

Marketplace Laws: How's it going out there?

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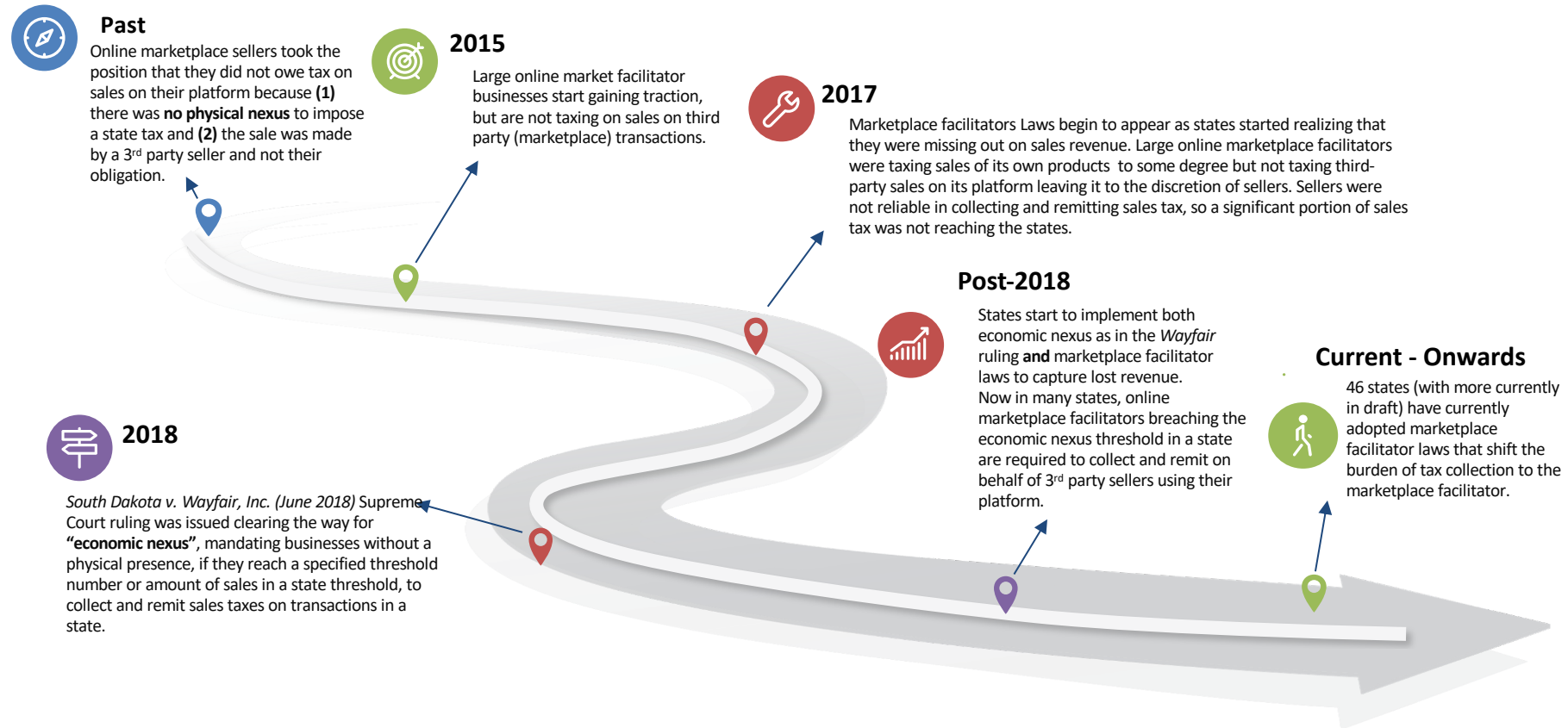
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Agenda

- History of marketplace Laws
- Common misnomers
- Exclusions
- Implementation challenges
- Sourcing
- Other taxes and fees
- Audit challenges
- Class action issues
- Other

Roadmap to Marketplace Facilitator Laws

– How We got Here



We are not a marketplace because....

We are not receiving a commission....

- Consideration for the service of facilitation is not necessarily required

We don't represent multiple sellers.....

- No requirement to represent multiple sellers in the marketplace facilitator definitions

We don't operate a marketplace

- The term marketplace, if defined, may be very broad
 - A marketplace is “a physical or electronic place, including, but not limited to, a store, ... internet website, ... or a dedicated sales software application, where a marketplace seller sells or offers for sale tangible personal property for delivery into this state.....” Cal. Rev. & Tax. Code § 6041(a).
 - A electronic marketplace includes digital distribution services, digital distribution platforms, online portals, application stores, computer software applications, in-app purchase mechanisms, or other digital products. Ohio Rev. Code Ann. § 5741.01(V)

We don't collect payment....

