Appendix E:

Disclosed Practice Number 8 – Collection and Remittance Laws related to Remote Sellers, Marketplace Sellers and Marketplace Facilitators/Providers (Adopted XX)

Note: These tax administration practices address how a member state administers its economic nexus and remote seller statutes. The United States Supreme Court (SCOTUS) ruled in ***South Dakota v. Wayfair*** on June 21, 2018, that states can require sellers to collect and remit sales or use tax on sales delivered to locations within their state even if the seller does not have a physical presence in the state.

Disclosed Practice 8.1 – Remote Sellers

Definition: As used in this disclosed practice, the following general definition applies:

> **"Remote Seller"** is a seller that does not have any physical presence in a state but who sells products or services for delivery into that state. (A remote seller can include a "marketplace seller" that does not have physical presence in the state.)

Although the member state may not use the term "remote seller" in its statutory or regulatory language, member states conform to this definition in concept/practice.

Disclosed Practice 8.1. – Remote Seller Definition

The State treats a seller whose only physical presence in the state is inventory owned by the seller that is in a third-party warehouse as a remote seller.

Example 1: The seller (physically located in SST State A) makes direct sales and sales through a marketplace. The marketplace has a warehouse in SST State B. Seller does not have any other property or employees in State B, except for inventory in the marketplace's warehouse. The inventory in the marketplace's warehouse in SST State B does not preclude the seller from being a remote seller in SST State B.

Example 2. The seller, physically located in SST State A, only makes direct sales to its customers. Seller obtains warehouse space owned by a third party in SST State B to store inventory. The presence of Seller's inventory in a warehouse owned by a third party in SST State B does not preclude the seller from being a remote seller in SST State B.

Disclosed Practice 8.1. – Remote Seller Definition

The State treats a seller whose only physical presence in the state is an employee that is not involved in making sales as a remote seller.

Example 1: The seller is physically located in SST State A. The seller has an employee who works out of his home in SST State B. The employee is only responsible for human resource services. The presence of the employee in SST State B does not preclude the seller from being a remote seller in SST State B.

Example 2: The seller is a manufacturer and is physically located in SST State A. The seller has an employee who works out of his home in SST State B. The employee primarily engages in marketing the seller's product to distributors located in SST State B and other surrounding states. The presence of the employee in SST State B precludes Seller from being a remote seller in SST State B.

<u>Disclosed Practice 8.1.a.</u> – What is the State's Remote Seller Monetary Economic Nexus Threshold?

Explanation:
The SCOTUS indicated that South Dakota's law "…affords small merchants a reasonable degree of protections. **The law at issue requires a merchant to collect the tax only if it does a considerable amount of business of in the State**; the law is not retroactive; and South Dakota is a party to the Streamlined Sales and Use Tax Agreement…" SST member states have established monetary thresholds to set forth a small seller exception in their state.

<u>8.1.a.i</u> The State's Remote Seller monetary economic nexus threshold is "$100,000" (i.e., either $100,000 or more" or "more than $100,000") in sales. If the State's monetary economic nexus threshold includes exactly $100,000 in sales, the State will indicate that in the Comments column.

<u>8.1.a.ii</u> The State's Remote Seller monetary economic nexus threshold is something other than "$100,000" (i.e., $1, $200,000, $500,000, etc.). The State will indicate the economic nexus monetary threshold in the Comments column. If there is no threshold, the State will indicate N/A.

<u>Disclosed Practice 8.1.b.</u> – How is the State's Remote Seller *Monetary* Economic Nexus Threshold Calculated?

Explanation: A state may base its monetary economic nexus sales threshold on gross sales, gross revenues, gross receipts, retail sales or taxable sales. Many states do not distinguish between taxable and non-taxable sales when determining if a threshold is met.

<u>8.1.b.i.</u> The State's Remote Seller monetary economic nexus threshold is based on **GROSS** sales, gross revenue, or gross receipts from ALL sales of products and services.

If the threshold is applied based on "gross sales", all sales and transactions into the state are included in determining whether the remote seller meets or exceeds the threshold, including sales for resale and other exempt or nontaxable sales.

Example:
Company A has $400,000 (400 transactions) in total sales to State 1 for the calendar year that are made up of the following:

- $220,000 (220 transactions) of those sales are to wholesalers that provided exemption certificates claiming sales for resale.
- $75,000 (75 transactions) of those sales are to purchasers claiming exemption for purposes other than resale (use in manufacturing, exemption certificate on file, sales to exempt entities).
- $10,000 (10 transactions) of those sales are sales that qualify for product exemptions.
- $95,000 (95 transactions) are taxable sales to purchasers

Company A has $400,000 (400 transactions) in GROSS sales for purposes of computing the thresholds.

