

Multi-Channel Sales and Marketplace Facilitator Issues

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Agenda

- Background and current status
- What is a Marketplace Facilitator?
- Implementation challenges
- Audit issues and next steps

Foundational Background

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- Marketplace facilitator (“MPF”) laws generally do not create a new “tax” regime, but rather a new “collection” regime.
- Collection of tax by someone other than the seller is not novel.
- Though they vary, all marketplace laws are aimed at the same general set of businesses.
 - But variation in statutory structure exists, and that matters.
- The MPF trend followed the broad enactment of economic nexus legislation; the MPF laws were primarily aimed at increasing sales tax compliance for sales by remote sellers.

Current State

- All states that impose a general sales and use tax have enacted marketplace facilitator laws.
 - Missouri is the only state without an effective statute- law becomes effective on January 1, 2023
 - Certain home-rule jurisdictions (e.g., in Alaska and Colorado) have adopted model marketplace ordinances
- Certain states have adopted specific marketplace laws for unique types of sales- sales of accommodations and/or short term rentals, peer-to-peer car sharing.
- Certain states have expanded the types of taxes and fees marketplace facilitators must collect.
- Generally, states have not acted to narrow the scope of the marketplace laws, adopt new waiver provisions, increase thresholds, etc.

Scope of Marketplace Laws

- State marketplace facilitator laws vary in terms of the type of transactions that are captured
 - Certain state laws (e.g., California and New York) apply only to facilitated sales of tangible personal property
 - Other laws are broader and capture facilitated sales of tangible personal property, digital products and services
- Generally, the marketplace laws are located in the sales tax code; transactions subject to taxes other than sales and use taxes may be excluded
 - E.g., rental cars, accommodations, admissions, telecommunications services
- Issues arise when marketplaces are facilitating sales of both tangible personal property and/or excluded services or transactions

What *is* a Marketplace facilitator?

- The laws are not uniform, but states most commonly define a “marketplace facilitator” as having two components:
 1. A person that performs one or more of a set of activities such as listing taxable property for sale at retail in a forum it owns or controls; and
 2. The person (or an affiliate in some states) must directly or indirectly, through agreements or arrangements with third parties, collect the payment from the purchaser and transmit the payment to the person selling or provide payment processing services.
- Some states define “marketplace facilitators” so broadly that they include “marketplaces” that cannot possibly comply with the laws.
- Minimal guidance on nuanced fact patterns.

What *is* a Marketplace Facilitator?

- **Narrow definition: Maryland (Md. Code, Tax-Gen. § 11-101(c-6)(1)):**
- "Marketplace facilitator" means a person that:
 - (i) facilitates a retail sale by a marketplace seller by listing or advertising for sale in a marketplace tangible personal property, digital code, or a digital product; and
 - (ii) regardless of whether the person receives compensation or other consideration in exchange for the person's services, directly or indirectly through agreements with third parties, collects payment from a buyer and transmits the payment to the marketplace seller.
- **“Broad” definition: New Jersey (N.J. Stat. Ann. 54:32B-3.6):**
 - A person qualifies as a “marketplace facilitator” if they facilitate taxable retail sales by doing both of the following:
 - (1) lists or advertises tangible personal property, specified digital products, or services for sale by a marketplace seller in a forum the person owns, operates, or controls; and
 - (2) charges, collects, or otherwise receives selling fees, listing fees, referral fees, closing fees, or other consideration from the facilitation of a retail sale, regardless of ownership or control of the tangible personal property, specified digital products, or taxable services that are the subject of the retail sale.

Impact of Broad and Varying Definitions

- By design or by accident, the MPF laws apply or arguably apply to “marketplaces” that do not fit the typical mold:
 - Delivery network companies
 - Fundraising platforms
 - Marketplaces that do not process payments
 - Marketplaces that process payments but do little else
 - Web3 Platforms
- Unique issues to each.
- We will talk about a few.

