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Rep. Robert M. Spendlove, Chair
House Revenue and Taxation Committee
Utah State Legislature
Salt Lake City, Utah

March 6, 2019

Re: SB 168 – Taxation of marketplace facilitators

Dear Chair Spendlove and members of the committee:

While SB 168 attempts to address the tax simplification requirements described in the *Wayfair* decision, the bill includes some unworkable definitions and obligations for Marketplace Facilitators, and we'd like to suggest just a few amendments¹.

First, let me offer some context for how SB 168 must meet the findings in *Wayfair*. In June 2018, the US Supreme Court's *Wayfair* decision discarded the 60-year precedent of *Quill* and *National Bellas Hess*, so states may now impose sales tax burdens on businesses without a physical presence in their state. The *Wayfair* decision goes on to describe how South Dakota's sales tax law would likely survive a Commerce Clause challenge as an undue or discriminatory burden on interstate commerce, based on three findings:

"First, the South Dakota law at issue in *Wayfair* applies a safe harbor to those who transact only limited business in South Dakota." (p.23, *Wayfair*)

"Second, the South Dakota law at issue in *Wayfair* ensures that no obligation to remit the sales tax may be applied retroactively." (p.23, *Wayfair*)

"Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs. It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the state. Sellers who choose to use such software are immune from audit liability." (p.23, *Wayfair*)

SB 168 would meet the first two *Wayfair* standards quoted above. And Utah's prior adoption of the Streamlined Sales and Use Tax Agreement appears to meet the third set *Wayfair* requirements.

However, SB 168 imposes tax obligations on marketplaces that in various ways facilitate sales by third party sellers. Neither the *Wayfair* decision nor SSUTA addresses whether or how states can impose sales tax obligations on online marketplaces or facilitators – *who are not the actual sellers*.

Moreover, several states are adopting laws and regulations to tax marketplaces, in ways that will invite legal challenges for undue or discriminatory burdens per the Constitution's Commerce Clause, as described in *Wayfair*.

¹ The views of NetChoice do not necessarily represent the views of each of its members.

In the attached one-pager, we describe a dozen sensible principles that can help Utah avoid legal challenges for imposing undue burdens on marketplaces and make SB 168 more workable for marketplace providers.

For example, SB 168 imposes sales tax collection requirements on marketplace platforms that don't have any direct involvement or visibility into the exchange of funds between the buyer and seller. Below we describe an amendment to address this undue and unworkable burden.

A proposed alternative definition of Marketplace Facilitator

The definition currently in SB 168 provides two lists of activities, where just one activity from each list is sufficient to be defined a marketplace facilitator (59-12-102, 68).

But some activities are essentially duplicated in both lists. For example, "lists, makes available, or advertises" is in (A) on the first list, and "collects the sales price" is in (A) on the second list. Both these activities would be present on a marketplace page listing items and linking to the seller's website, even when the sale eventually occurs off the marketplace.

As another example, "software development" is in (E) on the first list, and "making available ... on the person's marketplace" is in (C) on the second list. Nearly all online marketplaces engage in software development in order to list and promote items offered by sellers that match-up with searches requested by users.

These examples show how marketplace facilitators performing just a single activity would find themselves on *both* lists in SB 168, and would therefore be required to collect sales tax – *even on transactions where the marketplace does not actually manage the purchase transaction.*

Our proposed alternative aligns with example definitions from the Multi-State Tax Commission and clarifies which entities and transactions create a sales tax collection obligation for a marketplace²:

"Marketplace facilitator" means a person who facilitates a retail sale by a marketplace seller by listing or advertising for sale by a marketplace seller in a marketplace, tangible personal property and either directly or indirectly through agreements or arrangements with third parties, collects payment from the customer and transmits that payment to the marketplace seller for compensation.

