

Comparison of NCSL, WA and NY Use Tax Information Notice and Reporting and/or Collection Provisions

1. NCSL

Section 1. Legislative findings that due to ready availability of tax collection software and simplification under state law, imposing use tax collection obligation on remote sellers no longer creates an undue compliance burden.

Section 2.¹ Definition of doing business expanded to include sales through Marketplace Provider who facilitates sale of taxable products or services and collection of the sales price. Also, cookies and other software placed on customers' computers constitutes doing business. "Amazon-type" third party referrer relationships constitutes doing business if referrer has nexus with state. Advertising commissions based on sales also constitutes doing business. Seller is presumed to be doing business in state if total cumulative sales in state exceeds \$X in the immediately preceding calendar year. This economic presence threshold creates a presumption of nexus, which the seller can rebut by demonstrating that it was not engaged in business in the state. Various activities by related parties may also constitute doing business by the seller. Marketplace Provider or Referrer is also subject to use tax collection if it engages in the same activities listed in Section 2 for sellers, other than the related party provision.

Section 3. Marketplace Provider is a person who facilitates a taxable sale and collects the sale receipts.² Unless seller is registered to collect tax, Marketplace Provider is required to collect the tax.

Section 4. A Marketplace Referrer is a person who contracts with a retailer to referrer customers to the retailer, for a fee, but does not collect the sale proceeds.³ If Referrer received more than \$10,000 in fees for the previous year, or \$7,500 in the first 3 quarters of the current year, referrer must register with the state as a Marketplace Referrer. If the referrer receives more than \$10,000 in fees in the previous year, he must file a report in the current year, listing the

¹ There is no analogue to Section 2 in the MTC model.

² The MTC model is similar in that it defines a marketplace facilitator in terms of providing check out services.m

³ The MTC model does not currently include a provision for marketplace referrers.

name and address of all retailers with whom he contracted to refer customers in the state and, if available, the cumulative sales price and any other transactional-level detail for referrals, including listed prices of items and the number of times referrals were made to retailers, and the number of potential customers in the state that were referred to the retailer and the number of customers who made purchases after a referral. Any referrer who received more than \$10,000 from fees in the previous calendar year must provide notice to retailers that the retailers sales may be subject to SUT and that the retailer's contact information and sales volume in the state is being reported to the revenue department. A referrer is not required to provide the information for any retailer who is registered to collect SUT in the state, or if the referrer is a Marketplace Provider that collects SUT. The referrer is liable to pay SUT for any sale made by a retailer as a result of a referral, unless the retailer is registered to collect tax.

2. WA

Sec. 601 WA legislature finds failure to collect SUT on remote sales will coast WA \$353 million in lost tax revenue in FY 218. In light of CO law and DMA case, legislature has given remote sellers meeting a specified threshold the option of either collecting SUT or comply with SUT notice and reporting requirements. Option is also made available to marketplace facilitators.

Sec. 602. Beginning 1/1/2018, remote sellers, referrers and marketplace facilitators meeting the statutory criteria must elect to either collect SUT or comply with notice and reporting requirements. For marketplace facilitators, the election applies only to retail sales through the marketplace facilitator's marketplace by or on behalf of marketplace sellers who do not have a physical presence in the state and the marketplace facilitator's own sales if the marketplace facilitator does not have a physical presence in the state. For referrers, the election applies only to retail sales directly resulting from a referral of the purchaser to a marketplace who does not have a physical presence in the state and the referrer's own sales if the referrer does not have a physical presence in the state. Remote sellers or marketplace facilitators are subject to the election if, during the current or immediately preceding calendar year, the

gross receipts of the remote seller or marketplace facilitator from retail sales sourced to WA are at least \$10,000. Referrers are subject to the election if, during the current or immediately preceding calendar year, the gross income of the referrer received from the referrer's referral services apportioned to WA are at least \$10,000.

Sec. 603. Provides limited relief from liability for marketplace facilitators or referrers for failure to collect the tax or to collect the correct amount of tax due to erroneous information supplied by the marketplace seller. There is no relief if the failure to collect tax is due to improper sourcing of the sale. Liability relief is limited as follows. 2018: liability relief will not exceed 10% of the total tax due. 2019 – 2023: liability relief will not exceed 5% of the total tax due. 2024 and subsequent years, liability relief will not exceed 3% of the total tax due. Marketplace seller is relieved from obligation to collect tax if marketplace facilitator or referrer is registered to collect the tax and has notified the seller that it will in fact collect the tax. Marketplace seller that is also a remote seller is relieved of obligation to collect SUT if marketplace facilitator confirms in writing that it will comply with the notice and reporting requirements in lieu of collecting the tax. NO CLASS ACTIONS ARE ALLOWED AGAINST MARKETPLACE FACILITATORS OR REFERRERS ARISING FROM OR IN ANY WAY RELATED TO AN OVERPAYMENT OF SUT COLLECTED BY THE MARKETPLACE FACILITATOR OR REFERRER, WHETHER OR NOT THE CLAIM IS CHARACTERIZED AS A TAX REFUND CLAIM.⁴

Sec. 604. A "marketplace facilitator" is defined as a person that contracts with sellers to facilitate for consideration, the sale of the seller's products through any of the following activities. (1) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller, (2) Owning or operating the infrastructure or technology that brings the buyer and seller together, (3) Providing a virtual currency that buyers are required or allowed to use to purchase the seller's products, (4) Software development or R&D related to any of the following activities – or engaging in any of the following activities - in relation to the seller's products. (1) Payment processing services, (2) Fulfillment

⁴ There is no comparable provision in the current MTC model. Sales and use tax class action relief is a major issue for retailers. The work group might consider a similar provision.

or storage services, (3) Listing products for sale, (4) Setting prices, (5) Branding sales as those of the marketplace facilitator, (6) Order taking, (7) Advertising or promotion, or (7) Providing customer service or accepting or assisting with returns or exchanges. A “referrer” is a person who contracts with a seller to list or advertise for sale one or more items and who receives consideration from the seller to transfer a buyer to the seller, without collecting receipts from the purchaser.