Delivery Network Companies

- In certain states, delivery network companies are excluded from the definition of an MPF
 - May elect into MPF status in California and Tennessee
- A “delivery network company” is generally defined as a business entity that maintains an internet website or mobile application used to facilitate delivery services for the sale of local products
- In Rev. Rul. 20-13, the Tennessee Department of Revenue concluded that “delivery network companies” are excluded from marketplace facilitator requirements if:
 - The company does not have common ownership or control over the sellers (i.e., restaurants) with whom it contracts; **AND**
 - The deliveries it facilitates occur within 50 miles of the sellers
 - It does not matter if the delivery network company’s employees or contractors deliver the food

Marketplaces That Do Not Process Payments

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- Many platforms list others' products or services without processing payments.
 - Example: referral platforms, online directories and classifieds.
- Broad MPF definitions can include these platforms, despite them having no way to comply with the laws.

Marketplaces Process Payments, and Little Else

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- States generally exempt platforms that only provide payment processing.
- But all it takes is one other activity (e.g., for example, order taking) to be technically caught by a state's MPF law.

What *is* a marketplace?

- Not all states have defined “marketplace” and there is still minimal guidance from the relevant tax authorities.
- California “... 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, where a marketplace seller sells or offers for sale tangible personal property for delivery in this state regardless of whether the tangible personal property, marketplace seller, or marketplace has a physical presence in this state.”
- Ohio “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.
- Illinois, 2022 WL 1110434 (Ill.Dept.Rev.) – “... when a car rental facilitation company operates a peer-to-peer motor vehicle sharing platform it is acting as a marketplace facilitator. . . .”

Implementation Challenges

- Does more than one entity meet the definition of a “marketplace facilitator”
 - In broad definitions states, more than one entity involved in facilitating a sale may be considered a marketplace facilitator
 - Generally, there is no state guidance on how to address which party is the marketplace facilitator if there is more than one possibility
- What are the registration/certification requirements for marketplace facilitators?
 - Certain state laws include a provision requiring the marketplace facilitator to certify to the marketplace seller that it has commenced collection of sales/use tax on facilitated sale
- Are there special return presentation requirements?
- What taxes and/or fees are required to be collected by the marketplace?
 - E.g., E911 fees, battery fees, waste or recycling fees, new Colorado retail delivery fee
 - Fees may be remitted to an agency other than the taxing authority

Implementation Challenges

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- Are there waiver and/or contracting provisions?
 - If yes, what information is needed to obtain a waiver or to be protected if contracting with sellers
- How should a marketplace handle exemption certificates?
 - Only a few states provide liability relief for invalid exemption certificates provided by the marketplace seller or purchaser
 - See e.g., Virginia, “a marketplace facilitator shall be relieved from liability, including penalties and interest, for the incorrect collection or remittance of sales and use tax on transactions it facilitates or for which it is the seller if the error is due to reasonable reliance on an invalid exemption certificate provided by the marketplace seller or the purchaser”
- Local sourcing issues
 - Illinois example
 - Different rules for marketplace versus brick and mortar sales

Liability Protection Provisions

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- A marketplace facilitator is subject to audit and liable for failure to properly collect and remit sales, unless an exception applies to shift the liability back to the marketplace seller
 - Many states have provisions that relieve a marketplace facilitator from liability provided that it can show the failure to collect the correct amount of tax was due to incorrect and/or insufficient information provided by the marketplace seller
 - E.g., Cal. Tax Code “If the marketplace facilitator demonstrates to the satisfaction of the department that the marketplace facilitator has made a reasonable effort to obtain accurate and complete information from an unrelated marketplace seller about a retail sale and that the failure to remit the correct amount of tax imposed under this part was due to incorrect or incomplete information provided to the marketplace facilitator by the unrelated marketplace seller, then the marketplace facilitator shall be relieved of liability for the tax for that retail sale
- These provisions raise several questions- What is needed to satisfy the Department? What are reasonable efforts? What does it mean to provide incorrect or insufficient information
- A smaller number of states provide protection against class action lawsuits related to the a marketplace’s tax collection activities

Audits and What's to Come

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- Audits have started, mostly for mature marketplaces; pre-*Wayfair* audits of marketplaces ongoing
 - Some focus on marketplace facilitator income tax filings
- Hopefully, more guidance (e.g., rulings, regulations) will be forthcoming from state taxing authorities on application of marketplace laws
- From a non-tax standpoint, many states requiring marketplaces to have more oversight of “high-volume” marketplace sellers
 - Sellers must disclose certain information to customers