<u>8.1.b. ii.</u> The State's Remote Seller monetary economic nexus threshold is based only on **RETAIL** sales of products and services (only excludes sales for resale)

"**Retail** sales" are defined in the SSUTA, in part, as any sale other than a sale for resale. Since sales for resale are specifically excluded from the definition of "retail sale," they are not included in the threshold computation. However, sales that are not taxable because of the provision of an exemption certificate or that are exempt due to a product exemption, such as food in certain states, are included in the computation.

Example:
Company A has $400,000 (400 transactions) in total sales to State 1 for the calendar year that are made up of the following:

- $220,000 (220 transactions) of those sales are to wholesalers that provided exemption certificates claiming sales for resale.
- $75,000 (75 transactions) of those sales are to purchasers claiming exemption for purposes other than resale (use in manufacturing, sales to exempt entities).
- $10,000 (10 transactions) of those sales are sales that qualify for product exemptions.
- $95,000 (95 transactions) are taxable sales to purchasers.

Company A has $180,000 (180 transactions) in RETAIL sales for purposes of computing the thresholds.

__8.1.b.iii.__ The State's Remote Seller monetary economic nexus threshold is based only on **TAXABLE** sales of products and services (all sales and transactions that are or should be taxed).

"**Taxable** sales" means all transactions that are (or should be) taxed. Transactions that are not taxed due to the provision of an exemption certificate or other documentation on the part of the purchaser are not included in "taxable sales."

Example:
Company A has $400,000 (400 transactions) in total sales to State 1 for the calendar year that are made up of the following:

- $220,000 (220 transactions) of those sales are to wholesalers that provided exemption certificates claiming sales for resale.
- $75,000 (75 transactions) of those sales are to purchasers claiming exemption for purposes other than resale (use in manufacturing, sales to exempt entities).
- $10,000 (10 transactions) of those sales are sales that qualify for product exemptions.
- $95,000 (95 transactions) are taxable sales to purchasers.

Company A has $95,000 (95 transactions) in TAXABLE sales for purposes of computing the thresholds.

__8.1.b. iv.__ If the State calculates the monetary economic nexus threshold based on something other than Gross, Retail or Taxable sales, the State should indicate what the State's monetary economic nexus threshold is based on. In addition, if sales of all types of goods and services are not included in the calculation, for example the threshold is only based on sales of TPP, the state should indicate that in the Comments column.

__Disclosed Practice 8.1.c.__ - What is the State's Remote Seller *Transactional* Economic Nexus Threshold?

Explanation:
The SCOTUS indicated that South Dakota's law "…affords small merchants a reasonable degree of protections. **The law at issue requires a merchant to collect the tax only if it does a considerable amount of business of in the State**; the law is not retroactive; and South Dakota is a party to the Streamlined Sales and Use Tax Agreement…" In addition to monetary thresholds, some SST member states have also established transactional thresholds as an alternative small seller exception in their state.

__8.1.c.i.__ The State's Remote Seller transactional economic nexus threshold is "200" (i.e., either "200 or more" or "more than 200") separate transactions (What constitutes a "transaction" is explained in XX) Note: If yes, indicate if a seller that has exactly 200 transactions is considered to have met the State's transactional economic nexus threshold in the Comment column.

8.1.c. ii. The State's Remote Seller transactional economic nexus threshold is something greater than "200" (i.e., 1, 300, 500, etc.) separate transactions. The State will indicate the economic nexus transaction threshold in the Comments or if there is no threshold the State will indicate N/A. In addition, if sales of all types of goods and services are not included, for example the threshold is only based on sales of TPP, the state should indicate that in the Comments column.

Disclosed Practice 8.1.d. - Which sales are used to determine if a seller has met a state's *transactional* economic nexus threshold?

Explanation: A state may base its transactional economic nexus sales threshold on several factors. This calculation can be on an invoice basis, a per item basis or based on each order placed. As a subset of this calculation, the type of transactions included in the threshold may be the same gross sales, gross revenues, gross receipts, retail sales or taxable sales as used in the monetary economic nexus threshold calculation. See Disclosed Practice 8.1.b. for examples.

8.1.d.i. The State's Remote Seller transactional economic nexus threshold is calculated using the same sales that are used to calculate the State's monetary economic nexus threshold (gross sales, retail sales or taxable sales).

8.1.d.ii. If the State's transactional economic nexus threshold is calculated using different sales than are used in calculating the State's monetary economic nexus threshold the State should explain specifically which sales are used in calculating the transactional economic nexus threshold.

