

# Marketplace Facilitator Sales Tax Collection Model Legislation

Draft Date: September 22, 2019

## Section 1. Nexus Standard for Sales and Use Tax Collection

Notwithstanding any other provision of law, any \_\_\_\_\_ [vendor, seller, marketplace facilitator, or appropriate state-law term] selling or facilitating the sale of tangible personal property \_\_\_\_\_ [and/or other property or services subject to sales tax in the State] for delivery into [State] is [“doing business in this state”], is subject to \_\_\_\_\_ [pertinent sales tax code sections], shall [collect and remit/pay] applicable sales or use tax<sup>1</sup>, and shall follow all applicable procedures and requirements of law, provided the [seller, vendor, marketplace facilitator] meets the following criteria in the previous calendar year:

- A. If a [seller], the [seller] makes sales of tangible personal property [and/or other property or services subject to sales or use tax in the State] for delivery into this state exceeding [100,000] dollars.
- B. If a [marketplace facilitator], the [marketplace facilitator] makes or facilitates the sale of tangible personal property [and/or other property or services subject to sales tax in the State], on its own behalf or on behalf of one or more marketplace sellers, for delivery into this State exceeding [100,000] dollars.
- C. [The Department] may grant a waiver from the requirements of this section if a marketplace facilitator demonstrates, to the satisfaction of [the Department] that substantially all of its marketplace sellers already are [registered sellers] under [cite code section]. If such waiver is granted, the tax levied under [cite code section] shall be collectible from the marketplace seller. [The Department] shall develop guidelines that establish the criteria for obtaining a waiver pursuant to this section, the process and procedure for a marketplace facilitator to apply for a waiver, and the process for providing notice to an affected marketplace facilitator and marketplace seller of a waiver obtained pursuant to this subsection.
- D. Nothing herein shall prohibit the marketplace facilitator and the marketplace seller from contractually agreeing to have the marketplace seller collect and remit all applicable taxes and fees where the marketplace seller:
  1. Has annual U.S. gross sales over \$1 billion[X], including the gross sales of any related entities;<sup>[A1]</sup>

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<sup>1</sup> ~~In their comments, the communications companies recommended requiring marketplaces to collect other transactions taxes and fees in addition to sales and use tax. To date, no state has implemented marketplace collection of other taxes and fees, although Washington State has adopted a statute which would require such collection in 2021. This issue is worthy of additional discussion to determine whether, when, to what extent, and how such other taxes and fees should be incorporated into marketplace collection. To the extent a state imposes other taxes and fees on the consumer for sales of products and services included in their marketplace facilitator legislation the state needs to determine whether, when, to what extent, and how such other taxes and fees should be incorporated into marketplace collection requirements.~~

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2. Provides evidence to the marketplace facilitator that it is registered under [cite code section] in this state and also registered to collect sales and use tax in every state where the ~~seller makes sales~~ product or service can be sold [A2]; and,
3. Notifies [the Department] in a manner prescribed by [the Department] that the marketplace seller will collect and remit all applicable taxes and fees on its sales through the marketplace and is liable for failure to collect or remit applicable taxes and fees on its sales.

## Section 2. Imposition of Sales and Use Tax Collection on Marketplace Facilitators

- A. "Marketplace facilitator" means a person, including any affiliate of the person, that:
  1. Contracts or otherwise agrees with marketplace sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the marketplace seller's products through a physical or electronic marketplace operated, owned, or otherwise controlled by the person; and,
  2. Either directly or indirectly through contracts, agreements, or other arrangements with third parties, collects the payment from the purchaser and transmits all or part of the payment to the marketplace seller.
  3. A "marketplace facilitator" does not include: a) a platform or forum that exclusively provides advertising services, including listing products for sale, so long as the advertising service platform or forum does not also engage directly or indirectly through one or more affiliated persons in the activities described in A.1. and A.2. of this section; (b) a person whose principal activity with respect to marketplace sales is to provide payment processing services between two parties; or (c) a derivatives clearing organization, a designated contract market, foreign board of trade or swap execution facility, registered with the Commodity Futures Trading Commission ("CFTC registered platforms"), and any clearing members, futures commission merchants or brokers when using the services of CFTC registered platforms.
  4. [OPTIONAL—If sales tax in state applies to hotel/lodging, consider adding following language to exclude from definition of "marketplace facilitator": "A person is not a marketplace facilitator with respect to the sale or charges for rooms, lodgings or accommodations described in (cite code section) if the rooms, lodgings or accommodations are provided by a hotel, motel, inn, or other place that is a [registered seller] under (cite code section) and the

