

To: Holly Coon, Chair, MTC Uniformity Committee

**From: Tommy Hoyt, Chair, MTC Uniformity Committee
Wayfair Implementation &
Marketplace Facilitator Work Group; Richard Cram**

Re: White Paper

Date: November 7, 2018

INTRODUCTION

The Uniformity Committee established a work group to consider issues in the implementation of the *Wayfair* decision and, especially, how marketplace facilitators might be treated, including the imposition of a tax collection and remittance obligation on those sellers. The work group was instructed to identify issues that having marketplace facilitators collect and remit tax might raise, and also determine if there were agreed upon best practices to address those issues. This white paper provides both an executive summary and a detailed discussion of the issues identified and the recommended practices for addressing those issues.

EXECUTIVE SUMMARY OF FINDINGS

Provided below is a summary of the guidance developed by the Marketplace Facilitator Work Group for states considering enacting laws requiring marketplace facilitators to collect sales/use tax on facilitated sales, provided to the Uniformity Committee for its consideration. This summary represents the positions that a majority of the taxing agency staff of the states participating in the work group agreed with.

Issue #1 – Definitions

The work group recommended definitions for “marketplace” and “marketplace seller,” along with optional bracketed language to consider. Definitions for “referral” and “referrer” were deemed outside the scope of the work group, so are not

provided. Narrow and broad definitions for “marketplace facilitator” are provided as examples for consideration.

Issue #2 – Registration

The work group concluded that a marketplace facilitator should be required to register, collect, and remit sales/use tax on all facilitated sales, without exception. The marketplace seller will not need to register, collect and remit sales/use tax on those facilitated sales.

Issue #3 – Audit

If the marketplace facilitator is required to register, collect and remit sales/use tax on sales it is facilitating, then the marketplace facilitator should be the entity subject to audit, with possible relief for situations in which the marketplace facilitator can show that its failure to collect tax was due to reliance on erroneous information provided by the marketplace seller. See Issue #6.

Issue #4 – Economic Nexus Threshold

When a marketplace facilitator that lacks physical presence in a state has both facilitated and direct sales in that state, both types of sales should be counted in determining whether that marketplace facilitator has exceeded the state’s economic nexus threshold, and is therefore required to register, collect and remit sales/use tax on those sales.

When a marketplace seller that lacks physical presence in a state makes direct sales and sales through one or more marketplace facilitators who are required to register, collect, and remit sales/use tax, both types of sales should be counted in determining if the seller has exceeded the state’s economic nexus threshold and is required to register, collect and remit sales/use tax on its direct sales.

States considering adoption of economic nexus thresholds for requiring a remote seller without physical presence to register, collect, and remit sales/use tax should consider adopting an economic nexus threshold that is based only on sales volume per year, or on sales volume and the number of transactions per year.

Issue #5 – Exemption certificate

If the marketplace facilitator is required to register, collect, and remit sales/use tax on sales it is facilitating, then the marketplace facilitator is responsible for obtaining and

maintaining exemption certificates from purchasers claiming exemptions for any of those sales.

Issue #6 – Liability protection from marketplace seller errors

Legislation requiring marketplace facilitators to register, collect, and remit sales/use tax on facilitated sales should include provisions that relieve the marketplace facilitator from liability when the marketplace facilitator's failure to collect sales/use tax is caused by reliance on erroneous information provided by the marketplace seller. In that situation, the marketplace seller could be held liable for the uncollected tax. See Issue #3.

Issue #7 – Protection from risk of class action lawsuits

Legislation requiring marketplace facilitators to register, collect, and remit sales/use tax on facilitated sales should include provisions protecting the marketplace facilitator from the risk of class action lawsuits.

FINDINGS

Objective of the Work Group

The work group was formed to consider the issues in implementing *Wayfair* that might benefit from a uniform state approach. The imposition of tax collecting and reporting duties on marketplace facilitators was determined to be of the highest priority. Therefore, the objective of the work group is to identify issues and develop and discuss concepts or ideas for consideration by states desiring to require marketplace facilitators to collect and remit sales/use tax on marketplace sales, in order to maximize compliance while minimizing the burden on marketplace facilitators and marketplace sellers.

