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TaxNewsFlash

United States

No. 2020-404
June 22, 2020

Remote sellers and marketplace facilitators update (Colorado, Louisiana, Mississippi)

More U.S. state and local governments continue to react in response to the U.S. Supreme Court's decision in "South Dakota v. Wayfair, Inc." and in particular with respect to sales tax obligations for remote sales and transactions involving marketplace facilitators.

Colorado: There are efforts underway in certain home-rule jurisdictions to require marketplace facilitators to collect home rule sales and use taxes. Currently marketplace facilitators with Colorado nexus collect state sales and use taxes and local taxes that are administered by the Department of Revenue. The **Colorado Municipal League** has worked with home-rule municipal tax professionals and the business community to develop a draft economic nexus and marketplace facilitator model ordinance. The draft ordinance proposes Colorado municipalities adopt uniform definitions within their sales tax codes to encompass marketplace facilitators, marketplace sellers, and multichannel sellers that do not have a physical presence in a city, but do have a taxable connection with a city. The Municipal League cautions that only home rule cities that intend to join the "single point of filing" being administrated by the Colorado Department of Revenue should incorporate the model economic nexus and marketplace provisions.

The City of Englewood appears to be the first home-rule jurisdiction to propose **amendments** to its sales tax ordinance that would require a marketplace facilitator to collect the city sales tax. The proposed changes would adopt a new definition of "engaged in business in the city" to include all businesses required to collect and remit sales tax as a marketplace facilitator. The proposed ordinance also revises the definition of "engaged in business in the City" to require one delivery into the city in a 12-month period. The current version of the ordinance states that it's one delivery in a 12-month period by means other than common carrier.

The definition of a "marketplace facilitator" in the proposed ordinance is a person who: (1) contracts with a marketplace seller to facilitate for consideration, regardless of whether the consideration is deducted as fees from the transaction, the sale of the marketplace seller's tangible personal property, commodities, or services through the person's marketplace; (2) engages directly or indirectly, through one or more affiliated persons, in transmitting or otherwise communicating the offer or acceptance between a purchaser and the marketplace seller; and (3) either directly or indirectly, through

agreements or arrangements with third parties, collects the payment from the purchaser and transmits the payment to the marketplace seller. The Englewood ordinance does not incorporate the economic nexus provisions developed by the Municipal League. Based on information from the Colorado Department of Revenue, Englewood does not appear to have signed on to the single point of remittance portal.

Louisiana: The governor signed Senate Bill 138, which requires marketplace facilitators (as defined) to collect sales and use tax effective July 1, 2020.

Mississippi: Since September 1, 2018, Mississippi has required remote sellers with over $250,000 of in-state sales, plus a purposeful or systematic exploitation of the Mississippi market, to collect and remit sales and use tax. Recently, the Mississippi House and Senate adopted a conference committee report—**House Bill 379** [PDF 154 KB]—that would codify the regulation and adopt new collection requirements for marketplace facilitators. To become law, the bill still requires the governor's signature.

Under the bill, a "marketplace facilitator" would be defined as any person who facilitates a retail sale by a seller by: (1) listing or advertising for sale by the retailer in any forum, tangible personal property, services or digital goods that are subject to tax; and (2) directly or indirectly through agreements or arrangements with third parties, collects payment from the customer and transmits that payment to the retailer. A marketplace facilitator, similar to a remote seller, would be deemed to be doing business in state if it has in-state sales that exceed $250,000 in any consecutive 12-month period. A sale made through a marketplace facilitator would be a sale of the marketplace facilitator and not the sale of a marketplace seller for purposes of determining whether a person exceeds the $250,000 in sales threshold.

The bill would also permit a marketplace facilitator and marketplace seller to enter into a contractual arrangement whereby the marketplace seller remains responsible for collecting and remitting the applicable taxes and fees. However, the ability to contract applies only if:

- The marketplace seller (including its related entities and franchisees) has annual gross sales in the United States of more than $1 billion.
- The marketplace seller provides evidence to the facilitator that it is registered in Mississippi.
- The marketplace facilitator informs the Department of Revenue that the marketplace seller will be collecting and remitting the applicable taxes and will be liable for any failure to collect or remit.

The bill would exclude from the definition of a "retail sale" any sales by a third-party food delivery service that delivers food from an unrelated restaurant to a customer, regardless of whether the customer orders and pays for the food through the delivery service or whether the delivery service adds fees or upcharges to the price of the food. The effective date of the bill would be July 1, 2020.

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