- Many states require a marketplace to “directly or indirectly through agreements with third parties, collect payment from a buyer and transmit the payment to the marketplace seller”
- In other states, payment processing or collection is not required

Exclusions/carve outs

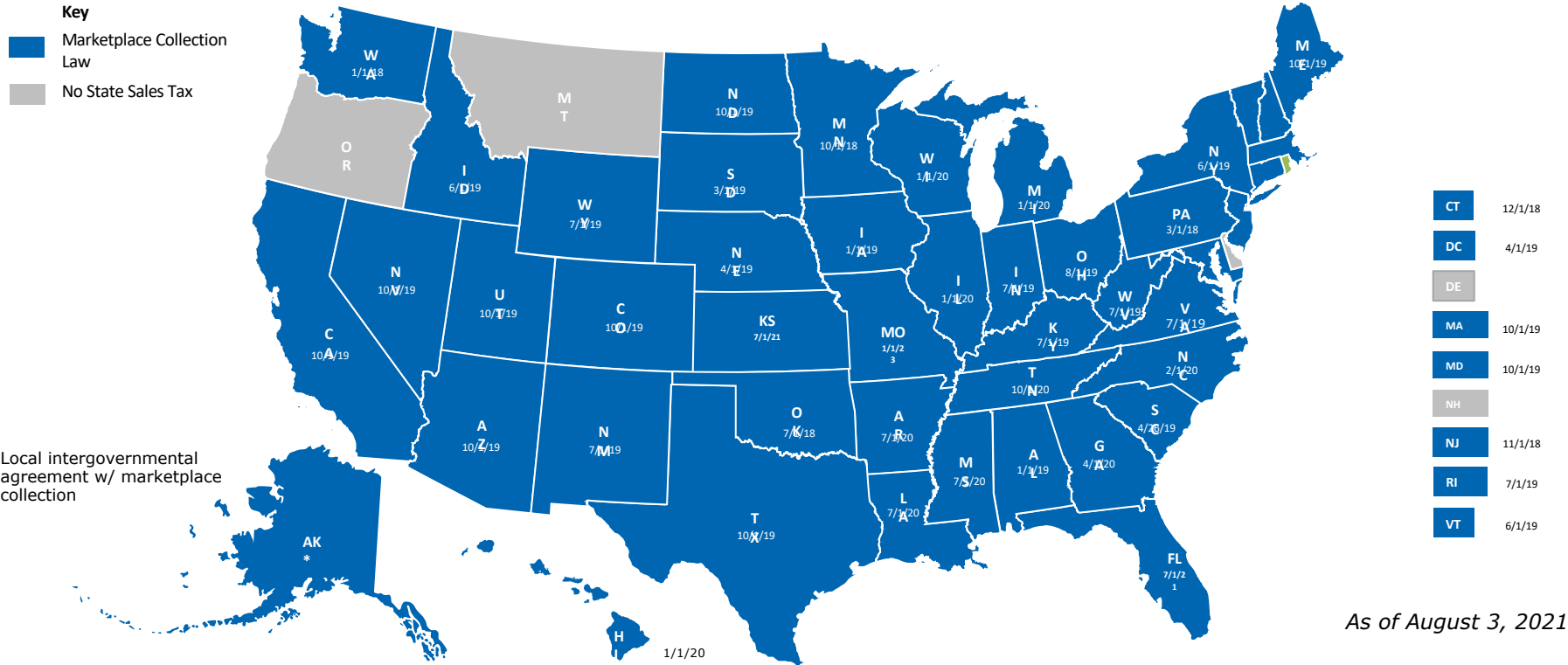
Various states have adopted exclusions or special carve-outs from the definition of a marketplace facilitator for certain types of businesses

- Some states recognize the difficulty in complying with the marketplace obligations for certain industries
- Other states have carve-outs because the state already has procedures set place for collection and remittance of tax (e.g. travel intermediaries, telecom facilitators)

Examples

- Companies that are simply advertising products
- Payment processors
- Delivery network companies
- Accommodations, facilitators, car rental facilitators, peer-to-peer sharing programs
- Telecommunication service facilitators
- Franchisor marketplace facilitators