Background

Growth in the volume of online sales facilitated through a marketplace continues to accelerate. Online marketplace sellers number in the millions, although most are quite small.

In order to increase sales/use tax collection compliance levels, several states are imposing requirements on marketplace facilitators to collect and remit the sales/use tax on their marketplace sales. Following the *Wayfair* decision, more states are likely to increase this trend. The following states have enacted legislation requiring marketplace

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facilitators to collect and remit sales/use tax on marketplace sales, or in some states, giving marketplace facilitators the option to collect and remit tax or comply with notice and reporting requirements:

- Minnesota (2017 HF 1, marketplace provider must have physical presence and is only required to collect and remit on behalf of a marketplace seller having >\$10,000 taxable retail sales in the 12-month period ending on the last day of the most recently completed calendar quarter, collect eff. 10/1/18)
- Washington (2017 HB 2163, >\$10,000 gross receipts from retail sales/yr., option to collect or notice/report eff. 1/1/18; >\$100,000 gross retail sales or 200+ separate transactions, remote sellers must collect on all non-marketplace sales, and marketplace facilitators must collect on own sales and sales by all marketplace sellers through marketplace (eff. 10/1/18); for remote sellers and marketplace facilitators \$10,000 and at or below \$100,000 of sales, they must make an election to do notice and reporting or collect)
- Rhode Island (2017 H 5175A, >\$100,000 sales or 200 or more separate transactions/yr., option to collect or notice/report eff. 6/27/17)
- Pennsylvania (2017 Act 43, \$10,000 sales/yr., option to collect or notice/report eff. 4/1/18)
- Alabama (2018 HB 470, \$250,000 sales/yr., option to collect or notice/report eff. 1/1/19)
- Oklahoma (2018 HB 1019XX, \$10,000 sales/yr., option to collect or notice/report eff. 7/1/18)
- Iowa (2018 SF 2417, \$100,000 sales or 200 separate transactions/yr., collect eff. 1/1/19)
- Connecticut (2018 SB 417, \$250,000 and 200 separate transactions/yr., collect eff. 12/1/18)
- New Jersey (2018 A4496, \$100,000 sales or 200 separate transactions/yr., collect eff. 11/1/18)
- South Dakota (2018 SB2, \$100,000 sales or 200 separate transactions/yr., collect eff. 3/1/19).

These enacted statutes are currently available for download from the MTC website at www.mtc.gov under the topics “Uniformity,” “Current and Recent Uniformity Projects,” and “Wayfair Implementation and Marketplace Facilitator Work Group.”

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The Retail Industry Leaders Association (RILA) submitted to the work group a model statute for imposing a collection duty on marketplace facilitators entitled “Economic Nexus and Marketplace Collection for Sales Tax.” This document is also available for download from the MTC website on the same webpage as above.

The MTC Uniformity Committee established the work group at its meeting in Boston, Massachusetts on July 24, 2018 to accomplish the objective stated above, with the goal of developing necessary guidance for states prior to the commencement of their 2019 legislative sessions. The work group was tasked to provide that guidance to the Uniformity Committee for consideration at its meeting in Orlando, FL on November 7, 2018. The work group includes staff of interested state tax agencies, as well as a wide variety of industry participants. Tommy Hoyt (Office of Texas Comptroller of Public Accounts) is the work group chair. The work group met by telephone conference on the following dates: August 29, September 12, 19, 26, October 10, 17, 24 and 31 of 2018. Work group calls often included over 100 participants. The work group conducted a survey to initially establish a prioritized list of seven issues to be considered. Several additional surveys were conducted in order to measure the level of support from the participating states, as well as industry participants, for concepts addressing those issues. All survey results and comments received are available for download on the MTC website. Those surveys related to specific issues are attached as appendixes, as indicated below.

The work group submits this White Paper to address each issue listed below in order of priority. The results of surveys concerning each issue are analyzed. Whenever the survey results show a strong consensus position among participating states on an issue, that position is provided as the work group’s guidance. When the survey results showed a lack of consensus among participating states concerning an issue, alternative approaches for addressing the issue are suggested. Comments received are also provided.

