

Conforming Comments

There were issues in the draft that came up multiple times. Rather than comment each time, I simply made the changes in some cases. This is a list of those issues:

1. Use parallel formatting for similar provisions.
2. “Who” can only be used to refer to natural persons. Use “that” when the group could include artificial entities.
3. Don’t use and/or.
4. Use “must” instead of shall when the subject is inanimate.
5. Don’t use “shall” to state the law. (Say “is” or “are.”)
6. Don’t use “shall” to state a permissive act.
7. Avoid use of multiple terms – e.g. “transmitting or otherwise communicating,” “contracts or otherwise agrees,” “fees, commissions, or other consideration.” Instead, if the intent is to apply broadly, use the broadest term. Or use one term that is best.
8. Don’t use “and/or.” This may mean the provision has to be reworded slightly.
9. Avoid using “any,” “all,” or “every,” especially when imposing a duty, unless absolutely necessary. (Otherwise, you have to do it “all” the time.)
10. Don’t use, “includes, but is not limited to.” “Includes” is nonexclusive.
11. Don’t use “notwithstanding” in a section to state an exception. Instead, note in the controlling rule that “except for” the exception.
12. Don’t use “provided that” where “if” would work.
13. Once a term is defined, use that term.

MTC Model Use Tax Reporting Statute

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

- (1) **“Department”** means the [State Department of Revenue].
- (2) **“Director”** means the [Director/Commissioner of the State Department of Revenue].
- (3) **“Marketplace”** includes any means, whether physical or electronic, through which one or more sellers may advertise and sell or lease tangible personal property, such as a catalog, Internet website, or television or radio broadcast, regardless of whether the tangible personal property or the seller are physically present in the state.
- (4) **“Marketplace facilitator”** means a person that operates a marketplace and facilitates transactions by engaging, directly or indirectly, in communicating the offer and acceptance between a purchaser and a seller. A marketplace facilitator that also engages in transactions as a seller is treated as a seller with respect to those transactions.
- (5) **“Marketplace seller”** means a seller that sells or leases tangible personal property through a third-party marketplace.
- (6) **“Marketplace transaction”** means a transaction facilitated by a marketplace facilitator.
- (7) **“Non-Collecting Seller”** means a seller that sells or leases tangible personal property and does not collect tax due under [State Sales And/Or Use Tax Act] on a transaction.
- (8) **“Person”** includes any individual, firm, corporation, partnership, limited liability company, joint venture, estate, trust, or group or combination acting as a unit.

[Drafter’s Note: A state should adopt this definition only if there is no generally applicable definition of “person” that includes a business. The model is intended to extend to business to business transactions. Therefore, the definition must include businesses.]

Comment [HH1]: In general – try not to use a word or part of a word to define that word

Comment [HH2]: Transactions include leases.

Comment [HH3]: Don’t use.

Comment [HH4]: We can’t use the term facilitates to define “facilitator” unless we know what it means. And we don’t. Also, we use the term facilitate a number of other places in the draft. So we have to use the term “by” in order to define what facilitates means. If this is not what it means, then we have to say what it does mean.

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

(10) **“Referrer”** means a person that:

(A) Contracts with a seller or seller’s representative to advertise or list tangible personal property for sale or lease;

(B) Makes a referral by connecting a person to the seller or seller’s representative, but not acting as a marketplace facilitator; and

(C) Received in the prior year, in the aggregate, at least \$10,000 in consideration from sellers or sellers’ representatives for advertisements or listings directed at persons in this state.

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

(12) **“Seller”** means [the state definition of seller]. *[Drafter’s Note: each state should include “offering for sale or lease” in its definition of seller. This is to make clear that the reference to “seller” in the definition of “referrer” includes persons offering goods for sale or lease even if the referrer does not know whether the transaction is ever consummated. In addition, this makes clear that sales and leases of tangible personal property that a seller offers for sale or lease on a marketplace must be reported, even if the sale or lease is finalized by the marketplace facilitator and not by the seller.]*

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

(b) Notice and Reports, Required.

