Mary Geist; Ariel McDowell; Arthur Gelber; Ashley McGhee; Brian A. Hamer; Brian Hamer; Brian Kuntz; Bruce J. Fort; Bruce Johnson; Bryan Kelly; Cameran Clark; Charles Maniace; Charles McLure; Charlie Kearns; Christie Comanita; Christopher Dowsey; Craig Johnson (craig.johnson@sstgb.org); D Zaldivar; Dave Matelski; David Steines; Deborah Bierbaum; Dee Wald; Denise; Diane Yetter; Dick Eppleman (dick.eppleman@vertexinc.com); Donna Vaillancourt; Dunmire, Melinda; Elisa Magnuson; Elissa Borges; Emmett O'Keefe; Eric Carstens; Eric Fader; Erick Shaner; Erlinda Doherty; Frank O'Connell; Fred Nicely; G Downs; Gil Brewer; Ginny Upchurch; Greg Duke; Helen Hecht; Hsin Pai; Jackson Brainerd; Jacqueline M. Patrick; Jamie Fenwick; Jean Morrison; Jennifer Hays; Jerry Johnson; Jesse Hereford; Jessie Eisenmenger; Joe Crosby; Joe Henschman; Joe Rinzel; Joe Strong; John Cmelak; John Kutsukos; Jon Guiliana; Josh Pens; Julio Mendoza-Quiroz; Kathleen Smith; Katy Jenkins; Kelley Gillikin; Kelly Peloquin; Kent DeBruin; Kevin Callahan; Kevin Milligan; Lanell Strait; Lara Abi Habib; Larry Molnar; Lauren Ballard; Lila Disque; Lindsay McAfee; Lisa Hawes; Luke Matiasevich; Luke Morris; M Dabbs; M Zaldivar; Maria Johnson; Mark Gibbs; Mark N. Stefan; Matt Peyerl; Matthew Largent; Mayra Ceja; Melissa Smith (meliss@amazon.com); Merry Hopkins; Mia Strong; Michael Bernard; Michael Houdyshell; Michael Mazerov (mazerov@cbpp.org); Michael Ostafy; Michelle Prather; Mike Bailey; Mitchell Robins (mitchell.robins@dor.ga.gov); Myles Vosberg; N Munoz; Nancy Prosser; Natalie Friedman; Nathan Hoepfner; Nicole Johnson; Norma Ickes; Paul Rafelson; Paul Williams; Phil Skinner; Rachelle Bernstein; Richard Cram; Richard Dobson; Rob Plattner; Russ Brubaker; Ryan Maness; S Bisom; S Norman; Scott Clark; Scott Letourneau; Scott Peterson; Scott Scharf; Scott Talbott; Shirley K. Sicilian (ssicilian@kpmg.com); Silvia Aguirre; SOSIDKA, BETH L; Stacey Greaud; Stephan Jimenez; Stephanie Gilfeather; Stephen Shur; Steve DelBianco; Steve Oldroyd; Susan Barry; Terry Ryan; Terue Yoshihara; Tim

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Subject:Wayfair Implementation and Marketplace Facilitator Work Group--Survey Results

To Wayfair Implementation and Marketplace Facilitator Work Group:

The Work Group met by teleconference on February 5, 2020 at 2pm EST to receive a presentation from Beth Sosidka, AT&T, requesting that the Multistate Tax Commission send letters to state tax administrators encouraging them to recommend to their state legislatures that the NCSL model marketplace facilitator legislation (previously distributed) be enacted.

Work Group Chair Tommy Hoyt (TX) requested a survey of participating states regarding this request. The results of that survey are provided below:

1. Recommend that the Work Group forward the above request to the Uniformity Committee for its consideration.

Response:___ND NM UT

2. Recommend that the Work Group not forward the above request to the Uniformity Committee for its consideration.

Response:___CO KS NC WA

3. Recommend the above request remain with the Work Group for further study.

Response:___IA KY MA MN PA SD TN TX

Comments received:

KY DOR: For the KY Department of Revenue, we believe these issues are not ripe for enacting wholesale legislation at this time. We recommend the above request should remain with the Work Group for

monitoring during the current legislative cycle and observing how current implementations unfold in respective states.

With the perspective of additional time, the issues may then be ready for further study.

MA DOR: Some of the proposed rules look appropriate, but this is model legislation that seems intended to replace pre-existing state statutes in their entirety. It does not seem to me that result should necessarily follow if a state's pre-existing rules are largely ok. And that is particularly so because I think in many states legislative changes need to be customized to the pre-existing law, and cannot simply be accomplished by passing "overlay" statutory language. I also think that in some cases – e.g., the use of the narrow approach to the definition of a marketplace facilitator as opposed to the broad approach – the determination as to whether a change would be advisable and what change that should be might best be determined, at this point, by the states' actual experiences under their current statutes. The need for some of the other rules – e.g., that pertaining to "derivatives clearing organizations" – is also unclear to me.

PA DOR's RESPONSE: The technical issue before the working group is a narrow one – AT&T is seeking a large seller exemption from the general marketplace facilitator sales tax collection provisions. PA DOR may be open to this narrow request with a better understanding of the type and number of large sellers in online marketplaces. However, the suggested MTC action that all state tax administrators receive letters recommending the adoption of the NCSL model marketplace facilitator legislation is a broad-based action which we don't view as helpful for specifically addressing just the issue (large seller exemption) under consideration.

WA DOR Comment: While Washington does not object to providing this model legislation to states as

another resource or example to consider when drafting/amending marketplace legislation, it does not recommend sending letters to state administrators encouraging them to promote adoption of this legislation. This model legislation has been offered late in the process, well after most states have already adopted marketplace legislation. As such, there does not seem to be a great need to amend already enacted legislation at this time, particularly if the recently enacted legislation is working and no pervasive issues have cropped up.

Based on the survey responses, Work Group Chair Tommy Hoyt indicates that the AT&T request will not be forwarded to the Uniformity Committee at this time and will remain with the Work Group for further study.

Public Notice will be provided of scheduling of any future meetings of the Work Group.

Please let me know if you have any questions.

Richard Cram

Director, National Nexus Program

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