The purpose of this memo is to update the Committee on relevant developments since the Committee put the MTC Use Tax Notice and Reporting project on hold, pending a decision in the Direct Marketing Association case. That case has now been decided. In *Direct Marketing Ass’n v. Brohl*, 814 F.3d 1129 (CA 10 2016), the United States Court of Appeals for the Tenth Circuit ruled that Colorado’s use tax notice and reporting statute for noncollecting retailers does not violate the Commerce Clause. Subsequently, the State of Colorado and DMA entered into a settlement agreement, pursuant to which members of the DMA will begin complying with Colorado’s use tax notice and reporting statute, effective July 1, 2017.

1. **Status of use tax notice statutes**

A number of states have enacted use tax notice statutes, pursuant to which noncollecting retailers or vendors are required to notify their customers of the obligation to pay use tax in their state. The statutes are attached to this memo.

**Oklahoma** – As of July 1, 2010, Oklahoma has required out of state retailers who are not required to collect Oklahoma use tax to notify their Oklahoma customers that use tax is imposed on the Oklahoma use of tangible personal property, unless the property is otherwise exempt. The notification must be provided on the retailer’s website or retail catalog and on any invoices provided to the customers. 68 Okl.St.Ann §1406.1. By regulation, the Oklahoma Tax Commission has set de minimis sales thresholds for exempt noncollecting retailers. Any noncollecting retailer or online auction website with less than $100,000 in total gross sales in Oklahoma during the prior year and who reasonably expects Oklahoma gross sales of less than $100,000 in the current year is exempt from the notice and reporting requirements. Furthermore, the regulation requires the notice to contain the same disclosures as does the South Dakota statute, infra. OAC 710:65-21-8(a) and (b) (1), copy attached.

**South Dakota** – Effective in 2011, South Dakota requires a notice be provided by each noncollecting retailer to South Dakota purchasers of tangible personal property, services or products transferred electronically that use tax is due on nonexempt purchases and that the tax shall be paid by the South
Dakota purchaser. The notice must inform the purchaser that; (1) the noncollecting retailer is not required, and does not collect South Dakota sales or use tax, (2) the purchase is subject to state use tax unless it is specifically exempt, (3) the purchase is not exempt merely because the purchase is made over the Internet, by catalog, or by other remote means, (4) the state requires each South Dakota purchaser to report any purchase that was not taxed and pay tax on the purchase, as reported and paid on the South Dakota use tax form, and (5) the use tax form and instructions are available on the South Dakota Department of Revenue website. SDCL §10-63-2.

Vermont – Vermont’s use tax notice law requires each noncollecting vendor making sales into Vermont to notify Vermont purchasers at the time of sale that sales or use tax is due on nonexempt purchases and that Vermont requires the purchaser to pay the tax due on his or her tax return. Failure to provide the notice is subject to a penalty of $5 for each such failure, subject to a reasonable cause defense. In addition, on or before January 31 of each year any noncollecting vendor is to provide an annual notice of the total amount paid by each Vermont purchaser in the previous calendar year. The annual notice is to be provided to all Vermont purchasers who have made $500 or more of purchases in the preceding calendar year. The notice is to be sent separately to all Vermont purchasers by first-class mail or electronic mail and is not to be included with any other shipments. The notice must include the words “Important Tax Document Enclosed” on the exterior of the mailing. The notice must advise the purchaser that the State requires that the purchaser file a return and pay any tax that is due. Failure to supply the annual notice is subject to a $10 penalty for each such failure, subject to a reasonable cause defense. The Vermont statute takes effect July 1, 2017 or on the first day of the first quarter after the Colorado sales and use tax reporting requirements at issue in DMA are implemented by Colorado, whichever first occurs. 32 V.S.A. §9712.

2. Currently pending bills

Copies of all bills described here are attached to this memo.

Pennsylvania – On February 17, 2017, Representatives Thomas and D. Costa introduced House Bill 542 in the Pennsylvania House of Representatives. HB 542 requires all sellers, whether located in Pennsylvania or elsewhere, to provide a specific notice to all purchasers in Pennsylvania upon each separate retail sale of tangible personal property or services via a website operated by the seller. The notice is to read: “Unless you paid Pennsylvania sales tax on this purchase, you may owe a Pennsylvania use tax on this purchase based on the total sales price of the purchase … If you owe a Pennsylvania use tax on this purchase, you must report and remit the tax on your Pennsylvania income tax form.” Failure to provide the notice is subject to a fine of not less than $5 for each sale in which the seller failed to provide notice.

Kansas, Arkansas and Washington – Bills are currently pending in each state that would require noncollecting retailers to provide transactional and annual reports to each purchaser in the state that are similar to the requirements of the Colorado statute. In addition, these bills also provide for annual reports to the state revenue department that are similar to the reports required in Colorado. The Kansas bill provides an exclusion for purchases or rentals of VHS tapes, DVDs, Blu-ray disks or other video materials to the extent that disclosure of the purchasers of such items would violate 18 U.S.C. §2710 (Wrongful disclosure of video tape rental or sale records). Kansas Senate Bill no. 111 (2017); Arkansas House Bill 1388 (2017); Washington Senate Bills 5855, 5856 (2017).
3. MTC Model Sales and Use Tax Notice and Reporting Statute

The MTC Model went to public hearing in 2011. A copy of the Hearing Officer Report is attached. Although the Hearing Officer recommended that the model be adopted, the model received only eight of the nine affirmative responses that would be required for adoption. It was referred back to the executive committee for further consideration. At its December 2011 meeting, the executive committee considered the proposal and requested that the uniformity committee recommend minimum threshold amounts for the exceptions in (d)(1) and (d)(2) of the proposal. On February 21, 2012, the uniformity committee recommended a revised version of the model that incorporated minimum thresholds. At its next meeting, on May 10, 2012, the executive committee suspended further consideration of the model pending the resolution of the DMA litigation. As the 10th Circuit has now sustained the constitutionality of the Colorado statute, it is appropriate for the committee to consider the model at this time.

Staff has reviewed the model and, with one possible addition, has concluded that the model could be adopted in its current form. The suggested addition is because, as a model, it is possible that it could be adopted in multiple states. It might be appropriate therefore to consider whether some provision should be added to clarify where a noncollecting retailer should make the required reports if it is unclear where the purchased property will be used. Noncollecting retailers may not have implemented systems to “source” the sale since they aren’t collecting and remitting tax. One example of a potentially unclear transaction is a purchase of a gift item, for delivery into the state of the gift recipient rather than to the purchaser’s state. It might be unclear from the seller’s records where the transaction is properly reportable because there would be a discrepancy between the purchaser’s billing address and the delivery address.

It is perhaps less important to correctly “source” the transaction for reporting purposes than it would be if the proper determination of tax liability were the issue. Nevertheless, to the extent the model is widely adopted, it would “facilitate taxpayer convenience and compliance” (Compact, Article I) to provide some guidance to noncollecting sellers as to where they should file the reports in doubtful cases.

In the vast majority of cases, it is likely that the delivery address and billing address for consumer purchases is identical. Therefore, staff believes requiring the reports to be filed with the state to which the transaction is billed will capture the correct state of use in most cases. The determination of whether a particular transaction has been correctly sourced can probably be deferred until and unless there is an assessment of tax.
CHAPTER 65. SALES AND USE TAX

SUBCHAPTER 21. USE TAX

710:65-21-8. Out-of-state retailers or vendors not registered in Oklahoma

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

(1) "Non-collecting retailer" means a retailer, not currently registered to collect and remit Oklahoma sales and use tax, who makes sales of tangible personal property from a place of business outside of Oklahoma to be shipped to Oklahoma for use and who is not required to collect Oklahoma sales or use taxes.

(2) "Oklahoma purchaser" means a purchaser that requests goods be shipped to Oklahoma.

(3) "Online auction website" means a collection of web pages on the Internet that allows persons to display tangible personal property for sale which is purchased through a competitive process where participants place bids with the highest bidder purchasing the item when the bidding period ends.

(4) "De minimis retailer" means any non-collecting retailer that made total gross sales in Oklahoma in the prior year of less than $100,000.00 and reasonably expects Oklahoma sales in the current year will be less than $100,000.00.

(5) "De minimis online auction website" means any online auction website that facilitates total gross sales in Oklahoma in the prior year of less than $100,000.00 and reasonably expects Oklahoma sales in the current year will be less than $100,000.00.

(b) Requirements for notice. Effective October 1, 2010, every non-collecting retailer must give notice that Oklahoma use tax is due on nonexempt purchases of tangible personal property and should be paid by the Oklahoma purchaser.

(1) Notice contents. The notice must be readily visible and contain the information set forth as follows:

(A) The non-collecting retailer is not required, and does not collect Oklahoma sales or use tax;

(B) The purchase is subject to Oklahoma use tax unless it is specifically exempt from taxation;

(C) The purchase is not exempt merely because it is made over the Internet, by catalog, or by other remote means;

(D) The State of Oklahoma requires Oklahoma purchasers to report all purchases that were not taxed and pay tax on those purchases. The tax may be reported and paid on the Oklahoma individual income tax return [Form 511] or by filing a consumer use tax return [Form 21-1]; and

(E) The referenced forms and corresponding instructions are available on the Oklahoma Tax Commission website, www.tax.ok.gov.

(2) Website and/or catalog notice. Notice on a website shall occur on a page necessary to facilitate the applicable transaction. It shall be sufficient if the non-collecting retailer provides a prominent linking notice that reads as follows: "See important Oklahoma sales tax information regarding the tax you may owe directly to the state of Oklahoma", if such linking notice directs the purchaser to the principal notice required by this Section. Notice in a catalog shall be part of the order form. It shall be sufficient if the non-collecting retailer provides a prominent reference to a supplemental page that reads as follows: "See important Oklahoma sales tax information regarding the tax you may owe directly to the state of Oklahoma on page __", if such page includes the principal notice required by this Section.

(3) Invoice notice. For internet purchases, the invoice notice must occur on the electronic
order confirmation. It shall be sufficient if the non-collecting retailer provides a prominent linking notice that reads as follows: "See important Oklahoma sales tax information regarding the tax you may owe directly to the state of Oklahoma", if such linking notice directs the purchaser to the principal notice required by this Section. If the non-collecting retailer does not issue an electronic order confirmation, the complete notice must be placed on the purchase order, bill, receipt, sales slip, order form, or packing statement. For catalog purchases, the complete notice must be placed on the purchase order, bill, receipt, sales slip, order form, or packing statement.

(4) **Exceptions.**

(A) For internet purchases, notice on the check-out page fulfills both the website and invoice notice requirements simultaneously. It shall be sufficient if the non-collecting retailer provides a prominent linking notice that reads as follows: "See important Oklahoma sales tax information regarding the tax you may owe directly to the state of Oklahoma", if such linking notice directs the purchaser to the principal notice required by this Section.

(B) If a retailer is required to provide a similar notice for another state in addition to Oklahoma, the retailer may provide a consolidated notice so long as such notice includes the information contained in (b) of this Section, specifically references Oklahoma and meets the placement requirements of this Section.

(c) **Prohibition from advertising no tax due.** A non-collecting retailer may not state or display or imply that no tax is due on any Oklahoma purchase unless such display is accompanied by the notice required by (b) of this Section each time the display appears.

(1) For example, a summary of the transaction including a line designated "sales tax" and showing the amount of sales tax as "zero" or "0.00" would constitute a "display" implying that no tax is due on the purchase. Such a display must be accompanied by the notice required by (b) of this Section every time it appears.

(2) Notwithstanding the limitation in this subsection, if a non-collecting retailer knows that a purchase is exempt from Oklahoma tax pursuant to Oklahoma law, the non-collecting retailer may display or indicate that no sales tax is due even if such display is not accompanied by the notice required by (b) of this Section.

(d) **Invoice notification exception for online auction websites.** With the exception of notification on invoices, the provisions of this Section shall apply to online auction websites as defined in (a) of this Section.

(e) **De minimis exception.** A de minimis retailer and a de minimis online auction website, as defined in (a) of this Section, shall be exempt from the notice requirements in (b) of this Section.
AN ACT

Amending the act of March 4, 1971 (P.L.6, No.2), entitled "An act relating to tax reform and State taxation by codifying and enumerating certain subjects of taxation and imposing taxes thereon; providing procedures for the payment, collection, administration and enforcement thereof; providing for tax credits in certain cases; conferring powers and imposing duties upon the Department of Revenue, certain employers, fiduciaries, individuals, persons, corporations and other entities; prescribing crimes, offenses and penalties," in sales and use tax, providing for remote sales tax notice.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, is amended by adding a section to read:

Section 279. Remote Sales Tax Notice.--(a) A seller in this Commonwealth or remote seller shall conspicuously provide the following notice to a purchaser in this Commonwealth upon each separate sale at retail of tangible personal property or services via an Internet website operated by the seller or remote seller:

"Unless you paid Pennsylvania sales tax on this purchase,
you may owe a Pennsylvania use tax on this purchase based on the total sales price of the purchase in accordance with the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971. Visit www.revenue.state.pa.us for more information. If you owe a Pennsylvania use tax on this purchase, you must report and remit the tax on your Pennsylvania income tax form."

(b) The department shall impose a fine of not less than five dollars ($5) on a seller or remote seller for each sale in which the seller or remote seller is in violation of this section.

(c) This section shall apply to sales made on or after the effective date of this section.

Section 2. This act shall take effect in 60 days.
AN ACT concerning sales and use taxation; relating to the administration thereof; required notices and reports.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in sections 1 through 6, and amendments thereto:

(a) "Director" means the state director of taxation.

(b) "Kansas purchase" means:

(1) In the case of goods that are shipped, a Kansas purchase is one that is shipped into Kansas;

(2) with respect to sales of goods that are downloaded or otherwise delivered electronically:

(A) If the purchaser provides a "bill to" address, then a Kansas purchase is one for which the "bill to" address is in Kansas; or

(B) if the purchaser does not provide a "bill to" address, then the retailer that does not collect Kansas sales tax shall determine whether a purchaser is in Kansas, and is therefore a Kansas purchaser, using any other commercially reasonable method based on the business's existing billing, customer-tracking or other systems.

A "Kansas purchase" shall not include any purchases or rentals of VHS tapes, DVDs, blu-ray disks or other video materials to the extent that disclosure of the purchasers of such items would violate 18 U.S.C. § 2710.

(c) "Kansas purchaser" means:

(1) With respect to sales of goods that are shipped, a Kansas purchaser is a purchaser that requests the goods be shipped into Kansas. If a purchase is made by one party, who may be inside or outside of Kansas, and shipped to a party in Kansas, the Kansas purchaser is the purchaser of the goods, not the recipient of the goods; or

(2) with respect to sales of goods that are downloaded or otherwise delivered electronically:

(A) If the purchaser provides a "bill to" address, then a Kansas purchaser is a purchaser whose "bill to" address is in Kansas; or

(B) if the purchaser does not provide a "bill to" address, then the retailer that does not collect Kansas sales tax shall determine whether a purchaser is in Kansas, and is therefore a Kansas purchaser, using any other commercially reasonable method based on the business’s existing billing, customer-tracking or other systems.
SB 111

(d) (1) "Retailer that does not collect Kansas sales tax" means a retailer that sells goods to Kansas purchasers and that does not collect Kansas sales or use tax. A retailer that does not collect Kansas sales tax includes a retailer that makes sales in Kansas both by means of download of digital goods or software and by means of shipping or otherwise physically delivering goods to a Kansas purchaser.

(2) A "retailer that does not collect Kansas sales tax" does not include:

(A) A retailer that makes sales in Kansas solely by means of download of digital goods or software; or

(B) A retailer that makes less than $100,000 in total gross sales in Kansas in the prior calendar year and that reasonably expects total gross sales in Kansas in the current calendar year will be less than $100,000.

(e) "Secretary" means the secretary of revenue.

Sec. 2. A retailer that does not collect Kansas sales tax who makes sales to a Kansas purchaser shall maintain records and books of such sales in the same manner as provided in K.S.A. 79-3609, and amendments thereto. If any such retailer fails to voluntarily furnish any of the information specified in K.S.A. 79-3609(a), and amendments thereto, when requested by the director, or the director's duly authorized agents and employees, the director may issue subpoenas to compel access to or for the production of such books, papers, records, invoices or documents in the custody of or to which the retailer has access, or to compel the appearance of such retailer, and may issue interrogatories to any such retailer to the same extent and subject to the same limitations as would apply if the subpoena or interrogatories were issued or served in aid of a civil action in the district court. The director may administer oaths and take depositions to the same extent and subject to the same limitations as would apply if the deposition was in aid of a civil action in the district court. In case of the refusal of any retailer to comply with any subpoena or interrogatory or to testify to any matter which such person may be lawfully questioned, the district court of any county may, upon application of the director, order such retailer to comply with such subpoena or interrogatory or to testify. Failure to obey the court's order may be punished by the court as contempt. Subpoenas or interrogatories issued under the provisions of this section may be served upon individuals and corporations in the manner provided in K.S.A. 60-304, and amendments thereto, for the service of process by any officer authorized to serve subpoenas in civil actions or by the director.

Sec. 3. (a) (1) Each retailer that does not collect Kansas sales tax shall notify Kansas purchasers that sales or use tax is due on all purchases made from the retailer that are not exempt from sales tax and that the state of Kansas requires the purchaser to report use taxes due on their K-40 tax.
form. Such notice must be provided with respect to each transaction between the retailer that does not collect Kansas sales tax and a Kansas purchaser. Such notice must be clearly legible, reasonably prominent and located in close proximity to the total price.

(2) The notice required by this section shall contain the following information:
   (A) A statement indicating that the retailer does not collect Kansas sales or use tax;
   (B) the purchase is not exempt from Kansas sales or use tax merely because it is made over the internet or by other remote means; and
   (C) the state of Kansas requires a Kansas purchaser to report the use tax due on such purchaser's K-40 tax form.

(3) Failure to provide the notice required by subsection (a) shall subject the retailer to a penalty of $5 for each such failure. The director may waive all or a portion of such penalty for reasonable cause shown.