Examples of statutory language (with reference to the source for such language) are provided for the issues considered. These are not offered as model provisions, but only suggestions for consideration. A state interested in enacting legislation imposing a marketplace facilitator collection obligation should carefully develop the appropriate statutory language to meet its circumstances. Any examples provided herein should be considered only as a starting point for that process. Review of legislation enacted by

other states imposing marketplace facilitator collection obligations, listed above, may also be helpful.

Issues

1. Definition: Should there be common definitions for the terms such as “marketplace,” “marketplace seller,” “marketplace facilitator,” “referral,” “referrer” or equivalent terms?

The work group agreed that common definitions for the above terms needed to be developed, except for “referral” or “referrer,” which were deemed outside the work group’s scope.

States participating in the work group responded to a survey dated September 13, 2018 to indicate their preferences for definitions of “marketplace,” “marketplace seller,” and “marketplace facilitator.” The results of that survey and comments received are attached as Appendix A.

The results of the survey did not establish a consensus for the definitions of “marketplace” or “marketplace seller,” although these are essentially generic terms. Sample definitions for those terms are provided below. The bracketed provisions (with footnotes referencing the states that have already enacted marketplace facilitator collection laws using those provisions in their definitions) were included as options to consider.

Marketplace¹

A physical or electronic place [including but not limited to, a store, booth, Internet website, catalog, television or radio broadcast, or a dedicated sales software application]² where [a marketplace seller sells or offers for sale]³ tangible personal property [taxable services, digital goods] is/are offered for sale [for delivery in this state]⁴ [regardless of

¹ Some states used the term “forum” in their definition. *See* CT 2018 SB 417, PA 2017 HB 542.

² *See* CT 2018 SB 417, KY Section 139.010, OK 2018 HB 1019xx, PA 2017 HB 542.

³ *See* SD 2018 SB 2.

⁴ *See id.*

whether the tangible personal property, digital property, marketplace seller, or marketplace has a physical presence in the state].⁵

Marketplace seller

A person [not a related party to a marketplace facilitator]⁶ who has an agreement with a marketplace facilitator [regarding sales of such person]⁷ and makes retail sales of tangible personal property [taxable services, digital goods] through a marketplace owned, operated, or controlled by a marketplace facilitator [whether or not such person is required to register . . .]⁸ [even if such person would not have been required to collect and remit sales and use tax had the sale not been made through such marketplace].⁹

Marketplace facilitator¹⁰

States responding to the survey split into two groups: those supporting a narrow definition (GA, KY, MN, OK, PA), and those supporting a broad definition (AL, IA, LA, MI, ID, WA). States using the narrow definition limit it to include a requirement that the marketplace facilitator handle or process the customer payment. The broad definition does not have that limitation.

An example of the narrow definition is provided below, with optional bracketed provisions that some states that have already enacted marketplace facilitator collection laws have included in their definitions, as indicated:

Any person who facilitates a retail sale by a marketplace seller by:

(1) listing or advertising for sale by a marketplace seller in a marketplace, tangible personal property [, services, or digital goods that are subject to tax under this chapter] [rendering services in connection with such sales

⁵ See KY Section 139.010, SD 2018 SB 2.

⁶ See AL 2018 HB 470.

⁷ See CT 2018 SB 417.

⁸ See CT 2018 SB 417, WA 2017 HB 2163.

⁹ See IA 2018 SF 2417.

¹⁰ Some states use the term “provider” in their definition. See, e.g., MN 2017 HF 1, SD 2018 SB 2.

or otherwise enhancing or enabling such sales for compensation, other than merely providing payment processing services];¹¹ and

(2) either directly or indirectly through agreements or arrangements with third parties collecting payment from the customer and transmitting that payment to the marketplace seller [for compensation]¹² [regardless of whether the marketplace facilitator receives compensation or other consideration in exchange for its services].¹³

Those supporting the narrow definition argue that if the marketplace facilitator is going to be required to collect and remit the sales/use tax, the marketplace facilitator must have access to the payment in order to collect the tax on the transaction. Also, the marketplace facilitator must have access to the relevant information concerning the sale in order to properly report the transaction on a return.

