

## MTC Model Use Tax Reporting Statute

~~(a) Administration. [The [State Department of Revenue] [shall/may] state should adopt appropriate term depending on drafting standards.] perform all functions necessary and proper for the administration and enforcement of this Section, including promulgating regulations and reviewing protests in accordance with the [State Administrative Procedures Act].]~~

~~(b)~~(a) **Definitions.** For purposes of this Section:

(1) **“Department”** means the [State Department of Revenue].

(2) **“Director”** means the Director of the [State Department of Revenue].

~~(3)~~ **“Marketplace”** means a place, digital or otherwise, in which ~~multiple a~~ sellers advertise for sale and/or sell tangible personal property without the tangible personal property or the seller necessarily being physically located in the state. ~~For purposes of this section, a marketplace does not include a place in which all sales taking place are subject to this state’s sales and use tax collection obligations. A marketplace does include a place in which fewer than all sales taking place are subject to this state’s sales and use tax collection obligations.~~

~~(4)~~(3) **“Marketplace facilitator”** means a person who operates a marketplace and facilitates transactions and engages directly or indirectly in transmitting or otherwise communicating the offer and acceptance between a purchaser and a seller. If a person acts as a Marketplace Facilitator with respect to a transaction and that person also acts as a Seller with respect to the transaction, then such person is treated as a seller with respect to the transaction. ~~Nothing in this section implies that a Marketplace Facilitator may not also be a Seller with respect to any its own transactions with a purchaser.~~

~~(5)~~(4) **“Marketplace seller”** means a seller that sells or leases tangible personal property through a marketplace.

~~(6)~~(5) **“Non-Collecting Seller”** means a seller who sells or leases tangible personal property, and does not collect tax due under [State Sales And/Or Use Tax Act] if the storage, use, sale, lease or consumption of which the property is subject to [State Sales And/Or Use Tax Act] ~~and who does not collect the tax.~~

~~(7)~~(6) **“Person”** includes any individual, firm, corporation, partnership, limited liability company, joint venture, estate, trust, or group or combination acting as a unit. [State should adopt only if there is no generally applicable definition of “person” that does not include businesses.]

~~(8)~~(7) **“Purchaser”** means any person who purchases or leases tangible personal property for delivery to a location in this state.

~~(9)~~(8) **“Referrer”** means a person who:

(A) Contracts or otherwise agrees with a seller to list and/or advertise for sale in any forum, including, but not limited to, a catalog or Internet website any tangible

### Comment [1]:

One comment suggested that the wording could be confusing as to whether the property was subject to the sales/use tax act or the seller was subject to the sales/use tax act.

personal property;

(B) Received in the prior year, in the aggregate, at least \$10,000 in fees, commissions, and/or other consideration from sellers for the listings and/or advertisements directed at persons in this state with respect to which listings or advertisements the person is neither a marketplace facilitator nor a seller and;

(C) Transfers, via software, Internet link, or otherwise, an in-state person to the seller or the seller's representative; ~~and~~

(D) ~~Is not a marketplace facilitator with respect to the transaction.~~

(9) **“Related Party”** means [state should insert chosen state definition of related party]

~~(10)~~ \_\_\_\_\_

~~(11)~~(10) **“Seller”** means [the state definition of seller]. For purposes of this section, Seller also includes (A) a person who ~~lists or advertises offers~~ tangible personal property for sale or lease ~~tangible personal property for sale or lease. For purposes of this section, the term “Seller” includes, a seller’s representative and (B) if the seller is not subject to the jurisdiction of this state, a seller’s representative.~~

**Comment [SHL2]:** Can we just leave the definition to the states?

~~(12)~~(11) **“Transaction”** means a sale, purchase, or lease, or the potential sale, purchase, or lease, of tangible personal property for delivery to a location in this state.

**(c) Notice and Reports, Required.**

(1) **Transactional Notice to purchaser at time of transaction.** Non-collecting sellers and marketplace facilitators shall provide the notice required by this subsection (1) (the “Transactional Notice”) to each purchaser at the time of each transaction.

(A) The notice shall indicate that neither sales nor use tax is being collected or remitted upon the transaction, and that the purchaser may be required to remit such tax directly to the Department.

(B) The notice shall be prominently displayed on all invoices and order forms, including, where applicable, electronic and catalogue invoices and order forms, and upon each sale or lease receipt provided to the purchaser.

(C) The non-collecting seller shall provide the Transactional Notice for all sales not facilitated by a marketplace facilitator. The marketplace facilitator shall provide the Transactional Notice for all sales facilitated by the marketplace facilitator.

**Comment [3]:**  
One comment asked if a seller and a marketplace facilitator can agree that the seller will provide the notice.  
-We have not discussed this issue, and the priority, previously.