(1) **Transactional Notice to purchaser at time of transaction.** Non-collecting sellers and marketplace facilitators shall provide the transactional notices as further provided in this paragraph (b)(1). Subject to the exceptions provided in subsection (e) of this section, each purchaser shall be provided the transactional notice required by this section at the time of each transaction.

Comment [HH5]: “Otherwise agrees” adds nothing.

Comment [HH6]: We need this to be consistent.

Comment [HH7]: Lease has to be included to be consistent.

Comment [HH8]: This breaks two rules – use of “any” and use of “including but not limited to.”

Comment [HH9]: What about something like the Home Shopping Network? What about a broker? I think it’s better not to add this clause. I’m not sure it’s necessary given (B), or that it’s sufficiently inclusive.

Comment [HH10]: Moved this section from (C) to (B) where it flows better.

Comment [HH11]: We use the term “referral” in the reports required to be filed by the referrer – so this connects that term to this definition.

Comment [HH12]: Referrer can’t be a seller. Moved the “not a marketplace” condition to (B).

Comment [h13]: I agree with the overall rewording of these sections. However, I am concerned that there nowhere do we say “A non-collecting seller shall provide transactional notices. A marketplace facilitator shall provide transactional notices.” Maybe we can say something like “Non-collecting sellers and marketplace facilitators shall provide transactional notices as further provided for in this subsection.” Then we can follow this with the passive sentence, and then later with the ‘who provides which’ provision. Same comment with respect to (b)(2) and (b)(3).

Comment [HH14]: There are significant exceptions in section (e) and this provides a signal that those exceptions may apply to the requirements here (which are otherwise quite broad).

Comment [HH15]: Although this is passive voice, using it here is permissible to simplify wording and leaves the specific requirement to (C).

(A) The notice must state that no sales or use tax is being collected or remitted upon the transaction or marketplace transaction, and that the purchaser may be required to remit any tax owed directly to the Department.

Comment [HH16]: "Indicate" is too wishy-washy.

(B) The notice must be prominently displayed on each invoice and sales or lease receipt for the transaction or marketplace transaction that is provided to the purchaser, whether provided in physical or electronic form.

(C) The marketplace facilitator shall provide the transactional notice for all marketplace transactions. The non-collecting seller shall provide the transactional notice for all other transactions.

Comment [HH17]: See comment above.

Comment [HH18]: Using newly defined term to simplify this section.

(2) **Annual Transactions Report to Purchaser.** Non-collecting sellers and marketplace facilitators shall provide the annual transaction report to purchasers as further provided in this paragraph (b)(2).

Comment [HH19]: This raises the question of whether taxed transactions go into this \$200 limit. Assuming they do not, we can tie this, instead, to the transactions for which a notice is required.

Subject to the exceptions provided in subsection (e) of this section, an annual transactions report shall be provided to each purchaser who entered into, in the aggregate during the previous calendar year, more than \$200 in transactions that are subject to the notice requirement of paragraph (1) of this subsection.

Comment [HH20]: There are significant exceptions in section (e) and this provides a signal that those exceptions may apply to the requirements here (which are otherwise quite broad).

Comment [HH21]: Follows the format of paragraph (1) – where the specific requirement is included as a subparagraph below. (In this case, (E).)

(A) The annual transactions report shall include:

1. A statement that sales or use tax was not collected on the transactions in the prior calendar year and that the purchaser may be required to remit any tax owed directly to the Department;
2. A list of transactions entered into during the prior calendar year by the purchaser, if subject to

the notice requirement of paragraph (1) of this subsection, showing, with respect to each transaction:

Comment [HH22]: Again, this would exclude those transactions on which tax was collected.

Comment [HH23]: This is unnecessary since it's included in the definition of transaction.

a. The amount paid;

Comment [HH24]: For a lease, which is included in "transaction", this term makes more sense.

b. The date of the transaction;

Comment [HH25]: Don't want to exclude leases, as the term "purchase" would.

c. The type of tangible personal property purchased or leased; and

d. The shipping address.

