Do Not Pass Go. Do Collect $200 – States Quickly Adding Marketplace Facilitator Collection Requirements Will Lead to New Strategies, Complications and Disputes

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A lot has changed in the state and local tax world after the 2018 *Wayfair*[1] decision which finally paved the way for state revenue departments and other taxing authorities to force out-of-state sellers to collect tax on sales to customers if the retailer has sufficient economic nexus, instead of physical nexus, in that jurisdiction. But, it has also caused another domino to fall – states quickly enacting legislation to also place such collection requirements on companies providing a "marketplace" for these remote and online sellers, such as Amazon, eBay, Etsy, Walmart, etc. As discussed below, states are just now rolling out these new "marketplace facilitator" laws which will continue to cause new headaches, and lead to new fights, for these providers, remote sellers, and customers alike.

What is a Marketplace Facilitator?

In general, a marketplace facilitator is a company that contracts with third parties to sell goods and services on its virtual platform, or "marketplace," and helps facilitate sales from this forum by providing a bevy of services to the seller, including listing the product, payment and collection services and often various logistical help.

And why is this so important? Because the marketplace "pie" continues to balloon, as best exemplified by Amazon founder and CEO, Jeff Bezos, recently revealing that over half of the sales on its platform are currently by third-party sellers using its online marketplace, so much so that he publicly stated that "third-party sellers are kicking our first party butt. Badly."[2] The money out there is simply too big for states to miss out on.

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As this marketplace system continues to grow, it has become a no brainer for states to force these facilitators to collect applicable sales and use tax on these sales as they are typically much larger than the sellers it hosts, which means they are easier for taxing authorities to find, keep tabs on and collect from for any taxes resulting from the numerous transactions done via its marketplace. Therefore, rather than having to (historically unsuccessfully) chase after hundreds of smaller online retailers, which has plagued taxing authorities for decades for use tax in particular, it only has to focus on a few large players instead.

In addition to being helpful for states, in theory, the smaller sellers will now have less administrative burdens and compliance costs to worry about which many feared after *Wayfair*. Sound like a win-win for everybody, right? But, it's definitely not as simple and easy as it seems. So much so, the Multistate Tax Commission is continuing to examine the potential effects of these news laws.[3] Regardless, many states are moving forward with these laws to make clear that the burden is on these facilitators for collection and payment of relevant taxes in order to avoid litigation over outdated sale tax laws as we are currently seeing in South Carolina.[4]

Wait, the Internet is Being Taxed Now?!

While many sellers have enjoyed the benefits of such tax collection requirements recently being shifted to marketplace facilitators, it has also caused problems for many online sellers who for years or even decades have avoided charging, collecting or remitting sales or use tax on its transactions (giving them another advantage over brick and mortar businesses selling similar products), but soon there will be no way to avoid such taxes (which many consumers still don't understand need to be paid after also enjoying years and even decades of not paying sales or use tax on their online purchases) if it chooses to use such marketplace facilitators. Some of the larger marketplace providers have gone so far as to provide detailed CYA-type charts to outline which states it is required to follow such laws.[5]

So, one question is: will this lead to smaller or niche "underground" marketplaces that will continue to allow such sellers to not charge

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sales or use tax until a taxing authority finally chases them down too? If there is a will, there is a way, so it will be interesting to see what internet-based platforms pop up or new technologies are created that don't fit within the generic definition of marketplace facilitators most states are beginning to use.

For example, beginning last year, my home state of Kentucky statutorily defined the term "marketplace facilitator" as "a person that facilitates the retail sale of tangible personal property or digital property by listing or advertising the tangible personal property for sale at retail and either directly or indirectly through agreements or arrangements with third parties, collects the payment from the purchaser, and transmits the payment to the person selling the property", as well as the phrase "marketplace" as "any physical or electronic means through which one (1) or more retailers may advertise and sell or lease tangible personal property or digital property, such as a catalog, Internet Web site, or television or radio broadcast, regardless of whether the tangible personal property, digital property, or retailer is physically present in this state."[6] Pretty broad language, but technology will always be ahead of state legislators and there are lots of smart people out there always looking for a competitive edge (i.e., finding ways not to charge online shoppers sales tax) – will states keep an eye on these inevitable advances or shifts in the market or will they naively believe they are now catching everything they've lost from online sellers since *Quill*?[7]

As but one example, some states with marketplace facilitator laws have specifically excluded "virtual classified ad" platforms, such as Craigslist, from these obligations if the marketplace only advertises goods and services for sale and connects the buyer and seller but has no other involvement with the transaction.[8] That seems like a pretty big opportunity for peer-to-peer type sale platforms to pop up that crafty app and software developers can use to potentially get around all or certain state marketplace requirements.