Steve DelBianco (NetChoice) suggested the following additional statement:

Absent a requirement for marketplace sellers to provide instantaneous and automated access to this sale and payment information, the broad definition would not be workable for marketplace facilitators.

An example of the broad definition¹⁴ is provided below:

"Marketplace facilitator" means a person that contracts with 2 sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the seller's products through a physical or electronic marketplace operated by the person, and engages:

(a) Directly or indirectly, through one or more affiliated persons in any of the following:

(i) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller;

¹¹ GA recommended this language in its survey response.

¹² See CT 2018 SB 417.

¹³ See MN 2017 HF 1; SD 2018 SB 2.

¹⁴ This definition is taken from WA 2017 HB 2163.

(ii) Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;

(iii) Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller; or

(iv) Software development or research and development activities related to any of the activities described in (b) of this subsection [], if such activities are directly related to a physical or electronic marketplace operated by the person or an affiliated person; and

(b) In any of the following activities with respect to the seller's products:

(i) Payment processing services;

(ii) Fulfillment or storage services;

(iii) Listing products for sale;

(iv) Setting prices;

(v) Branding sales as those of the marketplace facilitator;

(vi) Order taking;

(vii) Advertising or promotion; or

(viii) Providing customer service or accepting or assisting with returns or exchanges.

Alabama suggested that if more than one entity falls within the definition, a hierarchy be established to determine which entity should have the registration/collection obligation.

Washington Department of Revenue staff, in support of the broad definition, stated that it minimizes “loopholes” and should prevent businesses that would otherwise be considered marketplace facilitators under the narrow definition from changing their business models so as to fall outside that narrow definition. Also, the broad definition is intended to more effectively accommodate future changes in the industry and technology.

Diane Yetter (Yetter Consulting) commented that small, specialized marketplaces could end up falling within the broad definition, even though they only provide the platform infrastructure and are not processing payments, and may also not have access to the information on the actual sales transaction. She raised the concern that the broad definition might apply to too many platforms that lacked the ability to comply with collection and remittance requirements.

Scott Talbott (Electronic Transactions Association [ETA]) raised the concern that the broad definition of marketplace facilitator might inadvertently be construed to include businesses that are only payment processors. He did not indicate that Washington Department of Revenue currently considered those businesses to be marketplace facilitators. Mr. Talbott submitted a written statement (included in Appendix A) recommending that language be added to the broad definition of marketplace facilitator expressly excluding payment processors from the definition.

Scott DelBianco (NetChoice) suggested the following additional statement:

Under either the broad or narrow definitions of marketplace facilitator, states should consider extending vendor and/or service provider compensation to Marketplace Facilitators who are performing duties on behalf of the seller, including tax calculation, collection, remittance, and audit.

2. Registration: Are registration and return filing requirements in conflict or duplicative? If the marketplace facilitator is required to register, collect, and remit the sales/use tax on facilitated sales, then is there a need for the marketplace seller to register or report those same sales?

One of the administrative savings from states requiring marketplace facilitators to register, collect, and remit sales/use tax should be elimination of the need to register the large volume of marketplace sellers. If a marketplace seller is making direct sales or using other marketplace facilitators that are not collecting, the marketplace seller may have a registration, collection, and remittance obligation. A multichannel retailer may have a brick and mortar store, make direct online sales over its own website, use one or a marketplace facilitators, or itself act as a marketplace facilitator selling its own and others' products. States should establish clear rules for determining the

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multichannel retailer's registration, collection, and remittance responsibilities, so as to avoid conflicting or duplicative requirements.

States and industry representatives participating in the work group responded to a survey seeking their preferences for three options: (1) requiring the marketplace facilitator to register and collect on all facilitated sales, but allowing the marketplace facilitator discretion to let the marketplace seller take on that responsibility; (2) requiring the marketplace facilitator to register and collect on all facilitated sales, but allowing the marketplace seller the option to take on that responsibility by providing a copy of its registration to the marketplace facilitator; and (3) requiring the marketplace facilitator to register and collect on all facilitated sales, without exception. The results of that survey (dated September 28, 2018) and comments received are attached as Appendix B.

