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STATE AND LOCAL TAX

# Meal-Delivery Platforms: Multistate Sales Tax Practice Tips and Advisory Considerations

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Determining the sales, use, excise, and other tax (collectively, transaction tax) obligations associated with the sale of a meal has always been a difficult endeavor. Historically, the transaction tax consequences of the sale of food and beverages have been fraught with uncertainties, resulting in different tax consequences applying to sales of seemingly similar items. One of the most notorious examples is the New York “sliced bagel tax,” under which a whole bagel served without spread is exempt from state sales tax as a “grocery item,” but a sliced bagel with cream cheese (or other spread) is subject to state sales tax as a “sandwich.”<sup>1</sup> Numerous other examples abound, such as the nuances of whether an item is “prepared food” or a “food ingredient,” or “food” versus a “nutritional supplement,” or “prepared for immediate consumption” or otherwise—all of which can affect taxability in several states (with varying results).<sup>2</sup>

Given these nuances, correctly ascertaining the transaction taxes due on the sale of food and beverages is a highly complicated task for a dining establishment, even without the involvement of a third-party intermediary. When the transactions involve intermediary platforms that facilitate the purchase and delivery of meals to customers (referred to throughout this article as “meal-delivery platforms”), and that may be operated outside of the state and have no direct control over the preparation and delivery of the food at issue, the ability to correctly determine the amount of transaction tax due becomes even more complex. In addition to the underlying taxability of the food and beverage items being sold, meal-delivery platforms must consider, among other things, whether a given state’s marketplace facilitator platform law applies, whether any fees imposed by the platform are taxable, and whether special transaction taxes (including local taxes) apply. These and other issues are explored in this article, the third in a series from Checkpoint Catalyst on intermediary platforms, which draws from the author’s experience in practice to highlight transaction tax considerations for meal-delivery platforms. The previous articles in this series

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delivery platform establishes nexus through the physical presence of delivery personnel in the state<sup>4</sup>—but the obligations of remote platforms to potentially collect and remit transaction taxes expanded exponentially following *Wayfair* and the subsequent proliferation of state marketplace facilitator laws. As discussed in the earlier articles in this series, marketplace facilitator laws generally shift the transaction tax remittance obligation from the marketplace seller of the taxable good or service (e.g., the restaurant preparing and selling the meal) to the platform that facilitates the sale of that good or service (e.g., the meal-delivery platform).<sup>5</sup> Thus, at the outset, meal-delivery platforms should ascertain whether they are potentially subject to a state's marketplace facilitator law—a determination that may vary depending on the meal-delivery platform's business model and the nuances of the marketplace facilitator law at hand.

Some states have directly addressed the applicability of their marketplace facilitator laws to meal-delivery platforms, with varying results. For example, effective April 1, 2020, Georgia law treats meal-ordering and other platforms as marketplace facilitators and requires them to collect and remit tax if the gross receipts from transactions they facilitate on behalf of third-party restaurants or meal providers equal or exceed \$100,000 in the previous or current calendar year.<sup>6</sup> California, on the other hand, excludes “delivery network companies” from the marketplace facilitator provisions requiring collection and remittance of sales tax.<sup>7</sup> The California law defines delivery network companies to mean businesses that maintain an internet website or mobile application used to facilitate delivery services for the sale of local products, and thus would encompass meal-delivery platforms that facilitate the sale and delivery of meals from local restaurants.<sup>8</sup> In other states, such as Tennessee, a meal-delivery platform can elect to be treated as a marketplace facilitator.<sup>9</sup>

Furthermore, even in states that may not have addressed meal-delivery platforms outright, the statutory language that defines a marketplace facilitator often bears particular relevance for meal-delivery platforms. Namely, some states' facilitator laws require that a platform enter into a contractual arrangement with a marketplace seller in order for that platform to be considered a marketplace facilitator. For example, in Virginia, a marketplace facilitator is defined as “a person that contracts with a marketplace seller to facilitate, for consideration and regardless of whether such consideration is deducted as fees from transactions, the sale of such marketplace seller's products through a physical or electronic marketplace operated by such person.”<sup>10</sup> However, in the author's experience, some meal-delivery platforms do not necessarily contract with every meal provider listed on the platforms. Rather, certain restaurants and other meal providers may be permitted to list their items on the platform without ever entering into a contractual arrangement with the platform itself. In those arrangements, the platform may not be considered a marketplace facilitator in states that require contractual privity between the marketplace facilitator and the marketplace seller.

