

DANIEL L. STANLEY, Esq., is a Partner at Honigman LLP. BREEN M. SCHILLER, Esq., is a Partner with HMB Legal Counsel.

Nexus News

Update on Marketplace Facilitator Legislation

By Daniel L. Stanley and Breen M. Schiller

Marketplace Facilitator Laws Liability

In our last column, we wrote about the activities of the Multistate Tax Commission (MTC) *Wayfair* Implementation and Marketplace Facilitator Work Group and applauded the efforts of the MTC to address the issues caused by Marketplace Facilitator legislation. In this issue, we will give a quick update on the status of Marketplace Facilitator laws and then outline some of the pitfalls and problems with them.

Update on the Status of Marketplace Facilitator Laws

In the aftermath of *Wayfair* and its removal of the physical presence nexus requirement, the States enacted rushed to enact legislation allowing them to collect sales and use taxes on Internet sales. Seeking to make it as easy as possible to collect the tax, regardless of the complexity or burden on the entities remitting the tax, the majority of States quickly enacted Marketplace Facilitator laws imposing tax liability upon entities that facilitated online sales. At last count, over 30 states had enacted such legislation, including: Alabama, Arkansas, Arizona, California, Colorado, Connecticut, the District of Columbia, Hawaii, Iowa, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Some of the latest updates to such Marketplace Facilitator liability laws are:

Florida

Currently, there are two bills pending in Florida legislature, Senate Bill 126 and House Bill 159, that would impose tax liability on marketplace facilitators

with more than \$100,000 in sales or 200 or more retail transactions. Both bills were read for the first time in their respective houses on January 14, 2020. Given Florida's fiscal reliance upon sales and use taxes, it is somewhat surprising that it is somewhat late to the game with regard to marketplace facilitator liability.

Georgia

HB 276 was passed by the Georgia legislature on January 29, 2020 and signed by the Governor on January 30, 2020. Effective April 1, 2020, the new law will impose tax liability upon marketplace facilitators that have sales of \$100,000.00 or more in the previous or current calendar year.

Seeking to make it as easy as possible to collect the tax, regardless of the complexity or burden on the entities remitting the tax, the majority of States quickly enacted Marketplace Facilitator laws imposing tax liability upon entities that facilitated online sales.

Illinois

On December 20, 2019, the Illinois Department of Revenue adopted an emergency regulation addressing marketplace facilitators,¹ effective from December 23, 2019, through May 18, 2020. The emergency regulations were promulgated to implement Pub. Act 101-9 and Pub. Act 101-604, which imposed collection requirements on marketplace facilitators beginning January 1, 2020. A marketplace facilitator is subject to liability if it has more than \$100,000 in sales or 200 or more transactions. A marketplace facilitator, however, must reevaluate whether it meets the above thresholds on a quarterly basis, ending on the last day of March, June, September, and December, as to whether it meets either threshold for the preceding 12-month period. The more controversial part of the regulation deals with the application of the Illinois Retailers' Occupation Tax ("ROT") to out-of-state sellers

and marketplace facilitators. Specifically, under the regulation marketplace facilitators are required to collect the state's ROT, which is imposed on sales that are fulfilled from inventory held in Illinois warehouses, and transmit that tax to the marketplace seller for remittance to the department, the rule said. However, marketplace sellers are considered the retailer for such transactions, the regulation added.

The ROT is levied at the local level at various rates around the state and has traditionally been an origin-based tax. Under a law enacted in December, the tax will shift to a destination-based tax in 2021 for remote sellers and marketplace facilitators that will require them to source their sales based on the location of where the product is delivered. The tax remains origin-based for intrastate sales, however. This sourcing change raises constitutional concerns as transactions originating from outside the state would be taxed at different rates than in-state sales delivered to the same cities.

Kansas

Governor Laura Kelly's proposed 2021 budget anticipated additional tax revenue of \$22.4 million if marketplace facilitator legislation was passed. On January 28, 2020, HB 2513 was introduced, which would impose collection and remittance duties on marketplace facilitators that have more than \$100,000 in sales of taxable property or services into the state in the previous calendar year.

Louisiana

On January 29, 2020, the Louisiana Supreme Court held that Walmart.com was not liable to collect and remit sales tax imposed by Jefferson Parish on sales made by third party retailers through its website. In a 4-3 decision,² the Court held that Walmart.com was not a "dealer" under La. R.S. 47:301(4)(1) and was therefore not liable to collect the tax.

