Marketplace Facilitator Legislation

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What is a marketplace?

A physical or electronic forum where marketplace sellers can sell or offer for sale tangible personal property or taxable services.

What is a marketplace seller?

A person who has an agreement with a marketplace facilitator and makes retail sales of tangible personal property or taxable services through a marketplace.
Why are states enacting marketplace collection laws?

• Marketplace sales are **growing** and are now a significant portion of ecommerce.

• Prior to *Wayfair*, states began enacting marketplace **collection or reporting requirements**, as marketplace sellers without nexus could not be required to collect tax, and compliance was low, even when such sellers had nexus.

• After *Wayfair*, marketplace collection responsibility provides states with a **more efficient method of collecting tax**.

• In addition, marketplaces are being required to collect tax on behalf of **millions of small marketplace sellers** who might not reach the new economic nexus thresholds individually.
Marketplace facilitator as collector/reporter

Enacted in 2017:

- **Minnesota** (HF 1 news release published 7/25/18--collect eff. 10/1/18 if place of business in MN)
- **Pennsylvania** (HB 542 collect or report if sales >$10,000/yr; Bulletin 2019-01, mandatory collection for sales >$100,000/yr. eff. 7/1/19)
- **Rhode Island** (H5175A collect or report if sales/yr $100,000/200 trans eff. 8/17/17; 2019 H. 5278 Sub A and S. 251 Sub A enacted, removing reporting requirements and requiring collection)
- **Washington** (HB 2163 collect eff. 1/1/18; 2019 HB 5581 enacted, repealing notice/reporting eff. 7/1/19)
Marketplace facilitator as collector/reporter

Enacted in 2018 pre-Wayfair:

• **Alabama** (HB 470 collect if sales/yr $250,000 or report eff. 1/1/19)

• **Connecticut** (SB 417 collect/referrer report if sales/yr $250,000 + 200 trans eff. 12/1/18)

• **Iowa** (SF 2417 collect/referrer report if sales/yr $100,000/200 trans eff. 1/1/19)

• **Oklahoma** (HB 1019XX collect if sales/yr $10,000 or report eff. 7/1/18)
Marketplace facilitator as collector

Enacted in 2018 post-Wayfair:
South Dakota (SB 2 collect if sales/yr >$100,000/200 trans eff. 3/1/19)
New Jersey (A. 4496 collect if sales/yr >$100,000/200 trans eff. 11/1/18)
DC (B22-1070 collect eff. 4/1/19)

Enacted in 2019:
Nebraska (LB 284) eff. 4/1/19
South Carolina (SB 214) eff. 4/26/19
Idaho (HB 259) New York (S. 1509, part G) eff. 6/1/19
Arkansas (SB 576) Indiana (HB 1001) Kentucky (HB 354) New Mexico (HB 6)
Rhode Island (H. 5278 Sub A, S. 251 Sub A) Virginia (HB 1722, SB 1083) West Virginia (HB 2813) Wyoming (HB 69) eff. 7/1/19
California (AB 147) North Dakota (SB 2338) Utah (SB 168) eff. 10/1/19
Hawaii (SB 396/SD 1) eff. 1/1/20
2019 Marketplace facilitator as collector bills

**Arizona**: HB 2702 first reading

**Colorado**: HB 1240 sent to governor

**Florida**: SB 1112 introduced 2/15/19

**Georgia**: HB 276, SB 128 passed differing versions, no agreement, session ended

**Kansas**: HB 2033 sent to governor, veto expected

**Louisiana**: HB 524, HB 547 pre-filed 3/20/19

**Maine**: HB 1452 introduced 4/2/19

**Maryland**: SB 728 sent to governor, eff. 10/1/19

**Massachusetts**: Governor’s FY 19 Budget Message; H. 1, S. 1637, S. 7762 introduced

**Missouri**: SB 46, 50 passed Sen. W & M Com. 2/12/19, eff. 1/1/20
2019 Marketplace facilitator collection bills

**Nevada**: AB 445 introduced 3/25/19

**North Carolina**: HB 966 passed House

**Ohio**: included in governor’s FY20 budget proposal

**Oklahoma**: SB 513 passed Senate, HB 2352 and HB 2201 passed House (option to collect or report)

**Texas**: HB 1525 pending, eff. 10/1/19

**Vermont**: H 117 introduced

**Wisconsin**: marketplace facilitator collection requirements proposed in governor’s FY 2019-21 Biennial Budget Proposal 2/28/19
Marketplace facilitator litigation/policy

**Louisiana** (*Normand v. Wal-Mart.com* litigation re obligation of marketplace facilitator to collect at parrish level as “dealer;” Wal-Mart’s petition to review to Louisiana S. Ct. accepted)

**South Carolina** (Amazon litigation pending—trial held Feb. 4-8, 2019, decision expected in April; SC DOR considers marketplace to be the retailer; ruling #18-14 requiring collection if sales/yr >$100,000 effective 11/1/18)

**New York** State Tax and Finance Dept. Adv. Op. TSB-1-19(1)S 3/7/19: software vendor operating online marketplace facilitating taxable sales by other software vendors considered co-vendor, required to collect

**Tennessee** A. G. Op. No. 19-03 (3/12/19): department authorized to promulgate regs to require in-state marketplace facilitators to collect as “dealers”

**Wisconsin** Department of Revenue FAQ (eff. 10/1/18): A marketplace that is a remote seller but does not qualify for the small seller exception (> $100,000 sales/200 transactions/yr) is required to register and collect Wisconsin sales or use tax on taxable sales made on behalf of third-party sellers.
MTC “White Paper” on Marketplace Facilitator Collection Laws: topics addressed

• Definitions: marketplace, marketplace seller, marketplace facilitator
• Marketplace facilitator, not marketplace seller, should register.
• Marketplace facilitator should be the entity audited.
• Economic nexus threshold should include both marketplace seller and facilitator sales. Eliminate the “transactions” threshold.
• Marketplace facilitator should receive and maintain exemption certificates.
• Liability protection should be provided to marketplace facilitators for collection errors due to erroneous information from marketplace seller.
• Marketplace facilitators should be protected against risk of class action lawsuits.
Marketplace facilitator definition: narrow

Any person who facilitates a retail sale by a marketplace seller by:

(1) listing or advertising for sale by a marketplace seller in a marketplace, tangible personal property or taxable services; and

(2) either directly or indirectly through agreements or arrangements with third parties collecting payment from the customer and transmitting that payment to the marketplace seller.
Marketplace facilitator definition: broad

A marketplace facilitator contracts with marketplace sellers to facilitate the sale of products or services through a marketplace and engages in both;

- Directly or indirectly in any of the following:
  - Communicating the offer or acceptance between buyer and seller;
  - Owning or operating the infrastructure that brings buyers and sellers together;
  - Providing a virtual currency used to purchase products from the seller; or
  - Software development or R&D activities related to the activities described below
- And in any of the following activities with respect to the seller's products:
  - Payment processing services;
  - Fulfillment or storage services;
  - Listing products for sale;
  - Setting prices;
  - Branding sales as those of the marketplace facilitator;
  - Order taking;
  - Advertising or promotion; or
  - Providing customer service or accepting or assisting with returns or exchanges