Disclosed Practice 8.1.e. - For purposes of computing the state's transactional economic nexus threshold, what is considered a "transaction"?

Explanation: A state may base its transactional economic nexus threshold on several factors. This calculation can be on an invoice basis, an individual item basis (i.e., multiple items on the same invoice may each count as a separate transation) or on the basis of each order placed. As a subset of this calculation, the type of transactions included in the threshold may be the same gross sales, gross revenues, gross receipts, retail sales or taxable sales as used in the monetary economic nexus threshold calculation. See Disclosed Practice 8.1.b. for examples.

8.1.e.i. The State's Remote Seller transactional economic nexus threshold is based on an **invoice** basis.

8.1.e. ii. The State's Remote Seller transactional economic nexus threshold is based on an **individual item** basis (each ~~line~~ item on a single invoice is considered a separate transaction).

> **Example:** An invoice may have: Line 1- 20 orange widgets $100, Line 2- 10 brown widgets $150 and Line 3 – 50 clear widgets $300. The total of the number of transactions used in calculating the transaction economic nexus threshold is 80.

8.1.e.iii. The State's Remote Seller transactional economic nexus threshold is based on **each order placed** (i.e., if a single order is placed but it is delivered in three (3) separate shipments, it is considered one (1) transaction).

> **Example:** Customer places an order for 3 distinct items which are all fulfilled ~~from 3 different locations~~ at different times. The customer receives 3 shipments and 3 invoices that were generated separately from the one order. This would count as one transaction.

8.1.e.iv. An invoice that includes items to be delivered into multiple states is considered a transaction in each of the states where the product is delivered.

Example:

- Customer purchases 2 taxable items for $1,000 each
- One item is being shipped to OH and one item is being shipped to SD
- The customer is given one invoice for $2,000 that covers both items

Result:

- OH would count this as one invoice/transaction
- SD would count this as one invoice/transaction
- OH would consider this to be $1,000 toward their dollar threshold
- SD would consider this to be $1,000 toward their dollar threshold

Disclosed Practice 8.1.f. - A lease or contract that requires multiple payments is considered one transaction for purposes of the State's Remote Seller transactional economic nexus threshold (i.e., each payment is not considered a separate transaction).

Example: Customer signs an annual agreement and is billed monthly. This is considered one transaction and not twelve transactions.

Example: Customer enters into a monthly lease agreement lasting 30 days. There is automatic renewal at the end of each month unless cancelled. Over the course of the year, this will count as twelve transactions not one.

Disclosed Practice 8.1.g. – Remote seller who makes sales through a marketplace facilitator

8.1.g.i A remote seller must include sales made through a Marketplace Facilitator when determining if it meets or exceeds the state's economic nexus threshold.

8.1.g.ii Does it make a difference if the marketplace facilitator is or is not registered or required to be registered in the state?

Disclosed Practice 8.1.h. - What period of time does a remote seller use to determine if it meets or exceeds a state's economic nexus threshold? – Only one answer should be yes.

Background:

States differ on the measurement period for determining if the economic nexus threshold has been met. The most common measurement period is the previous calendar year or current calendar year. States also have measurement periods of the previous calendar year, the current calendar year or previous twelve-month period.

8.1.h.i. A Remote Seller has economic nexus in the state if it meets or exceeds the state's economic nexus threshold in **either** the previous calendar year or current calendar year.

8.1.h. ii. A Remote Seller has economic nexus in the state only if it meets or exceeds the economic nexus threshold in **only the previous** calendar year.

8.1.h. iii. A Remote Seller has economic nexus in the state based on a different period of time. The State will indicate the period of time in the Comment column.

Disclosed Practice 8.1.i. - When is a remote seller required to register and begin collecting the applicable sales or use tax? – Only one answer should be yes.

Background:

Generally, if the economic nexus threshold was not reached in the previous calendar year, but is reached part way through the current calendar year, the seller is required to register and begin collecting the tax on transactions and sales that occur after the threshold is met for the remaining part of the current calendar year. The seller is not responsible for remitting the tax on transactions that occurred prior to meeting the economic nexus threshold. Some states allow a grace period for requiring the registration and collection of the tax once the threshold is met.

8.1.i.i. A Remote Seller must register and begin collecting the applicable tax on the **next transaction after meeting or exceeding the threshold.**

8.1.i.ii. A Remote Seller must register and begin collecting the applicable tax ~~by~~ no later than the **first day of the month that is at the most 30 days after meeting or exceeding the threshold.**

8.1.i.iii. A Remote Seller must register and begin collecting the applicable tax ~~by~~ no later than the **first day of the month that is at the most 60 days after meeting or exceeding the threshold.**

8.1.i.iv. If the State requires a remote seller to register and begin collecting at a different point in time, the State should indicate the point in time.