No states and three industry participants (Microsoft, TaxCloud and Diane Yetter) preferred Option 1. Two states preferred Option 2 (KS and MN). Ten states (AL, GA, IA, ID, KY, MS, OK, PA, TX, WA) and two industry participants (Amazon and Walmart) preferred Option 3. Thus, Option 3 clearly garnered the strongest support in the work group.

Example language from the survey for Option 3 is provided below.

A marketplace provider shall collect state and local sales and use tax on all sales made through the marketplace to purchasers in this state whether or not the marketplace seller:

(1) has or is required to have a sales and use tax permit, or

(2) would have been required to collect and remit state and local sales and use tax had the sale not been made through the marketplace provider.

Kentucky suggested that a requirement be added to the language in Option 3 that the marketplace facilitator provide a certificate to the marketplace seller advising that the marketplace facilitator is registering and collecting on facilitated marketplace sales.

Alex Oxford (The Tax Butler.com), representing internet sellers, suggested that marketplace facilitators be required to provide proof to sellers that tax is being

collected. Sellers need a way to prove to the state that tax has been collected by the marketplace facilitator.

Robert Plattner (Amazon) also suggested the marketplace facilitator certification requirement and provided language from the proposed marketplace provisions in the 2018 New York Executive Budget Bill (which was not enacted), attached as Appendix C.

Tommy Hoyt (TX) indicated support for the marketplace facilitator certification requirement. The following is an example of such certification language drafted by Texas:

A marketplace provider shall certify to its marketplace sellers that it will collect and remit state and local sales and use tax on sales of taxable items made through the marketplace. A marketplace seller that accepts a marketplace provider's collection certificate in good faith may exclude sales made through the marketplace from the marketplace seller's report under [applicable statute].

The work group conducted an additional survey on Issue #2 in response to a request received from Jerry Johnson (TaxCloud, a Certified Service Provider[CSP]). Mr. Johnson indicated that when a multichannel retailer makes direct remote sales and uses the services of a CSP for handling its sales tax administration responsibilities, but also has sales through a marketplace facilitator that the marketplace facilitator is required to collect and remit tax on, the multichannel retailer needs to receive sufficient information from the marketplace facilitator on those facilitated sales, in order to properly reconcile the tax remitted and collected on retailer's direct sales vs. facilitated sales. Mr. Johnson provided suggested language for Options 2 and 3, which would impose those information-providing requirements on the marketplace facilitator. The additional survey (dated October 18, 2018) sought input from work group participants on whether they would support Mr. Johnson's suggested language. The results of that survey and comments received are attached as Appendix D.

Regarding Mr. Johnson's suggested language for Option 2, two states supported it (ID and MS) and eight states did not (AL, CO, ID, KY, MN, ND, OK, TX). Six industry participants (Etsy, NetChoice, TaxCloud, Taxometry, Intuit, Diane Yetter) supported that language and two (anonymous, Amazon) did not. Regarding Mr. Johnson's suggested language for Option 3, five states (AL, IA, ID, KY, MS) supported it and

six (CO, KS, MN, ND, OK, TX) did not. Six industry participants (Michael Mazerov/CBPP, Etsy, TaxCloud, Taxometry, Intuit, and Diane Yetter) supported the language and three (Amazon, NetChoice, and Walmart) did not.

Additional comments received from work group participants on Issue #2, either during meetings, or submitted separately, are summarized and attached as Appendix E.

3. Audit: Should the person registering, collecting, remitting tax and filing returns be the person that the state should audit and require compliance with the state's record keeping requirements?

Work group participants reached general consensus that if the state imposes the obligation on the marketplace facilitator to register, collect, and remit sales/use tax on facilitated sales it handles, then the marketplace facilitator should also be the one subject to audit by the state on those transactions. This is generally consistent with most of the current marketplace facilitator collection statutes already in place. However, these statutes also typically contain provisions that if the marketplace facilitator can establish its failure to properly collect sales/use tax on a transaction was due to erroneous information provided to the marketplace facilitator by the marketplace seller, then the marketplace seller could be held liable for such error and the marketplace facilitator relieved of such liability.