(2) **Annual Sales Report to Purchaser.** ~~On or before January 31st of each year,~~ Non-collecting sellers and marketplace facilitators shall provide the an annual report required by this subsection (2) to each purchaser who entered into, in the aggregate during the previous calendar year, more than \$500 in transactions with the non-collecting seller or more than \$500 in transactions facilitated by the marketplace facilitator. ~~on or before January 31<sup>st</sup> of each year.~~

(A) The report shall include:

1. a statement indicating that ~~the non-collecting seller or marketplace facilitator did not collect~~ sales or use tax was not collected on the

purchaser's transactions in the prior calendar year and that the purchaser may be required to remit such tax directly to the Department;

2. a list of transactions entered into during the prior calendar year by the purchaser from such non-collecting seller or facilitated by the marketplace facilitator for delivery to a location into this state showing, with respect to each transaction;
  - a. the price paid.
  - b. theby date of purchase.
  - c. generally indicating the type of tangible personal property purchased or leased, and
  - d. the shipping address~~during the prior calendar year by the purchaser from such non-collecting seller or marketplace facilitator for delivery to a location in this state and the price of each item of tangible personal property;~~
3. instruction for obtaining additional information regarding whether and how to remit the sales or use tax to the Department;
4. a statement that such non-collecting seller or marketplace facilitator is required to submit a report to the Department pursuant to subsection (c)(3) of this Section stating only the purchaser's name, address, and total dollar amount of the purchaser's purchases; and
5. any additional information the Director shall reasonably require.

~~5.~~ (B) The report required under this subsection shall be due on or before January 31 of each year.

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~~(B)~~ (C) The report shall be sent to the purchaser's billing address, or if unknown, the purchaser's shipping address, in an envelope marked prominently with words indicating important tax information is enclosed. If no billing or shipping address is known, the report shall be sent electronically to the purchaser's last-known e-mail address with a subject heading indicating important tax information is enclosed.

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~~(C)~~ (D) Notwithstanding subsection (c)(2)(CB) if the purchaser's billing or shipping address is known, the non-collecting seller or marketplace facilitator may choose to provide the annual report to the purchaser electronically, provided that:

Comment [4]:  
What if the notice provider has an even more secure method of providing the notice than e-mail? Is that likely to still be electronic?

~~1-6.~~ No earlier than December 1<sup>st</sup> and no later than December 31<sup>st</sup> of the year to be covered by the electronic report, the purchaser agrees to receive the notice electronically, and

Comment [5]:  
agrees to receive or actually downloads and affirmatively agrees

~~2-7.~~ The purchaser acknowledges that she or he understands that the report to be received electronically will contain important tax information which information will also be sent to the Department.

~~(D)~~ (E) The non-collecting seller shall include in its Annual Sales Report to Purchaser all of its sales to each purchaser for which no marketplace facilitator facilitated the sale. The marketplace facilitator shall include in its annual non-

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collecting seller report to purchaser all of the sales to each purchaser for which it acted as a marketplace facilitator.

(3) **Annual Report to [State Department of Revenue].** Non-collecting sellers and marketplace facilitators shall provide the following report to the Department before January 31<sup>st</sup> of each year.

(A) The report shall include, with respect to each purchaser:

1. the name of the purchaser;
2. the billing address and, if different, the last known mailing address;
3. the shipping address for each item of tangible personal property sold or leased to such purchaser for delivery to a location in this state; and
4. the total dollar amount of all such purchases by such purchaser which that were made during the prior calendar year for delivery to each such shipping address.

**Comment [6]:**  
Does this contradict the idea that the report does not reflect the individual items?

(B) The report shall be filed electronically in the form and manner required by the Director.

(C) The non-collecting seller shall include in its annual non-collecting seller report to [state department of revenue] all of its sales to each purchaser for which no marketplace facilitator facilitated the sale. The marketplace facilitator shall include in its annual non-collecting seller report to [state department of revenue] all of the sales to each purchaser for which it acted as a marketplace facilitator.

**(d) Reports by Referrer.**

- (1) A referrer shall provide to all sellers with whom it contracts or otherwise agrees to list or advertise written notice that the sellers' sales may be subject to this state's sales and use tax and that each such seller may have an obligation to provide the notices required by this Section.
- (2) On or before January 31 of each year, in the manner required by the director, a referrer shall report the identity of each seller with whom it contracts or otherwise agrees to list or advertise for sale. The referrer shall notify each such seller that it has done so on or before January 31 of each year, for the previous calendar year.

**Comment [7]:**  
past tense vs present tense - rewrite

**Comment [8]:**  
Do we want to have a minimum dollar threshold for the seller? Do we really want EVERY seller that the referrer contracts with?