3. Contact information for the Department including the department’s web page where filing and payment instructions for the purchaser’s payment of sales or use tax may be found. Such contact information shall be made available by the department no later than October 1 of the year of the transactions reported. The failure of the department to publish the information required by this paragraph (3.) shall relieve the non-collecting seller or marketplace facilitator only of the obligation to provide the information required by this paragraph (3.) and only with respect to the year of the failure.

Comment [h26]: New - and questionable wording?

4. A statement that a report will be submitted to the Department, pursuant to paragraph (b)(3) of this Section, stating only the purchaser’s name, address, and total dollar amount of the purchaser’s transactions; and

Comment [HH27]: Again, follows the general format of leaving to (E) to say who is responsible.

5. Additional information the Director may reasonably require.

Comment [HH28]: Can’t use “purchases” or we will exclude leases.

(B) The report required under this paragraph is due by January 31 of each year following the year for which the report is due.

(C) Except as provided in subparagraph (D) of this paragraph, 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.

(D) If the purchaser’s billing or shipping address is known, the report may be provided to the purchaser electronically, if:

Comment [HH29]: Throughout this paragraph, we refer to “the report.”

1. No earlier than December 1st of the year to be covered by the report and no later than January 15th of the year following the year to be covered by the report, the purchaser agrees to receive the report electronically, and

2. 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.

(E) The annual transactions report for marketplace transactions shall be provided to the purchaser by the marketplace facilitator. The annual transactions report for all other transactions shall be provided to the purchaser by the non-collecting seller.

Comment [HH30]: Would exclude leases.

Comment [HH31]: Complication created by the bifurcation of the responsibility.

Comment [HH32]: See comment above.

Comment [HH33]: Mirror's the format used in paragraph (1).

Comment [h34]: Is this language sufficiently precise to require a marketplace facilitator to include in its report all transactions facilitated by it and to require a non-collecting seller to include in its report all transactions transacted by it other than marketplace transactions?

(3) **Annual Report to the Department.** Non-collecting sellers and marketplace facilitators shall provide the annual report to the department as further provided in this paragraph (b)(3). Subject to the exceptions provided in subsection (e) of this section, an annual report to the Department shall be provided for each purchaser who entered into transactions that are subject to the notice requirement of paragraph (1) of this subsection.

Comment [HH35]: The date needs to indicate that it is for the year preceding (see a similar provision in the prior paragraph). This is easier done in a separate subparagraph (as it was in the prior paragraph).

Comment [HH36]: There are significant exceptions in section (e) and this provides a signal that those exceptions may apply to the requirements here (which are otherwise quite broad).

(A) The report shall include:

1. The name of the purchaser;
2. The billing address and, if different, the last known mailing address;
3. The shipping address of all 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 transactions subject to this requirement by the purchaser that were made during the prior calendar year for delivery to all shipping addresses.

Comment [HH37]: Follows the format of paragraph (1) – where the specific requirement is included as a subparagraph below. (In this case, (C).)

[Drafter's Note for 3 and 4. The shipping address provisions are largely designed for states that authorize a separate local sales or use tax. If a state does not need transactions broken out by local jurisdiction, paragraph 3 may be eliminated. Paragraph 4 should be retained and require that the total dollar amount of all transactions be reported, without being broken down by shipping address.]

(B) The report shall be filed electronically in the form and manner required by the Director no later than January 31 following the year for which the report is due.

(C) The annual report to the Department for marketplace transactions shall be provided to the Department by the marketplace facilitator. The annual report to the Department for all other transactions shall be provided to the Department by the non-collecting seller.

Comment [HH38]: This format tracks the formatting in the earlier paragraphs.

Comment [h39]: I'm not convinced that this section shouldn't be worded in the form of "The annual report of the marketplace facilitator shall include.... The annual report of the non-collecting seller shall include...."

(c) Reports by Referrer.