Massachusetts

Massachusetts is one of the few states to impose marketplace facilitator liability by rule rather than legislation. On December 13, 2019, the Massachusetts Department of Revenue adopted a new regulation, MASS. REGS. CODE TIT. 830 CMR 64H.1.9, to explain Massachusetts sales and use tax registration and collection obligations of remote retailers, including marketplace facilitators. The

new regulation contains a bright line annual Massachusetts sales threshold of \$100,000, which is far lower than the threshold contained in the prior regulation (\$500,000 in sales and at least 100 transactions). The new regulations also allow a marketplace facilitator to seek a waiver from tax collection obligations when the sellers for which it facilitates sales are registered and collecting the tax and provides that a marketplace facilitator shall be relieved from liability when an invalid exemption certificate is accepted in good faith.

Michigan

On December 12, 2019, Governor Gretchen Whitmer signed legislation imposing marketplace facilitator liability effective January 1, 2020. The legislation has an economic nexus threshold of processing either more than \$100,000 in sales or 200 transactions in the prior calendar year. On December 23, 2019, the Michigan Department of Treasury issued a Notice to Marketplace Facilitators³ and FAQs⁴ explaining their liability. Potentially affected taxpayers should consult these documents. For example, the FAQs make it clear that the economic nexus threshold is computed using all gross sales to Michigan customers, including taxable, nontaxable, and exempt sales.

Missouri

A slew of bills have been pre-filed with the Missouri Legislature that would impose tax collection obligations on marketplace facilitators. Specifically, S.B. 529, S.B. 659 and S.B. 648 were pre-filed on December 1, 2019, and would adopt a \$100,000 threshold for marketplace facilitators effective January 1, 2022. Missouri S.B. 805, pre-filed on December 27, 2019, would also adopt a \$100,000 threshold for remote sellers and require marketplace facilitators to collect tax. Missouri H.B. 1957, pre-filed on January 6, 2020, would establish an economic nexus threshold of \$100,000 or 200 transactions effective January 1, 2021, and require marketplace facilitators to collect tax.

Problems and Issues with Marketplace Facilitator Laws

State legislation on marketplace facilitator liability is diverse and oftentimes vague. Compliance with the

overlapping and inconsistent requirements imposed by various states is difficult. Many issues regarding marketplace facilitator laws will not arise until the first audits of marketplace facilitators and/or marketplace sellers are performed in the coming years. In this column, we will outline what we see as some of the most problematic issues.

Who Is a Marketplace Facilitator?

The definition of the term “marketplace facilitators” varies widely among the states. Therefore, a business might be considered a marketplace facilitator in some states but not others. At first blush, state tax practitioners might think this is not problematic because it is similar to the traditional issue of having nexus in some states but not others and being required to file returns in some states but not others. But there is an additional complication. When a business does not have nexus with a state, that fact puts an end to the issue of tax liability. In the area of marketplace facilitator liability, however, if a marketplace facilitator is not collecting tax in a particular state, the seller will almost certainly be required to do so. This imposes a burden on marketplace sellers to know for which states its facilitator (or facilitators) are considered to be a “marketplace facilitator” and collecting tax. Thus, marketplace sellers will have to keep informed on the issue of who is considered to be a marketplace facilitator and in which states.

We applaud the MTC's work in this area which, hopefully, will help provide some much needed standardization and uniformity.

Furthermore, some States have a narrow definition of the term “marketplace facilitator” while other states have definitions that are both vague and broad. As an example of one of the latter, New Jersey’s law has multiple definitions of the term marketplace facilitator, one of which is one who “[d]irectly or indirectly ... [p]rovides payment processing services for a retail sale of tangible personal property, specified digital products, or taxable services” and “[p]rovides or offers customer service to

a marketplace seller or a marketplace seller's customers, or accepts or assists with taking orders, returns, or exchanges of tangible personal property, specified digital products, or taxable services sold by a marketplace seller." Theoretically, that definition could apply to PayPal because PayPal both "provides payment processing services" and provides buyer protection, which means PayPal could be construed as a person that "directly or indirectly ... [p]rovides or offers customer service to a marketplace seller or a marketplace seller's customers, or accepts or assists with taking orders, returns, or exchanges of tangible personal property."

In addition to making it unclear what entities are considered marketplace facilitators, a broad definition of the term "marketplace facilitator" might also result in multiple entities being considered a marketplace facilitator for the same transaction. For example, suppose that a buyer purchased an item on Etsy.com and used PayPal to pay for it. Under a broad definition of the term "marketplace facilitator," both Etsy.com and PayPal might both be considered a marketplace facilitator for the same transaction, resulting in confusion and duplication about which entity is responsible for collecting and remitting tax.

