

PUBLICATION

Spotlight on Tennessee: Governor Signs Marketplace Facilitators Sales Tax Law, Effective October 1, 2020

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On April 1, 2020, Tennessee Governor Lee signed the Marketplace Facilitators Sales Tax bill into law, effective October 1, 2020. Although it is difficult at present to focus on any topic other than the COVID-19 crisis, this new sales tax law is an important step for Tennessee and deserves recognition and discussion.

Based upon information provided to the Legislature during the 2020 session, the U.S. Government Accountability Office (GAO) concluded that approximately 46 percent of potential collectible revenues would have come from marketplace facilitators. The GAO also reportedly concluded that somewhere between 14 percent and 33 percent of sales taxes on third-party sales through marketplace facilitators is already being collected, leaving a not-so-insignificant amount of sales taxes potentially not being collected on third-party sales through facilitators.

The purpose of this new Tennessee law is to expressly require marketplace facilitators to be responsible for collecting and remitting sales tax unless specifically relieved from that obligation under the terms of this law.

The following is a brief summary of, as well as a few concerns regarding, the new law.

I. Definitions

For these purposes, the term "marketplace" means a physical or electronic place, platform, or forum, including but not limited to a store, booth, internet website, catalog, or dedicated sales software application, where tangible personal property or any of the things or services taxable under the Tennessee sales tax laws are offered for sale.

"Marketplace facilitator" means a person, including the affiliate of that person, that: (i) for consideration agrees with a "marketplace seller" to facilitate the sale of the marketplace seller's tangible personal property/things or services taxable in Tennessee through a physical or electronic marketplace operated, owned or otherwise controlled by that person or the person's affiliate, and (ii) either directly or indirectly through contracts, agreements or other arrangements collects payment from the purchaser of the marketplace seller's tangible personal property/other taxable things or services and transmits payment to the marketplace seller.

"Person" is broadly defined in existing sales tax law to include (among others) individuals, corporations, associations, co-partnerships, and business trusts.

"Marketplace seller" means a person who makes sales through any marketplace operated, owned, or controlled by a marketplace facilitator.

II. Marketplace Facilitators to Collect and Remit Tax Effective October 1, 2020

Effective October 1, 2020, when a marketplace seller uses a marketplace facilitator to facilitate sales of tangible personal property/other taxable things or services, "the marketplace facilitator is liable" for the Tennessee sales/use tax on the sales price of the property/other taxable things or services. That liability for

such taxes is imposed on the facilitator regardless of whether the marketplace seller already has a sales tax certificate of registration or would have been required to collect sales/use taxes had the sale not been facilitated by the marketplace facilitator.

III. "Marketplace Facilitator" Definition Excludes Certain Business Activities

Although the definition of "marketplace facilitator" is broad, the new law specifically provides that the following are not considered to be such a facilitator: (i) a person who exclusively provides advertising services, including listing products for sale, so long as the person does not also engage, whether directly or indirectly through an affiliate, in those activities (see Part I above) that do define a marketplace facilitator; (ii) a person whose activity with respect to marketplace sales is limited to providing payment processing services between two or more parties; (iii) a derivatives clearing organization, designated contract market, or foreign board of trade or swap execution facility registered with the Commodities Futures Trading Commission or certain other uses of the services of the Commission's registered platforms; or (iv) a person who is a "delivery network company" (that is, a business that maintains an internet website or mobile application used to facilitate delivery services of one or more local products from a local merchant and delivery of the local products to a customer, not including any delivery requiring over 50 miles of travel from the local merchant to the customer), although a delivery network company under certain circumstances can elect to be deemed a marketplace facilitator.