(1) A referrer shall provide to a seller with which it contracts, as provided in Subsection (a)(10), a written notice at the time of such contract that the sellers' transactions may be subject to this state's sales and use tax and that the seller may have an obligation to provide the notices required by this Section.

Comment [h40]: Is this language sufficiently precise to require a marketplace facilitator to include in its report all transactions facilitated by it and to require a non-collecting seller to include in its report all transactions transacted by it other than marketplace transactions?

Comment [HH41]: This would not cover the term "list" which is used in the definition of "referrer" so this reference is substituted for ease.

(2) A referrer shall make an annual report to the Department of the identity of each seller to which it makes referrals, as provided in Subsection (a)(10), no later than January 31 following the calendar year in which the referral was made, and shall include information as required by the Department.

Comment [HH42]: See similar comment in the prior paragraph.

Comment [HH43]: I'm afraid "identity" of the seller is not going to be sufficient.

(d) 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 or marketplace facilitator among the related parties. The annual transactions report to the purchaser, as required by paragraph (b)(2), shall contain sufficient information to allow the purchaser to determine the identity of the non-collecting seller or marketplace facilitator making each transaction reported. The annual report to the Department shall indicate all non-collecting sellers or marketplace facilitators whose transactions are included.

(e) Exceptions.

(1) De minimis Transactions.

(A) A non-collecting seller that made less than \$B [state should choose an approach similar to either \$5,000,000 in national gross sales or leases or \$100,000 in total transactions] during the prior calendar year shall not be required to provide notice or file reports pursuant to subsection (b) of this Section. [Drafter's note: the term "transactions" above includes only transactions made

Comment [HH44]: Unnecessary because of the definition of "transaction."

into the state. Thus, the distinction here is made between national sales or leases and in-state sales or leases.]

(B) A marketplace facilitator that facilitated transactions 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 (b) of this Section.

(C) **De minimis exception as Applied to Related Parties.** Related parties shall calculate the de minimis exceptions described by this paragraph (e)(1) for the entire group.

Comment [LDD45]: Where does this fit?

(2) **Sales and leases 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/Or Use Tax Acts], is not required to provide notice or file reports pursuant to subsection (b) of this Section.

Comment [HH46]: Consistent with the earlier exceptions.

(3) **Sales and leases with respect to which sales or use tax is collected.** A transaction with respect to which sales or use tax was actually collected and remitted by a person authorized to collect the tax is not subject to the notice or reporting requirements of subsection (b) of this Section.

(4) **Sales with respect to which sales or use tax is not actually due.** A transaction with respect to which sales or use tax is not actually due pursuant to [State Sales and/or Use Tax Acts] is not subject to the notice or reporting requirements of subsection (b) of this Section.

(f) **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 (b)(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 the notice required by paragraph (b)(1) of this section prior to the date or within 45 of the date for providing the report required by paragraph (b)(1), and

Comment [h47]: This is a change from providing the transactional notice - It seems to me that once the transactional notice has been missed, we really care about the (b)(2) notice rather than the transactional notice. Also, should we provide a number of days for uniformity purposes? It seems to me that we should.

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 (b)(2) shall be assessed a penalty, 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 45 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 (b)(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 45 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 (c)(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 45 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.

[Drafter's note: 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 tax protest procedures]. 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 transaction subject to the exceptions described in subsection (e) of this section.

(g) **Confidentiality of Purchaser Information.** Information received by the Department pursuant to this Section shall be exempt from 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.

- (h) **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].

[Drafter's Note: The intent of this provision is to limit this requirement as well as liability for penalties to periods subsequent to the adoption of this section. If the state uses standard language to indicate prospectivity, that language may be substituted herein.]

- (i) **Construction with Other Laws.** 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.
- (j) **Limitations on liability.** Except for the penalties provided in subsection (f) of this section, no seller, marketplace facilitator, or referrer shall be liable to any person for the provision or failure to provide the notices or reports required by this Section.
- (k) **Severability.** 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.
- (l) **Administration.** The Department [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].]