



MULTISTATE TAX COMMISSION

## MEMORANDUM

**To: Members of the Uniformity Committee and Members of the Public**  
**From: Helen Hecht, Multistate Tax Commission General Counsel**  
**Subject: Summary of *Wayfair* Issues for Possible Committee Consideration**  
**Date: July 10, 2018**

On Friday, July 6, 2018, the Commission's Uniformity Committee held a conference call to solicit input from states and the public on issues the committee might consider in light of the recent *Wayfair* decision. Over 90 participants, including a substantial number of members of the public, raised a number of issues and were also encouraged to email any additional comments or questions to staff. Holly Coon, chair, asked commission staff to summarize the issues raised. This memo provides that summary, by category (without specific attribution other than that the issue was raised on the call or received after). It also notes the steps that staff will take in preparation for the committee's in-person meeting on July 24.

### SUMMARY OF ISSUES –

1. Marketplace facilitator collection and remittance:
  - a. Consider addressing the collection and reporting of taxes by marketplace facilitators. The approach should be sufficiently broad, so as not to discriminate or distinguish between different types of facilitators or business models. [From call]
  - b. If marketplace facilitators are to be required to collect tax, then the committee should also address a number of related issues in implementing this approach, including:
    - i. Whether the third-party sellers who sell across marketplaces that are collecting and remitting will need to report and take deductions for those sales,
    - ii. Whether the marketplace must collect on sales by sellers that sell less than the state threshold,
    - iii. How sales across the marketplace will be counted by the third-party seller for purposes of that state threshold, and
    - iv. What happens if the seller wants to report the sales made across a marketplace instead. [From call]
  - c. Understand that there are more than 200 different marketplaces in operation and more are starting up all the time. If states do not require detailed



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reporting (presumably, reporting of those sales by seller) then it may make it impossible to reconcile data or perform audits. So states should make sure that they are able to audit effectively. (This comment was made by multiple participants.) [From call]

- d. Be aware that a number of states are already letting marketplaces collect and remit tax on third-party transactions on an ad hoc basis. It is important for sellers to know how these transactions will be tracked and treated. [From call]
- e. There is no consensus on what is the one best model for how marketplace collection and remittance should work. (Some apparently prefer Iowa's approach, others prefer the Washington/Pennsylvania model.) [From call]
- f. Request that commission staff put together a description or list of the different marketplace models and how they operate. [From call]

2. Nexus standards and state thresholds:

- a. The committee should consider the development of standards for the small business threshold. [From call]
- b. Question - how will a seller's sales will be counted for purposes of a state threshold when some, but not all, of those sales are made across marketplace platforms? [From call]
- c. Even if the state adopts a threshold, there needs to be consideration of what is the minimal physical presence required, assuming that such presence will also create nexus for tax collection. Unless there is a bright line, or some other clear definition of what is instate presence, there will continue to be gray areas. For example, software companies that do minimal installation or training in the state, but have only a few sales or customers, need to know if they have nexus. [From call]
- d. The issue of sellers that have a very small amount of inventory in a marketplace facility in a state continues to be a big issue. If these sellers are considered to have physical presence, so that the threshold does not apply, some very small sellers may be swept up. [From call]
- e. In addition to the issue of inventory in a marketplace facility, small sellers may have small amounts of sales over their own websites where they do their own shipment of products into a state (not using instate inventory). [From call]
- f. Question - should exempt or nontaxed sales be counted toward meeting that threshold? [From call]



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- g. Another issue with the threshold is whether it will be adjusted for inflation, or geographic or population differences between the states. [From call]
  - h. Question - what about local governments and especially home rule jurisdictions? Do the state thresholds apply there? [From call]
  - i. Consider adding a dollar threshold with the number-of-transaction threshold versus the *Wayfair* \$100,000 or 200 transactions rule. For t-shirt sales (or any low-dollar item) online from one single location, it would be easy to get 200 transactions but still be well below the \$100,000 threshold. Compliance costs for many in the small business world would be cost prohibitive. [After call]
  - j. Comment - MTC has the \$500,000 threshold in the current nexus minimum (factor presence standard). If this were the amount used and indexed for inflation, it seems that all small businesses could comply that have at least this amount and the costs to these types of businesses make more sense than one that has a \$100,000 threshold. Just because *Wayfair* indirectly approved a \$100,000 threshold doesn't mean all states should use this dollar amount. [After call]
  - k. It would also be helpful if a de minimus inventory level of inventory in a state could be established that would limit small sellers from nexus creation - particularly if they would be below the economic thresholds. [After call]
3. Coordination with the Streamlined Sales and Use Tax process:
- a. If the committee decides to look at nexus issues, it should also consider whether to recommend membership in Streamlined. [From call]
  - b. MTC is encouraged to work with Streamlined and states should have a renewed interest in Streamlined. [From call]
  - c. Streamlined is looking at the following issues—expanding centralized registration, how states are going to move forward to implement *Wayfair* generally, what are the elements of a uniform nexus standard, and renegotiation of certified service provider (CSP) contracts. [From call]
4. Other sales and use tax, transactional tax, or related issues:
- a. If the committee decides to look at nexus issues, it should also address related issues including retroactivity. [From call]
  - b. States should be cautioned to not apply *Wayfair* retroactively. This would be unfair and could be seen by Congress as a reason to step in. [From call]



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- c. Question - will the committee work with states on recommendations on retroactivity issues for taxpayers that had inventory in third-party warehouses that they didn't realize created nexus – in particular if they didn't ship the inventory to the warehouse and the marketplace facilitator moved the inventory without their knowledge? [After call]
  - d. There are also specific industries to consider. For example, registered vehicle sales, which almost every state has a requirement that the customer pay the tax in order to register, and where the seller must have an in-state location in order to be licensed. (There was also a comment that the Streamlined agreement has addressed this issue.) [From call]
  - e. Question - does an obligation for a remote seller to collect and remit taxes raise other state regulatory and licensing requirements? [From call]
  - f. Question - do states need to be concerned about the Internet Tax Freedom Act, which was raised in the arguments in *Wayfair*, but was not addressed by the opinion. [After call]
  - g. Question – might the states enter into limited look back agreements for marketplace sellers that might have not known their inventory was located in the state. [After call]
  - h. Comment - a more uniform single statewide tax rate versus having to monitor hundreds of unique county and local rates per state, would greatly simplify the system and lessen the administrative burden for both sellers and the states and auditors. [After call]
  - i. States should not allow class-action lawsuits against sellers who are trying to comply. [After call]
5. Income tax issues:
- a. Any effects of *Wayfair* on income tax issues should also be considered. [From call]
  - b. It would help to have consistent rules for multistate businesses to understand what will cause nexus under the economic nexus rules and how P.L. 86-272 may be impacted. [After call]
  - c. The states may want to prioritize sales and use tax issues and defer any discussion of the effect of *Wayfair* on income tax nexus for now. [After call]
6. Process related issues:
- a. For those not familiar with the committee, Holly Coon noted that while the committee often drafts model language, a lengthy process, it is not



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limited to that process and may, instead, adopt general recommendations for the states.

- b. States are already acting and any collective discussion needs to happen quickly. [From call]
- c. Some states are not waiting for legislative action. [From call]

**STAFF TO PREPARE –**

Commission staff will do the following before the July 24<sup>th</sup> in-person meeting:

- Prepare an overview of the different types of marketplace models.
- Summarize the existing marketplace tax collection and remittance laws.
- Monitor the upcoming Streamlined meeting.
- Prepare other background information as time permits.