(b) (1) Each retailer that does not collect Kansas sales tax shall send an annual notice to all Kansas purchasers by January 31 of each year summarizing the Kansas purchases of a Kansas purchaser for the preceding calendar year. Such notice shall be sent separately to all Kansas purchasers by first-class mail, shall include the words "Important Tax Document Enclosed" on the exterior of the mailing and shall not be included with any other shipments.

   (2) The notice required by this subsection shall include the following information:
      (A) The name of the retailer;
      (B) the total amount paid by the Kansas purchaser for Kansas purchases made from the retailer in the previous calendar year. Such notification shall also include, if available, the dates of purchase, the amounts of each purchase and the category of the purchase, including, if known by the retailer, whether the purchase is exempt or not exempt from taxation;
      (C) that the state of Kansas requires use taxes due to be reported on the K-40 tax form;
      (D) that the retailer is required by law to provide the Kansas department of revenue with the total dollar amount of purchases made by the Kansas purchaser, however, no information about the purchase other than the dollar amount will be provided to the department; and
      (E) any other information required by the director.

(3) If the retailer is required by another state to provide a similar notice, and the retailer provides a single such notice to all purchasers with respect to items purchased for delivery in all states, the notice required by subsection (b) shall be sufficient if it contains substantially all the information required in a form that is generalized to any state.
(4) Any retailer that does not collect Kansas sales tax that is required to send an annual notice to Kansas purchasers as required by this subsection shall not be required to send the notice to any de minimis Kansas purchaser. A de minimis Kansas purchaser shall be a Kansas purchaser whose total Kansas purchases for the prior calendar year are less than $500. Such retailer shall make commercially reasonable business efforts, based on the business's existing billing, customer-tracking or other systems, to identify multiple purchases made by a single Kansas purchaser.

(5) Failure to provide the notice required by subsection (b) shall subject the retailer to a penalty of $10 for each such failure. The director may waive all or a portion of such penalty for reasonable cause shown.

Sec. 4. (a) On or before March 1 of each year, each retailer that does not collect Kansas sales tax who is required to file a notice under the provisions of section 3(b), and amendments thereto, shall file an annual statement for each purchaser to the department of revenue on such forms as approved by the department. Such notice shall contain the following information:

(1) The name of each Kansas purchaser;

(2) the billing address of each Kansas purchaser, if the information was provided to the retailer;

(3) the shipping address of each Kansas purchaser, if the information was provided to the retailer; and

(4) the total amount of Kansas purchases made by each Kansas purchaser during the prior calendar year. No other information about the purchase shall be provided.

(b) If the retailer has more than one Kansas billing address or more than one Kansas shipping address for a Kansas purchaser, then the retailer shall provide all such addresses of the Kansas purchaser.

(c) Any retailer who is not required to send any notices pursuant to the provisions of section 3(b)(4), and amendments thereto, shall also be exempt from the requirements to send the report required by this section.

(d) If a retailer is required to provide any notices pursuant to the provisions of section 3(b), and amendments thereto, then such retailer must include all the purchases made by all Kansas purchasers in its report, including any purchases made by de minimis Kansas purchasers as determined under section 3(b)(4), and amendments thereto.

(e) Failure to file the notice required by this section shall subject the retailer to a penalty equal to $10 times the number of Kansas purchasers that should have been included in the report. The director may waive all or a portion of such penalty for reasonable cause shown.

Sec. 5. Any information obtained by the department of revenue in connection with the administration of sections 1 through 4, and amendments thereto, shall be subject to the same confidentiality provisions
as set forth in K.S.A. 79-3614, and amendments thereto.

Sec. 6. The secretary may adopt any rules and regulations necessary to administer the provisions of sections 1 through 5, and amendments thereto.

Sec. 7. This act shall take effect and be in force from and after its publication in the statute book.
Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas  

As Engrossed: H1/31/17 H2/3/17

A Bill

HOUSE BILL 1388

By: Representative D. Douglas

By: Senator Files

For An Act To Be Entitled

AN ACT TO REQUIRE OUT-OF-STATE SELLERS AND
FACILITATORS TO PROVIDE NOTICE TO ARKANSAS PURCHASERS
REGARDING TAX DUE ON CERTAIN PURCHASES; TO REQUIRE
OUT-OF-STATE SELLERS AND FACILITATORS TO REPORT SALES
MADE TO ARKANSAS PURCHASERS; AND FOR OTHER PURPOSES.

Subtitle

TO REQUIRE OUT-OF-STATE SELLERS AND
FACILITATORS TO PROVIDE NOTICE TO
ARKANSAS PURCHASERS REGARDING TAX DUE ON
CERTAIN PURCHASES AND TO REPORT SALES
MADE TO ARKANSAS PURCHASERS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 26-52-110(f), concerning referral
agreements between sellers and affiliated persons and the notice required, is
amended to read as follows:

(f) A seller that does not have a physical presence in this state and
does not collect Arkansas sales or use tax on sales made to Arkansas
purchasers shall:

(1)(A) Notify Arkansas purchasers at the time of purchase that
sales or use tax is due on certain purchases made from the seller and that
the State of Arkansas requires the purchaser to file a sales or use tax
return.

(B) A seller that fails to provide the notice required
under this subdivision (f)(1) is subject to a penalty of five dollars ($5.00) for each failure to provide notice, unless the seller shows reasonable cause for the failure to provide notice;

(2)(A) If a seller does not collect Arkansas sales or use tax, send notice to all Arkansas purchasers by January 31 of each year showing the total amount paid by the purchaser for Arkansas purchases made from the seller in the previous calendar year.

(B) The notice required under this subdivision (f)(2) shall:

(i) Include, if available, the date of each purchase, the amount of each purchase, and the category of each purchase, including without limitation whether the purchase is exempt from taxation;

(ii) State that the State of Arkansas requires a sales or use tax return to be filed and sales or use tax paid on certain Arkansas purchases made by the purchaser from the seller;

(iii) Be sent separately to each Arkansas purchaser through communication by electronic means or first-class mail;

(iv) Not be included with any other shipment or electronic communication; and

(v) Include the words important tax document enclosed” and the name of the seller on the exterior of the mailing or within the electronic communication.

(C) A seller that fails to provide the notice required under this subdivision (f)(2) is subject to a penalty of ten dollars ($10.00) for each failure to provide notice, unless the seller shows reasonable cause for the failure to provide notice; and

(3)(A) By March 1 of each year, file an annual report of sales to each Arkansas purchaser with the Director of the Department of Finance and Administration.

(B) The report required under this subdivision (f)(3) shall include:

(i) The name of the purchaser;

(ii) The total amount paid by each purchaser to the seller during the immediately preceding calendar year; and

(iii) Each delivery or shipping address provided by the purchaser to the seller.
(C) A seller that fails to provide the annual report required under this subdivision (f)(3) is subject to a penalty of ten dollars ($10.00) for each purchaser that should have been included in the annual report, unless the seller shows reasonable cause for the failure to provide the report.

(g) A seller is presumed to be engaged in the business of selling tangible personal property or taxable services for use in this state if the seller enters into an agreement with a facilitator to directly aid or assist the seller in making remote sales.

(h) A facilitator shall:

(1) (A) Notify:

(i) Arkansas purchasers at the time of purchase that sales or use tax is due on certain purchases made from sellers and that the State of Arkansas requires the purchaser to file a sales or use tax return; and

(ii) Sellers to Arkansas purchasers that sales or use tax is imposed on sales made to Arkansas purchasers.

(B) A facilitator that fails to provide the notices required under this subdivision (h)(1) is subject to a penalty of five dollars ($5.00) for each failure to provide notice, unless the facilitator shows reasonable cause for the failure to provide notice.

(2) (A) By March 1 each year, file an annual report of each seller to the director showing the total amount paid by Arkansas purchasers to the seller during the preceding calendar year.

(B) A facilitator that fails to provide the annual report required under this subdivision (h)(2) is subject to a penalty of ten dollars ($10.00) for each seller that should have been included in the annual report, unless the facilitator shows reasonable cause for the failure to provide the report.

(k) The Director of the Department of Finance and Administration shall promulgate rules to implement this section.

SECTION 2. EFFECTIVE DATE. Section 1 of this act is effective on and after January 1, 2018.

/s/D. Douglas
AN ACT Relating to adopting retail sale nexus standards to require retail sales tax collection by remote sellers selling into Washington; amending RCW 82.04.066, 82.04.067, 82.04.220, 82.08.050, 82.08.052, 82.12.040, 82.32.762, and 82.32.045; adding new sections to chapter 82.08 RCW; adding new sections to chapter 82.32 RCW; adding a new chapter to Title 82 RCW; creating new sections; repealing RCW 82.04.424; prescribing penalties; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Part I
Findings and Intent

NEW SECTION. Sec. 101. (1) The legislature finds that states fail to collect more than twenty-three billion dollars annually in sales taxes from remote sales over the internet and through catalogues. The legislature further finds that Washington and its local governments will lose out on an estimated three hundred fifty-three million dollars in sales and use taxes in fiscal year 2018 from remote sales, reducing funds that would otherwise be available for the public education system, health care services, infrastructure, and other vital public services.
(2) The legislature recognizes that states may not impose sales
or use tax collection obligations on an out-of-state business unless
the business has a substantial nexus with the taxing state. The
legislature also recognizes that under the United States supreme
court's decision in National Bellas Hess v. Dep't of Revenue of Ill.,
386 U.S. 753 (1967), substantial nexus under the commerce clause
requires a physical presence by the seller in the taxing state.
Relying on the doctrine of stare decisis, the United States supreme
court reaffirmed the physical presence nexus standard twenty-five

(3) The legislature further finds that the basis of the physical
presence nexus standard was primarily justified by the complexity and
burden on mail order sellers and other out-of-state sellers in
complying with the sales tax laws in numerous jurisdictions at the
state and local level all across the country. The legislature further
finds that the supreme court's concerns underlying the Bellas Hess
decision have been effectively addressed by advances in technology
and simplified tax laws. For example, Washington and most other
states with sales taxes allow or require electronic reporting and
payment of the tax. Also, several states, including Washington, offer
free online sales tax rate lookup tools. A number of private
companies offer automated sales tax compliance solutions. In
addition, sales tax laws have been simplified in many states,
including Washington, through participation in the streamlined sales
and use tax project and compliance with the streamlined sales and use
tax agreement.

(4) The legislature further finds that Bellas Hess was decided
one year before the first plans were developed for the computer
network that became the basis of the internet. The legislature
further finds that since Quill was decided e-commerce has grown
substantially, generating retail sales of over three hundred forty-
one billion dollars in 2015, which have been growing at a rate of
about fifteen percent for the last five years. The legislature
further finds that like their brick and mortar competitors, online
businesses receive benefits and opportunities provided by their
market states, such as transportation networks, infrastructure, laws
providing protection of business interests, access to the courts to
protect valuable rights, and a regulated marketplace. However, the
legislature finds that under the current physical presence nexus
standard, online only sellers have an unfair competitive advantage
over in state brick and mortar stores to the detriment of main street retailers. Online only businesses have no geographical limitations to their marketplace; no costs of maintaining local physical retail stores, such as infrastructure costs, employee costs, and property taxes; and may not have to collect sales tax on sales to customers in states in which they do not have a physical presence, all of which lead to their ability to price their goods at a lower cost to consumers. The legislature further finds that even if the physical presence nexus standard was once a wise rule of law, it is no longer justifiable.

(5) The legislature further finds that the supreme court in its Quill decision implicitly invited the United States congress to resolve whether and to what extent states may impose a sales tax collection obligation on remote sellers. The legislature further finds that there is overwhelming support among the public, states, and municipalities, and many national and local associations representing brick and mortar businesses for federal legislation requiring remote sellers to collect and remit retail sales tax. The legislature further finds that despite such broad-based support, congress has failed to enact such legislation.

(6) The legislature agrees with Justice Kennedy's concurring opinion in the Direct Marketing Association v. Brohl decision (135 S. Ct. 1124) that the court's Quill holding is "inflicting extreme harm and unfairness on the States," and that "[t]here is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently 'substantial nexus' to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet." Justice Kennedy stated that "it is unwise to delay any longer a reconsideration of the Court's holding in Quill," and he closed his opinion by inviting a direct challenge to Quill and Bellas Hess, saying that "[t]he legal system should find an appropriate case for this Court to reexamine Quill and Bellas Hess."

(7) The legislature finds that because Washington is unique in that it relies so heavily on sales tax to fund education and other vital state services, and because Washington has frequently been at the forefront of advancing technology and tax policy, it is incumbent upon this state to lead the way to a more fair and equitable modern marketplace where online businesses and brick and mortar businesses can compete based on quality of products and other nontax factors, which benefits all consumers. The legislature recognizes that the
fast pace of technological change seen with the rapid growth of electronic commerce puts pressure on states to update their tax codes just as this state did (a) in 2007 in adopting Senate Bill No. 5089, which enacted significant simplifications in sales and use administration and brought Washington into full compliance with the streamlined sales and use tax agreement, (b) in 2009 in adopting Engrossed Substitute House Bill No. 2075 addressing the excise taxation of digital products, and (c) in 2010 in adopting economic nexus and market-based apportionment for business and occupation tax purposes in Second Engrossed Substitute Senate Bill No. 6143. The legislature finds that making such changes is not radical or to be unexpected, but is a rational means to avoid an ever shrinking tax base resulting from an outdated tax code that has not kept up with significant changes in technology and the economy.

(8) The legislature finds that several states, including Alabama, South Dakota, and Tennessee have taken measures to adopt an "economic nexus" standard with respect to the collection of sales tax. The legislature further finds that other states are considering adopting similar rules or legislation.

(9) The legislature also finds that Colorado adopted a law requiring out-of-state retailers that do not collect Colorado's sales tax to report tax-related information to their Colorado customers and the Colorado department of revenue. The legislature further finds that in 2016 the United States court of appeals for the tenth circuit upheld that law.

(10) Therefore, the legislature intends by this act to address the significant harm and unfairness brought about by the physical presence nexus rule by testing the boundaries of the rule. This act also sets up a legal challenge to the physical presence nexus rule that could potentially lead to the United States supreme court reevaluating Bellas Hess and Quill or congress enacting legislation authorizing and establishing the requirements for states to impose a sales tax collection duty on remote sellers. To achieve these objectives, part II of this act establishes clear statutory guidelines for determining when sellers are required to collect Washington's sales tax. These guidelines clarify the extent of the traditional physical presence standard and also adopt an "economic nexus" standard under which a remote seller would establish a substantial nexus with this state solely by making a meaningful amount of sales into this state. Part II of this act also extends the
economic nexus standard for the business and occupation tax imposed on retail sales taxed under RCW 82.04.250(1) and 82.04.257(1). Part III of this act adopts a sales and use tax notice and reporting law based on the multistate tax commission's draft model sales and use tax notice reporting statute, which is similar to Colorado's sales and use tax notice reporting law.

(11) The legislature recognizes that the enactment of part II of this act places remote sellers in a complicated position, precisely because existing constitutional doctrine calls certain provisions of part II of this act into question. Accordingly, the legislature intends to clarify that the obligations created by this law on sellers with a substantial nexus with this state under section 206(1)(b) of this act would be appropriately stayed by the courts until the constitutionality of section 206(1)(b) of this act has been clearly established by a binding judgment, including, for example, a decision from the supreme court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer.

(12) The legislature finds that the declaratory judgment action authorized in section 211 of this act is warranted by existing law, by good faith arguments for the extension, modification, or reversal of existing law, or the establishment of new law.

Part II
Nexus for Excise Tax Purposes

Sec. 201. RCW 82.04.066 and 2015 3rd sp.s. c 5 s 203 are each amended to read as follows:
"Engaging within this state" and "engaging within the state," when used in connection with any apportionable activity as defined in RCW 82.04.460 or ((wholesale sales)) selling activity taxable under RCW 82.04.250(1), 82.04.257(1), or 82.04.270, means that a person generates gross income of the business from sources within this state, such as customers or intangible property located in this state, regardless of whether the person is physically present in this state.

Sec. 202. RCW 82.04.067 and 2016 c 137 s 2 are each amended to read as follows:
(1) A person engaging in business is deemed to have substantial nexus with this state if, in the current or immediately preceding calendar year, the person is:

(a) An individual and is a resident or domiciliary of this state; 
(b) A business entity and is organized or commercially domiciled in this state; or
(c) A nonresident individual or a business entity that is organized or commercially domiciled outside this state, and (in the immediately preceding tax year) the person had:

(i) More than ((fifty)) fifty-three thousand dollars of property in this state;
(ii) More than ((fifty)) fifty-three thousand dollars of payroll in this state;
(iii) More than two hundred ((fifty)) sixty-seven thousand dollars of receipts from this state; or
(iv) At least twenty-five percent of the person's total property, total payroll, or total receipts in this state.

(2)(a) Property counting toward the thresholds in subsection (1)(c)(i) and (iv) of this section is the average value of the taxpayer's property, including intangible property, owned or rented and used in this state during the current or immediately preceding ((tax)) calendar year.

(b)(i) Property owned by the taxpayer, other than loans and credit card receivables owned by the taxpayer, is valued at its original cost basis. Loans and credit card receivables owned by the taxpayer are valued at their outstanding principal balance, without regard to any reserve for bad debts. However, if a loan or credit card receivable is charged off in whole or in part for federal income tax purposes, the portion of the loan or credit card receivable charged off is deducted from the outstanding principal balance.

(ii) Property rented by the taxpayer is valued at eight times the net annual rental rate. For purposes of this subsection, "net annual rental rate" means the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(c) The average value of property must be determined by averaging the values at the beginning and ending of the ((tax)) applicable calendar year; but the department may require the averaging of monthly values during the ((tax)) applicable calendar year if reasonably required to properly reflect the average value of the taxpayer's property.
(d)(i) For purposes of this subsection (2), loans and credit card receivables are deemed owned and used in this state as follows:

(A) Loans secured by real property, personal property, or both real and personal property are deemed owned and used in the state if the real property or personal property securing the loan is located within this state. If the property securing the loan is located both within this state and one or more other states, the loan is deemed owned and used in this state if more than fifty percent of the fair market value of the real or personal property is located within this state. If more than fifty percent of the fair market value of the real or personal property is not located within any one state, then the loan is deemed owned and used in this state if the borrower is located in this state. The determination of whether the real or personal property securing a loan is located within this state must be made, as of the time the original agreement was made, and any and all subsequent substitutions of collateral must be disregarded.