States Slow to Start, But Quickly Catching On

Speaking of Kentucky, it is a perfect example of how states slowly dipped their toes in the marketplace facilitator waters initially, as it

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added the above statutory definitions as part of its broader tax reform efforts in 2018, but did so without adding any corresponding statutes putting collection burdens on these facilitators.[9] It wasn't until earlier this year when Kentucky, as part of its "clean-up" bills to fix issues with the 2018 tax reform bill, added teeth to these terms by requiring sales and use tax collection from facilitators if it has sales, or facilitates same for a remote retailer, which exceed $100,000 or two hundred (200) separate transactions in the prior calendar year.[10] Many states have likewise used the *Wayfair* $100,000 and 200 transaction threshold for marketplace facilitator requirements to help protect itself from constitutional attack.

Apparently Kentucky realized that its marketplace-related definitions were not broad enough, as it already revised the term "marketplace facilitator" to "marketplace provider" in April, and greatly expanded its meaning to capture any company, or its affiliate, that directly or indirectly does two things: (i) provides any online platform (e.g. listing products or services of a marketplace retailer; facilitating the sale by providing terms of same to buyers; owns, operates or makes an electronic or physical infrastructure available for the sale; provides software development or R&D activities for retailers; provides or offers fulfillment and logistical services; sets prices for the retailer; provides customer services and helps brands the products), and (ii) provides various contractual services to the retailer (e.g., collecting sale price; provide payment processing; charges or receives fees for selling, listing, or referrals; or provides a virtual currency that can be used to purchase offered products and services). Many states have followed suit.

Normally Kentucky is behind other states in progressive legislation socially and economically (see gaming tax – a different story for a different day), but it typically is ahead of the game on sales and use tax compliance laws given its strong involvement with the Streamlined Sales Tax Governing Board, including with these broader marketplace provider statutes.[11] But other states are quickly picking up the pace on enacting similar legislation either as part of a larger remote seller legislation after *Wayfair* or as a separate add-on just for marketplace facilitators, including

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Alabama, Connecticut, Iowa, Minnesota, Nebraska, New Jersey, Oklahoma, Pennsylvania, Washington D.C., Washington and Wyoming.[12] As such, approximately a dozen states now have statutory marketplace facilitator requirements on the books, with another twenty (20) or so states currently proposing or recently enacting similar laws, including Arizona, Arkansas, California, Florida, Georgia, Hawaii, Idaho, Indiana, Louisiana, Maine, Maryland, Massachusetts, New Mexico, New York, North Carolina, North Dakota, Rhode Island, Texas, Vermont, Virginia, West Virginia and Utah.[13]

More Fights on the Horizon, and Not Just with the Tax Man

So, what does this all mean? It means there will surely be more fights in the future over these laws in general, as well as with those states that have more aggressive thresholds. Local jurisdictions will also begin jumping into the fire by enacting new ordinances or regulations to collect local sales taxes from similar marketplace providers, which some predict is the next frontier of *Wayfair*-related fighting.

It also means increased audit risks, and novel issues involved in such audits, which could pit marketplace facilitators and remote sellers against one another, or in some cases, joining in arms to fight a taxing jurisdiction. For example, Kentucky now requires a marketplace provider to not only register and obtain a sales and use tax permit for itself, but also obtain separate permits for all of its remote retailers, as well as specifies that it can audit these facilitators on its collections from these sellers.