Other states do not require that any contractual arrangement exists between the platform and the marketplace seller.

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## Taxability of Meal-Delivery Platform Fees

Another issue that frequently arises for meal-delivery platforms is the taxability of the fee(s) charged by the platform. While fee structures vary among meal-delivery platforms, common fees charged or retained by these platforms include service fees, processing fees, and delivery fees. Depending on the platform and the fee at issue, the fee may be charged to the restaurant as a condition of being listed on the platform, or to the person ordering the meal.

Most states have not yet expressly taken a position on whether fees charged by a meal-delivery platform are taxable, but there are some notable exceptions. For example, Texas issued a private letter ruling in September 2021 finding that numerous fees charged by a meal-delivery platform, including service fees, credit card processing fees, and other special fees, were all subject to sales tax as data processing services.<sup>12</sup> To the contrary, Tennessee issued a letter ruling in April 2022 advising that service fees and other fees charged by a meal-delivery platform were not taxable under the state's marketplace facilitator law, because the "true object" of these fees was the provision of a non-taxable service.<sup>13</sup>

Other states take the position that, broadly speaking, amounts retained by a marketplace facilitator in connection with the sale of the taxable item via the facilitator's platform are subject to sales tax as part of the measure of gross receipts.<sup>14</sup> In other states, the taxability of the fee may depend on its characterization. For example, in several states, "delivery fees" associated with the sale of food are taxable.<sup>15</sup> However, more amorphous "service fees" may not be taxable, particularly if the service charge is separately stated and the state does not generally tax services.<sup>16</sup> In still other states, amounts retained by a marketplace facilitator that are contingent on a sale being made (e.g., fees or commissions paid by a marketplace seller to a marketplace facilitator after a sale is made) are excluded from sales tax.<sup>17</sup>

Overall, the taxability of fees charged or retained by meal-delivery platforms varies widely from state to state (and at times, from fee to fee), and therefore meal-delivery platforms should conduct a careful state-by-state review to ensure that they are not undercollecting or overcollecting sales tax on fees.

## Applicability of Special Transaction Taxes

Finally, a meal-delivery platform should consider whether it is potentially subject to transaction taxes other than the state's general sales tax. Some states (e.g., New Hampshire and Vermont) impose a special meals tax in addition to or in lieu of the sales tax.<sup>18</sup> New Hampshire, for example, does not impose a general sales tax but does impose a meals and rooms tax. Under this law, a meal-delivery platform is considered an "operator" that is required to collect and remit the state meals and rooms tax if: (1) the

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state.<sup>22</sup> As discussed in the first article in this series,<sup>23</sup> the question of whether locally-imposed taxes can be collected from marketplace facilitators lacking a physical presence in the state raises constitutional concerns. Namely, many of the constitutional “safeguards” referenced by the *Wayfair* Court (e.g., economic nexus thresholds, centralized filing mechanisms, and uniformity standards) don’t necessarily exist in the locally-administered tax consequences, and the practical burden that remote marketplaces may encounter in attempting to comply with thousands of different local taxing statutes raises “undue burden” concerns that were first envisioned by the Supreme Court in *Pike v. Bruce Church, Inc.*<sup>24</sup> and later referenced in *Wayfair*.