(B) Loans not secured by real or personal property are deemed owned and used in this state if the borrower is located in this state.

(C) Credit card receivables are deemed owned and used in this state if the billing address of the cardholder is in this state.

(ii)(A) Except as otherwise provided in (d)(ii)(B) of this subsection (2), the definitions in the multistate tax commission's recommended formula for the apportionment and allocation of net income of financial institutions as existing on June 1, 2010, or such subsequent date as may be provided by the department by rule, consistent with the purposes of this section, apply to this section.

(B) "Credit card" means a card or device existing for the purpose of obtaining money, property, labor, or services on credit.

(e) Notwithstanding anything else to the contrary in this subsection, property counting toward the thresholds in subsection (1)(c)(i) and (iv) of this section does not include a person's ownership of, or rights in, computer software as defined in RCW 82.04.215, including computer software used in providing a digital automated service; master copies of software; and digital goods and digital codes residing on servers located in this state.

(3)(a) Payroll counting toward the thresholds in subsection (1)(c)(ii) and (iv) of this section is the total amount paid by the taxpayer for compensation in this state during the immediately preceding tax year plus nonemployee compensation paid to
representative third parties in this state. Nonemployee compensation paid to representative third parties includes the gross amount paid to nonemployees who represent the taxpayer in interactions with the taxpayer's clients and includes sales commissions.

(b) Employee compensation is paid in this state if the compensation is properly reportable to this state for unemployment compensation tax purposes, regardless of whether the compensation was actually reported to this state.

(c) Nonemployee compensation is paid in this state if the service performed by the representative third party occurs entirely or primarily within this state.

(d) For purposes of this subsection, "compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees or nonemployees and defined as gross income under 26 U.S.C. Sec. 61 of the federal internal revenue code of 1986, as existing on June 1, 2010.

(4) Receipts counting toward the thresholds in subsection (1)(c)(iii) and (iv) of this section are:

(a) Those amounts included in the numerator of the receipts factor under RCW 82.04.462;

(b) For financial institutions, those amounts included in the numerator of the receipts factor under the rule adopted by the department as authorized in RCW 82.04.460(2); and

(c) For persons taxable under RCW 82.04.250(1), 82.04.257(1), or 82.04.270 ((with respect to wholesale sales)), the gross proceeds of sales taxable under those statutory provisions and sourced to this state in accordance with RCW 82.32.730.

(5)(a) Each December, the department must review the cumulative percentage change in the consumer price index. The department must adjust the thresholds in subsection (1)(c)(i) through (iii) of this section if the consumer price index has changed by five percent or more since the later of June 1, 2010, or the date that the thresholds were last adjusted under this subsection. For purposes of determining the cumulative percentage change in the consumer price index, the department must compare the consumer price index available as of December 1st of the current year with the consumer price index as of the later of June 1, 2010, or the date that the thresholds were last adjusted under this subsection. The thresholds must be adjusted to reflect that cumulative percentage change in the consumer price index. The adjusted thresholds must be rounded to the nearest one
thousand dollars. Any adjustment will apply to tax periods that begin
after the adjustment is made.

(b) As used in this subsection, "consumer price index" means the
consumer price index for all urban consumers (CPI-U) available from
the bureau of labor statistics of the United States department of
labor.

(6)(a) (i) Except as provided in (a)(iii) of this subsection (6),
subsections (1) through (5) of this section only apply with respect
to the taxes on persons engaged in apportionable activities as
defined in RCW 82.04.460 or making wholesale sales taxable under RCW
82.04.257(1) or 82.04.270.

(ii) Subject to the limitation in RCW 82.32.531, for purposes of
the taxes imposed under this chapter on ((any)) the business of
making sales at retail or any other activity not included in the
definition of apportionable activities in RCW 82.04.460, other than
the business of making wholesale sales taxed under RCW 82.04.257(1)
or 82.04.270, ((except as provided in RCW 82.32.531,)) a person is
deemed to have a substantial nexus with this state if the person has
a physical presence in this state during the tax year, which need
only be demonstrably more than a slightest presence.

(iii) For purposes of the taxes imposed under this chapter on the
business of making sales at retail taxable under RCW 82.04.250(1) or
82.04.257(1), a person is also deemed to have a substantial nexus
with this state if the person's receipts from this state, pursuant to
subsection (4)(c) of this section, meet either criterion in
subsection (1)(c)(iii) or (iv) of this section, as adjusted under
subsection (5) of this section.

(b) For purposes of this subsection, a person is physically
present in this state if the person has property or employees in this
state.

(c)(i) A person is also physically present in this state for the
purposes of this subsection if the person, either directly or through
an agent or other representative, engages in activities in this state
that are significantly associated with the person's ability to
establish or maintain a market for its products in this state.

(ii) A remote seller as defined in RCW 82.08.052 is presumed to
be engaged in activities in this state that are significantly
associated with the remote seller's ability to establish or maintain
a market for its products in this state if the remote seller is
presumed to have a substantial nexus with this state under RCW
The presumption in this subsection (6)(c)(ii) may be rebutted as provided in RCW 82.08.052. To the extent that the presumption in RCW 82.08.052 is no longer operative pursuant to RCW 82.32.762, the presumption in this subsection (6)(c)(ii) is no longer operative. 

Nothing in this section may be construed to affect in any way RCW 82.04.424, 82.08.050(11), or 82.12.040(5) or to narrow the scope of the terms "agent" or "other representative" in this subsection (6)(c).

Sec. 203. RCW 82.04.220 and 2011 1st sp.s. c 20 s 101 are each amended to read as follows:

(1) There is levied and collected from every person that has a substantial nexus with this state a tax for the act or privilege of engaging in business activities. The tax is measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

(2)(a) A person who has a substantial nexus with this state in any tax year under the provisions of RCW 82.04.067 will be deemed to have a substantial nexus with this state for the following tax year the current calendar year under the provisions of RCW 82.04.067, based solely on the person's property, payroll, or receipts in this state during the current calendar year, is subject to the tax imposed under this chapter for the current calendar year only on business activity occurring on and after the date that the person established a substantial nexus with this state in the current calendar year.

(b) This subsection (2) does not apply to any person who also had a substantial nexus with this state (i) during the immediately preceding calendar year under RCW 82.04.067, or (ii) during the current calendar year under RCW 82.04.067 (1) (a) or (b) or (6) (a)(ii) or (c).

NEW SECTION. Sec. 204. RCW 82.04.424 (Exemptions—Certain in-state activities) and 2015 3rd sp.s. c 5 s 206 & 2003 c 76 s 2 are each repealed.

NEW SECTION. Sec. 205. A new section is added to chapter 82.08 RCW to be codified between RCW 82.08.050 and 82.08.052 to read as follows:
A seller with a substantial nexus with this state must comply with the provisions of this chapter.

NEW SECTION. Sec. 206. A new section is added to chapter 82.08 RCW to be codified between RCW 82.08.052 and 82.08.054 to read as follows:

(1) A seller has a substantial nexus with this state during a calendar year for the purposes of collecting the taxes imposed under this chapter if, during the current or immediately preceding calendar year:

(a) The seller had its property or employees in this state for the seller's business purposes; or

(b) The seller's receipts from retail sales in this state, pursuant to RCW 82.04.067(4), meet either criterion in RCW 82.04.067(1)(c) (iii) or (iv), as adjusted under RCW 82.04.067(5).

(2) A seller also has a substantial nexus with this state during a calendar year for the purposes of collecting the taxes imposed under this chapter if the seller's total gross proceeds of sales at retail sourced to this state under RCW 82.32.730 exceed ten thousand dollars during the current or immediately preceding calendar year and at any time during such current or immediately preceding calendar year:

(a)(i) The seller offers its products for sale through one or more marketplaces operated by any marketplace facilitator that has a substantial nexus with this state; or

(ii) The seller or another person, as the case may be, including an affiliated person, other than a common carrier acting solely as a common carrier, engages in or performs any of the following activities in this state, but not including the activities described in RCW 82.08.052:

(A) Sells a similar line of products as the seller and does so under the same business name as the seller or a similar business name as the seller;

(B) Uses its employees, agents, representatives, or independent contractors in this state to promote or facilitate sales by the seller to purchasers in this state;

(C) Maintains, occupies, or uses an office, distribution facility, warehouse, storage place, or similar place of business in this state to facilitate the delivery or sale of tangible personal property sold by the seller to the seller's purchasers in this state;
(D) Uses, with the seller's consent or knowledge, trademarks, service marks, or trade names in this state that are the same or substantially similar to those used by the seller;

(E) Delivers, installs, assembles, or performs maintenance or repair services for the seller's purchasers in this state;

(F) Facilitates the sale of tangible personal property to purchasers in this state by allowing the seller's purchasers in this state to pick up or return tangible personal property sold by the seller at an office, distribution facility, warehouse, storage place, or any other place of business maintained by that person in this state;

(G) Shares management, business systems, business practices, or employees with the seller or, in the case of an affiliated person, engages in intercompany transactions related to the activities occurring with the seller to establish or maintain the seller's market in this state; or

(H) Conducts any other activities in this state that are significantly associated with the seller's ability to establish and maintain a market in this state for the seller's sales of products to purchasers in this state; or

(b)(i) The seller is under contract with a payment processor or merchant bank, or accepts credit cards issued either by a financial institution under a license from a credit card association or by an entity that also authorizes purchases and settles with consumers and merchants, if the payment processor, merchant bank, credit card association, or credit card issuer has a substantial nexus with this state for purposes of collecting the taxes imposed under this chapter.

(ii) Pursuant to RCW 82.32.330(3)(u), the department may disclose the identity of payment processors, credit card associations, credit card issuers described in (b)(i) of this subsection (2), and merchant banks that have a substantial nexus with this state for purposes of collecting the taxes imposed under this chapter.

(3)(a) For purposes of subsection (2)(a)(i) of this section, a marketplace facilitator is deemed to have a substantial nexus with this state during a calendar year if:

(i) The marketplace facilitator or any affiliated person maintained a physical presence in this state during any portion of the current or immediately preceding calendar year to engage in any
of the activities described in subsection (5)(a)(i) or (ii) of this section; or

(ii) The marketplace facilitator generated more than ten thousand dollars of gross proceeds of sales in the current or immediately preceding calendar year from retail sales made through its physical or electronic marketplace by sellers that are physically located in this state. For purposes of this subsection (3)(a)(ii), a seller is presumed to be physically located in this state if the address for the seller maintained in the business records of the marketplace facilitator is in this state.

(b) Pursuant to RCW 82.32.330(3)(u), the department may disclose the identity of marketplace facilitators that have a substantial nexus with this state for purposes of collecting the taxes imposed under this chapter.

(4) For purposes of this section, persons are "affiliated persons" with respect to each other where one of the persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of the persons by another person or by a group of other persons who are affiliated with respect to each other.

(5) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Marketplace facilitator" means a person that contracts with sellers to facilitate, for consideration, the sale of the seller's products through a physical or electronic marketplace operated by the person, and engages, either directly or indirectly, through one or more affiliated persons, in:

(i) Any of the following:

(A) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller;

(B) Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;

(C) Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller; or

(D) Software development or research and development activities related to any of the activities described in (a)(i)(A) through (C) or (ii)(A) through (H) of this subsection (5), if such activities are directly related to a physical or electronic marketplace operated by the person or an affiliated person; and
(ii) Any of the following activities with respect to the seller's products:

(A) Payment processing services;
(B) Fulfillment or storage services;
(C) Listing products for sale;
(D) Setting prices;
(E) Branding sales as those of the marketplace facilitator;
(F) Order taking;
(G) Advertising or promotion; or
(H) Providing customer service or accepting or assisting with returns or exchanges.

(b) "Merchant bank" means a financial institution or any other member of a credit card network that allows the seller to accept credit card payments and is responsible for depositing transaction proceeds into the seller's designated account.

(c) "Payment processor" means a person that contracts directly with a seller to provide settlement for the seller's credit card, debit card, or other payment transactions.

(d) "Product" means any property or service that is sold in a sale at retail as defined in RCW 82.04.050.

(6) This section is subject to RCW 82.32.762.

NEW SECTION. Sec. 207. A new section is added to chapter 82.08 RCW to be codified between section 206 of this act and RCW 82.08.054 to read as follows:

(1) For purposes of this chapter, a marketplace facilitator is deemed to be an agent of any marketplace seller making retail sales through the marketplace facilitator's physical or electronic marketplace. A marketplace facilitator with a substantial nexus with this state must collect and remit to the department the taxes imposed under this chapter on all taxable retail sales made through the marketplace facilitator's marketplace and sourced to this state under RCW 82.32.730, whether as principal or as the agent of a marketplace seller.

(2) A marketplace facilitator is relieved of liability under this chapter for failure to collect the correct amount of tax to the extent that the marketplace facilitator can show to the department's satisfaction that the error was due to incorrect information given to the marketplace facilitator by the marketplace seller, unless the marketplace facilitator and marketplace seller are affiliated
persons. Where the marketplace facilitator is relieved of liability under this subsection (2), the marketplace seller is solely liable for the amount of uncollected tax due.

(3)(a) A marketplace facilitator is relieved of liability under this chapter for the failure to collect tax on taxable retail sales to the extent that the marketplace facilitator can show to the department's satisfaction that:

(i) The taxable retail sale was made through the marketplace facilitator's marketplace;

(ii) The taxable retail sale was made solely as the agent of a marketplace seller, and the marketplace facilitator and marketplace seller are not affiliated persons; and

(iii) The failure to collect sales tax was not due to an error in sourcing the sale under RCW 82.32.730.

(b) Where the marketplace facilitator is relieved of liability under this subsection (3), the marketplace seller is also relieved of liability for the amount of uncollected tax due, subject to the limitations in subsection (4) of this section.

(4) A marketplace seller with a substantial nexus with this state is relieved of its obligation to collect the taxes imposed under this chapter on all taxable retail sales through a marketplace operated by a marketplace facilitator if the marketplace seller has obtained documentation from the marketplace facilitator indicating that the marketplace facilitator is registered with the department and will collect all applicable taxes due under this chapter on all taxable retail sales made on behalf of the marketplace seller through the marketplace operated by the marketplace facilitator. The documentation required by this subsection (4) must be provided in a form and manner prescribed by or acceptable to the department. This subsection (4) does not relieve a marketplace seller from liability for uncollected taxes due under this chapter resulting from a marketplace facilitator's failure to collect the proper amount of tax due when the error was due to incorrect information given to the marketplace facilitator by the marketplace seller.

(5) Nothing in this section affects the obligation of any purchaser to remit sales or use tax as to any applicable taxable transaction in which the seller or the seller's agent does not collect and remit sales tax.

(6) For purposes of this section, the following definitions apply:
(a) "Affiliated person" has the same meaning as in section 206 of this act.

(b) "Marketplace facilitator" has the same meaning as in section 206 of this act.

(c) "Marketplace seller" means a seller that makes retail sales through any physical or electronic marketplace operated by a marketplace facilitator, regardless of whether the seller is required to be registered with the department as provided in RCW 82.32.030.

(7) This section is subject to RCW 82.32.762.

Sec. 208. RCW 82.08.050 and 2010 c 112 s 8 are each amended to read as follows:

(1) (a) The tax imposed in this chapter must be paid by the buyer to the seller. Each seller must collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the department under the provisions of RCW 82.08.060.

(b) Sellers, including marketplace facilitators as defined in section 206 of this act, establishing a substantial nexus with this state during the current calendar year based solely on the provisions of section 206 (1)(b), (2), or (3)(a)(ii) of this act, and who did not have a substantial nexus with this state during the immediately preceding calendar year for purposes of collecting the taxes imposed under this chapter, must begin collecting state and local sales taxes on taxable retail sales sourced to this state beginning on the first day of the calendar month that is at least thirty days from the date that the person established a substantial nexus with this state.

(2) The tax required by this chapter, to be collected by the seller, is deemed to be held in trust by the seller until paid to the department. Any seller who appropriates or converts the tax collected to the seller's own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter is guilty of a gross misdemeanor.

(3) Except as otherwise provided in this section, if any seller fails to collect the tax imposed in this chapter or, having collected the tax, fails to pay it to the department in the manner prescribed by this chapter, whether such failure is the result of the seller's own acts or the result of acts or conditions beyond the seller's own control, the tax must be collected by the department in the manner prescribed by this chapter.
control, the seller is, nevertheless, personally liable to the state for the amount of the tax.

(4) Sellers are not relieved from personal liability for the amount of the tax unless they maintain proper records of exempt or nontaxable transactions and provide them to the department when requested.

(5) Sellers are not relieved from personal liability for the amount of tax if they fraudulently fail to collect the tax or if they solicit purchasers to participate in an unlawful claim of exemption.

(6) Sellers are not relieved from personal liability for the amount of tax if they accept an exemption certificate from a purchaser claiming an entity-based exemption if:
   (a) The subject of the transaction sought to be covered by the exemption certificate is actually received by the purchaser at a location operated by the seller in Washington; and
   (b) Washington provides an exemption certificate that clearly and affirmatively indicates that the claimed exemption is not available in Washington. Graying out exemption reason types on a uniform form and posting it on the department's web site is a clear and affirmative indication that the grayed out exemptions are not available.

(7)(a) Sellers are relieved from personal liability for the amount of tax if they obtain a fully completed exemption certificate or capture the relevant data elements required under the streamlined sales and use tax agreement within ninety days, or a longer period as may be provided by rule by the department, subsequent to the date of sale.

(b) If the seller has not obtained an exemption certificate or all relevant data elements required under the streamlined sales and use tax agreement within the period allowed subsequent to the date of sale, the seller may, within one hundred twenty days, or a longer period as may be provided by rule by the department, subsequent to a request for substantiation by the department, either prove that the transaction was not subject to tax by other means or obtain a fully completed exemption certificate from the purchaser, taken in good faith.