During discussion of this issue, the question arose: who should be responsible for correct mapping¹⁵ of the taxability of products listed on the marketplace, the marketplace seller or the marketplace facilitator? Work group participants responded to the following survey question: When the state requires the marketplace facilitator to register, collect, and remit sales/use tax on facilitated sales for a marketplace seller, who should be responsible for the correct mapping of the taxability of the marketplace seller's products to be sold?

The responses and comments received on the Issue #3 survey are attached as Appendix F. Three states (KY, OK, TX) and two industry participants (Walmart, Diane Yetter) responded that mapping responsibility should fall on the marketplace

¹⁵ "Mapping" refers to the process of determining whether the product being sold is exempt for sales tax under the applicable state's laws, or whether the state has imposed sales tax on that product.

seller. Seven states (CO, GA, IA, KS, MN, MS, PA) and two industry participants (Michael Mazerov/CBPP, anonymous) responded that such responsibility should belong to the marketplace facilitator. However, some of those states qualified their responses by commenting that if the marketplace facilitator can show that the marketplace seller provided it incorrect information that it relied upon in failing to collect, then the marketplace seller could be held liable, instead of the marketplace facilitator. Two states (ID, LA) responded that a “facts and circumstances” test should be developed to determine who should have the mapping responsibility.

The majority of participating states in the work group supported the position that the marketplace facilitator should be responsible for correct mapping of taxability of products being sold on the marketplace, with the caveat that the marketplace facilitator could be relieved of liability for failure to collect by showing that it relied on erroneous information provided by the marketplace seller. In that situation, the state could look to the marketplace seller for liability.

Example (NJ 2018 A. 4496):

A marketplace facilitator shall be subject to audit by the division with respect to all retail sales for which it is required to collect and pay the tax imposed under [applicable statute]. Where the division audits the marketplace facilitator, the division is prohibited from auditing the marketplace seller for the same retail sales unless the marketplace facilitator seeks relief under [applicable statute].

If the marketplace facilitator demonstrates to the satisfaction of the division that the marketplace facilitator has made a reasonable effort to obtain accurate information from the marketplace seller about a retail sale and that the failure to collect and pay the correct amount of tax imposed under [applicable statute] was due to incorrect information provided to the marketplace facilitator by the marketplace seller, then the marketplace facilitator shall be relieved of liability of the tax for that retail sale. This subsection does not apply with regard to a retail sale for which the marketplace facilitator is the seller or if the marketplace facilitator and seller are affiliates. Where the marketplace facilitator is relieved under this subsection, the seller is liable for the tax imposed under [applicable statute].

4. Economic Nexus Threshold: If a state establishes an economic nexus threshold for requiring collection of sales/use tax, does it clearly indicate when that threshold is met, triggering a registration obligation, with respect to a marketplace seller, marketplace facilitator? Should states consider a sales volume economic nexus threshold, without an alternative separate number of transactions threshold, or include both sales volume and separate number of transactions in the threshold?

The work group participants responded to two survey questions related to the first question in this issue, dealing with how an economic nexus threshold should apply to multichannel retailers that are marketplace sellers, marketplace facilitators or both. The work group participants responded to one survey question related to the second question within this issue, dealing with whether the economic nexus threshold should be based on sales volume alone, sales volume or transactions, or both. The survey results and comments received on the Issue #4 survey are also included in Appendix F.

The first survey question provided:

If the state has adopted a remote seller economic nexus threshold for imposing a sales/use tax collection duty (such as South Dakota's \$100,000 gross sales volume or 200 transactions/yr. threshold) and has also adopted legislation requiring marketplace facilitators to register, collect and remit sales/use tax on sales they are facilitating, how should that threshold be applied to a marketplace facilitator that lacks physical presence in the state and is making direct remote sales in the state on its own website, as well as facilitating sales for multiple remote marketplace sellers?

Eleven states (AL, CO, GA, IA, KS, KY, LA, MS, OK, PA, TX) and three industry participants (Michael Mazerov/CBPP, Walmart, anonymous) responded in favor of the following response: total of all of the marketplace facilitator's sales or transactions into the state, including direct sales and sales of marketplace sellers facilitated by the marketplace facilitator. Those responses indicated strong consensus.