Marketplace Collection Laws & Effective Dates (2021)



Waivers

A handful of states allow a marketplace facilitator to request a waiver of its obligation to collect and remit

- Certain waivers apply narrowly to certain companies (e.g., Maryland publicly traded communications companies)
- Other states waivers are broader, but generally must demonstrate that “substantially all of the sellers are registered”
- Massachusetts, Ohio and Virginia allow marketplace sellers to request waivers

Other states allow contracting or agreements for the collection of tax (e.g., KS, MN, NJ, NV)

Implementation challenges

All sales tax imposing states now have marketplace laws

- Missouri law becomes effective January 1, 2023
- The marketplace collection laws provide a general framework for marketplace collection but they have not addressed implementation challenges and have resulted in some unintended consequences that states have not addressed.
- These issues vary for different industries but include:
 - Challenges in navigating responsibility for other taxes and fees;
 - Broad definition of marketplace facilitator in many states creates ambiguity on which party may be a marketplace facilitator;
 - Resistance of marketplace sellers in some industries to let marketplaces collect and remit tax.
 - Challenges with sourcing laws;
 - Lack of education of state auditors to audit marketplaces; and
 - Local tax efforts to enact and apply marketplace laws.

Implementation challenges

Return presentation for marketplace sellers and marketplace facilitators

- How do the marketplace facilitator and marketplace seller report facilitated sales?
 - For example, New Mexico requires marketplace sellers to take a deduction for facilitated sales, while in New York facilitated sales can be excluded from the marketplace seller's own return
 - Maryland requires a marketplace facilitator to report facilitated sales separately on a Form 202F; other states allow both facilitated and direct sales to be included on the same return
 - Certain states have not addressed

Determination of exempt status and exemption certificates

- Virginia law provides liability relief for invalid exemption certificates provided by the marketplace seller or purchaser
- Massachusetts provides that the marketplace facilitator shall be relieved from liability, including penalties, for the incorrect collection or remittance of sales or use tax on transactions it facilitates or for which it is the seller if the error is due to an exemption certificate taken in good faith

Implementation challenges

Unique challenges exist when facilitating sales for bricks and mortar businesses

- Is there an in-store transaction that occurs? How is the tax computed at the point-of-sale?
- Sourcing rules may differ for brick and mortar business and marketplace facilitators (e.g., Alabama)
- Dual remittance issues- marketplace may be required to remit sales and use tax, but what about other taxes (e.g., accommodations taxes, rental car taxes, taxes and fees specific to meals)?
- How do you handle returns and upsells (e.g., rental car and room upgrades)?
- What if the business doesn't have an agreement with the facilitator?
- Brick and mortar businesses may be less inclined to stop collecting
- How will the marketplace determine the tax due when the brick and mortar business sells a mix of products that may be taxable, nontaxable, or subject to reduced rates (e.g., groceries, clothing, medicine, etc.)?

Sourcing challenges

- Even in states that administer local taxes at the state level there can be sourcing issues for marketplace facilitators.
 - Most states now use destination for local tax sourcing meaning marketplace facilitators will use destination as well.
 - In states that use origin sourcing it may not be clear where the “origin” is for marketplace transactions – the seller’s location or the delivery location or the marketplace location?
- Some states that use origin sourcing for local tax purposes have indicated that a marketplace is required to use destination regardless of the marketplace seller’s location.
- This issue highlights the problems with deeming a party to be the seller for sales tax purposes that, in fact, is not the seller.

Other Applicable Taxes and Fees

- States' marketplace collection laws generally only provide that marketplace facilitators are required to collect the generally imposed sales and/or use tax, not other transaction taxes.
- The laws generally do not apply to other taxes and fees that may be imposed on a transaction including:
 - Mattress fees
 - Tire recycling fees
 - Bottled product fees
 - Alcoholic beverages excise taxes
 - Occupancy taxes
 - Car rental fees
 - Telecommunications taxes/fees
 - Waste Recycling Fee
 - 911 Surcharges and Fees

Other tax issues

- Marketplaces that may have “other tax” issues:
 - Marketplaces offering a wide variety of products and services
 - Meal-delivery services
 - Online travel companies
 - Home service marketplaces
 - Special industry marketplaces
 - “Payment Processors” (if considered a marketplace facilitator)
 - Any marketplace that might be subject to unique taxes or fees