(c) Sellers are relieved from personal liability for the amount of tax if they obtain a blanket exemption certificate for a purchaser with which the seller has a recurring business relationship. The department may not request from a seller renewal of blanket exemption
certificates or updates of exemption certificate information or data
elements if there is a recurring business relationship between the
buyer and seller. For purposes of this subsection (7)(c), a
"recurring business relationship" means at least one sale transaction
within a period of twelve consecutive months.

(d) Sellers are relieved from personal liability for the amount
of tax if they obtain a copy of a direct pay permit issued under RCW
82.32.087.

(8) The amount of tax, until paid by the buyer to the seller or
to the department, constitutes a debt from the buyer to the seller.
Any seller who fails or refuses to collect the tax as required with
intent to violate the provisions of this chapter or to gain some
advantage or benefit, either direct or indirect, and any buyer who
refuses to pay any tax due under this chapter is guilty of a
misdemeanor.

(9) Except as otherwise provided in this subsection, the tax
required by this chapter to be collected by the seller must be stated
separately from the selling price in any sales invoice or other
instrument of sale. On all retail sales through vending machines, the
tax need not be stated separately from the selling price or collected
separately from the buyer. Except as otherwise provided in this
subsection, for purposes of determining the tax due from the buyer to
the seller and from the seller to the department it must be
conclusively presumed that the selling price quoted in any price
list, sales document, contract or other agreement between the parties
does not include the tax imposed by this chapter. But if the seller
advertises the price as including the tax or that the seller is
paying the tax, the advertised price may not be considered the
selling price.

(10) Where a buyer has failed to pay to the seller the tax
imposed by this chapter and the seller has not paid the amount of the
tax to the department, the department may, in its discretion, proceed
directly against the buyer for collection of the tax. If the
department proceeds directly against the buyer for collection of the
tax as authorized in this subsection, the department may add a
penalty of ten percent of the unpaid tax to the amount of the tax due
for failure of the buyer to pay the tax to the seller, regardless of
when the tax may be collected by the department. In addition to the
penalty authorized in this subsection, all of the provisions of
chapter 82.32 RCW, including those relative to interest and
penalties, apply. For the sole purpose of applying the various provisions of chapter 82.32 RCW, the twenty-fifth day of the month following the tax period in which the purchase was made will be considered as the due date of the tax.

(11) Notwithstanding subsections (1) through (10) of this section, any person making sales is not obligated to collect the tax imposed by this chapter if:

(a) The person's activities in this state, whether conducted directly or through another person, are limited to:
   (i) The storage, dissemination, or display of advertising;
   (ii) The taking of orders; or
   (iii) The processing of payments; and

(b) The activities are conducted electronically via a web site on a server or other computer equipment located in Washington that is not owned or operated by the person making sales into this state nor owned or operated by an affiliated person. "Affiliated persons" has the same meaning as provided in RCW 82.04.424.

(12) Subsection (11) of this section expires when: (a) The United States congress grants individual states the authority to impose sales and use tax collection duties on remote sellers; or (b) it is determined by a court of competent jurisdiction, in a judgment not subject to review, that a state can impose sales and use tax collection duties on remote sellers.

(13) For purposes of this section, The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Exemption certificate" means documentation furnished by a buyer to a seller to claim an exemption from sales tax. An exemption certificate includes a reseller permit or other documentation authorized in RCW 82.04.470 furnished by a buyer to a seller to substantiate a wholesale sale; and

(b) "Seller" includes a certified service provider, as defined in RCW 82.32.020, acting as agent for the seller.

Sec. 209. RCW 82.08.052 and 2015 3rd sp.s. c 5 s 202 are each amended to read as follows:

(1) For purposes of this chapter, a remote seller is presumed to have a substantial nexus with this state and is obligated to collect retail sales tax during the current calendar year if the remote seller enters into an agreement with a resident of this state under
which the resident, for a commission or other consideration, directly
or indirectly refers potential customers, whether by a link on an
internet web site or otherwise, to the remote seller, if the
cumulative gross receipts from sales by the remote seller to
Washington customers ((in this state)) who are referred to the remote
seller by all residents with this type of an agreement with the
remote seller exceed ten thousand dollars during the current or
immediately preceding calendar year. This presumption may be rebutted
by proof that the resident with whom the remote seller has an
agreement did not engage in any solicitation in this state on behalf
of the remote seller that would satisfy the nexus requirement of the
United States Constitution during the calendar year in question.
Proof may be shown by (a) establishing, in a manner acceptable to the
department, that (i) each in-state person with whom the remote seller
has an agreement is prohibited from engaging in any solicitation
activities in this state that refer potential customers to the remote
seller, and (ii) such in-state person or persons have complied with
that prohibition; or (b) any other means as may be approved by the
department.

(2) The definitions in this subsection apply throughout this
section unless the context clearly requires otherwise.

(a) "Remote seller" means a seller that makes retail sales in
this state through one or more agreements described in subsection (1)
of this section, and the seller's other physical presence in this
state, if any, is not sufficient to establish a retail sales or use
tax collection obligation under the commerce clause of the United
States Constitution.

(b) "Washington customer" means a purchaser of goods or services
that are received in this state by the purchaser or the purchaser's
donee. "Washington customer" also means a purchaser that provides a
seller with an address in this state during the consummation of the
sale, if the location where the goods or services are received by the
purchaser or the purchaser's donee is not known.

(3) ((Nothing in this section may be construed to affect in any
way RCW 82.04.424, 82.08.050(11), or 82.12.040(5).

(4))) This section is subject to RCW 82.32.762.

Sec. 210. RCW 82.12.040 and 2015 c 169 s 9 are each amended to
read as follows:
(1) Every person who ((maintains in this state a place of business or a stock of goods, or engages in business activities within this state,)) has a substantial nexus with this state based on RCW 82.08.052 or section 206 of this act must obtain from the department a certificate of registration, and must, at the time of making sales of tangible personal property, digital goods, digital codes, digital automated services, extended warranties, or sales of any service defined as a retail sale in RCW 82.04.050 (2) (a) or (g) or (6)((bb)) (c), or making transfers of either possession or title, or both, of tangible personal property for use in this state, collect from the purchasers or transferees the tax imposed under this chapter. The tax to be collected under this section must be in an amount equal to the purchase price multiplied by the rate in effect for the retail sales tax under RCW 82.08.020. ((For the purposes of this chapter, the phrase "maintains in this state a place of business" includes the solicitation of sales and/or taking of orders by sales agents or traveling representatives. For the purposes of this chapter, "engages in business activity within this state" includes every activity which is sufficient under the Constitution of the United States for this state to require collection of tax under this chapter. The department must in rules specify activities which constitute engaging in business activity within this state, and must keep the rules current with future court interpretations of the Constitution of the United States.))

(2) Every person who engages in this state in the business of acting as an independent selling agent for persons who do not hold a valid certificate of registration, and who receives compensation by reason of sales of tangible personal property, digital goods, digital codes, digital automated services, extended warranties, or sales of any service defined as a retail sale in RCW 82.04.050 (2) (a) or (g) or (6)((bb)) (c), of his or her principals for use in this state, must, at the time such sales are made, collect from the purchasers the tax imposed on the purchase price under this chapter, and for that purpose is deemed a retailer as defined in this chapter.

(3) The tax required to be collected by this chapter is deemed to be held in trust by the retailer until paid to the department, and any retailer who appropriates or converts the tax collected to the retailer's own use or to any use other than the payment of the tax provided herein to the extent that the money required to be collected is not available for payment on the due date as prescribed is guilty
of a misdemeanor. In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay the same to the department in the manner prescribed, whether such failure is the result of the seller's own acts or the result of acts or conditions beyond the seller's control, the seller is nevertheless personally liable to the state for the amount of such tax, unless the seller has taken from the buyer a copy of a direct pay permit issued under RCW 82.32.087.

(4) Any retailer who refunds, remits, or rebates to a purchaser, or transferee, either directly or indirectly, and by whatever means, all or any part of the tax levied by this chapter is guilty of a misdemeanor.

(5) (Notwithstanding subsections (1) through (4) of this section, any person making sales is not obligated to collect the tax imposed by this chapter if:

(a) The person's activities in this state, whether conducted directly or through another person, are limited to:

(i) The storage, dissemination, or display of advertising;

(ii) The taking of orders; or

(iii) The processing of payments; and

(b) The activities are conducted electronically via a web site on a server or other computer equipment located in Washington that is not owned or operated by the person making sales into this state nor owned or operated by an affiliated person. "Affiliated persons" has the same meaning as provided in RCW 82.04.424.

(6) Subsection (5) of this section expires when: (a) The United States congress grants individual states the authority to impose sales and use tax collection duties on remote sellers; or (b) it is determined by a court of competent jurisdiction, in a judgment not subject to review, that a state can impose sales and use tax collection duties on remote sellers.

((7))) Notwithstanding subsections (1) through (4) of this section, any person making sales is not obligated to collect the tax imposed by this chapter if the person would have been obligated to collect retail sales tax on the sale absent a specific exemption provided in chapter 82.08 RCW, and there is no corresponding use tax exemption in this chapter. Nothing in this subsection ((7))) (5) may be construed as relieving purchasers from liability for reporting and remitting the tax due under this chapter directly to the department.
Notwithstanding subsections (1) through (4) of this section, any person making sales is not obligated to collect the tax imposed by this chapter if the state is prohibited under the Constitution or laws of the United States from requiring the person to collect the tax imposed by this chapter.

Notwithstanding subsections (1) through (4) of this section, any licensed dealer facilitating a firearm sale or transfer between two unlicensed persons by conducting background checks under chapter 9.41 RCW is not obligated to collect the tax imposed by this chapter.

NEW SECTION. Sec. 211. A new section is added to chapter 82.32 RCW to read as follows:

(1) Notwithstanding any other provision of law, and whether or not the department initiates an audit or other tax collection procedure, the department may bring a declaratory judgment action under chapter 7.24 RCW, regardless of any other remedy available to the department, against any person the department believes has a substantial nexus with this state under section 206(1)(b) of this act to establish that the obligation to remit sales tax is applicable and valid under state and federal law.

(2) The filing of the declaratory judgment action by the department as authorized in this section prohibits the department, during the pendency of the action and any subsequent appeal, from enforcing the tax collection obligations of chapter 82.08 RCW against any remote seller who does not affirmatively consent or otherwise remit sales tax to the department on a voluntary basis. The prohibition in this subsection does not apply if there is a previous judgment from a court establishing the validity of the tax collection obligations of chapter 82.08 RCW with respect to the particular taxpayer.

(3) Notwithstanding any other provisions of state law, attorneys' fees may not be awarded to any party in any action brought pursuant to this section or any appeal from any action brought pursuant to this section.

(4) For purposes of this section, "remote seller" means any seller that makes retail sales in this state but does not have a physical presence in this state.
NEW SECTION. Sec. 212. A new section is added to chapter 82.32 RCW to read as follows:

(1) A taxpayer that, for the purposes of the tax collection obligations in chapter 82.08 RCW, has a substantial nexus with this state solely under the provisions of section 206(1)(b) of this act and is complying with the requirements of chapter 82.08 RCW, voluntarily or otherwise, may only seek a recovery of sales taxes, penalties, or interest from the department by following the recovery procedures established under RCW 82.32.060. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with the tax collection provisions of chapter 82.08 RCW voluntarily while covered by the prohibition on enforcement provided in section 211 of this act.

(2) Neither the state nor any seller who remits sales tax voluntarily or otherwise under this act is liable to a purchaser who claims that the sales tax has been over collected because a provision of this act is later deemed unlawful.

(3) Nothing in this act affects the obligation of any purchaser from this state to remit sales or use tax as to any applicable taxable transaction in which the seller does not collect and remit sales tax.

Sec. 213. RCW 82.32.762 and 2015 3rd sp.s. c 5 s 205 are each amended to read as follows:

(1) If the department determines that a change, taking effect after (September 1, 2015) the effective date of this section, in the streamlined sales and use tax agreement or federal law creates a conflict with any provision of RCW 82.08.052, section 206 of this act, or section 207 of this act, such conflicting provision or provisions of RCW 82.08.052, section 206 of this act, or section 207 of this act, including any related provisions that would not function as originally intended, have no further force and effect as of the date the change in the streamlined sales and use tax agreement or federal law becomes effective.

(2) For purposes of this section:

(a) A change in federal law conflicts with RCW 82.08.052, section 206 of this act, or section 207 of this act if the change clearly allows states to impose greater sales and use tax collection obligations on remote sellers than provided for, or clearly prevents states from imposing sales and use tax collection obligations on
remote sellers to the extent provided for, under RCW 82.08.052, section 206 of this act, or section 207 of this act.

(b) A change in the streamlined sales and use tax agreement conflicts with RCW 82.08.052, section 206 of this act, or section 207 of this act if one or more provisions of RCW 82.08.052, section 206 of this act, or section 207 of this act causes this state to be found out of compliance with the streamlined sales and use tax agreement by its governing board.

(3) If the department makes a determination under this section that a change in federal law or the streamlined sales and use tax agreement conflicts with one or more provisions of RCW 82.08.052, section 206 of this act, or section 207 of this act, the department:

(a) May adopt rules in accordance with chapter 34.05 RCW that are consistent with the streamlined sales and use tax agreement and that impose sales and use tax collection obligations on remote sellers to the fullest extent allowed under state and federal law; and

(b) Must include information on its web site informing taxpayers and the public (i) of the provision or provisions of RCW 82.08.052, section 206 of this act, or section 207 of this act that will have no further force and effect, (ii) when such change will become effective, and (iii) about how to participate in any rule making conducted by the department in accordance with (a) of this subsection (3).

(4) For purposes of this section, "remote seller" has the same meaning as in RCW 82.08.052.

Part III

Sales and Use Tax Notice and Reporting Requirements

NEW SECTION. Sec. 301. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Consumer" has the same meaning as in chapters 82.04, 82.08, and 82.12 RCW.

(2) "Department" has the same meaning as in RCW 82.02.010.

(3) "Product" has the same meaning as in RCW 82.32.023.

(4) "Purchaser" means any consumer who purchases or leases a product sourced to this state under RCW 82.32.730.

(5) "Retail sale" has the same meaning as in RCW 82.04.050.

(6) "Sale" has the same meaning as in RCW 82.04.040.
"Seller" has the same meaning as in RCW 82.08.010, and includes a marketplace facilitator as defined in section 206 of this act.

NEW SECTION. Sec. 302. (1) Except as otherwise provided in subsection (5) of this section, a seller who does not collect the tax imposed under chapter 82.08 or 82.12 RCW on a taxable retail sale must comply with the notice and reporting requirements of this section. For taxable retail sales made through a marketplace facilitator or other agent, the marketplace facilitator or other agent must comply with the notice and reporting requirements of this section, and the principal is not subject to the notice and reporting requirements of this section with respect to those sales.

(2) A seller subject to the notice and reporting requirements of this section must provide a notice to each consumer at the time of each taxable retail sale.

(a) The notice under this subsection (2) must include the following information:

(i) A statement that neither sales nor use tax is being collected or remitted upon the sale;
   (ii) A statement that the consumer may be required to remit sales or use tax directly to the department; and
   (iii) Instructions for obtaining additional information from the department regarding whether and how to remit the sales or use tax to the department.

(b) The notice under this subsection (2) must be prominently displayed on all invoices and order forms, including, where applicable, electronic and catalogue invoices and order forms, and upon each sales receipt or similar document provided to the purchaser, whether in paper or electronic form. No indication may be made that sales or use tax is not imposed upon the transaction, unless:

(i) Such indication is followed immediately with the notice required by this subsection (2); or
   (ii) The transaction with respect to which the indication is given is exempt from sales and use tax pursuant to law.

(3) A seller subject to the notice and reporting requirements of this section must, no later than January 31st of each year, provide a report to each consumer for whom the seller was required to provide a notice under subsection (2) of this section.
(a) The report under this subsection (3) must include:

(i) A statement that the seller did not collect sales or use tax on the consumer's transactions with the seller and that the consumer may be required to remit such tax directly to the department;

(ii) A list, by date, generally indicating the type of product purchased or leased during the immediately preceding calendar year by the consumer from the seller sourced to this state under RCW 82.32.730 and the price of each product;

(iii) Instructions for obtaining additional information from the department regarding whether and how to remit the sales or use tax to the department;

(iv) A statement that the seller is required to submit a report to the department pursuant to subsection (4) of this section stating the total dollar amount of the consumer's purchases from the seller; and

(v) Any information as the department may reasonably require.

(b) The report required under this subsection (3) must be sent to the consumer's billing address, or if unknown, the consumer'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 must be sent electronically to the consumer's last known email address with a subject heading indicating important tax information is enclosed.

(4) A seller subject to the notice and reporting requirements of this section must, no later than January 31st of each year, file a report with the department.

(a) The report under this subsection (4) must include, with respect to each consumer to whom the seller is required to provide a report under subsection (3) of this section by January 31st of the current calendar year:

(i) The consumer's name;

(ii) The billing address and, if different, the last known mailing address;

(iii) The shipping address for each product sold or leased to such consumer for delivery to a location in this state during the immediately preceding calendar year; and

(iv) The total dollar amount of all such purchases by such consumer.

(b) The report under this subsection (4) must be filed electronically in a form and manner required by the department.
The following exemptions to the notice and reporting requirements of this section apply:

(a) A seller who made less than two hundred thousand dollars in total worldwide gross retail sales during the immediately preceding calendar year is not required to file reports under subsections (3) and (4) of this section in the current calendar year.

(b) A seller who made less than one hundred thousand dollars in total worldwide gross retail sales during the immediately preceding calendar year is not required to provide notice under subsection (2) of this section with respect to retail sales made in the current calendar year.

(c) A seller who made less than one hundred thousand dollars in total gross retail sales sourced to this state under RCW 82.32.730 during the immediately preceding calendar year is not required to file reports under subsections (3) and (4) of this section in the current calendar year.

(d) A seller who made less than fifty thousand dollars in total gross retail sales sourced to this state under RCW 82.32.730 during the immediately preceding calendar year is not required to provide notice under subsection (2) of this section with respect to retail sales made in the current calendar year.

(e) A seller who is registered with the department to collect and remit sales and use tax, and who makes a reasonable effort to comply with the requirements of RCW 82.08.050 and 82.12.040, is not required to provide notice or file reports under this section.