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Robert Plattner (Amazon) emphasized that once the marketplace facilitator without physical presence has exceeded that economic nexus threshold, the marketplace facilitator would be required to collect on all facilitated sales, regardless of the sales volume or number of transactions for a particular marketplace seller using that marketplace facilitator.

No states and one industry participant (Diane Yetter) responded in favor of the following response: the economic nexus threshold is applied separately to total direct sales or transactions of the marketplace facilitator vs. total sales or transactions facilitated by the marketplace facilitator.

The second survey question provided:

If the state has adopted a remote seller economic nexus threshold for imposing a sales/use tax collection duty (such as South Dakota's \$100,000 gross sales volume or 200 transactions/yr. threshold) and has also adopted legislation requiring marketplace facilitators to register, collect and remit sales/use tax on all facilitated sales in the state, how should that threshold be applied to a multichannel remote seller who has direct remote sales in the state on its own website, and also has sales in the state through multiple marketplace facilitators?

Eight states (ID, KS, KY, LA, MN, MS, OK, PA) and one industry participant responded in favor of the following: total of all of the multichannel remote seller's sales or transactions into the state, including direct sales and marketplace sales. These responses indicated that a majority of participating states supported this position.

Five states (AL, CO, GA, IA, TX) and three industry participants (Michael Mazerov/CBPP, Diane Yetter, anonymous) responded in favor of the following: total of only direct sales or transactions by the multichannel remote seller.

The survey question related what the economic nexus threshold should consist of stated:

What type of economic nexus threshold for imposing sales/use tax collection duties on remote sellers should states adopt?

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Responders were given the options of (1) sales volume; (2) sales volume or number of transactions; or (3) sales volume and number of transactions.

Seven states (AL, GA, IA, ID, MS, OK, TX) and two industry participants (Michael Mazerov/CBPP, anonymous) responded in favor of the following: annual sales volume economic nexus threshold only.

One state (PA) and one industry participant (Walmart) responded in favor of the following: annual sales volume or number of separate transactions threshold only.

Three states (CO, KY, LA) and one industry participant (Diane Yetter) responded in favor of the following: annual sales volume and number of separate transactions economic nexus threshold.

Based on the survey results, a majority of states supported for the following positions:

When a marketplace facilitator that lacks physical presence in a state has both facilitated and direct sales in that state, both types of sales should be counted in determining whether that marketplace facilitator has exceeded the state's economic nexus threshold, and is therefore required to register, collect and remit sales/use tax on those sales.

When a marketplace seller that lacks physical presence in a state makes direct sales and sales through one or more marketplace facilitators who are required to register, collect, and remit sales/use tax, both the marketplace seller's direct sales and facilitated sales should be counted in determining if the seller has exceeded the state's economic nexus threshold and is required to register, collect and remit sales/use tax on its direct sales.

A strong consensus in the work group supported the position that states consider adopting economic nexus thresholds for imposing sales/use tax collection duties that are based on sales volume alone, or sales volume and number of separate transactions.

Additional comments received on Issue#4 from work group participants, either during the meetings or submitted separately, are summarized and attached as Appendix G.

5. Exemption Certificates: How should remote sellers/facilitators handle sales to exempt persons/entities? For instance, for tribal members purchasing products in their Indian country, those sales are exempt in WA, but how should sellers/facilitators handle those transactions?

Sales tax administration laws generally provide that if a seller fails to collect sales/use tax on a transaction, then if the seller later is audited and the seller cannot produce a valid exemption certificate from the purchaser who claimed the exemption, the seller will be held liable for the uncollected tax. The consensus of states participating in the work group is that if state law requires the marketplace facilitator to register, collect, and file returns on its facilitated transactions, and would subject the marketplace facilitator to audit on those transactions, then it should also be the marketplace facilitator's duty to obtain and maintain exemption certificates so they are on hand at the time of audit. Without those exemption certificates, the marketplace facilitator will not be protected from liability for uncollected tax.