Therefore, it is reasonable to predict that not only will marketplace providers and retailers attack the legality of certain states and local jurisdictions going too far on what it can require, but we are also likely to see actions *between* the marketplace provider and the retailers it facilitates as these states specifically relieve the retailers from all collection and remittance requirements if using these marketplaces, unless "incorrect or insufficient information is provided by the marketplace seller" or other issues are alleged by a marketplace facilitator.[14]

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And don't forget about fights involving consumers. Many states are examining whether to include statutory protections for marketplace facilitators to prevent class action lawsuits being brought by purchasers against facilitators for refund claims when the purchaser believes it has been overcharged.[15]

Another complicating factor – some states specifically allow for these parties to contractually determine which entity will meet these collection requirements despite the statutory burden being on the marketplace facilitator (e.g., New Jersey[16]), while some states will not. Therefore, contracts between these entities will need to be more tightly drafted to anticipate such issues or at least require the retailer to make all reasonable efforts to help the facilitator in future audits or assessments (e.g., document production, etc.).

Just another reason for us SALT practitioners to continue emphasizing to clients (both internally and externally) that a SALT-focused review of these contracts prior to execution is critical to help mitigate these risks for future agreements involving marketplace provider or online retailer, because three years down the line, you can bet that one of these parties will receive a nice notice from your friendly state or local taxing authority saying "Do Not Pass Go. You Better Have Collected $200", and both the provider and seller will need to work together, or fight each other, to deal with same.

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[1] *S. Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S.Ct. 2080, 201 L.Ed.2d 403 (2018)

[2] Adam Levy, "Amazon's Third Party Sales are Exploding," Apr. 13, 2019, Yahoo Finance online, available at https://finance.yahoo.com/news/amazon-apos-third-party-sales-131700125.html.

[3] MTC, Wayfair Implementation and Marketplace Facilitator Work Group.

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[4] *Amazon Services, LLC v. South Carolina Dep't of Revenue*, Docket No. 17-ALJ-17-0238-CC (State of Carolina Administrative Law Court).

[5] *See e.g.*, Amazon's Marketplace Tax Collection chart, available at https://www.amazon.com/gp/help/customer/display.html?nodeId=202211260 ; Etsy website, "How Marketplace Tax Laws Impact State Sales Tax for Etsy Sellers," Jan. 14, 2019, available at https://www.etsy.com/seller-handbook/article/how-marketplace-tax-laws-impact-state/321914904041; Walmart website, "Sales Tax Collection Overview, available at https://sellerhelp.walmart.com/seller/s/guide?article=000006444.

[6] KRS 139.010(21) & (22). Kentucky also added definitions for marketplace "referrers" which anyone "that: (a) Contracts with a retailer or retailer's representative to advertise or list tangible personal property or digital property for sale or lease; (b) Makes referrals by connecting a person to the retailer or the retailer's representative, but not acting as a marketplace facilitator; and (c) Received in the prior calendar year or the current calendar year, in the aggregate, at least ten thousand dollars ($10,000) in consideration from remote retailers, marketplace retailers, or representatives of remote retailers or marketplace retailers for referrals on retail sales to purchasers in this state," [KRS 139.010(33)], but later removed such language in 2019 as part of expanding its marketplace facilitator laws (see *infra*, n. 9).

[7] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[8] *See e.g.*, South Carolina Department of Revenue website, Marketplace Provides FAQ, available at https://dor.sd.gov/taxes/business_taxes/MarketplaceProvider.aspx; Washington Department of Revenue website, Marketplace facilitators, available at https://dor.wa.gov/find-taxes-rates/retail-sales-tax/marketplace-fairness-leveling-playing-field/marketplace-facilitators.

[9] 2019 Kentucky Laws Ch. 151 (HB 354); KRS 139.010(22).

[10] KRS 139.450(2); KRS 139.340(2)(g).

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[11] For example, Kentucky had one of the most onerous use tax notice requirements in the country well before other states picked up on this trendy requirement. *See* 2013 Ky. Laws Ch. 119 (HB 440) (adding KRS 139.450(2)).