NEW SECTION. Sec. 303. (1) The following penalties apply to any seller who fails to provide notices and reports as required by section 302 of this act:

(a) The department must assess a penalty against any seller who fails to provide notice as required by section 302(2) of this act, in addition to any other applicable penalties, in the amount of five dollars for each such failure.

(b) The department must assess a penalty against any seller who fails to provide a report as required by section 302(3) of this act, in addition to any other applicable penalty, in the amount of ten dollars for each such failure.

(c) The department must assess a penalty against any seller who fails to file a report as required by section 302(4) of this act, in addition to any other applicable penalty, equal to ten dollars times...
the number of such consumers that should have been included on such report.

(2) When assessing a penalty under this section, the department may use any reasonable sampling or estimation technique where necessary or appropriate to determine the number of failures in any calendar year.

(3) Interest accrues on the amount of the total penalty that has been assessed under this section until the total penalty amount is paid in full. Interest imposed under this section must be computed and assessed as provided in RCW 82.32.050 as if the penalty imposed under this subsection were a tax liability.

(4) The department must notify a seller by mail, or electronically as provided in RCW 82.32.135, of the amount of any penalty and interest due under this section. Amounts due under this section must be paid in full within thirty days from the date of the notice, or within such further time as the department may provide in its sole discretion.

(5)(a)(i) A seller is entitled to a conditional waiver of penalties and interest imposed under this section if the seller enters into a written agreement with the department committing to fully comply with all notice and reporting requirements of this chapter beginning by a date acceptable to the department.

(ii) The department may grant a waiver of penalties and interest under this subsection (5)(a) for penalties and interest assessed for a seller's failure to comply with the notice and reporting requirements for one or more violations.

(iii) The department may not grant more than one request by a seller for a waiver of penalties and interest under this subsection (5)(a).

(iv) The department must reassess penalties and interest conditionally waived under this subsection (5)(a) if the department finds that, after the date that the seller agreed to fully comply with the notice and reporting requirements of this chapter, the seller failed to:

(A) Provide notice under section 302(2) of this act to at least ninety-five percent of the consumers entitled to such notice in any given calendar year or portion of the initial calendar year in which the agreement required under this subsection was in effect if the agreement was in effect for less than the entire calendar year;
(B) Timely provide the reports required under section 302(3) of this act to all consumers who received notice from the seller under section 302(2) of this act during any calendar year, unless the department finds that any such failure was due to circumstances beyond the seller's control; or

(C) Timely provide the reports required under section 302(4) of this act during any calendar year, unless the department finds that any such failure was due to circumstances beyond the seller's control.

(v) The department may not reassess penalties and interest conditionally waived under this subsection (5)(a) more than four calendar years following the calendar year in which the department granted the conditional waiver under this subsection (5)(a).

(vi) The provisions of subsection (4) of this section apply to penalties and interest reassessed under this subsection (5)(a). The department may add additional interest on penalties reassessed under this subsection (5)(a) only if the total amount of penalties reassessed under this subsection (5)(a) is not paid in full by the date due. Additional interest authorized under this subsection (5)(a)(vi) applies beginning on the day immediately following the day that the reassessed penalties were due and accrues until the total amount of reassessed penalties are paid in full.

(b) The department must waive penalties and interest imposed under this section if the department determines that the failure of the seller to fully comply with the notice or reporting requirements was due to circumstances beyond the seller's control.

(c) A request for a waiver of penalties and interest under this subsection must be received by the department in writing and before the penalties and interest for which a waiver is requested are due pursuant to subsection (4) of this section. The department must deny any request for a waiver of penalties and interest that does not fully comply with the provisions of this subsection (5)(c).

NEW SECTION. Sec. 304. Chapter 82.32 RCW applies to the administration of this chapter.

NEW SECTION. Sec. 305. (1) Except as otherwise provided in this section, taxes imposed under chapter 82.08 or 82.12 RCW on a taxable retail sale and payable by a consumer directly to the department are due, on returns prescribed by the department, by March 1st of the
calendar year immediately following the calendar year in which the
taxable retail sale occurred.

(2) This section does not apply to the reporting and payment of
taxes imposed under chapters 82.08 and 82.12 RCW:
(a) On the retail sale or use of motor vehicles, vessels, or
aircraft; or
(b) By consumers who are engaged in business, unless the
department has relieved the consumer of the requirement to file
returns pursuant to RCW 82.32.045(4).

NEW SECTION. Sec. 306. Nothing in this chapter relieves sellers
or consumers who are subject to chapter 82.08 or 82.12 RCW from any
responsibilities imposed under those chapters. Nor does anything in
this chapter prevent the department from administering and enforcing
the taxes imposed under chapter 82.08 or 82.12 RCW with respect to
any seller or consumer who is subject to such taxes.

Sec. 307. RCW 82.32.045 and 2010 1st sp.s. c 23 s 1103 are each
amended to read as follows:
(1) Except as otherwise provided in this chapter or chapter
82.-- RCW (the new chapter created in section 404 of this act),
payments of the taxes imposed under chapters 82.04, 82.08, 82.12,
82.14, and 82.16 RCW, along with reports and returns on forms
prescribed by the department, are due monthly within twenty-five days
after the end of the month in which the taxable activities occur.
(2) The department of revenue may relieve any taxpayer or class
of taxpayers from the obligation of remitting monthly and may require
the return to cover other longer reporting periods, but in no event
may returns be filed for a period greater than one year. For these
taxpayers, tax payments are due on or before the last day of the
month next succeeding the end of the period covered by the return.
(3) The department of revenue may also require verified annual
returns from any taxpayer, setting forth such additional information
as it may deem necessary to correctly determine tax liability.
(4) Notwithstanding subsections (1) and (2) of this section, the
department may relieve any person of the requirement to file returns
if the following conditions are met:
(a) The person's value of products, gross proceeds of sales, or
gross income of the business, from all business activities taxable
under chapter 82.04 RCW, is less than:
Twenty-eight thousand dollars per year; or

(ii) Forty-six thousand six hundred sixty-seven dollars per year for persons generating at least fifty percent of their taxable amount from activities taxable under RCW 82.04.255, 82.04.290(2)(a), and 82.04.285;

(b) The person's gross income of the business from all activities taxable under chapter 82.16 RCW is less than twenty-four thousand dollars per year; and

(c) The person is not required to collect or pay to the department of revenue any other tax or fee which the department is authorized to collect.

Part IV
Miscellaneous

NEW SECTION. Sec. 401. If any provision of this act or its application to any person or circumstance is held invalid:

(1) The remainder of this act or the application of the provision to other persons or circumstances is not affected; and

(2) If the department of revenue is prevented from enforcing chapters 82.04, 82.08, and 82.12 RCW against persons without a physical presence in this state, the department of revenue must impose such provisions to the fullest extent allowed under the Constitution and laws of the United States.

NEW SECTION. Sec. 402. The tax collection, reporting, and payment obligations imposed by this act apply prospectively only.

NEW SECTION. Sec. 403. For purposes of determining whether a person engaged in the business of making sales at retail has a substantial nexus with this state under the provisions of RCW 82.04.067(6)(a)(iii) or section 206 (1)(b), (2), or (3)(a)(ii) of this act for taxable periods beginning on the effective date of this section through December 31, 2017, the person's gross proceeds of sales are based on the entire 2017 calendar year.

NEW SECTION. Sec. 404. Sections 301 through 306 of this act constitute a new chapter in Title 82 RCW.
NEW SECTION. Sec. 405. This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2017.

--- END ---
AN ACT Relating to adopting retail sale nexus standards to require sales tax collection by remote sellers in order to fund safety net programs; amending RCW 82.04.066, 82.04.067, 82.04.220, 82.08.050, 82.08.052, 82.12.040, 82.32.762, and 82.32.045; adding new sections to chapter 82.08 RCW; adding new sections to chapter 82.32 RCW; adding a new section to chapter 74.04 RCW; adding a new chapter to Title 82 RCW; creating new sections; repealing RCW 82.04.424; prescribing penalties; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Part I
Findings and Intent

NEW SECTION. Sec. 101. (1) The legislature finds that states fail to collect more than twenty-three billion dollars annually in sales taxes from remote sales over the internet and through catalogues. The legislature further finds that Washington and its local governments will lose out on an estimated three hundred fifty-three million dollars in sales and use taxes in fiscal year 2018 from remote sales, reducing funds that would otherwise be available for
the public education system, health care services, infrastructure, and other vital public services.

(2) The legislature recognizes that states may not impose sales or use tax collection obligations on an out-of-state business unless the business has a substantial nexus with the taxing state. The legislature also recognizes that under the United States supreme court's decision in National Bellas Hess v. Dep't of Revenue of Ill., 386 U.S. 753 (1967), substantial nexus under the commerce clause requires a physical presence by the seller in the taxing state. Relying on the doctrine of stare decisis, the United States supreme court reaffirmed the physical presence nexus standard twenty-five years later in Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

(3) The legislature further finds that the basis of the physical presence nexus standard was primarily justified by the complexity and burden on mail order sellers and other out-of-state sellers in complying with the sales tax laws in numerous jurisdictions at the state and local level all across the country. The legislature further finds that the supreme court's concerns underlying the Bellas Hess decision have been effectively addressed by advances in technology and simplified tax laws. For example, Washington and most other states with sales taxes allow or require electronic reporting and payment of the tax. Also, several states, including Washington, offer free online sales tax rate lookup tools. A number of private companies offer automated sales tax compliance solutions. In addition, sales tax laws have been simplified in many states, including Washington, through participation in the streamlined sales and use tax project and compliance with the streamlined sales and use tax agreement.

(4) The legislature further finds that Bellas Hess was decided one year before the first plans were developed for the computer network that became the basis of the internet. The legislature further finds that since Quill was decided e-commerce has grown substantially, generating retail sales of over three hundred forty-one billion dollars in 2015, which have been growing at a rate of about fifteen percent for the last five years. The legislature further finds that like their brick and mortar competitors, online businesses receive benefits and opportunities provided by their market states, such as transportation networks, infrastructure, laws providing protection of business interests, access to the courts to protect valuable rights, and a regulated marketplace. However, the
legislature finds that under the current physical presence nexus standard, online only sellers have an unfair competitive advantage over in state brick and mortar stores to the detriment of main street retailers. Online only businesses have no geographical limitations to their marketplace; no costs of maintaining local physical retail stores, such as infrastructure costs, employee costs, and property taxes; and may not have to collect sales tax on sales to customers in states in which they do not have a physical presence, all of which lead to their ability to price their goods at a lower cost to consumers. The legislature further finds that even if the physical presence nexus standard was once a wise rule of law, it is no longer justifiable.

(5) The legislature further finds that the supreme court in its Quill decision implicitly invited the United States congress to resolve whether and to what extent states may impose a sales tax collection obligation on remote sellers. The legislature further finds that there is overwhelming support among the public, states, and municipalities, and many national and local associations representing brick and mortar businesses for federal legislation requiring remote sellers to collect and remit retail sales tax. The legislature further finds that despite such broad-based support, congress has failed to enact such legislation.

(6) The legislature agrees with Justice Kennedy's concurring opinion in the Direct Marketing Association v. Brohl decision (135 S. Ct. 1124) that the court's Quill holding is "inflicting extreme harm and unfairness on the States," and that "[t]here is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently 'substantial nexus' to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet." Justice Kennedy stated that "it is unwise to delay any longer a reconsideration of the Court's holding in Quill," and he closed his opinion by inviting a direct challenge to Quill and Bellas Hess, saying that "[t]he legal system should find an appropriate case for this Court to reexamine Quill and Bellas Hess."

(7) The legislature finds that because Washington is unique in that it relies so heavily on sales tax to fund education and other vital state services, and because Washington has frequently been at the forefront of advancing technology and tax policy, it is incumbent upon this state to lead the way to a more fair and equitable modern marketplace where online businesses and brick and mortar businesses
can compete based on quality of products and other nontax factors, which benefits all consumers. The legislature recognizes that the fast pace of technological change seen with the rapid growth of electronic commerce puts pressure on states to update their tax codes just as this state did (a) in 2007 in adopting Senate Bill No. 5089, which enacted significant simplifications in sales and use administration and brought Washington into full compliance with the streamlined sales and use tax agreement, (b) in 2009 in adopting Engrossed Substitute House Bill No. 2075 addressing the excise taxation of digital products, and (c) in 2010 in adopting economic nexus and market-based apportionment for business and occupation tax purposes in Second Engrossed Substitute Senate Bill No. 6143. The legislature finds that making such changes is not radical or to be unexpected, but is a rational means to avoid an ever shrinking tax base resulting from an outdated tax code that has not kept up with significant changes in technology and the economy.

(8) The legislature finds that several states, including Alabama, South Dakota, and Tennessee have taken measures to adopt an "economic nexus" standard with respect to the collection of sales tax. The legislature further finds that other states are considering adopting similar rules or legislation.

(9) The legislature also finds that Colorado adopted a law requiring out-of-state retailers that do not collect Colorado's sales tax to report tax-related information to their Colorado customers and the Colorado department of revenue. The legislature further finds that in 2016 the United States court of appeals for the tenth circuit upheld that law.

(10) Therefore, the legislature intends by this act to address the significant harm and unfairness brought about by the physical presence nexus rule by testing the boundaries of the rule. This act also sets up a legal challenge to the physical presence nexus rule that could potentially lead to the United States supreme court reevaluating Bellas Hess and Quill or congress enacting legislation authorizing and establishing the requirements for states to impose a sales tax collection duty on remote sellers. To achieve these objectives, part II of this act establishes clear statutory guidelines for determining when sellers are required to collect Washington's sales tax. These guidelines clarify the extent of the traditional physical presence standard and also adopt an "economic nexus" standard under which a remote seller would establish a
substantial nexus with this state solely by making a meaningful amount of sales into this state. Part II of this act also extends the economic nexus standard for the business and occupation tax imposed on retail sales taxed under RCW 82.04.250(1) and 82.04.257(1). Part III of this act adopts a sales and use tax notice and reporting law based on the multistate tax commission's draft model sales and use tax notice reporting statute, which is similar to Colorado's sales and use tax notice reporting law.

(11) The legislature recognizes that the enactment of part II of this act places remote sellers in a complicated position, precisely because existing constitutional doctrine calls certain provisions of part II of this act into question. Accordingly, the legislature intends to clarify that the obligations created by this law on sellers with a substantial nexus with this state under section 206(1)(b) of this act would be appropriately stayed by the courts until the constitutionality of section 206(1)(b) of this act has been clearly established by a binding judgment, including, for example, a decision from the supreme court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer.

(12) The legislature finds that the declaratory judgment action authorized in section 211 of this act is warranted by existing law, by good faith arguments for the extension, modification, or reversal of existing law, or the establishment of new law.

Part II

Nexus for Excise Tax Purposes

Sec. 201. RCW 82.04.066 and 2015 3rd sp.s. c 5 s 203 are each amended to read as follows:

"Engaging within this state" and "engaging within the state," when used in connection with any apportionable activity as defined in RCW 82.04.460 or ((wholesale sales) selling activity taxable under RCW 82.04.250(1), 82.04.257(1), or 82.04.270, means that a person generates gross income of the business from sources within this state, such as customers or intangible property located in this state, regardless of whether the person is physically present in this state.
Sec. 202. RCW 82.04.067 and 2016 c 137 s 2 are each amended to read as follows:

(1) A person engaging in business is deemed to have substantial nexus with this state if, in the current or immediately preceding calendar year, the person is:

(a) An individual and is a resident or domiciliary of this state;
(b) A business entity and is organized or commercially domiciled in this state; or
(c) A nonresident individual or a business entity that is organized or commercially domiciled outside this state, and ((in the immediately preceding tax year)) the person had:

(i) More than (fifty) fifty-three thousand dollars of property in this state;
(ii) More than (fifty) fifty-three thousand dollars of payroll in this state;
(iii) More than two hundred (sixty-seven) sixty-seven thousand dollars of receipts from this state; or
(iv) At least twenty-five percent of the person's total property, total payroll, or total receipts in this state.

(2)(a) Property counting toward the thresholds in subsection (1)(c)(i) and (iv) of this section is the average value of the taxpayer's property, including intangible property, owned or rented and used in this state during the current or immediately preceding (tax) calendar year.

(b)(i) Property owned by the taxpayer, other than loans and credit card receivables owned by the taxpayer, is valued at its original cost basis. Loans and credit card receivables owned by the taxpayer are valued at their outstanding principal balance, without regard to any reserve for bad debts. However, if a loan or credit card receivable is charged off in whole or in part for federal income tax purposes, the portion of the loan or credit card receivable charged off is deducted from the outstanding principal balance.

(ii) Property rented by the taxpayer is valued at eight times the net annual rental rate. For purposes of this subsection, "net annual rental rate" means the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(c) The average value of property must be determined by averaging the values at the beginning and ending of the (tax) applicable calendar year; but the department may require the averaging of monthly values during the (tax) applicable calendar year if
reasonably required to properly reflect the average value of the taxpayer's property.

(d)(i) For purposes of this subsection (2), loans and credit card receivables are deemed owned and used in this state as follows:

(A) Loans secured by real property, personal property, or both real and personal property are deemed owned and used in the state if the real property or personal property securing the loan is located within this state. If the property securing the loan is located both within this state and one or more other states, the loan is deemed owned and used in this state if more than fifty percent of the fair market value of the real or personal property is located within this state. If more than fifty percent of the fair market value of the real or personal property is not located within any one state, then the loan is deemed owned and used in this state if the borrower is located in this state. The determination of whether the real or personal property securing a loan is located within this state must be made, as of the time the original agreement was made, and any and all subsequent substitutions of collateral must be disregarded.

(B) Loans not secured by real or personal property are deemed owned and used in this state if the borrower is located in this state.

(C) Credit card receivables are deemed owned and used in this state if the billing address of the cardholder is in this state.

(ii) (A) Except as otherwise provided in (d)(ii)(B) of this subsection (2), the definitions in the multistate tax commission's recommended formula for the apportionment and allocation of net income of financial institutions as existing on June 1, 2010, or such subsequent date as may be provided by the department by rule, consistent with the purposes of this section, apply to this section.