Other taxes and fees

- Marketplace facilitators may be pressured by marketplace sellers to collect all applicable taxes.
- Other taxes and fees may have licensing requirements (e.g., alcohol or tobacco products) or separate reporting requirements.
- Concern that if marketplace facilitator agrees to collect other taxes and fees that states may still attempt to hold marketplace seller liable.
- Marketplace facilitator may not have adequate information to collect other taxes, or may not have information on rates

Multiple marketplaces

- Because of the broad scope of marketplace facilitator definitions, certain fact patterns have been arising where two parties involved in a marketplace could potentially be the marketplace facilitator.
- No guidance from the states on how to address which party is the marketplace facilitator if there is more than one possibility.
- No guidance indicating which party is liable for responsible for collecting and remitting the tax.
- Options for marketplace facilitator to address this issue:
 - Seek rulings from the states;
 - Wait till either party is audited;
 - Contractually agree with other party on which party will be the marketplace facilitator; or
 - Include indemnification provision in contract.
- Unclear whether states will respect party's contractual terms (probably not).
- Possible states may attempt to collect tax from both parties (e.g. DC, SC).

Audit challenges

- States have begun to audit marketplace facilitators, but have not made efforts to educate and train auditors on marketplace collection issues and data requests.
 - Marketplaces are having to educate auditors on how their transactions work, how information is gathered, and how tax is collected.
- Marketplace data is significant and states lack awareness and the ability to review and receive large volumes of data.
- States have also continued to pursue information regarding marketplace sellers from marketplace facilitators.
 - This information may include the names, addresses and sales amounts of marketplace sellers.
 - States still appear to want to pursue marketplace sellers for other taxes.
- Marketplace sellers generally have no recourse to protest an assessment of the marketplace and could have inconsistent tax treatment on the marketplace vs direct sales

Protections for Marketplaces: Safe Harbors

- Almost every marketplace law recognizes the unique challenges facing marketplace facilitators and the associated risks with those challenges.
- For example, marketplaces are faced with the challenge of properly (i) characterizing the products sold by marketplace sellers, *e.g.* tangible personal property, taxable services, amusements, etc. and (ii) administering exemptions from tax, *e.g.* sales by a nonprofit organization or religious institution.
- Making these characterizations and administering exemptions generally requires the marketplace facilitator to request information from the marketplace sellers.
- What if the marketplace sellers provides incorrect information to the marketplace facilitator? Will the marketplace facilitator be liable for uncollected tax related to that incorrect information?
- In 36 states, the answer is generally no: a marketplace will not be liable if the error “was due to incorrect or insufficient information given to the marketplace facilitator by the marketplace seller.”

Protections for Marketplaces: Class Action Protection

- Marketplaces also face unique risks associated with over collecting tax: consumer class actions.
- For example, a marketplace may decide that the risk of under collecting tax is substantial, and instead decide to take the conservative position that all the sales are taxable.
 - Relatedly, marketplaces may choose not to administer certain exemptions such as whether the sale is by a nonprofit organization or religious institution.
- Taking this conservative approach will inevitably lead to over collecting tax, *i.e.* collecting tax on either nontaxable transactions or exempt transactions. Can the marketplace be held liable for over collecting tax under a consumer class action?
- In 23 states, the answer is generally no: a marketplace cannot be subject to a consumer class action related to its tax collection activities through its platform.

Marketplace fees

- Marketplace facilitators generally charge marketplace sellers fees for facilitating transactions.
 - Lack of guidance regarding the taxability of marketplace facilitator fees.
 - States are starting to audit marketplaces and taking aggressive positions regarding taxability without clear guidance.
 - Marketplace fees may be included in the sales price (because they are deducted from the amount paid marketplace seller) so arguably the fees are already taxed.
 - However, if the item being sold is not taxable, states may try to tax marketplace facilitator fees.
- Marketplace facilitators may also charge fees to purchasers.
 - In these transactions, is the marketplace facilitators' fee taxable?
 - Absent a marketplace law, the answer would turn on whether the marketplaces' services for which the fee was charged were specifically enumerated as taxable.
 - However, marketplace laws make this answer less clear.
 - For example, is the fee included as part of the "purchase price" or "sales price" of the transactions?
 - Does the answer change if the marketplace facilitator is deemed the "seller" or "vendor" of the marketplace sellers' sale?

Other challenges

- Resistance of some marketplace sellers to agree to turn off tax collection.
- State treatment of marketplace facilitators for other taxes – gross receipts taxes, income taxes.
- Uncertainty regarding collection and remittance of locally administered other taxes and fees.
- Technology and systems challenges.

QUESTIONS?

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