IV. Certain Circumstances Relieve Marketplace Facilitator's Obligations

Even if a person is considered as a marketplace facilitator, the following circumstances can alleviate the facilitator's responsibility to collect or remit the sales tax: (i) the marketplace facilitator made or facilitated total sales to consumers in Tennessee of \$500,000 or less during the previous 12-month period; (ii) the facilitator demonstrates, to the satisfaction of the Department, that "substantially all" of the marketplace sellers for whom the facilitator facilitates sales are registered dealers with the Department, in which case the Department is authorized to waive the requirements of this new law and, if waived, the sales/use taxes shall be collectable from the marketplace sellers; or (iii) the facilitator and the marketplace seller contractually agree that the marketplace seller will collect or remit all the applicable taxes to the Department, assuming (A) the marketplace seller has annual gross sales in the U.S. of over \$1 billion including the gross sales of any related entities, and including the combined sales of all franchisees of a single franchisor where the marketplace seller is a franchised entity, (B) the marketplace seller provides evidence to the facilitator that it is registered with the Department, and (C) notification is given to the Department that the marketplace seller will collect and remit all applicable taxes on its sales through the facilitator and is liable for failure to collect and remit taxes on its sales.

V. Collection and Remittance by the Marketplace Facilitator.

When collecting or remitting taxes under this new law, the marketplace facilitator shall collect taxes on its sales through its marketplace based upon the address to which the property/other taxable things are shipped, and that taxes collected by the facilitator on taxable services sold through the marketplace shall be collected as otherwise provided under existing law in Tennessee.

In reporting sales/use taxes on sales made through a marketplace, the facilitator must separate those sales from any sales/use taxes collected on sales made directly by the facilitator or affiliates of the facilitator.

The Department may audit a marketplace facilitator for sales made by marketplace sellers and facilitated by the facilitator, except for those circumstances (see Part IV above) where the facilitator is relieved of the collection and remittance responsibilities. The Department is not to audit or otherwise assess taxes against the marketplace sellers for sales facilitated by the facilitator except, again, in those situations where the facilitator has been relieved of collection/remittance responsibilities.

This new law does not relieve the obligation of any purchaser to remit taxes for any taxable transaction as to which the marketplace facilitator or the marketplace seller does not collect and remit the taxes.

VI. Certain Other Important Provisions

The new law provides that a marketplace facilitator shall be relieved of liability for failure to collect and remit the correct amount of taxes to the extent that the error was due to incorrect or insufficient information given to the facilitator by the marketplace seller, assuming that the facilitator can demonstrate that it made reasonable efforts to obtain the correct and sufficient information. This particular provision does not apply if the facilitator and the marketplace seller are affiliates.

Further, the new law provides that no class action lawsuit may be brought against the marketplace facilitator in Tennessee on behalf of purchasers relating to overcollection of sales or use taxes by the facilitator.

Additionally, the marketplace seller under the new law shall not be obligated to collect or remit or be liable for any sales/use taxes on any retail sales for which the marketplace facilitator has collected and remitted such taxes.

Importantly, the new law provides that a marketplace facilitator shall be considered the seller and retailer for each sale facilitated through its marketplace only for the sole purposes of the sales/use tax laws.

VII. A Few Concerns

The Department will likely issue guidance regarding the administration and enforcement of this new law. In doing so, hopefully it will address some outstanding concerns such as: (i) the impact upon the existing Tennessee Sales and Use Tax Rule 1320-05-01-.01("Rule 1") which states in part that a sale by a factor, auctioneer or agent "when acting for a known or disclosed principal shall be taxable to the principal." That Rule 1 has been in effect for decades and has placed the collection/remittance responsibilities in many circumstances upon what might be a marketplace seller now as compared to this new law that otherwise generally would impose those responsibilities upon the marketplace facilitator; (ii) guidance needs to be provided as to the Department's definition of "substantially all" for purposes of a facilitator avoiding the responsibilities to collect and remit sales taxes where substantially all of its marketplace sellers are registered with the Department; and (iii) addressing whether the Department has a mandate, as compared to being discretionary, for purposes of issuing a waiver or other recognition that the facilitator is no longer required to collect or remit tax where the facilitator has satisfied applicable relief provisions (see (ii) and (iii) in Part IV above), since those provisions do not seem to compel the Department to issue a waiver or otherwise recognize that the facilitator is no longer responsible for collecting and remitting the taxes.

VIII. Conclusion

Many of the provisions of this new law are very complex. Before acting upon or in regard to this new law, careful consideration must be given to your particular fact situation.

Baker Donelson stands ready to assist businesses of all sizes in understanding and complying with this new Tennessee law. If you have any questions regarding this new marketplace facilitator law, please contact [Carl Hartley](#) or any member of the [Firm's Tax Group](#).