

## Marketplace Collection

All Things Marketplace Plus the Kitchen Sink

**November 7, 2018**

Michele Borens

# Agenda

- Background on Sales Tax Collection
- States' Ability to Shift Tax Collection Obligation
- Other Industries Targeted by States
  - Online Travel Companies
  - Transportation Network Companies
  - Payment Processors
- Pre-*Wayfair* Efforts by the States
  - New York
  - Washington
  - Minnesota
- State Rationale for Legislation
- Post-*Wayfair* Marketplace Collection Legislation
- Concerns with Legislation

# Background on Sales Tax Collection

# Sales Tax Collection

- Generally for state and local tax purposes, the seller of the goods or services is responsible for collecting and remitting sales tax.
- Collection of sales tax by someone other than the seller is not a new issue.
- In certain circumstances, states have required parties that are not the buyer or the seller to collect sales tax:
  - Auctioneers
  - Tradeshow operators
  - Brokers
  - Agents
  - Sales representatives
  - Consignors

# Sales Tax Collection

- These entities have been designated by states to be responsible for sales tax collection because:
  - They may have control over the transaction;
    - Agents
  - The actual seller may not be identified;
    - Consignment arrangements
    - Auctions
  - They may handle or receive the funds;
    - Brokers
  - They may process the payment; or
  - It is administratively more efficient for the state.
    - Tradeshow operators

# Ecommerce Industries Targeted by States

# Ecommerce Platform Collection

- With the expansion of electronic commerce marketplaces, states began looking for opportunities to shift the tax collection obligation to new types of entities.
- States have focused on:
  - Online hotel intermediaries (OTC);
  - Marketplaces (e.g., Ebay);
  - Transportation platforms (e.g, ride share/transportation network companies);
  - Financial entities; and
  - Common carriers.

# Ecommerce Platform Collection

- States have attempted to shift the tax collection obligation to these entities through:
  - Asserting these entities are the seller/vendor/retailer
    - OTCs
  - Asserting these entities are agents for the sellers
  - Enacting legislation to require such entities to collect tax
    - OTCs
    - Short-term rental platforms
    - Transportation platforms
  - Proposing legislation to require such entities to collect
    - Credit and debit card processors
    - Marketplaces



## Ecommerce Platform Collection – OTCs

- OTCs were one of the first electronic commerce industries that was targeted.
- State taxing authorities asserted that hotel taxes are unpaid or underpaid as a result of online bookings.
- There have been numerous cases in states with states reaching differing conclusions on whether online travel websites have a tax collection obligation for their bookings.
- Some short-term rental platforms (e.g., Airbnb) have avoided the fray by simply negotiating collection agreements with the states under existing laws.

# Transportation Platforms – Transportation Network Companies

- States and localities have also focused on transportation network companies such as Lyft.
- For example, in 2014 the City of Chicago expanded its Ground Transportation Tax to transportation network companies.
  - Chicago imposes the GTT on transportation network drivers at a rate of \$0.20 per vehicle, per ride accepted. Mun. Code of Chicago § 3-46-030(B)(b-1).
  - The City of Chicago defines a “transportation network driver” as “an individual affiliated with a [person that offers or provides a prearranged transportation service offered or provided for compensation using an Internet-enabled application or digital platform to connect potential passengers with transportation network drivers] ... .” Mun. Code of Chicago § 9-115-010.
  - Transportation network companies are required to collect the tax.
- Other cases pending in states.

## Payment Processors – State Proposals

- New York has proposed legislation several times that would have required issuers of credit cards and debit cards to pay and collect sales and use taxes and pay such taxes.
- In 2013, Connecticut attempted to create a pilot program to test the collection of sales tax through payment processors.
- In 2017, Massachusetts considered implementation of a real-time sales tax collection system by payment processors, but ultimately it was decided after public comment that significant systems and technology changes would be required and this would take significant time and investment.
- In 2018, Arizona proposed legislation that would have implemented a real-time sales tax pilot program, but was ultimately not passed.

# Marketplace Collection

## Marketplace Collection – Pre-*Wayfair* Rationale

- Before *Wayfair*, states targeted marketplaces because they were not able to require marketplace sellers that did not have a physical presence to collect and remit sales and use tax.
- Even if a third-party seller had a collection and remittance obligation, compliance and enforcement are challenging, especially for smaller sellers.
- States targeted online marketplace providers because enforcing collection and remittance obligations on providers is less difficult.
- Some of the pre-*Wayfair* laws contained a notice and reporting requirements option in order to avoid violating *Quill*.

## Marketplace Collection – New York

- New York was the first state to propose marketplace collection legislation.
- New York's 2015 Budget Bill proposed to create a new class of sales tax payer – a “marketplace provider.”
- Marketplace providers would have been required to collect and remit New York sales tax if they maintained an agreement with a marketplace seller to facilitate sales and collect the receipts.
- Marketplace providers would have been responsible and liable for collecting and remitting New York sales tax on sales by all marketplace sellers with which they have an agreement, irrespective of whether the marketplace seller has nexus in New York.
- This proposal was ultimately removed from the final Budget Bill.