## The Takeaway

With the proliferation of state marketplace facilitator laws, states have begun focusing increased attention on the transaction tax obligations of specialized intermediaries, including meal-delivery platforms. However, as with other types of specialized intermediaries, such as lodging and passenger transportation platforms, the states have taken different approaches to what these platforms’ obligations should be. For meal-delivery platforms in particular, there is little uniformity among the states regarding whether these platforms are generally required to collect and remit transaction taxes and the extent to which the platforms’ fees are also subject to tax. Imposition and collection of local taxes also varies widely among the states, in some cases generating constitutional issues yet to be resolved. To avoid surprises on audit, it is crucial for meal-delivery platforms and their advisors to carefully examine each state’s tax laws and evaluate the application of those laws to the meal-delivery transactions facilitated by the platform.

### In-depth state-by-state overview

For a detailed survey of each state’s approach to meal-delivery platforms, see [Checkpoint Catalyst Topic 1051: Sales Tax: Electronically Delivered Goods and Services](#).

<sup>1</sup> [New York Sales Tax Bulletin No. TB-ST-283, 04/13/2011](#); New York Sales Tax Bulletin No. TB-ST-835, 04/08/2019.

<sup>2</sup> These examples and others are explored in detail in [Catalyst Topic 1060 Sales & Use Tax: Food and Beverages](#).

<sup>3</sup> See [Lodging Intermediary Platforms: Tips for Parsing Their Sales Tax Duties Across the States, Checkpoint State Tax Update \(10/20/2022\)](#) and [Rental Car Facilitators and Other Passenger Transportation Platforms: Tips for Parsing Multistate Sales Tax Duties, Checkpoint State Tax Update \(10/20/2022\)](#).

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<sup>6</sup> [Ga. Code Ann. § 48-8-30\(c.2\)\(1\)](#), effective 04/01/2020, and applicable to all sales made on or after 04/01/2020; [Ga. Code Ann. § 48-8-30\(c.2\)\(2\)](#), effective 04/01/2020, and applicable to all sales made on or after 04/01/2020; [Ga. Code Ann. § 48-8-2\(8\)\(M.3\)](#), effective 04/01/2020, and applicable to all sales made on or after 04/01/2020; [Georgia Policy Bulletin SUT-2020-01, Marketplace Facilitators, Ga. Dept. Rev., 03/17/2020](#).

<sup>7</sup> [Cal. Rev. & Tax. Cd. § 6041.5\(a\)](#).

<sup>8</sup> [Cal. Rev. & Tax. Cd. § 6041.5\(b\)\(1\)](#).

<sup>9</sup> [Tenn. Code Ann. § 67-6-102\(56\)\(b\)\(iv\)](#).

<sup>10</sup> [Va. Code Ann. § 58.1-612.1\(A\)](#).

<sup>11</sup> [S.C. Code Ann. § 12-36-71\(A\)\(1\)](#).

<sup>12</sup> [Texas Private Letter Ruling No. 202109055L, 09/17/2021](#).

<sup>13</sup> [Tennessee Letter Ruling No. 22-02, 04/11/2022](#).

<sup>14</sup> See, e.g. , [NMSA 1978 § 7-9-3.5\(A\)](#).

<sup>15</sup> See, e.g. , [New York Sales Tax Bulletin No. TB-ST-806, 04/13/2011](#).

<sup>16</sup> See, e.g. , [Tennessee Letter Ruling No. 22-02, 04/11/2022](#).

<sup>17</sup> See, e.g. , South Dakota Tax Facts No. 05/01/2021(Marketplace), 05/01/2021.

<sup>18</sup> [N.H. Rev. Stat. Ann. § 78-A:6; Vt. Stat. Ann. Title 32 § 9241](#).

<sup>19</sup> [N.H. Admin. Rules, Rev § 702.15\(a\)\(1\)](#).

<sup>20</sup> [Taxable Meal Facilitators, Vermont Dept. of Rev., 08/01/2021](#).

<sup>21</sup> See [N.C. Gen. Stat. § 153A-154.1](#).