(e) **Reporting Requirements As Applied to Related Parties.** Any member of a group of related parties may file the reports required herein with respect to any non-collecting seller among the related parties. The annual sales report to the purchaser shall contain sufficient information to allow the purchaser to determine the identity of the non-collecting seller making each sale reported in the report. The Annual Report to [the state department of revenue] shall indicate all non-collecting sellers whose annual sales are included.

**(f) Exceptions.**

(1) **De minimis In-State Sales.**

(A) A non-collecting seller who made less than \$B [state should choose an approach

similar to *either* \$5,000,000 in national gross sales *or* \$100,000 in total gross sales for delivery to a location in this state] during the prior calendar year shall not be required to provide notice or file reports pursuant to subsection (c) of this Section.

(B) A marketplace facilitator who facilitated sales of less than \$B [state should insert the same rule as above], shall not be required to provide notice or file reports pursuant to subsection (c) of this Section.

(C) **Exceptions as Applied to Related Parties.** Related parties shall calculate these exceptions for the entire group.

(2) **Sales by Registered Sellers.** A seller who is registered to collect and remit sales and use tax, and who complies in good faith with the [State Sales and Sales And/Or Use Tax Acts], is not be required to provide notice or file reports pursuant to this Section.

(3) **Sales with respect to which sales or use tax is collected.** A sale with respect to which sales or use tax was actually collected and reported by a person authorized to collect the tax ~~(for example, by a marketplace facilitator not acting as a seller)~~ is not subject to the notice or reporting requirements of this section.

(4) **Multiple reporting parties.** In the case of sales with respect to which multiple parties are or may be obligated to provide notice or include in a report, the obligation must be fulfilled by the earliest listed person as follows. No other person is required to provide notice or include the sale in a report:

- (A) the seller
- (B) the marketplace facilitator
- (C) the seller representative.

(g) **Penalties.**

(1) **Amount.** The Director shall assess a penalty upon any person obligated to file a notice or report who fails to provide notices and reports as required by this Section as follows:

(A) **Penalty for Failure to Provide Notice to Purchaser at Time of Transaction.** A person who fails to provide notice as required by subsection (c)(1) shall be assessed a penalty, in addition to any other applicable penalties, in the amount of \$X for each such failure, not to exceed:

1. a total of \$Y in one calendar year, if such person remedied each failure by providing such notices within X days of the date such notice was required to be provided, and
2. a total of \$Z in one calendar year where subsection (g)(1)(A)(1.) of this Section does not apply.

(B) **Penalty for Failure to Provide Annual Report to Purchaser.** A person who fails to provide a report as required by subsection (c)(2) shall be assessed a penalty,

**Comment [9]:**

This is meant to be a backstop. But do the rules have a gap that needs to be filled? (i.e., the seller is obligated if the transaction didn't use a marketplace facilitator).

**Comment [SHL10]:**

Helen, Bruce and I had an extensive but inconclusive discussion of penalties yesterday. The Commission doesn't ordinarily include administrative provisions such as penalties in its model statutes, leaving such matters to the states under their general tax laws. The assumption is that the reporting provisions will be part of each state's revenue code. Is that a good assumption? If so, each state will need to determine how these failure to report penalties fit into the state's other tax penalties. Having said that, Helen felt providing for waivers of penalties perhaps subject to a negligence or good faith standard as to whether the seller is registered or not such that the notice penalties might be waived. Bruce leans towards a good faith standard as to whether a seller is registered. Perhaps a drafter's note or notes would be more appropriate than specific penalty provisions, alerting the states to tie any penalties to the principle of "know your seller." Penalties for late filing of notices (as opposed to failure to file) should probably be addressed under similar late filing provisions in the Tax Administration Act.

in addition to any other applicable penalty, of \$X for each such failure, not to exceed:

1. a total of \$Y in one calendar year if such person remedied each failure by providing such notices within X days of the date such report was required to be provided, and
2. a total of \$Z in one calendar year where subsection (g)(1)(B)(1.) of this Section does not apply.

**(C) Penalty for Failure to Provide Annual Report to Department.** A person who fails to provide a report as required by section (c)(3) shall be assessed a penalty, in addition to any other applicable penalty, equal to \$X times the number of such purchasers that should have been included on such report, not to exceed:

1. a total of \$Y in one calendar year if such person remedied the failure by providing the report within X days of the date such report was required to be provided, and
2. a total of \$Z in one calendar year where section (g)(1)(C)(1.) of this Section does not apply.

**(D) Penalty for Failure to Provide Referrer Report.** A person who fails to provide a report as required by subsection (d)(2) shall be assessed a penalty, in addition to any other applicable penalty, equal to \$X times the number of such non-collecting sellers that should have been included on such report, not to exceed:

1. a total of \$Y in one calendar year if such person remedied the failure by providing the report within X days of the date such report was required to be provided, and
2. a total of \$Z in one calendar year where section (g)(1)(D)(1.) of this Section does not apply.