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[registered seller] provides the rooms, lodgings or accommodations for occupancy under a brand belonging to such person.]<sup>2</sup>

- B. "Marketplace seller" means a seller that makes sales through any physical or electronic marketplace operated, owned, or controlled by a marketplace facilitator.
- C. Except as provided in Section 1.C. and 1.D., a marketplace facilitator [doing business in the state under Section 1] is required to [collect and remit/pay] the [sales or use tax] on all taxable sales made by the marketplace facilitator or facilitated for marketplace sellers to customers in this state regardless of whether the marketplace seller for whom sales are facilitated has a sales tax permit or would have been required to collect sales or use tax had the sale not been facilitated by the marketplace facilitator. For the purposes of [cite this law or appropriate sales and use tax code], a marketplace facilitator has the same rights and duties as a seller. Nothing in this Section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with each other regarding fulfillment of the requirements of this [Chapter].
- D. A marketplace facilitator shall either:
  - 1. Report the sales and use tax described in [this section] separately from any sales or use tax collected on taxable [retail sales] made directly by the marketplace facilitator, or affiliates of the marketplace facilitator, to customers in this state using a separate marketplace facilitator [return/report/form] to be published by the [department]; or,
  - 2. Report the sales and use tax described in [this section] combined with any sales or use tax collected on taxable [retail sales] made directly by the marketplace facilitator, or affiliates of the marketplace facilitator.
- E. No class action may be brought against a marketplace facilitator in any court of this state on behalf of customers arising from or in any way related to an overpayment of sales or use tax collected on sales facilitated by the marketplace facilitator, regardless of whether that claim is characterized as a tax refund claim. Nothing in this subsection affects a customer's right to seek a refund as provided under section [cite code section].
- F. Nothing in this section affects the obligation of any consumer to remit sales or use tax for any taxable transaction for which a marketplace facilitator or seller does not collect and remit sales or use tax.
- G. The [department] shall solely audit the marketplace facilitator for sales made by marketplace sellers but facilitated by the marketplace facilitator, except with respect to

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<sup>2</sup> According to the National Conference of State Legislatures, the following state impose statewide sales taxes on lodging: AR, CO, FL, GA, HI, ID, IN, KS, KY, LA, MD, MI, MN, MS, MO, MT, NE, NJ, NM, NY, NC, ND, OH, OK, RI, SC, SD, TN, UT, VA, WA, WV, WI, and WY.

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transactions that are subject to Section 1.C or 1.D. The [department] will not audit or otherwise assess tax against marketplace sellers for sales facilitated by a marketplace facilitator except to the extent the marketplace facilitator seeks relief under section (H) or with respect to transactions that are subject to Section 1.C or 1.D.

- H. A marketplace facilitator shall be relieved of liability under this [section] for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect or insufficient information [on the nature of the product or service](#) given to the marketplace facilitator by the marketplace seller, provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain correct and sufficient information from the marketplace seller. Provided, however, this [subsection] shall not apply if the marketplace facilitator and the marketplace seller are related as defined in [cite code section].
- I. The [department] may waive penalties and interest if a marketplace facilitator seeks liability relief and the department rules that a reasonable cause exists.
- J. A marketplace facilitator shall be relieved of liability under this [section] if it can prove, to the satisfaction of the [department], that the tax levied under this [chapter/title/article] on a sale facilitated by the marketplace facilitator was paid to the [department] by the marketplace seller.

### **Section 3. No Retroactive Application**

No obligation to collect the sales and use tax required by this Act may be applied retroactively.

### **Section 4. Severability**

If any provision of this act, or the application of such provision to any person or circumstance, is held to be unconstitutional, then the remainder of this act, and the application of the provisions of such to any person or circumstance, shall not be affected thereby.