Are Multiple Entities Liable for the Tax or Subject to Audit?

Nor is that the foregoing example the only instance in which there might be confusion as to which entity was liable for remitting tax to the State. Suppose, for example, that a national pizza franchise launches a mobile app on which customers can use their phones to order and pay for pizzas to be picked up at a local restaurant. Traditionally, the local restaurant would collect, report and remit the tax but in this example the franchisor would likely be considered to be a marketplace facilitator and liable for collecting and remitting the tax. The local pizza restaurant would have to take care to ensure that it was not also remitting tax on the transaction.

In some states, a marketplace facilitator is considered to be the seller for any transactions it facilitates,⁵ while in other states the marketplace facilitator is merely considered to be an agent for the seller.⁶ In the former case, it should be clear that the marketplace facilitator, not the seller, is the only entity liable for tax. In the latter, however, there is a possibility that both might be liable and that a marketplace seller would be liable if its agent, the marketplace facilitator, did not pay the tax.

There is also the issue of which entity is the proper entity to be audited and, as we shall see later, what documentation each entity must retain on audit. Generally, most marketplace facilitator laws provide that the marketplace facilitator is the party to be audited, not the marketplace seller, with regard to sales transactions that were facilitated by the marketplace facilitator. However, we expect that many large marketplace sellers are also going to be audited by the States and will likely face reporting and documentation issues.

Reporting and Documentation Issues

Marketplace facilitators and marketplace sellers face significant documentation issues and the issues are compounded by the fact that marketplace facilitators must keep documentation obtained from marketplace sellers and marketplace sellers must keep documentation obtained from marketplace facilitators. For example, what documents must a marketplace seller retain in order to verify that its marketplace facilitator informed it that it was collecting and remitting tax? Requirements vary by state and some states provide little guidance on this issue. This issue, however, is almost certain to frequently arise during the first round of audits of marketplace sellers in the next few years.

The aforementioned example regarding ordering a pizza using a franchisor's phone app also demonstrates problems with the inconsistent states requirements regarding reporting on tax returns. Does the local restaurant report a pizza sale made through its franchisor's app and deduct it or does it not report the sale at all? States are inconsistent in their treatment of this issue. In most states, however, a marketplace seller must report gross receipts from all sales in the state and then deduct receipts attributable to sales made through a marketplace. Connecticut's guidance, for example, instructs marketplace sellers that "[a]ll sales should be reported as gross receipts, and sales made through marketplace facilitators should be deducted on the same line as a sale for resale."⁷ However, in many states, if all sales are made through a marketplace that is registered with the State, the seller need not file a return or, for that matter, even register with the State,⁸ although that is certainly not the case for all states. And marketplace sellers that make both marketplace sales and other sales, such as the local pizza store in the example above, will need to keep documentation showing which sales were made which way.

Who Has the Information Necessary to Properly Compute the Tax Liability?

Marketplace facilitators may also be put in the unenviable position of not having sufficient information to properly calculate the correct tax. For example, there will also almost certainly be instances in which a marketplace seller is selling both taxable property and non-taxable services. In such instances, the marketplace facilitator may not have sufficient information about the complexities of the sale to properly compute the proper amount of tax. Some states allow for marketplace facilitators to contractually agree with their sellers that the seller will collect and remit the applicable tax. Other states allow the parties to petition the State for a waiver allowing the seller to pay. Such provisions would be very useful when a marketplace seller engages in many mixed transaction sales that involve both taxable and exempt components. Unfortunately, many states do not allow for the marketplace seller to remit the tax instead of the marketplace facilitator, leaving the marketplace facilitator as the party that must determine the correct amount of tax but without enough information to do so.

There are other situations in which marketplace facilitators may be put in the unenviable position of not being able to determine the proper sales or use tax base. Many states require that other taxes and fees be included in the sales tax base, but a marketplace facilitator may not know about such other tax and fees because in most states marketplace facilitators are only responsible for the sales and use taxes and are not informed about the presence of other taxes and fees, which are the responsibility of the marketplace seller.

Marketplace facilitators may also not know if their seller has issued a refund directly to a customer. Consider, for example, a situation in which a customer purchases an item through a marketplace facilitator but then e-mails the seller directly about a problem, returns the item to the seller, and the seller issues a refund directly to the customer. A marketplace facilitator may not know about the return and would be unable to claim the sales tax that had been remitted to the state.

