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May 22, 2019

The Honorable Matt Dolan, Chair
The Honorable Dave Burke, Vice-Chair
The Honorable Vernon Sykes, Ranking Member
Senate Finance Committee
Ohio General Assembly

Re: Recommended Changes to Marketplace Facilitator Provisions in Am. Sub. H.B. 166

Dear Chairman Dolan, Vice-Chairman Burke, Ranking Member Sykes, and Members of the Finance Committee:

On behalf of the Council On State Taxation (COST), we are submitting this testimony today to recommend changes to the marketplace facilitator provisions in Am. Sub. H.B. 166 (hereafter H.B. 166). While COST is continuing to work with its members to ensure marketplace laws operate as intended to enhance the states' collection of sales and use taxes via remote sales and marketplace facilitator laws, COST recommends the following changes to prevent unintended problems with the enforcement of marketplace facilitator provisions contained in H.B. 166. Addressed in more detail below, COST recommends revising the effective date provision, the definition of substantial nexus, the definition of marketplace facilitator, and a marketplace sourcing provision in H.B. 166 to improve its overall effectiveness and mitigate potential legal issues with the proposed law. Additionally, the proposed legislation covers the sale of all services. COST strongly suggests that services which can have simultaneous use at multiple locations should be excluded from the marketplace facilitator provisions.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of approximately 550 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST has a significant number of members that own property, have employees, and otherwise have significant operations in Ohio.

Effective Date of Marketplace Facilitator Law

Adequate time is needed for both marketplace facilitators and marketplace sellers to modify their compliance systems. Rather than having the marketplace facilitator provisions start the first day of the month at least thirty days after a marketplace facilitator has substantial nexus (see lines 72682 to 72687 and lines 73112 to 73119), we recommend changing the effective date provisions to the first day of a **calendar quarter** that is at least **sixty days** after a marketplace facilitator has substantial nexus.

Definition of Substantial Nexus for Marketplace Facilitators

Presently, Ohio law defines substantial nexus for all sellers, and does not limit the definition to marketplace facilitators as proposed in H.B. 166. COST recommends changing the substantial nexus provision (lines 72827 to 72841) to address all sellers, and not just marketplace facilitators. Additionally, COST recommends removing the 200-transaction threshold to facilitate compliance for both the State and marketplace sellers. The administrative burdens of imposing a 200 transaction threshold on sellers making sales of low-priced items and the administrative cost to the State in collecting a *de minimis* amount of tax make a transaction threshold problematic.¹ North Dakota recently removed its 200 transaction threshold for these reasons, and other states are also reconsidering the use of a transaction threshold.

Another important issue is the time period that determines whether a person has substantial nexus with Ohio. The proposed law change is based on a threshold being met in the current or **preceding calendar year**. To prevent any concerns with retroactive imposition of substantial nexus, we recommend limiting the time period to the current calendar year and inserting a provision that indicates a person is presumed to have substantial nexus for the **subsequent calendar year** when a seller exceeds the threshold for a current calendar year.

Definition of Marketplace Facilitator and Need for Exceptions

The proposed definition of a marketplace facilitator (see lines 72927 to 73000) is overly complicated and has the potential to include as a marketplace facilitator persons that are merely promoting the advertising of products or assisting in the payment process and not actually working with a marketplace seller to facilitate a sale to a purchaser located in Ohio. Also, by limiting its application to electronic marketplaces, it is arguably discriminating against electronic commerce in violation of the federal Internet Tax Freedom Act.² Additionally, the provision fails to address certain marketplace sellers that already have very sophisticated sales and use tax collection systems that would more accurately collect Ohio's state and local sales and use taxes, along with other taxes and fees on the same transaction (*e.g.*, certain telecommunication fees such as 911 charges). To address this issue, COST recommends incorporating the following language into Ohio law to address definitions of "marketplace facilitator" and "marketplace seller," and to clearly allow certain transactions to be excluded:

- A. "Marketplace facilitator" means a person who facilitates a retail sale by a marketplace seller by:
 - 1. Listing or advertising for sale by the marketplace seller in any forum, tangible personal property [limited to enumerated services and/or digital goods] that are subject to tax under this [chapter]; and
 - 2. Collecting payment from the customer and transmitting that payment to the marketplace seller, either directly or indirectly, through agreements or arrangements with third parties, regardless of whether the marketplace facilitator receives compensation or other consideration in exchange for its services.
- B. "Marketplace seller" means a seller that makes retail sales through any physical or electronic marketplace operated by a marketplace facilitator.

¹ For example, a seller selling a product at 99 cents that has 200 transactions in Ohio, using a 7 percent tax rate, would be required to register and collect and remit tax to the State and would only remit \$13.86 to the Ohio Department of Taxation.

² See *Performance Marketing Ass'n v. Hamer*, 2013 IL 114496, an Illinois Supreme Court decision that held a law that only applied to internet transactions ran afoul of the federal Internet Tax Freedom Act.