Diane Yetter (Yetter Consulting) submitted several questions to the work group concerning how marketplace facilitators should handle exemption certificates. These are attached as Appendix H. Due to time constraints, the work group did not address these questions. However, these are questions state tax administrators likely will receive in implementing requirements for marketplace facilitators to handle exemption certificates.

Steve DelBianco (NetChoice) suggested the following additional statement:

To be workable for marketplace facilitators, a purchaser's exemption certificate should be applicable to all transactions of that purchaser in the state, for all marketplace sellers and for all categories of products.

Provided below are example provisions for imposing the duty on the marketplace facilitator to obtain and maintain exemption certificates.

Example from CT 2018 SB 417:

A marketplace facilitator shall be considered the retailer of each sale such facilitator facilitates on its forum for a marketplace seller. Each marketplace facilitator shall (1) be required to collect and remit for each

such sale any tax imposed under [applicable statute], (2) be responsible for all obligations imposed under [applicable statute] as if such marketplace facilitator was the retailer of such sale, and (3) in accordance with the provisions of [applicable statute], keep such records and information as may be required by the Commissioner of Revenue Services to ensure proper collection and remittance of said tax.

Example from Texas (in proposal form):

Except as otherwise provided in [applicable statute], a marketplace provider has the rights and duties of a seller under this chapter with regard to sales made through the marketplace, including collection and reporting duties.

Example from marketplace provisions in 2018 New York Budget Bill (not enacted--suggested by Robert Plattner [Amazon]):

A marketplace provider with respect to a sale of tangible personal property it facilitates: (A) shall have all the obligations and rights of a vendor under [applicable statute] and under any regulations adopted pursuant thereto, including, but not limited to, the duty to obtain a certificate of authority, to collect tax, file returns, remit tax, and the right to accept a certificate or other documentation from a customer substantiating an exemption or exclusion from tax, the right to receive the refund authorized by [applicable statute] and the credit allowed by [applicable statute]; and (B) shall keep such records and information and cooperate with the commissioner to ensure the proper collection and remittance of tax imposed, collected or required to be collected under [applicable statute]

6. Should states provide liability protection to marketplace facilitators when errors in collection and remittance are due to marketplace seller providing erroneous information to the marketplace facilitator?

The work group reached general consensus that a statute imposing a duty on marketplace facilitators to register, collect, and remit sales/use tax on their facilitated sales, and be subject to audit on those sales, should also provide liability protection to marketplace facilitators when the marketplace facilitator's failure to collect the tax is

due to reliance on erroneous information provided by the marketplace seller. This issue was also addressed as part of Issue #3.

Example from OK 2018 HB 1019xx:

A marketplace facilitator is relieved of liability under [applicable statutory provision] if the marketplace facilitator can show to the satisfaction of the [taxing authority] that the failure to collect the correct amount of tax was due to incorrect information given to the marketplace facilitator by a marketplace seller or remote seller.

See also example provided for Issue #4

7. Liability Protection: Should states include statutory provisions concerning protection of collecting marketplace facilitators against the risk of class action lawsuits?

The work group reached general consensus that a statute imposing a duty on marketplace facilitators to register, collect, and remit sales/use tax on their facilitated sales, and be subject to audit on those sales, should also provide protection against the risk of class action lawsuits. Several enacted marketplace facilitator statutes that contain such provisions.

Diane Yetter suggested that protection against *qui tam* lawsuits should also be included.

Example from OK 2018 HB 1019xx:

A class action may not be brought against a marketplace facilitator on behalf of purchasers arising from or in any way related to an overpayment of sales or use tax collected by the marketplace facilitator, regardless of whether such action is characterized as a tax refund claim. Nothing in this subsection shall affect a purchaser's right to seek a refund from the [taxing authority] pursuant to [applicable statutory cite].

ADDITIONAL COMMENTS RECEIVED

Report of *Wayfair* Implementation & Marketplace Facilitator Work Group

Attached as Appendix I are three additional comments received from different anonymous sources, each relating to several of the issues addressed herein, as indicated.

CONCLUSION

Thank you to all of the staff of state taxing agencies, as well as interested industry groups and businesses participating in the work group for their comments and other input to the discussions concerning each the issues considered.