## Marketplace Collection – Minnesota

- On May 30, 2017, Minnesota enacted H.F. 1.
- Requires sales/use tax collection obligation on “marketplace providers” that have more than \$10,000 in sales into the state unless the retailer selling on the marketplace is already registered to collect Minnesota sales tax.
- Effective on July 1, 2019, or sooner if *Quill* is overturned.
- A “marketplace provider” is “any person who facilitates a retail sale by a retailer” by:
  - (a) Listing or advertising the retailer’s products or services on its website; and
  - (b) Collecting payments from the retailer’s customers and transmitting those payments to the retailer.

## Marketplace Collection – Washington

- Prior to the passage of H.B. 2163, the Washington legislature attempted to pass marketplace collection legislation, but it failed.
- On July 7, 2017, Washington enacted H.B. 2163.
- Requires “marketplace facilitators” whose sales to Washington consumers are \$10,000 or more to either:
  - a) Collect sales/use tax on sales to Washington consumers; or
  - b) Comply with specific use tax notice and reporting requirements.
- Effective on January 1, 2018.



## Marketplace Collection – Washington

- A “marketplace facilitator” is a person that contracts with a seller to facilitate the sale of the seller’s products into Washington through a physical or electronic marketplace and engages, directly or indirectly, in certain specified activities.
  - E.g., transmitting or communicating the offer or acceptance between the buyer and seller
  - E.g., owning or operating the infrastructure or technology that brings buyers and sellers together)
- The marketplace facilitator must also engage in at least one of the specified activities related to the seller’s products.
  - Payment processing, fulfillment or storage services, listing products for sale, setting prices, branding sales as those of its own, taking orders, advertising, or providing customer service or accepting or assisting with returns or exchanges.

## Marketplace Collection Laws – Post-*Wayfair*

- With the overturn of *Quill*, states are no longer restricted in pursuing marketplace sellers for sales tax collection.
- However, states have continued to show interest in requiring marketplaces to collect sales tax on behalf of marketplace sellers for ease of administration of state taxes.
- States have continued to enact legislation that requires marketplaces to collect sales tax on behalf of marketplace sellers.

# Marketplace Collection Laws

- The following states have enacted marketplace collection legislation:
  - Alabama
  - Connecticut
  - Minnesota
  - New Jersey
  - Oklahoma
  - Pennsylvania
  - South Dakota
  - Washington
  - Wisconsin
- There are numerous other proposals for marketplace collection legislation (e.g., DC).

# Marketplace Collection Laws

## Summary of Laws

- Marketplace collection laws generally contain the following provisions:
  - Require marketplaces to collect and remit sales tax on behalf of marketplace sellers.
  - Require marketplaces to report and remit sales tax collected on the marketplaces' sales tax return.
  - Marketplaces are audited for sales tax collected on marketplace seller sales.
  - Provide marketplaces some relief if the marketplace incorrectly determines taxability based on information provided by marketplace sellers.
  - Provide marketplaces some relief from liability – subject to certain annual caps – for failure to collect sales tax.
  - Limit class action lawsuits against marketplaces for overcollection of sales tax.

# Marketplace Collection

## Administrative Guidance

- The following states have issued administrative guidance regarding marketplace collection:
  - **Arizona:** Ruling provides that a business that operates an online marketplace and makes online sales on behalf of third-party merchants is a retailer conducting taxable sales. Arizona Transaction Privilege Tax Ruling No. 16-3 (Sept. 20, 2016).
  - **California:** Publication 109, *Internet Sales* (Cal. Bd. of Equalization Oct. 2016) provides that a marketplace operator providing fulfillment services is a retailer if it has possession of the property at the time of the sale and it can transfer ownership to the purchaser without further action by the marketplace seller.

# Marketplace Collection

## Administrative Guidance

- The following states have issued administrative guidance regarding marketplace collection:
  - **South Carolina:** Issued a draft ruling in August indicating that online marketplaces are the retailer of all tangible personal property sold on its website and must collect and remit South Carolina sales and use tax on all taxable products sold into South Carolina on its website. (S.C. Ruling 18-x).
  - **Utah:** An online marketplace provider was not required to collect and remit sales tax on sales of products to Utah customers that were facilitated using the provider's website because it never held title to the products and did not make an "exchange" with respect to the products because it never held any interest in the products. Private Letter Ruling 16-003 (Ut. State Tax Comm'n June 21, 2016).

# Marketplace Collection

## Application Concerns

- Do marketplace providers have access to necessary information to collect and remit tax?
- How do marketplace providers coordinate their efforts with third-party sellers?
- Who is in the better position to collect and remit taxes?
- What are the contractual realities between marketplace providers and third-party sellers?
- Increased class action risks from over collection?





EVERSHEDS  
SUTHERLAND

**eversheds-sutherland.com**

© 2018 Eversheds Sutherland (US) LLP  
All rights reserved.

*This communication cannot be used for the purpose of avoiding any penalties that may be imposed under federal, state or local tax law.*