[12] Ala. Act 2018-539 (enacted January 2016, but eff. Jan. 1, 2019 and applied prospectively, requiring marketplace facilitators with Alabama marketplace sales in excess of $250,000 to collect applicable tax); Ark S.B. 576 (enacted Apr. 10, 2019 and eff. Jul. 1, 2019, requiring registration and collection requirements for sales made or facilitated by marketplace facilitator into state of $100,000 or 200 separate transactions); Conn. Public Acts 2018, No. 18-152, §§ 2-5 (eff. December 1, 2018, requiring registration and collection/remittance by marketplace facilitator if at least $250,000 sales in the state through its providing of a "forum"); Iowa Senate File 2417 (SF 2417) (eff. January 1, 2019 requiring marketplace provider registration and collection requirements if it makes or facilitates $100,000 or 200 transactions in the state); Minn. Stat. Ann. § 297A.66 (eff. Oct. 1, 2018, requiring collection for remote sellers of more than $10,000 in twelve-month period); Neb. 2019 Legislative Bill 284 (eff. Apr. 1, 2019, requiring "multivendor marketplace platform" with $100,000 or 200 transactions in the state to collect and remit for remote retailers using its platform); NJ P.L. 2018, c. 132 & New Jersey Technical Bulletin-83 (Oct. 25, 2018) (eff. Nov. 1, 2018, requiring marketplace facilitators to begin collecting and remitting for sales of and marketplace sellers with $100,000 or 200 separate transactions, but allowing these parties to contractually agree regarding which party must do so); Ok. 2019 House Bill No 1019 (amending 68 O.S. 2011, Section 1403, eff. Jul. 1, 2018, to require marketplace facilitators to either collect and remit sales tax for remote sellers or comply with Oklahoma's prior use tax notice and reporting requirements for purchasers); 72 P.S. §§ 7213 – 7213.6 (eff. Mar. 2018, requiring a marketplace facilitator that makes or facilitates sales to Pennsylvania customers of $10,000 or more to either register and collect sales tax for the seller or comply with the state's use tax and notice reporting requirements through an election form, REV-1830); South Carolina Remote Sellers FAQs, available at https://dor.sc.gov/resources-site/lawandpolicy/Documents/RemoteSellerFAQ.pdf (Feb. 1, 2019,

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requiring registration, collection and remitting of sales tax for marketplace providers making or facilitating over $100,000 of "gross proceeds of sales", as well as remote sellers of $100,000 of "gross revenue" in the state which could include a combination of its sales in the state from its own website and those sold through a marketplace); SDCL Ch. 10-64-1 through 10-64-9 (eff. Mar. 1, 2019, requiring marketplace facilitators to collect and remit sales tax meeting a $100,000 or 200 transactions threshold, and specifically stating that inventory stored in a Amazon-type distribution warehouse meets the physical presence criteria regardless); A22-0556; D.C. Code § 472001(g-5) (eff. Apr. 1, 2019, requiring marketplace facilitators to collect and remit sales tax for sales into the District of Columbia of $100,000 or 200 separate transactions); RCW 82.13.010 (requiring marketplace facilitators to collect and remit sales tax for itself and sales it facilitates, but noting that the definition of marketplace facilitators would be changing July 1, 2019); Wyoming 2019 H.B. 0069, creating W.S. 39-15-502 (eff. Jul. 1, 2019).

[13] *See* Gail Cole, "More than 20 states aim to make marketplace facilitators collect sales tax for sellers in 2019," Avalara, available at https://www.avalara.com/us/en/blog/2019/02/more-than-20-states-to-make-marketplace-facilitators-collect-sales-tax-for-sellers.html (last updated Apr. 12, 2019).

[14] For example, Wyoming's recent marketplace facilitator laws shifts audits and liability to these facilitators generally, unless the facilitator seeks relief based on grounds that it was provided incorrect or inadequate information by the seller.

[15] *See e.g.*, Ok. 2018 HB 1019, which included the language that: "A class action may not be brought against a marketplace facilitator or a referrer on behalf of purchasers arising from or in any way related to an overpayment of sales or use tax collected by the marketplace facilitator or the referrer, 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 Commission under other provisions of Title 68 of the Oklahoma Statutes."

[16] *See* New Jersey Technical Bulletin-83, *supra,* n. 12.

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