Marketplace Facilitators Must Not Forget About Other Forms of Nexus

Almost all marketplace facilitator legislation contains an economic nexus threshold for collection liability and

most state tax practitioners focus exclusively on economic nexus thresholds when determining tax liability. Marketplace facilitators, however, should realize that in many states economic nexus is *not* the exclusive method by which the state can impose collection liability. For example, in Michigan, the Department of Treasury has reminded marketplace facilitators that they can be liable for tax collection obligations if they: (1) meet the statutory economic nexus threshold (\$100,000 in sales to, or more than 200 transactions with, Michigan customers); (2) have physical presence nexus; *or* (3) have representational, attributional, or “click-through” presence.⁹ Many marketplace facilitators will likely forget about the last two possibilities.

Update on the MTC Wayfair Implementation and Marketplace Facilitator Work Group

On December 13, 2019, the MTC’s Work Group released its Final White Paper.¹⁰ Among its many findings, the White Paper noted:

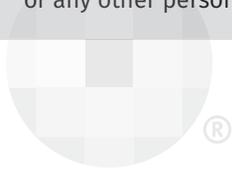
- That there was a disparity of narrow and broad definitions of the term “marketplace facilitator” and the draft working model approved on November 22, 2019, by the National Conference of State Legislatures State and Local Tax Task Force (the “NCSL working draft model”), to be reviewed by its Executive Committee in early 2020, suggests a narrow definition.
- Information requirements between the marketplace seller and marketplace facilitators should be clear and standardized.
- The NCSL working draft model contains a provision that would allow marketplace facilitators and marketplace sellers to negotiate which party has to collect and remit other applicable taxes, subject to certain limitations.
- Business participants strongly recommended that to reduce the compliance burden on remote sellers, state tax agencies should publish specific guidance to assist remote sellers in quickly determining items included in the state’s sales/use tax base and items exempted.
- Collection of local sales/use tax adds complexity to tax compliance for remote sellers. States and local governments need to reduce that complexity, in order to decrease the compliance burden.

We applaud the MTC’s work in this area which, hopefully, will help provide some much needed standardization and uniformity.

ENDNOTES

- ¹ A copy of the emergency regulation can be found at www2.illinois.gov/rev/research/legalinformation/EmergencyRules/Documents/150.804.pdf.
- ² *Normand v. Wal-Mart.com USA, LLC*, Louisiana Supreme Court Docket No. 2019-C-00263.
- ³ See www.michigan.gov/documents/taxes/Marketplace_and_nexus_notice_HBs_4540_to_4543_674741_7.pdf.
- ⁴ See www.michigan.gov/documents/treasury/Marketplace_Facilitator_Seller_FAQs_674744_7.pdf.
- ⁵ See, e.g., Ind. Code §6-2.5-4-18(a).
- ⁶ See, e.g., Wash. Rev. Code. 82.08.0531.
- ⁷ Connecticut Office of the Commissioner Guidance Regarding Marketplace Facilitators and Marketplace Sellers, available online at <https://portal.ct.gov/-/media/DRS/Publications/OCG/OCG-8.pdf?la=en>.
- ⁸ See, e.g., guidance from the Iowa Department of Revenue that “If a marketplace seller only makes retail sales in Iowa through a marketplace and the marketplace facilitator collects Iowa sales tax and applicable local option sales tax, the marketplace seller does not need to obtain an Iowa sales tax permit or file Iowa sales tax returns.” See <https://tax.iowa.gov/marketplace-facilitators>.
- ⁹ See Michigan Department of Treasury Marketplace Facilitator & Marketplace Seller Nexus, available online at www.michigan.gov/documents/treasury/Marketplace_Facilitator_Seller_FAQs_674744_7.pdf.
- ¹⁰ A copy of the Final White Paper can be found online at www.mtc.gov/getattachment/Uniformity/Project-Teams/Wayfair-Implementation-Informational-Project/White-Paper-with-apps-12-13-19.pdf.aspx?lang=en-US.

This article is reprinted with the publisher’s permission from the Journal of State Taxation, a quarterly journal published by Wolters Kluwer. Copying or distribution without the publisher’s permission is prohibited. To subscribe to the Journal of State Taxation or other Wolters Kluwer journals please call 1-800-344-3734 or visit taxna.wolterskluwer.com. All views expressed in the articles and columns are those of the author and not necessarily those of Wolters Kluwer or any other person.



Wolters Kluwer