(B) "Credit card" means a card or device existing for the purpose of obtaining money, property, labor, or services on credit.

(e) Notwithstanding anything else to the contrary in this subsection, property counting toward the thresholds in subsection (1)(c)(i) and (iv) of this section does not include a person's ownership of, or rights in, computer software as defined in RCW 82.04.215, including computer software used in providing a digital automated service; master copies of software; and digital goods and digital codes residing on servers located in this state.

(3)(a) Payroll counting toward the thresholds in subsection (1)(c)(ii) and (iv) of this section is the total amount paid by the
taxpayer for compensation in this state during the immediately preceding tax year plus nonemployee compensation paid to representative third parties in this state. Nonemployee compensation paid to representative third parties includes the gross amount paid to nonemployees who represent the taxpayer in interactions with the taxpayer's clients and includes sales commissions.

(b) Employee compensation is paid in this state if the compensation is properly reportable to this state for unemployment compensation tax purposes, regardless of whether the compensation was actually reported to this state.

(c) Nonemployee compensation is paid in this state if the service performed by the representative third party occurs entirely or primarily within this state.

(d) For purposes of this subsection, "compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees or nonemployees and defined as gross income under 26 U.S.C. Sec. 61 of the federal internal revenue code of 1986, as existing on June 1, 2010.

(4) Receipts counting toward the thresholds in subsection (1)(c)(iii) and (iv) of this section are:

(a) Those amounts included in the numerator of the receipts factor under RCW 82.04.462;

(b) For financial institutions, those amounts included in the numerator of the receipts factor under the rule adopted by the department as authorized in RCW 82.04.460(2); and

(c) For persons taxable under RCW 82.04.250(1), 82.04.257(1), or 82.04.270 ((with respect to wholesale sales)), the gross proceeds of sales taxable under those statutory provisions and sourced to this state in accordance with RCW 82.32.730.

(5)(a) Each December, the department must review the cumulative percentage change in the consumer price index. The department must adjust the thresholds in subsection (1)(c)(i) through (iii) of this section if the consumer price index has changed by five percent or more since the later of June 1, 2010, or the date that the thresholds were last adjusted under this subsection. For purposes of determining the cumulative percentage change in the consumer price index, the department must compare the consumer price index available as of December 1st of the current year with the consumer price index as of the later of June 1, 2010, or the date that the thresholds were last adjusted under this subsection. The thresholds must be adjusted to
reflect that cumulative percentage change in the consumer price index. The adjusted thresholds must be rounded to the nearest one thousand dollars. Any adjustment will apply to tax periods that begin after the adjustment is made.

(b) As used in this subsection, "consumer price index" means the consumer price index for all urban consumers (CPI-U) available from the bureau of labor statistics of the United States department of labor.

(6)(a) (i) Except as provided in (a)(iii) of this subsection (6), subsections (1) through (5) of this section only apply with respect to the taxes on persons engaged in apportionable activities as defined in RCW 82.04.460 or making wholesale sales taxable under RCW 82.04.257(1) or 82.04.270.

(ii) Subject to the limitation in RCW 82.32.531, for purposes of the taxes imposed under this chapter on (any) the business of making sales at retail or any other activity not included in the definition of apportionable activities in RCW 82.04.460, other than the business of making wholesale sales taxed under RCW 82.04.257(1) or 82.04.270, ((except as provided in RCW 82.32.531,)) a person is deemed to have a substantial nexus with this state if the person has a physical presence in this state during the tax year, which need only be demonstrably more than a slightest presence.

(iii) For purposes of the taxes imposed under this chapter on the business of making sales at retail taxable under RCW 82.04.250(1) or 82.04.257(1), a person is also deemed to have a substantial nexus with this state if the person's receipts from this state, pursuant to subsection (4)(c) of this section, meet either criterion in subsection (1)(c)(iii) or (iv) of this section, as adjusted under subsection (5) of this section.

(b) For purposes of this subsection, a person is physically present in this state if the person has property or employees in this state.

(c)(i) A person is also physically present in this state for the purposes of this subsection if the person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in this state.

(ii) A remote seller as defined in RCW 82.08.052 is presumed to be engaged in activities in this state that are significantly associated with the remote seller's ability to establish or maintain
a market for its products in this state if the remote seller is presumed to have a substantial nexus with this state under RCW 82.08.052. The presumption in this subsection (6)(c)(ii) may be rebutted as provided in RCW 82.08.052. To the extent that the presumption in RCW 82.08.052 is no longer operative pursuant to RCW 82.32.762, the presumption in this subsection (6)(c)(ii) is no longer operative. (Nothing in this section may be construed to affect in any way RCW 82.04.424, 82.08.050(11), or 82.12.040(5) or to narrow the scope of the terms "agent" or "other representative" in this subsection (6)(c).)

Sec. 203. RCW 82.04.220 and 2011 1st sp.s. c 20 s 101 are each amended to read as follows:

(1) There is levied and collected from every person that has a substantial nexus with this state a tax for the act or privilege of engaging in business activities. The tax is measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

(2) (a) A person who has a substantial nexus with this state in any tax year under the provisions of RCW 82.04.067 will be deemed to have a substantial nexus with this state for the following tax year. The current calendar year under the provisions of RCW 82.04.067, based solely on the person's property, payroll, or receipts in this state during the current calendar year, is subject to the tax imposed under this chapter for the current calendar year only on business activity occurring on and after the date that the person established a substantial nexus with this state in the current calendar year.

(b) This subsection (2) does not apply to any person who also had a substantial nexus with this state (i) during the immediately preceding calendar year under RCW 82.04.067, or (ii) during the current calendar year under RCW 82.04.067 (1) (a) or (b) or (6) (a)(ii) or (c).

NEW SECTION. Sec. 204. RCW 82.04.424 (Exemptions—Certain in-state activities) and 2015 3rd sp.s. c 5 s 206 & 2003 c 76 s 2 are each repealed.
NEW SECTION. Sec. 205. A new section is added to chapter 82.08 RCW to be codified between RCW 82.08.050 and 82.08.052 to read as follows:

A seller with a substantial nexus with this state must comply with the provisions of this chapter.

NEW SECTION. Sec. 206. A new section is added to chapter 82.08 RCW to be codified between RCW 82.08.052 and 82.08.054 to read as follows:

(1) A seller has a substantial nexus with this state during a calendar year for the purposes of collecting the taxes imposed under this chapter if, during the current or immediately preceding calendar year:

(a) The seller had its property or employees in this state for the seller's business purposes; or

(b) The seller's receipts from retail sales in this state, pursuant to RCW 82.04.067(4), meet either criterion in RCW 82.04.067(1)(c) (iii) or (iv), as adjusted under RCW 82.04.067(5).

(2) A seller also has a substantial nexus with this state during a calendar year for the purposes of collecting the taxes imposed under this chapter if the seller's total gross proceeds of sales at retail sourced to this state under RCW 82.32.730 exceed ten thousand dollars during the current or immediately preceding calendar year and at any time during such current or immediately preceding calendar year:

(a)(i) The seller offers its products for sale through one or more marketplaces operated by any marketplace facilitator that has a substantial nexus with this state; or

(ii) The seller or another person, as the case may be, including an affiliated person, other than a common carrier acting solely as a common carrier, engages in or performs any of the following activities in this state, but not including the activities described in RCW 82.08.052:

(A) Sells a similar line of products as the seller and does so under the same business name as the seller or a similar business name as the seller;

(B) Uses its employees, agents, representatives, or independent contractors in this state to promote or facilitate sales by the seller to purchasers in this state;
(C) Maintains, occupies, or uses an office, distribution facility, warehouse, storage place, or similar place of business in this state to facilitate the delivery or sale of tangible personal property sold by the seller to the seller's purchasers in this state;

(D) Uses, with the seller's consent or knowledge, trademarks, service marks, or trade names in this state that are the same or substantially similar to those used by the seller;

(E) Delivers, installs, assembles, or performs maintenance or repair services for the seller's purchasers in this state;

(F) Facilitates the sale of tangible personal property to purchasers in this state by allowing the seller's purchasers in this state to pick up or return tangible personal property sold by the seller at an office, distribution facility, warehouse, storage place, or any other place of business maintained by that person in this state;

(G) Shares management, business systems, business practices, or employees with the seller or, in the case of an affiliated person, engages in intercompany transactions related to the activities occurring with the seller to establish or maintain the seller's market in this state; or

(H) Conducts any other activities in this state that are significantly associated with the seller's ability to establish and maintain a market in this state for the seller's sales of products to purchasers in this state; or

(b)(i) The seller is under contract with a payment processor or merchant bank, or accepts credit cards issued either by a financial institution under a license from a credit card association or by an entity that also authorizes purchases and settles with consumers and merchants, if the payment processor, merchant bank, credit card association, or credit card issuer has a substantial nexus with this state for purposes of collecting the taxes imposed under this chapter.

(ii) Pursuant to RCW 82.32.330(3)(u), the department may disclose the identity of payment processors, credit card associations, credit card issuers described in (b)(i) of this subsection (2), and merchant banks that have a substantial nexus with this state for purposes of collecting the taxes imposed under this chapter.

(3)(a) For purposes of subsection (2)(a)(i) of this section, a marketplace facilitator is deemed to have a substantial nexus with this state during a calendar year if:
(i) The marketplace facilitator or any affiliated person maintained a physical presence in this state during any portion of the current or immediately preceding calendar year to engage in any of the activities described in subsection (5)(a)(i) or (ii) of this section; or
(ii) The marketplace facilitator generated more than ten thousand dollars of gross proceeds of sales in the current or immediately preceding calendar year from retail sales made through its physical or electronic marketplace by sellers that are physically located in this state. For purposes of this subsection (3)(a)(ii), a seller is presumed to be physically located in this state if the address for the seller maintained in the business records of the marketplace facilitator is in this state.

(b) Pursuant to RCW 82.32.330(3)(u), the department may disclose the identity of marketplace facilitators that have a substantial nexus with this state for purposes of collecting the taxes imposed under this chapter.

(4) For purposes of this section, persons are "affiliated persons" with respect to each other where one of the persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of the persons by another person or by a group of other persons who are affiliated with respect to each other.

(5) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Marketplace facilitator" means a person that contracts with sellers to facilitate, for consideration, the sale of the seller's products through a physical or electronic marketplace operated by the person, and engages, either directly or indirectly, through one or more affiliated persons, in:

(i) Any of the following:
(A) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller;
(B) Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;
(C) Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller; or
(D) Software development or research and development activities related to any of the activities described in (a)(i)(A) through (C)
or (ii)(A) through (H) of this subsection (5), if such activities are directly related to a physical or electronic marketplace operated by the person or an affiliated person; and

(ii) Any of the following activities with respect to the seller's products:

(A) Payment processing services;
(B) Fulfillment or storage services;
(C) Listing products for sale;
(D) Setting prices;
(E) Branding sales as those of the marketplace facilitator;
(F) Order taking;
(G) Advertising or promotion; or
(H) Providing customer service or accepting or assisting with returns or exchanges.

(b) "Merchant bank" means a financial institution or any other member of a credit card network that allows the seller to accept credit card payments and is responsible for depositing transaction proceeds into the seller's designated account.

(c) "Payment processor" means a person that contracts directly with a seller to provide settlement for the seller's credit card, debit card, or other payment transactions.

(d) "Product" means any property or service that is sold in a sale at retail as defined in RCW 82.04.050.

(6) This section is subject to RCW 82.32.762.

NEW SECTION. Sec. 207. A new section is added to chapter 82.08 RCW to be codified between section 206 of this act and RCW 82.08.054 to read as follows:

(1) For purposes of this chapter, a marketplace facilitator is deemed to be an agent of any marketplace seller making retail sales through the marketplace facilitator's physical or electronic marketplace. A marketplace facilitator with a substantial nexus with this state must collect and remit to the department the taxes imposed under this chapter on all taxable retail sales made through the marketplace facilitator's marketplace and sourced to this state under RCW 82.32.730, whether as principal or as the agent of a marketplace seller.

(2) A marketplace facilitator is relieved of liability under this chapter for failure to collect the correct amount of tax to the extent that the marketplace facilitator can show to the department's
satisfaction that the error was due to incorrect information given to
the marketplace facilitator by the marketplace seller, unless the
marketplace facilitator and marketplace seller are affiliated
persons. Where the marketplace facilitator is relieved of liability
under this subsection (2), the marketplace seller is solely liable
for the amount of uncollected tax due.

(3)(a) A marketplace facilitator is relieved of liability under
this chapter for the failure to collect tax on taxable retail sales
to the extent that the marketplace facilitator can show to the
department's satisfaction that:

(i) The taxable retail sale was made through the marketplace
facilitator's marketplace;

(ii) The taxable retail sale was made solely as the agent of a
marketplace seller, and the marketplace facilitator and marketplace
seller are not affiliated persons; and

(iii) The failure to collect sales tax was not due to an error in
sourcing the sale under RCW 82.32.730.

(b) Where the marketplace facilitator is relieved of liability
under this subsection (3), the marketplace seller is also relieved of
liability for the amount of uncollected tax due, subject to the
limitations in subsection (4) of this section.

(4) A marketplace seller with a substantial nexus with this state
is relieved of its obligation to collect the taxes imposed under this
chapter on all taxable retail sales through a marketplace operated by
a marketplace facilitator if the marketplace seller has obtained
documentation from the marketplace facilitator indicating that the
marketplace facilitator is registered with the department and will
collect all applicable taxes due under this chapter on all taxable
retail sales made on behalf of the marketplace seller through the
marketplace operated by the marketplace facilitator. The
documentation required by this subsection (4) must be provided in a
form and manner prescribed by or acceptable to the department. This
subsection (4) does not relieve a marketplace seller from liability
for uncollected taxes due under this chapter resulting from a
marketplace facilitator's failure to collect the proper amount of tax
due when the error was due to incorrect information given to the
marketplace facilitator by the marketplace seller.

(5) Nothing in this section affects the obligation of any
purchaser to remit sales or use tax as to any applicable taxable

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transaction in which the seller or the seller's agent does not collect and remit sales tax.

(6) For purposes of this section, the following definitions apply:

(a) "Affiliated person" has the same meaning as in section 206 of this act.

(b) "Marketplace facilitator" has the same meaning as in section 206 of this act.

(c) "Marketplace seller" means a seller that makes retail sales through any physical or electronic marketplace operated by a marketplace facilitator, regardless of whether the seller is required to be registered with the department as provided in RCW 82.32.030.

(7) This section is subject to RCW 82.32.762.

Sec. 208. RCW 82.08.050 and 2010 c 112 s 8 are each amended to read as follows:

(1) (a) The tax imposed in this chapter must be paid by the buyer to the seller. Each seller must collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the department under the provisions of RCW 82.08.060.

(b) Sellers, including marketplace facilitators as defined in section 206 of this act, establishing a substantial nexus with this state during the current calendar year based solely on the provisions of section 206 (1)(b), (2), or (3)(a)(ii) of this act, and who did not have a substantial nexus with this state during the immediately preceding calendar year for purposes of collecting the taxes imposed under this chapter, must begin collecting state and local sales taxes on taxable retail sales sourced to this state beginning on the first day of the calendar month that is at least thirty days from the date that the person established a substantial nexus with this state.

(2) The tax required by this chapter, to be collected by the seller, is deemed to be held in trust by the seller until paid to the department. Any seller who appropriates or converts the tax collected to the seller's own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter is guilty of a gross misdemeanor.

(3) Except as otherwise provided in this section, if any seller fails to collect the tax imposed in this chapter or, having collected...
the tax, fails to pay it to the department in the manner prescribed
by this chapter, whether such failure is the result of the seller's
own acts or the result of acts or conditions beyond the seller's
control, the seller is, nevertheless, personally liable to the state
for the amount of the tax.

(4) Sellers are not relieved from personal liability for the
amount of the tax unless they maintain proper records of exempt or
nontaxable transactions and provide them to the department when
requested.

(5) Sellers are not relieved from personal liability for the
amount of tax if they fraudulently fail to collect the tax or if they
solicit purchasers to participate in an unlawful claim of exemption.

(6) Sellers are not relieved from personal liability for the
amount of tax if they accept an exemption certificate from a
purchaser claiming an entity-based exemption if:

(a) The subject of the transaction sought to be covered by the
exemption certificate is actually received by the purchaser at a
location operated by the seller in Washington; and

(b) Washington provides an exemption certificate that clearly and
affirmatively indicates that the claimed exemption is not available
in Washington. Graying out exemption reason types on a uniform form
and posting it on the department's web site is a clear and
affirmative indication that the grayed out exemptions are not
available.

(7)(a) Sellers are relieved from personal liability for the
amount of tax if they obtain a fully completed exemption certificate
or capture the relevant data elements required under the streamlined
sales and use tax agreement within ninety days, or a longer period as
may be provided by rule by the department, subsequent to the date of
sale.

(b) If the seller has not obtained an exemption certificate or
all relevant data elements required under the streamlined sales and
use tax agreement within the period allowed subsequent to the date of
sale, the seller may, within one hundred twenty days, or a longer
period as may be provided by rule by the department, subsequent to a
request for substantiation by the department, either prove that the
transaction was not subject to tax by other means or obtain a fully
completed exemption certificate from the purchaser, taken in good
faith.
(c) Sellers are relieved from personal liability for the amount of tax if they obtain a blanket exemption certificate for a purchaser with which the seller has a recurring business relationship. The department may not request from a seller renewal of blanket exemption certificates or updates of exemption certificate information or data elements if there is a recurring business relationship between the buyer and seller. For purposes of this subsection (7)(c), a "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months.

(d) Sellers are relieved from personal liability for the amount of tax if they obtain a copy of a direct pay permit issued under RCW 82.32.087.

(8) The amount of tax, until paid by the buyer to the seller or to the department, constitutes a debt from the buyer to the seller. Any seller who fails or refuses to collect the tax as required with intent to violate the provisions of this chapter or to gain some advantage or benefit, either direct or indirect, and any buyer who refuses to pay any tax due under this chapter is guilty of a misdemeanor.