- C. Marketplace facilitator transactions do not include:
1. Transactions where a facilitator provides advertising services, including listing products for sale, so long as the internet advertising service platform or forum did not engage directly or indirectly through one or more affiliated persons in the activities described in Subsection A.2. In addition, Subsection A.2 does not apply to transactions where a person is appointed by a marketplace facilitator or marketplace seller to handle various forms of payments, such as processing credit cards and debit cards, and the person's principal activity with respect to the transactions is facilitating the payment between the purchaser and the marketplace facilitator or seller.
 2. Transactions for rooms, lodgings, or accommodations described in [cite code section] and transactions for motor vehicle rentals described in [cite code section] if the provider of such rooms, lodgings, accommodations, or motor vehicle rentals is a [registered seller] under [cite code section(s)].
 3. All transactions of a marketplace seller where a waiver is approved provided the following requirements are met:
 - a. The marketplace facilitator submits a waiver application to the tax commissioner;
 - b. Both the marketplace facilitator and the marketplace seller subject to the waiver agree that the marketplace seller will collect and remit all applicable taxes and fees and the facilitator collects the applicable tax registration numbers from the marketplace seller;
 - c. The marketplace seller who agrees to collect and remit all applicable taxes and fees provides evidence to the marketplace facilitator that it is registered under [cite code section]; and
 - d. The tax commissioner approves the waiver application. The commissioner has the authority to promulgate regulations for applying, processing a waiver for approval, and the denial of a waiver.
 4. All the transactions of a marketplace seller shall be subject to a waiver without the pre-approval of the tax commissioner where the conditions in Subsections C.3.a through C.3.c are met and the marketplace seller is able to certify the following:
 - a. It has annual U.S. gross sales over \$1 billion, including the gross sales of any related entities; and,
 - b. The seller or a related entity is publicly traded on at least one major stock exchange.

This waiver shall be valid at the time the marketplace facilitator submits the waiver application to the tax commissioner that includes the information required to be certified in this Subsection.

For all transactions excluded under Subsection C, the tax levied under [cite code section], including [list other applicable taxes/fees directly imposed on consumer from a transaction, e.g., environmental fee for paint, tire fee, 911 charges, etc.], shall be the

responsibility of the marketplace seller and the seller must collect and remit such taxes. The marketplace facilitator is not responsible for collecting and remitting the taxes on such transactions and shall be relieved of liability for any taxes or associated penalties and interest that qualify for exclusion under this section.

- D. Nothing in this section shall allow the tax commissioner to collect the tax owed more than once.

The above language would greatly clarify which transactions a marketplace seller must collect tax on. Importantly, it also allows marketplace sellers with sophisticated sales and use tax collection and remittance systems already in place to continue to collect those taxes and other associated taxes and fees that apply to the transaction. This also helps small marketplace facilitators who may not yet have the system capabilities to bill and collect the additional taxes and fees. The class action provision contained in lines 73154 to 73160 should also be clarified to include marketplace sellers. As presently written, it is inequitably limited to marketplace facilitators. Audit liability relief for marketplace sellers should also extend to the additional taxes and fees. Finally, to clarify that marketplace facilitators have the same standing as other sellers in Ohio, COST recommends revising the language in lines 73094 to 73111 to specifically address facilitators rights to claim credits, deductions and other adjustments to the sales price in the same manner as other sellers, including treatment of bad debts, vendor compensation, and the administration of exemptions and refunds.

Confusing and Unnecessary Sourcing Provision

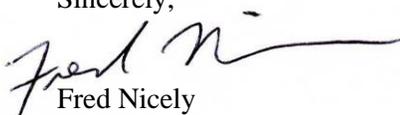
COST is concerned about the specific “sourcing of a sale” language contained in H.B. 166 (see lines 73049 to 73078). COST appreciates Ohio’s commitment to the Streamlined Sales and Use Tax Agreement (SSUTA) to work with other states and the business community to simplify and make the member states’ laws more uniform. There is no need to provide marketplace facilitators with a different sourcing mechanism for their sales. Such a provision adds unwarranted complexity and could potentially cause Ohio to be non-compliant with the SSUTA. We recommend removing this language and using Ohio’s current sourcing provisions, which are compliant with the SSUTA.

Summary

COST appreciates the ability to provide this Committee with comments and suggested changes to improve H.B. 166’s proposed marketplace facilitator provisions. The recommended changes to the effective date, the definition of substantial nexus, the definition of marketplace facilitator, and a marketplace sourcing provision in H.B. 166 will facilitate compliance in Ohio and mitigate potential legal issues with the proposed law.

Please contact me if you have any additional questions. COST is willing to work with all interested parties to address H.B. 166’s marketplace facilitator provisions.

Sincerely,



Fred Nicely

cc: COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director