A proposed clarification to apply Marketplace Facilitator obligations only to transactions where the marketplace manages payment for the sale

Discussions at MTC and in other states reveals that some entities could be classified as a Marketplace Facilitator even though a significant number of sale transactions are consummated outside of the marketplace platform. There is general agreement that off-marketplace transactions should not cause the marketplace to be responsible for sales tax on those sales.

Please consider a clarification to SB 168's definition of Marketplace Facilitator, **to exclude transactions where payment for the item sold by a Marketplace Seller is made directly from the buyer to the Marketplace Seller and without using any payment processing services operated, directly or indirectly, by the Marketplace Facilitator.** The Marketplace Seller or the buyer will be responsible for any sales or use tax applicable to these transactions.

² Multistate Tax Commission, Nov-2018, at <http://www.mtc.gov/getattachment/Uniformity/Uniformity-Committee/2018/Agenda-11-2018/White-Paper-Final-clean-v2.pdf.aspx?lang=en-US>

Tax commissioner discretion to temporarily suspend tax obligations for Marketplace Facilitators, on certain sales by Marketplace Sellers

Online marketplaces host a variety of transaction types for many small sellers, where these sellers must be educated as to their responsibilities to provide adequate and accurate taxability information and purchaser exemption certificates. Moreover, some purchase transactions occur completely off-platform, where the actual seller must understand and execute its sales tax responsibilities without relying on marketplace services.

During the expected and extended ramp-up time for both marketplaces and sellers, **we recommend that SB 168 empower the tax commissioner to temporarily suspend tax collection obligations for a Marketplace Facilitator who provides written application and adequate justification for the suspension.**

Conclusion

We look forward to working with you on appropriate principles to impose sales tax obligations on marketplace facilitators. Thank you for considering our views and please let us know if we can provide further information.

Sincerely,

Steve DelBianco
President, NetChoice

Principles for imposing sales tax obligations on Marketplaces

Neither the *Wayfair* decision nor SSUTA addresses whether or how states can impose sales tax obligations on online marketplaces or marketplace facilitators.

Some states are adopting laws and regulations to tax marketplaces, in ways that will invite legal challenges for undue or discriminatory burdens per the Constitution's Commerce Clause.

States seeking to tax marketplace facilitators can significantly reduce their legal risks by adhering to these principles in their legislation and regulation:

- Uniform definitions, rates, and rules for all localities in the state, regarding taxable and exempt products and the duty to collect sales tax for localities.
- A phase-in period for marketplace sellers and facilitators.
- State tax audits of marketplaces should not extend to audits of marketplace sellers. A marketplace facilitator should be relieved of liability for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect or insufficient information provided by the marketplace seller.
- Marketplace Facilitators should have the ability to separately report sales tax for the marketplace's own sales, apart from sales the facilitator or its affiliates make directly.
- Marketplace facilitators should not be liable for sales tax collection on sales where the marketplace facilitator requests and receives an agreement, certificate, or other form of proof that the seller is collecting the sales tax.
- A marketplace facilitator should not be liable for tax on sales where it receives a tax exemption or resale certificate from the marketplace seller or the marketplace seller's customer.
- State level administration of local taxes, including a single return and audit on behalf all local jurisdictions in a state.
- The safe harbor for small businesses applies to direct sales, via the seller's own website, phone numbers, catalogs, or other remote sales channels.
- Non-streamlined states must also provide adequate compensation to marketplace facilitators who collect tax on behalf of marketplace sellers. Any limits on vendor compensation should be aggregated for marketplace sellers, and not a limit on the marketplace facilitator.
- Marketplace Facilitators should not be obligated to collect sales tax on a seller's sales into the state until that marketplace seller has reached \$10,000 in sales on that marketplace over 12-months ending within the most recently completed calendar quarter.
- Marketplace Facilitator tax obligations for Marketplace Seller transactions should apply only when the facilitator is processing payments for customer transactions. Prohibit class action lawsuits against marketplaces for over-collection of sales tax.
- There should be no imposition of retroactive tax liability for sales prior to the *Wayfair* decision.