(9) Except as otherwise provided in this subsection, the tax required by this chapter to be collected by the seller must be stated separately from the selling price in any sales invoice or other instrument of sale. On all retail sales through vending machines, the tax need not be stated separately from the selling price or collected separately from the buyer. Except as otherwise provided in this subsection, for purposes of determining the tax due from the buyer to the seller and from the seller to the department it must be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter. But if the seller advertises the price as including the tax or that the seller is paying the tax, the advertised price may not be considered the selling price.

(10) Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax. If the department proceeds directly against the buyer for collection of the tax as authorized in this subsection, the department may add a penalty of ten percent of the unpaid tax to the amount of the tax due.
for failure of the buyer to pay the tax to the seller, regardless of
when the tax may be collected by the department. In addition to the
penalty authorized in this subsection, all of the provisions of
chapter 82.32 RCW, including those relative to interest and
penalties, apply. For the sole purpose of applying the various
provisions of chapter 82.32 RCW, the twenty-fifth day of the month
following the tax period in which the purchase was made will be
considered as the due date of the tax.

(11) Notwithstanding subsections (1) through (10) of this
section, any person making sales is not obligated to collect the tax
imposed by this chapter if:

(a) The person’s activities in this state, whether conducted
directly or through another person, are limited to:
   (i) The storage, dissemination, or display of advertising;
   (ii) The taking of orders; or
   (iii) The processing of payments; and

(b) The activities are conducted electronically via a web site on
a server or other computer equipment located in Washington that is
not owned or operated by the person making sales into this state nor
owned or operated by an affiliated person. "Affiliated persons" has
the same meaning as provided in RCW 82.04.424.

(12) Subsection (11) of this section expires when: (a) The United
States congress grants individual states the authority to impose
sales and use tax collection duties on remote sellers; or (b) it is
determined by a court of competent jurisdiction, in a judgment not
subject to review, that a state can impose sales and use tax
collection duties on remote sellers.

(13) For purposes of this section: The definitions in this
subsection apply throughout this section unless the context clearly
requires otherwise.

(a) "Exemption certificate" means documentation furnished by a
buyer to a seller to claim an exemption from sales tax. An exemption
certificate includes a reseller permit or other documentation
authorized in RCW 82.04.470 furnished by a buyer to a seller to
substantiate a wholesale sale; and

(b) "Seller" includes a certified service provider, as defined in
RCW 82.32.020, acting as agent for the seller.

Sec. 209. RCW 82.08.052 and 2015 3rd sp.s. c 5 s 202 are each
amended to read as follows:
(1) For purposes of this chapter, a remote seller is presumed to have a substantial nexus with this state and is obligated to collect retail sales tax during the current calendar year if the remote seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet web site or otherwise, to the remote seller, if the cumulative gross receipts from sales by the remote seller to Washington customers ((in this state)) who are referred to the remote seller by all residents with this type of an agreement with the remote seller exceed ten thousand dollars during the current or immediately preceding calendar year. This presumption may be rebutted by proof that the resident with whom the remote seller has an agreement did not engage in any solicitation in this state on behalf of the remote seller that would satisfy the nexus requirement of the United States Constitution during the calendar year in question. Proof may be shown by (a) establishing, in a manner acceptable to the department, that (i) each in-state person with whom the remote seller has an agreement is prohibited from engaging in any solicitation activities in this state that refer potential customers to the remote seller, and (ii) such in-state person or persons have complied with that prohibition; or (b) any other means as may be approved by the department.

(2) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Remote seller" means a seller that makes retail sales in this state through one or more agreements described in subsection (1) of this section, and the seller's other physical presence in this state, if any, is not sufficient to establish a retail sales or use tax collection obligation under the commerce clause of the United States Constitution.

(b) "Washington customer" means a purchaser of goods or services that are received in this state by the purchaser or the purchaser's donee. "Washington customer" also means a purchaser that provides a seller with an address in this state during the consummation of the sale, if the location where the goods or services are received by the purchaser or the purchaser's donee is not known.

(3) (Nothing in this section may be construed to affect in any way RCW 82.04.424, 82.08.050(11), or 82.12.040(5).

(4)) This section is subject to RCW 82.32.762.
Sec. 210. RCW 82.12.040 and 2015 c 169 s 9 are each amended to read as follows:

(1) Every person who maintains in this state a place of business or a stock of goods, or engages in business activities within this state, has a substantial nexus with this state based on RCW 82.08.052 or section 206 of this act must obtain from the department a certificate of registration, and must, at the time of making sales of tangible personal property, digital goods, digital codes, digital automated services, extended warranties, or sales of any service defined as a retail sale in RCW 82.04.050 (2) (a) or (g) or (6)((b))) (c), or making transfers of either possession or title, or both, of tangible personal property for use in this state, collect from the purchasers or transferees the tax imposed under this chapter. The tax to be collected under this section must be in an amount equal to the purchase price multiplied by the rate in effect for the retail sales tax under RCW 82.08.020. (For the purposes of this chapter, the phrase "maintains in this state a place of business" includes the solicitation of sales and/or taking of orders by sales agents or traveling representatives. For the purposes of this chapter, "engages in business activity within this state" includes every activity which is sufficient under the Constitution of the United States for this state to require collection of tax under this chapter. The department must in rules specify activities which constitute engaging in business activity within this state, and must keep the rules current with future court interpretations of the Constitution of the United States.)

(2) Every person who engages in this state in the business of acting as an independent selling agent for persons who do not hold a valid certificate of registration, and who receives compensation by reason of sales of tangible personal property, digital goods, digital codes, digital automated services, extended warranties, or sales of any service defined as a retail sale in RCW 82.04.050 (2) (a) or (g) or (6)((b))) (c), of his or her principals for use in this state, must, at the time such sales are made, collect from the purchasers the tax imposed on the purchase price under this chapter, and for that purpose is deemed a retailer as defined in this chapter.

(3) The tax required to be collected by this chapter is deemed to be held in trust by the retailer until paid to the department, and any retailer who appropriates or converts the tax collected to the retailer's own use or to any use other than the payment of the tax
provided herein to the extent that the money required to be collected
is not available for payment on the due date as prescribed is guilty
of a misdemeanor. In case any seller fails to collect the tax herein
imposed or having collected the tax, fails to pay the same to the
department in the manner prescribed, whether such failure is the
result of the seller's own acts or the result of acts or conditions
beyond the seller's control, the seller is nevertheless personally
liable to the state for the amount of such tax, unless the seller has
taken from the buyer a copy of a direct pay permit issued under RCW
82.32.087.

(4) Any retailer who refunds, remits, or rebates to a purchaser,
or transferee, either directly or indirectly, and by whatever means,
all or any part of the tax levied by this chapter is guilty of a
misdemeanor.

(5) Notwithstanding subsections (1) through (4) of this
section, any person making sales is not obligated to collect the tax
imposed by this chapter if:

(a) The person's activities in this state, whether conducted
directly or through another person, are limited to:

(i) The storage, dissemination, or display of advertising;

(ii) The taking of orders; or

(iii) The processing of payments; and

(b) The activities are conducted electronically via a web site on
a server or other computer equipment located in Washington that is
not owned or operated by the person making sales into this state nor
owned or operated by an affiliated person. "Affiliated persons" has
the same meaning as provided in RCW 82.04.424.

(6) Subsection (5) of this section expires when: (a) The United
States congress grants individual states the authority to impose
sales and use tax collection duties on remote sellers; or (b) it is
determined by a court of competent jurisdiction, in a judgment not
subject to review, that a state can impose sales and use tax
collection duties on remote sellers.

(7)) Notwithstanding subsections (1) through (4) of this
section, any person making sales is not obligated to collect the tax
imposed by this chapter if the person would have been obligated to
collect retail sales tax on the sale absent a specific exemption
provided in chapter 82.08 RCW, and there is no corresponding use tax
exemption in this chapter. Nothing in this subsection ((7)) (5) may
be construed as relieving purchasers from liability for reporting and
remitting the tax due under this chapter directly to the department.

Notwithstanding subsections (1) through (4) of this
section, any person making sales is not obligated to collect the tax
imposed by this chapter if the state is prohibited under the
Constitution or laws of the United States from requiring the person
to collect the tax imposed by this chapter.

Notwithstanding subsections (1) through (4) of this
section, any licensed dealer facilitating a firearm sale or transfer
between two unlicensed persons by conducting background checks under
chapter 9.41 RCW is not obligated to collect the tax imposed by this
chapter.

NEW SECTION. Sec. 211. A new section is added to chapter 82.32
RCW to read as follows:

(1) Notwithstanding any other provision of law, and whether or
not the department initiates an audit or other tax collection
procedure, the department may bring a declaratory judgment action
under chapter 7.24 RCW, regardless of any other remedy available to
the department, against any person the department believes has a
substantial nexus with this state under section 206(1)(b) of this act
to establish that the obligation to remit sales tax is applicable and
valid under state and federal law.

(2) The filing of the declaratory judgment action by the
department as authorized in this section prohibits the department,
during the pendency of the action and any subsequent appeal, from
enforcing the tax collection obligations of chapter 82.08 RCW against
any remote seller who does not affirmatively consent or otherwise
remit sales tax to the department on a voluntary basis. The
prohibition in this subsection does not apply if there is a previous
judgment from a court establishing the validity of the tax collection
obligations of chapter 82.08 RCW with respect to the particular
taxpayer.

(3) Notwithstanding any other provisions of state law, attorneys'
fees may not be awarded to any party in any action brought pursuant
to this section or any appeal from any action brought pursuant to
this section.

(4) For purposes of this section, "remote seller" means any
seller that makes retail sales in this state but does not have a
physical presence in this state.

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NEW SECTION. Sec. 212. A new section is added to chapter 82.32 RCW to read as follows:

(1) A taxpayer that, for the purposes of the tax collection obligations in chapter 82.08 RCW, has a substantial nexus with this state solely under the provisions of section 206(1)(b) of this act and is complying with the requirements of chapter 82.08 RCW, voluntarily or otherwise, may only seek a recovery of sales taxes, penalties, or interest from the department by following the recovery procedures established under RCW 82.32.060. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with the tax collection provisions of chapter 82.08 RCW voluntarily while covered by the prohibition on enforcement provided in section 211 of this act.

(2) Neither the state nor any seller who remits sales tax voluntarily or otherwise under this act is liable to a purchaser who claims that the sales tax has been over collected because a provision of this act is later deemed unlawful.

(3) Nothing in this act affects the obligation of any purchaser from this state to remit sales or use tax as to any applicable taxable transaction in which the seller does not collect and remit sales tax.

Sec. 213. RCW 82.32.762 and 2015 3rd sp.s. c 5 s 205 are each amended to read as follows:

(1) If the department determines that a change, taking effect after (September 1, 2015) the effective date of this section, in the streamlined sales and use tax agreement or federal law creates a conflict with any provision of RCW 82.08.052, section 206 of this act, or section 207 of this act, such conflicting provision or provisions of RCW 82.08.052, section 206 of this act, or section 207 of this act, including any related provisions that would not function as originally intended, have no further force and effect as of the date the change in the streamlined sales and use tax agreement or federal law becomes effective.

(2) For purposes of this section:

(a) A change in federal law conflicts with RCW 82.08.052, section 206 of this act, or section 207 of this act if the change clearly allows states to impose greater sales and use tax collection obligations on remote sellers than provided for, or clearly prevents states from imposing sales and use tax collection obligations on...
remote sellers to the extent provided for, under RCW 82.08.052, section 206 of this act, or section 207 of this act.

(b) A change in the streamlined sales and use tax agreement conflicts with RCW 82.08.052, section 206 of this act, or section 207 of this act if one or more provisions of RCW 82.08.052, section 206 of this act, or section 207 of this act causes this state to be found out of compliance with the streamlined sales and use tax agreement by its governing board.

(3) If the department makes a determination under this section that a change in federal law or the streamlined sales and use tax agreement conflicts with one or more provisions of RCW 82.08.052, section 206 of this act, or section 207 of this act, the department:

(a) May adopt rules in accordance with chapter 34.05 RCW that are consistent with the streamlined sales and use tax agreement and that impose sales and use tax collection obligations on remote sellers to the fullest extent allowed under state and federal law; and

(b) Must include information on its web site informing taxpayers and the public (i) of the provision or provisions of RCW 82.08.052, section 206 of this act, or section 207 of this act that will have no further force and effect, (ii) when such change will become effective, and (iii) about how to participate in any rule making conducted by the department in accordance with (a) of this subsection (3).

(4) For purposes of this section, "remote seller" has the same meaning as in RCW 82.08.052.

Part III

Sales and Use Tax Notice and Reporting Requirements

NEW SECTION. Sec. 301. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Consumer" has the same meaning as in chapters 82.04, 82.08, and 82.12 RCW.

(2) "Department" has the same meaning as in RCW 82.02.010.

(3) "Product" has the same meaning as in RCW 82.32.023.

(4) "Purchaser" means any consumer who purchases or leases a product sourced to this state under RCW 82.32.730.

(5) "Retail sale" has the same meaning as in RCW 82.04.050.

(6) "Sale" has the same meaning as in RCW 82.04.040.
"Seller" has the same meaning as in RCW 82.08.010, and includes a marketplace facilitator as defined in section 206 of this act.

NEW SECTION. Sec. 302. (1) Except as otherwise provided in subsection (5) of this section, a seller who does not collect the tax imposed under chapter 82.08 or 82.12 RCW on a taxable retail sale must comply with the notice and reporting requirements of this section. For taxable retail sales made through a marketplace facilitator or other agent, the marketplace facilitator or other agent must comply with the notice and reporting requirements of this section, and the principal is not subject to the notice and reporting requirements of this section with respect to those sales.

(2) A seller subject to the notice and reporting requirements of this section must provide a notice to each consumer at the time of each taxable retail sale.

(a) The notice under this subsection (2) must include the following information:

(i) A statement that neither sales nor use tax is being collected or remitted upon the sale;

(ii) A statement that the consumer may be required to remit sales or use tax directly to the department; and

(iii) Instructions for obtaining additional information from the department regarding whether and how to remit the sales or use tax to the department.

(b) The notice under this subsection (2) must be prominently displayed on all invoices and order forms, including, where applicable, electronic and catalogue invoices and order forms, and upon each sales receipt or similar document provided to the purchaser, whether in paper or electronic form. No indication may be made that sales or use tax is not imposed upon the transaction, unless:

(i) Such indication is followed immediately with the notice required by this subsection (2); or

(ii) The transaction with respect to which the indication is given is exempt from sales and use tax pursuant to law.

(3) A seller subject to the notice and reporting requirements of this section must, no later than January 31st of each year, provide a report to each consumer for whom the seller was required to provide a notice under subsection (2) of this section.
(a) The report under this subsection (3) must include:

(i) A statement that the seller did not collect sales or use tax on the consumer's transactions with the seller and that the consumer may be required to remit such tax directly to the department;

(ii) A list, by date, generally indicating the type of product purchased or leased during the immediately preceding calendar year by the consumer from the seller sourced to this state under RCW 82.32.730 and the price of each product;

(iii) Instructions for obtaining additional information from the department regarding whether and how to remit the sales or use tax to the department;

(iv) A statement that the seller is required to submit a report to the department pursuant to subsection (4) of this section stating the total dollar amount of the consumer's purchases from the seller; and

(v) Any information as the department may reasonably require.

(b) The report required under this subsection (3) must be sent to the consumer's billing address, or if unknown, the consumer'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 must be sent electronically to the consumer's last known email address with a subject heading indicating important tax information is enclosed.

(4) A seller subject to the notice and reporting requirements of this section must, no later than January 31st of each year, file a report with the department.

(a) The report under this subsection (4) must include, with respect to each consumer to whom the seller is required to provide a report under subsection (3) of this section by January 31st of the current calendar year:

(i) The consumer's name;

(ii) The billing address and, if different, the last known mailing address;

(iii) The shipping address for each product sold or leased to such consumer for delivery to a location in this state during the immediately preceding calendar year; and

(iv) The total dollar amount of all such purchases by such consumer.

(b) The report under this subsection (4) must be filed electronically in a form and manner required by the department.
(5) The following exemptions to the notice and reporting requirements of this section apply:

(a) A seller who made less than two hundred thousand dollars in total worldwide gross retail sales during the immediately preceding calendar year is not required to file reports under subsections (3) and (4) of this section in the current calendar year.

(b) A seller who made less than one hundred thousand dollars in total worldwide gross retail sales during the immediately preceding calendar year is not required to provide notice under subsection (2) of this section with respect to retail sales made in the current calendar year.

(c) A seller who made less than one hundred thousand dollars in total gross retail sales sourced to this state under RCW 82.32.730 during the immediately preceding calendar year is not required to file reports under subsections (3) and (4) of this section in the current calendar year.

(d) A seller who made less than fifty thousand dollars in total gross retail sales sourced to this state under RCW 82.32.730 during the immediately preceding calendar year is not required to provide notice under subsection (2) of this section with respect to retail sales made in the current calendar year.

(e) A seller who is registered with the department to collect and remit sales and use tax, and who makes a reasonable effort to comply with the requirements of RCW 82.08.050 and 82.12.040, is not required to provide notice or file reports under this section.

NEW SECTION. Sec. 303. (1) The following penalties apply to any seller who fails to provide notices and reports as required by section 302 of this act:

(a) The department must assess a penalty against any seller who fails to provide notice as required by section 302(2) of this act, in addition to any other applicable penalties, in the amount of five dollars for each such failure.

(b) The department must assess a penalty against any seller who fails to provide a report as required by section 302(3) of this act, in addition to any other applicable penalty, in the amount of ten dollars for each such failure.

(c) The department must assess a penalty against any seller who fails to file a report as required by section 302(4) of this act, in addition to any other applicable penalty, equal to ten dollars times
the number of such consumers that should have been included on such report.

(2) When assessing a penalty under this section, the department may use any reasonable sampling or estimation technique where necessary or appropriate to determine the number of failures in any calendar year.

(3) Interest accrues on the amount of the total penalty that has been assessed under this section until the total penalty amount is paid in full. Interest imposed under this section must be computed and assessed as provided in RCW 82.32.050 as if the penalty imposed under this subsection were a tax liability.