Sec. 605. Sellers who do not collect SUT, marketplace facilitators, and referrers who elect to do so are subject to notice and reporting requirements. If the referrer elects to comply with the notice and reporting requirements, marketplace facilitator must continue to comply unless the marketplace seller collects the SUT.

Notice Requirements

A NON-COLLECTING SELLER must post a notice on its website or other platform that sales or use tax may be due, that WA requires the purchaser to file a use tax return, and that the notice is provided under the requirements of Section 605. At the time of each retail sale, such sellers must provide a statement that neither sales nor use tax is being collected or remitted, that the consumer may be required to remit sales or use tax to the department, and instructions for obtaining additional information from the department regarding remittance. The notice must be prominently displayed. Seller may not claim SUT is not imposed unless such a statement is immediately followed with the notice or the specific transaction is exempt from SUT.

A REFERRER WHO ELECTS TO DO SO must post a conspicuous notice on its platform that SUT is due on certain purchases, that the seller may or may not collect or remit tax on a purchase, that WA requires the purchaser to file a use tax return if sales tax was not assessed at the time of sale, that the notice is provided under the requirements of Section 605, and instructions for obtaining additional information from the department regarding remittance. Furthermore, the notice must inform each purchaser that if the seller does not collect SUT on a subsequent purchase, the seller may be required to provide information to the

purchaser and to the department about the purchaser's potential SUT liability. The notice must be prominently displayed

Reporting Requirements

NON-COLLECTING SELLERS (including marketplace facilitators) must make annual reports to each consumer for whom the seller previously provided notice. The reports are due by January 31 for the preceding year. The report must state that the seller did not collect SUT on the consumer's transactions and that the consumer may be required to remit the tax directly to the department. The report must list, by date, generally indicating the type of product purchased during the year that was sourced to WA, and the price of each product. The report must contain instructions for obtaining additional information from the department regarding remittance. In addition, the report must inform the purchaser that the seller is required to submit a report to the department stating the total dollar amount of the consumer's purchases from the seller and any information that the department may reasonably require, The report is to be sent to the consumer's billing address or, if unknown, the consumer's shipping address.. If neither address is known, then the report is to be sent electronically to the consumer's last known email address.

REFERRERS SUBJECT TO THE NOTICE REQUIREMENTS must make annual reports to each marketplace seller to whom the referrer transferred a potential purchaser located in WA during the previous calendar year. The reports are to be made no later than January 31 of the following year. The report must state that WA imposes a SUT, that a seller meeting the sale thresholds is required to either collect the SUT or to comply with the notice and reporting requirements, and instructions for obtaining additional information from the department. In addition, the referrer must file an annual electronic report to the department, listing the sellers who received the referrer's annual notice.

NON-COLLECTING SELLERS (including marketplace facilitators) must file an annual report with the department,, no later than January 31 of each year. The

report must include, with respect to each consumer to whom the seller is required to provide the annual consumer report: the consumer's name and billing address (or if different, the last known mailing address), the shipping address for each product and the total dollar amount of all such purchases by such consumer. The report must be filed electronically.

Sec. 606. Sec. 606 provides penalties for non-compliance by sellers or referrers and in some circumstances provides for limited relief from such penalties.

Sellers are subject to a penalty of \$20,000, in addition to any other applicable penalties, for failure to provide the notice to consumers required by the statute. Such penalty may only be assessed once per year. Referrers are subject to the same penalty. Sellers are subject to a penalty of 8.5% of gross receipts from sales sourced to WA for any calendar year in which the seller failed to provide the annual consumer report. Referrers are subject to a similar penalty, measured by 8.5% of the gross income of the business received from the referrer's referral services sourced to WA, for failure to provide the annual notice and list to a marketplace seller. A referrer will incur a similar penalty for failure to file with the department the annual list of marketplace sellers to whom it made referrals. Sellers are subject to a penalty of \$25 multiplied by the number of consumers that should have been listed on the annual report to the department, and were not so listed. The department may exercise its discretion to waive penalties if a non-collecting seller agrees in writing to collect the tax for at least one year. Alternatively, the department may waive penalty if a non-collecting seller agrees in writing to fully comply with all applicable notice and reporting requirements. Full compliance is defined as providing notice to at least 95% of the consumers entitled to such notice in any calendar year and to timely provide or file all required reports. Similar waivers are allowed for referrers. Penalties may be reassessed for noncompliance.

NOTE: HB 2163 was signed into law by WA Governor Jay Inslee on July 7. Challenges are likely.

3. NY

The NY bill (SFY 2017018) would impose the obligation to collect SUT on marketplace providers who facilitate the sale of tangible personal property, subject to an annual sales threshold of \$100 million.