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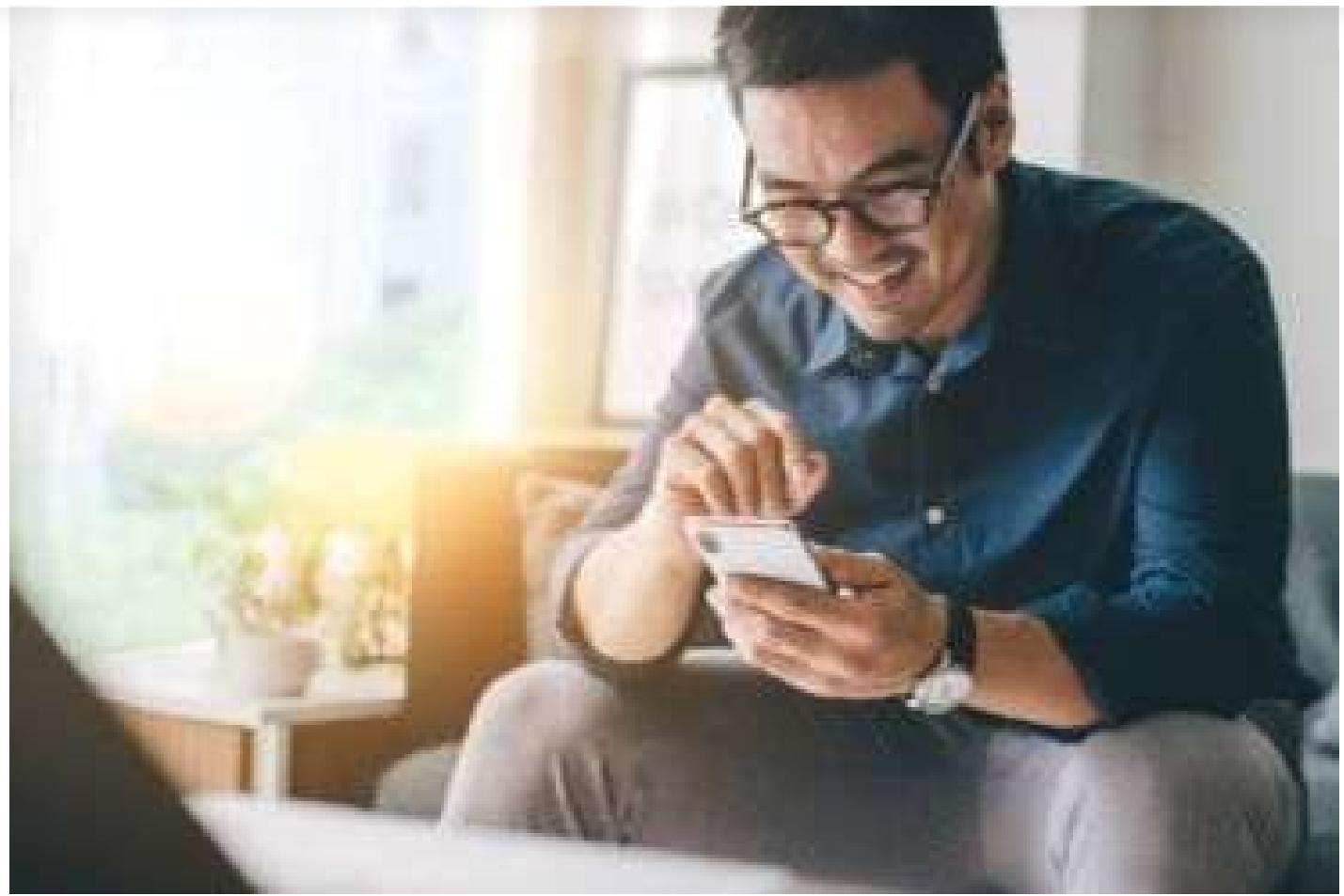
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