Disclosed Practice 8.1.j. - When is a remote seller who falls below a state's economic nexus threshold allowed to stop collecting and remitting the applicable sales or use tax.

8.1.j.i. A Remote Seller that falls below the State's Remote Seller economic nexus threshold(s) during the measurement period may cancel its registration or request inactive status any time after the measurement period ends.

8.1.j.ii. If the State does not allow a Seller to cancel its registration or to request inactive status at a time after the measurement period ends," the State should indicate when a seller may cancel its registration or request inactive status (e.g. the State has trailing nexus)

Disclosed Practice 8.1.k. – What Type of Permit Does a Remote Seller Apply For? – (Only one answer should be "yes")

8.1.k.i. Remote Sellers register for a sales tax permit.

8.1.k. ii. Remote Sellers register for a (seller's) use tax permit.

8.1.k.iii. Remote Sellers may register for either a sales tax or use tax permit.

Disclosed Practice 8.2 – Marketplace Sellers

Definition:
For purposes of Disclosed Practice 8.2, the following general definition applies:

> **"Marketplace Seller" means a seller who sells products or services through a physical or electronic marketplace operated by a Marketplace Facilitator/Provider.**

8.2.a - Is a Marketplace Seller Required to Register When All Sales Are Made Through Marketplace Facilitators

8.2.a.i. Subject to response in 8.1, a Marketplace Seller that does not have a physical presence in the State and sells exclusively through Marketplace Facilitators that are required to collect and remit sales/use tax on behalf of the Marketplace Seller is not required to register with the State.

8.2.a.ii. A Marketplace Seller with a physical presence in the State that sells exclusively through Marketplace Facilitators that are required to collect and remit sales/use tax on behalf of the Marketplace Seller is not required to register with the State.

8.2.b. The Marketplace Seller should exclude sales made through a Marketplace Facilitator in determining it's economic nexus threshold.

8.2.c. A Marketplace Seller should exclude sales made through the Marketplace Facilitator from its direct sales on its sales tax return.

8.2.c.i If a marketplace seller is otherwise required to register for sales tax due to physical nexus or meeting the remote seller threshold, the seller should report marketplace sales as if they are exempt sales on the sales tax return.

> **Example:** Seller B has $400,000 in gross revenue from Iowa sales. Seller B makes $325,000 of these sales through a marketplace facilitator that collects Iowa sales tax and applicable local option sales tax. The remaining $75,000 in gross revenue comes from sales made through Seller B's website. Seller B must collect and remit Iowa sales tax and applicable local option sales tax on the $75,000 in sales made through Seller B's website. On its Iowa sales tax return, Seller B should report $400,000 in gross sales, but Seller B may take a deduction of $325,000 for sales on which the marketplace collected Iowa sales tax and applicable local option sales tax.

8.2.c.ii. When reporting sales tax on the sales tax return, the marketplace seller must include all sales made or facilitated by the business or by a Marketplace Facilitator in their total sales. Marketplace sellers may include in the deduction section sales made through a Marketplace Facilitator that is collecting and remitting sales tax on the remote sellers' behalf to arrive at net taxable sales. Also, the marketplace seller must report the total dollar amount of their sales made through a Marketplace Facilitator in a separate section of the return.

8.2.d. A Marketplace Seller is required to maintain exemption documentation only for its direct sales, and not for sales made through a Marketplace Facilitator.

8.2.e. A Marketplace Seller may rely upon a customer's exemption documentation for its direct sales, even where that exemption certificate is maintained by a Marketplace Facilitator.

> **Example:**
> Marketplace Seller has access to the Marketplace Facilitator's exemption documentation.

8.2.f. Marketplace Seller Liability

8.2.f.i. A Marketplace Seller is only liable for the tax on sales through a Marketplace Facilitator when the Marketplace Seller fails to provide correct and sufficient information.

8.2.f.ii. A Marketplace Seller may not be audited for Marketplace Facilitator sales unless the Marketplace Facilitator demonstrates that the Marketplace Seller did not provide correct and sufficient information.

8.2.f.iii. Does the state have a written policy on when and how a Marketplace Seller is liable for tax on sales made using Marketplace Facilitators? If yes, the state will provide a reference to the document location.

8.2.g. Class action law suits are prohibited (and, if applicable, false claims act suits) against Marketplace Sellers