[Drafters' comment: The use of "X", "Y", and "Z" as placeholder dollar amounts in penalties under (A)-(D) of this subsection are independent in each lettered subsection. For example, the amount used for "X" in one lettered subsection may well be a different amount than the amount used for "X" in another or all other lettered subsections. The use of the same letter is not meant to suggest that they should be the same. However, common lettering is used to note that the amounts are imposed for similar purposes in each lettered subparagraph.]

- (2) **Estimates Authorized.** When assessing a penalty pursuant to subsection (g) of this Section, the Director may use any reasonable sampling or estimation technique where necessary or appropriate to determine the number of failures in any calendar year.
- (3) **Protest.** A person may protest the assessment of any such penalty or interest by filing a written objection with the Director within [number of days equal to the number of days allowed for protest of a use tax assessment or refund denial] days of the date of assessment. Disposition of a timely filed protest shall be in accordance with [State Administrative Procedures Act]. If no such protest is filed within the time allowed, the assessment shall become final and subject to [judgment, warrant, collection procedures].

(4) **Interest.** Interest shall accrue on the amount of the total penalty that has been assessed and become final for each calendar year pursuant to subsection (g) at the rate established pursuant to [state code section setting interest rate for tax underpayment].

(5) **Waiver.** Upon written request received within the time established for protest pursuant to subsection (g)(3), the Director, in his or her sole discretion, may waive any portion or all of the penalty or interest applicable under this section for good cause shown.

(6) **Exceptions.** No penalty shall be assessed with respect to any sale of property that would not actually be subject to the sales or use tax imposed under [State Sales And/Or Use Tax Act]. However, this exception shall not be read to suggest that a seller or marketplace facilitator has any obligation to determine whether a transaction or the storage use or consumption of property is subject to the sales or use tax imposed under [State Sales And/Or Use Tax Act].

(h) **Confidentiality of Purchaser Information.** Information received by the [State Department of Revenue] pursuant to this Section shall be exempt from any disclosure required pursuant to [State Open Records Act]. Such information shall be treated as confidential taxpayer information pursuant to [cite to open records exception for confidential taxpayer information, including exceptions statutes] and all exceptions, penalties, punishments, and remedies applicable to disclosure of confidential taxpayer information pursuant to [cite to statutes regarding confidential taxpayer information disclosure exceptions and penalties] shall apply to disclosure of information received by the Department pursuant to this Section.

(i) **Sourcing Sales of Digital Goods and electronically delivered software.** For purposes of filing the reports required in this section, the seller or marketplace facilitator may consistently use any commercially reasonable method of sourcing the sales of digital goods and electronically delivered software. [Drafters' comment: The choice not to suggest the use of the state's specific sourcing method for these sales is conscious. Non-collecting sellers would not generally be subject to the state's tax collection jurisdiction. This rule is intended to be flexible and allow a single business to apply a single sourcing rule across all states.]

**Comment [11]:**  
definition?

**Comment [12]:**  
Bruce says he doesn't think there is a commercial standard yet. Maybe taxpayers books and records

**Comment [13]:**  
Utah correctly notes that this statement is in conflict with the general assertion of jurisdiction under the model statute. The provision could independently establish a sourcing rule. However, it appears to be the more prudent course not to specify a sourcing rule.

**Comment [14]:**  
Utah suggests that not adopting a standard makes enforcement more difficult. Should the model statute simply suggest insertion of the state's sales tax sourcing rule?

(j) **Lookback period.** With respect to periods after the adoption of this section, [The Department may require the seller or marketplace facilitator to file reports for prior years, not to exceed the number of open tax years pursuant to [the applicable general statute of limitations for purchaser use tax reporting]. In all cases where the original seller or marketplace facilitator has been acquired by a successor in interest, the lookback period shall not exceed the number of years for which a successor in interest is liable for the obligations of its predecessor in interest pursuant to [applicable state statute].

(k) **Limitations.** Nothing in this Section shall relieve a person who is subject to [the state's sales tax act or the Sales And/Or Use Tax Act] from any responsibilities imposed thereunder. Nor shall anything in this Section prevent the Director from administering and enforcing [the state's sales tax act or the Sales And/Or Use Tax Act] with respect to any person who is subject to them.

(l) **Severance.** The provisions of this Section are severable and if any section, sentence, clause or phrase of this Section shall for any reason be held to be invalid or unconstitutional, such

holding shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Section, which shall remain in effect.

(+) (m) **Administration.** [The [State Department of Revenue] [shall/may - state should adopt appropriate term depending on drafting standards] perform all functions necessary and proper for the administration and enforcement of this Section, including promulgating regulations and reviewing protests in accordance with the [State Administrative Procedures Act].]

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(m) (n) \_\_\_\_\_