(4) The department must notify a seller by mail, or electronically as provided in RCW 82.32.135, of the amount of any penalty and interest due under this section. Amounts due under this section must be paid in full within thirty days from the date of the notice, or within such further time as the department may provide in its sole discretion.

(5)(a)(i) A seller is entitled to a conditional waiver of penalties and interest imposed under this section if the seller enters into a written agreement with the department committing to fully comply with all notice and reporting requirements of this chapter beginning by a date acceptable to the department.

(ii) The department may grant a waiver of penalties and interest under this subsection (5)(a) for penalties and interest assessed for a seller's failure to comply with the notice and reporting requirements for one or more violations.

(iii) The department may not grant more than one request by a seller for a waiver of penalties and interest under this subsection (5)(a).

(iv) The department must reassess penalties and interest conditionally waived under this subsection (5)(a) if the department finds that, after the date that the seller agreed to fully comply with the notice and reporting requirements of this chapter, the seller failed to:

(A) Provide notice under section 302(2) of this act to at least ninety-five percent of the consumers entitled to such notice in any given calendar year or portion of the initial calendar year in which the agreement required under this subsection was in effect if the agreement was in effect for less than the entire calendar year;
(B) Timely provide the reports required under section 302(3) of this act to all consumers who received notice from the seller under section 302(2) of this act during any calendar year, unless the department finds that any such failure was due to circumstances beyond the seller's control; or

(C) Timely provide the reports required under section 302(4) of this act during any calendar year, unless the department finds that any such failure was due to circumstances beyond the seller's control.

(v) The department may not reassess penalties and interest conditionally waived under this subsection (5)(a) more than four calendar years following the calendar year in which the department granted the conditional waiver under this subsection (5)(a).

(vi) The provisions of subsection (4) of this section apply to penalties and interest reassessed under this subsection (5)(a). The department may add additional interest on penalties reassessed under this subsection (5)(a) only if the total amount of penalties reassessed under this subsection (5)(a) is not paid in full by the date due. Additional interest authorized under this subsection (5)(a)(vi) applies beginning on the day immediately following the day that the reassessed penalties were due and accrues until the total amount of reassessed penalties are paid in full.

(b) The department must waive penalties and interest imposed under this section if the department determines that the failure of the seller to fully comply with the notice or reporting requirements was due to circumstances beyond the seller's control.

(c) A request for a waiver of penalties and interest under this subsection must be received by the department in writing and before the penalties and interest for which a waiver is requested are due pursuant to subsection (4) of this section. The department must deny any request for a waiver of penalties and interest that does not fully comply with the provisions of this subsection (5)(c).

NEW SECTION. Sec. 304. Chapter 82.32 RCW applies to the administration of this chapter.

NEW SECTION. Sec. 305. (1) Except as otherwise provided in this section, taxes imposed under chapter 82.08 or 82.12 RCW on a taxable retail sale and payable by a consumer directly to the department are due, on returns prescribed by the department, by March 1st of the
calendar year immediately following the calendar year in which the taxable retail sale occurred.

(2) This section does not apply to the reporting and payment of taxes imposed under chapters 82.08 and 82.12 RCW:
(a) On the retail sale or use of motor vehicles, vessels, or aircraft; or
(b) By consumers who are engaged in business, unless the department has relieved the consumer of the requirement to file returns pursuant to RCW 82.32.045(4).

NEW SECTION. Sec. 306. Nothing in this chapter relieves sellers or consumers who are subject to chapter 82.08 or 82.12 RCW from any responsibilities imposed under those chapters. Nor does anything in this chapter prevent the department from administering and enforcing the taxes imposed under chapter 82.08 or 82.12 RCW with respect to any seller or consumer who is subject to such taxes.

Sec. 307. RCW 82.32.045 and 2010 1st sp.s. c 23 s 1103 are each amended to read as follows:
(1) Except as otherwise provided in this chapter or chapter 82.--- RCW (the new chapter created in section 504 of this act), payments of the taxes imposed under chapters 82.04, 82.08, 82.12, 82.14, and 82.16 RCW, along with reports and returns on forms prescribed by the department, are due monthly within twenty-five days after the end of the month in which the taxable activities occur.
(2) The department of revenue may relieve any taxpayer or class of taxpayers from the obligation of remitting monthly and may require the return to cover other longer reporting periods, but in no event may returns be filed for a period greater than one year. For these taxpayers, tax payments are due on or before the last day of the month next succeeding the end of the period covered by the return.
(3) The department of revenue may also require verified annual returns from any taxpayer, setting forth such additional information as it may deem necessary to correctly determine tax liability.
(4) Notwithstanding subsections (1) and (2) of this section, the department may relieve any person of the requirement to file returns if the following conditions are met:
(a) The person's value of products, gross proceeds of sales, or gross income of the business, from all business activities taxable under chapter 82.04 RCW, is less than:
Twenty-eight thousand dollars per year; or

(ii) Forty-six thousand six hundred sixty-seven dollars per year for persons generating at least fifty percent of their taxable amount from activities taxable under RCW 82.04.255, 82.04.290(2)(a), and 82.04.285;

(b) The person's gross income of the business from all activities taxable under chapter 82.16 RCW is less than twenty-four thousand dollars per year; and

(c) The person is not required to collect or pay to the department of revenue any other tax or fee which the department is authorized to collect.

Part IV
Revenues to Fund Housing and Public Assistance Programs

NEW SECTION. Sec. 401. A new section is added to chapter 82.32 RCW to read as follows:

(1) By December 15th and June 15th of each year, the department must estimate the increase in state general fund revenue from the taxes collected as a result of parts II and III of this act and notify the treasurer of the increase.

(2) By the last workday of the second and fourth calendar quarters, the state treasurer must transfer the amount specified in subsection (1) of this section as follows:

(a) Twelve percent must be deposited into the home security fund account and used solely for housing assistance programs pursuant to chapter 43.185C RCW;

(b) Thirty-eight percent must be deposited into the Washington housing trust fund account and used solely for construction of low-income housing pursuant to chapter 43.185 RCW; and

(c) Fifty percent must be deposited into the human services safety net account created in section 402 of this act.

NEW SECTION. Sec. 402. A new section is added to chapter 74.04 RCW to read as follows:

The human services safety net account is created in the state treasury. All receipts from section 401(2)(c) of this act must be deposited into the account. Moneys in the account may be spent only after appropriation. Expenditures from the account may only be used for the Washington WorkFirst temporary assistance for needy families.
program established under chapter 74.08A RCW; the aged, blind, or
disabled assistance program established under chapter 74.62 RCW; and
the pregnant women assistance program established under chapter 74.62
RCW.

Part V
Miscellaneous

NEW SECTION. Sec. 501. If any provision of this act or its
application to any person or circumstance is held invalid:
(1) The remainder of the act or the application of the provision
to other persons or circumstances is not affected; and
(2) If the department of revenue is prevented from enforcing
chapters 82.04, 82.08, and 82.12 RCW against persons without a
physical presence in this state, the department of revenue must
impose such provisions to the fullest extent allowed under the
Constitution and laws of the United States.

NEW SECTION. Sec. 502. The tax collection, reporting, and
payment obligations imposed by this act apply prospectively only.

NEW SECTION. Sec. 503. For purposes of determining whether a
person engaged in the business of making sales at retail has a
substantial nexus with this state under the provisions of RCW
82.04.067(6)(a)(iii) or section 206 (1)(b), (2), or (3)(a)(ii) of
this act for taxable periods beginning on the effective date of this
section through December 31, 2017, the person's gross proceeds of
sales are based on the entire 2017 calendar year.

NEW SECTION. Sec. 504. Sections 301 through 306 of this act
constitute a new chapter in Title 82 RCW.

NEW SECTION. Sec. 505. This act is necessary for the immediate
preservation of the public peace, health, or safety, or support of
the state government and its existing public institutions, and takes
effect July 1, 2017.

--- END ---
I. Introduction and Summary

On April 11, 2011, the Executive Committee approved the proposed model Sales & Use Tax Notice and Reporting statute for public hearing. Under the proposal, sellers of a product that is delivered into a state who do not collect and remit sales or use tax for that state are required to: (1) notify purchasers at the time of transaction that tax is not being collected and may be due directly to the department, (2) provide purchasers an annual report showing their purchases, and (3) provide the department of revenue an annual report showing total dollar amount of each purchaser’s purchases.

The hearing was held on May 18, 2011, after 30 days’ notice. Written and oral comments were received from the American Institute of Certified Public Accountants and Washington State Department of Revenue. (Exhibits A and B). Although neither recommends specific changes to the language of the proposed model, both discuss important policy, legal, and administrative issues, such as constitutionality and compatible with the Streamlined effort. This report summarizes the proposal and its procedure history, reviews the public comment received, and recommends that the model be approved, without further amendment. (Exhibit C, Proposed Model Statute.) The hearing officer also recommends that the resolution adopting the model explicitly confirm the Commission’s continued support for efforts, such as the Streamlined effort, to achieve collection and remittance by sellers as opposed to buyers.

The report and its recommendations are now before the Executive Committee for action. Executive Committee may either direct further study and consideration of the proposal or submit the report to the Commission along with the Executive Committee’s own recommendation for action, which may include additional amendments. (See Commission bylaw 7(e)). If the Executive Committee recommends Commission action, then the proposal will be submitted to a bylaw 7 survey of affected Compact member states. (See Commission bylaw 7(g)). The bylaw 7 survey asks whether the state would consider adopting the proposal. If a majority of affected Compact member states respond affirmatively, the Chairman will submit the proposal for consideration at the Commission’s annual business meeting in July, 2011.
II. The Proposal

A. Background and Procedural History

On March 3, 2010, the Uniformity Committee voted to begin developing a model statute, along the lines of a bill that had been introduced in the Colorado legislature just days earlier. A drafting group\(^1\) was formed to develop a policy question list, which served as the basis for the Subcommittee’s teleconference discussions on April 22, 2010; May 13, 2010; and June 22, 2010. On June 22, 2010, the Subcommittee completed its preliminary answers to the policy checklist and a draft model reflecting that policy direction was provided for Subcommittee discussion at its July, 2010 meeting. The draft was discussed and further developed at a subcommittee teleconference on September 30, 2010; an in-person meeting on December 7, 2010, and a teleconference on February 8, 2011. The Subcommittee then finalized the draft at its in-person meeting on March 1, 2011, and on March 2, 2011, the Uniformity Committee recommended the model favorably to the Executive Committee for submission to public hearing.

On April 11, 2011, the Executive Committee approved the model, without further amendment, for public hearing. The public hearing was held after 30 days' notice on May 18, 2011 in Washington, D.C. Two sets of written comments were received prior to the close of the public comment period on May 20, 2011:

Exhibit A  
American Institute of Certified Public Accountants (AICPA) – Patricia A. Thompson, CPA, Chair of Tax Executive Committee

Exhibit B  
Washington State Department of Revenue (WA DOR) – Tim Jennrich, Tax Policy Specialist

In addition, oral comments were received during the hearing from Tim Jennrich, WA DOR Tax Policy Specialist; Marc Hyman, AICPA Technical Manager; and Jamie Yesnowitz, Grant Thornton LLP Senior Manager, on behalf of AICPA.

B. Key Features

*Stand-Alone Act:* The model is designed so that it can be introduced as a stand-alone Act, rather than as part of the tax statute, because it does not impose a tax or require collection of a tax.

*Notice and Reporting Required:* Sellers that do not collect and remit state sales or use taxes on items delivered into the state must provide:

1. Notice to customers at the time of the transaction, as a public service to assist customers in understanding that tax is not being collected and that the customer may owe the tax directly to the department;

\(^1\) The Drafting Group included Richard Cram (KS), Phil Horwitz (CO), Michael Fatale (MA) and MTC staff – Roxanne Bland and Shirley Sicilian.
2. Annual report to customers, as a public service to assist customers in remitting tax directly to the department; and
3. Annual report to the tax department, to assist it in identifying non-filers.

Exceptions: There are exceptions to these requirements for: (1) small sellers, (2) sellers with only de minimis in-state sales, and (3) sellers that are registered to collect the tax.

Penalties and Interest: Penalties apply for failure to provide notice or reports, and interest accrues on the penalty once it becomes final.

Confidentiality: All customer information received by the tax agency shall be treated as confidential taxpayer information.

Since the Commission began development of this proposal, three states have enacted or introduced similar legislation.2

III. Public Comment and Hearing Officer Recommendations

At the outset, the Hearing Officer wishes to thank the AICPA and the Washington State DOR for their insightful and helpful comments. Although neither recommends specific changes to the language of the proposed model, both discuss important policy, legal, and administrative issues. The AICPA concludes that the proposal should not be adopted. The Washington State DOR cautions that additional sales and use tax related issues should be addressed, or should continue to be addressed, if this proposal moves forward.

A. Policy Issues - Compatibility with the Streamlined Effort

The AICPA is concerned that adopting the model statute could undermine progress toward uniformity made through the collaborative work of the Streamlined project because it would unilaterally “force businesses in other states to collect simply to avoid burdensome notice and reporting requirements.” (AICPA, point 1, p.1) The hearing officer suggests, to the contrary, the proposal is compatible with, and even

2 Enacted:


Introduced:

California – AB 155 (notice and annual reports to purchaser and BOE) http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0151-0200/ab_155_bill_20110118_introduced.html;
Hawaii – HB 1183 - (presumes entities with “click-through” affiliates have nexus, requires them to file annual report with the Department) http://www.capitol.hawaii.gov/session2011/bills/HB1183_HTM
complimentary to, the Streamlined effort. Although the proposal and the Streamlined effort both address the same basic problem – low consumers’ use tax compliance – each does so in a distinct and complimentary manner. The Streamlined effort is focused on encouraging remote sellers to collect and remit the tax, either purely voluntarily or as required by possible federal legislation. The proposal is focused on educating and assisting in-state buyers with their use tax responsibilities in situations where the seller does not collect and remit for them.

It is generally agreed that collection by sellers is a more efficient mechanism for administering sales and use taxes. As the streamlined project makes progress in that direction, it is a preferred approach. The Commission proposal would not change or interfere with that effort. It does not “force” sellers to collect sales tax, either directly by its terms or indirectly by imposing an unreasonable administrative burden (see discussion below). Rather, the proposal helps to educate buyers about their own use tax remittance responsibilities. The Washington State DOR points out that the proposal “does not address the substantial costs and barriers that will continue to exist with respect to collecting sales and use taxes from consumers directly.” And, for this reason, it is important to “support, or continue to support, a comprehensive solution that would give states remote seller collection authority over sellers through federal action, including federal legislation.” (WA DOR, bullet point 1)

In fact, the Commission expressed support for both seller collection and buyer notification when it adopted resolutions in support of each approach at the same July, 2000, Commission annual business meeting:

Commission Resolution in Support of Streamlined Sales Tax Project (No. 00-02): 3

...RESOLVED, that the Multistate Tax Commission recognizes the value of the Streamlined Sales Tax Project to the tax systems of States that impose sales taxes, and to the state tax structure as a whole; and be it further
RESOLVED, that the Multistate Tax Commission commend those who are working on the project for their efforts; and be it further
RESOLVED, that States be encouraged to consider active participation in the project.....

And, Commission Resolution in Support of States Achieving Disclosure to Consumers of Their Potential Liability for Use Taxes (No. 00-05): 4

3 MTC Resolution in Support of Streamlined Sales Tax Project (Resolution No. 00-2)

4 MTC Resolution in Support of States Achieving Disclosure to Consumers of Their Potential Liability for Use Taxes (Resolution No. 00-5)
http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/Policy_S_and_R/2000/00-5.pdf
...WHEREAS, all merchants have an obligation to inform their customers of the true, total cost of their purchases and any after-sale conditions attached to the ownership or use of the product being purchased; and WHEREAS, the failure of certain sellers to inform their customers in an adequate manner of the true cost of their purchases has justifiably led to government regulatory actions mandating disclosure, for example, of the true, effective rate of interest on consumer installment loans and of real estate settlement costs; and WHEREAS, the legal obligation to pay use taxes is an additional element of the cost of making remote purchases and direct marketers are, of course, well aware of this; and….now, therefore, be it RESOLVED, that the Multistate Tax Commission urge all direct marketers to include in all of their sales solicitations, written and oral, a disclosure that their customers may owe use taxes on their purchases and should contact their tax agencies for information on how they may fulfill this obligation…

The Hearing Officer believes these two approaches complement each other by addressing seller collection on the one hand; and buyer education and compliance on the other. Therefore, the Hearing Officer disagrees with AICPA’s contention that the proposed model “undermines the work of the Streamlined Sales and Use Tax Project.” Rather, the Hearing Officer agrees with the Washington State DOR, and finds that, because reasonable approaches for achieving state collection authority over remote sellers continue to be appropriate, our continued support for these approaches should be emphasized to ensure momentum in that direction is not jeopardized. To accomplish this, the Hearing Officer recommends that any resolution adopting all, or any part, of this proposed model should explicitly confirm the Commission’s continued support for the Streamlined effort and seller collection approaches generally, consistent with Resolution 00-05.

B. Legal Issues - Constitutionality

As mentioned above, the Commission proposal is based on a sales & use tax notice and reporting statute recently enacted in Colorado. Soon after Colorado enacted its statute, the Direct Marketing Association filed suit in the U.S. District Court for the District of Colorado arguing that the new law violates several state and federal constitutional provisions, including the dormant commerce clause, right to privacy, and right to free speech. In January, 2011, the District Court granted DMA’s motion to preliminarily enjoin Colorado from administering its statute while the lawsuit is pending. The Court granted DMA’s motion because it found DMA is likely to succeed on its dormant commerce clause argument.

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5 Direct Marketing Association v. Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue, United States District Court for the District of Colorado, Civil Action No. 10-cv-01546-REB-CBS.

6 The parties have now filed cross motions for summary judgment on that issue; and the Court has agreed to certify its decision on those cross motions for appeal. The other constitutional arguments will be stayed.
In light of this early-stage loss, AICPA comments that “a proposed model statute based on a law that is currently being challenged on constitutional grounds, and which is likely to be struck down in that challenge, simply should not be used as a template for other states’ use.” (AICPA, point 5, p.4) The Hearing Officer suggests a broader view is called for. First, the Hearing Officer disagrees that either the Colorado statute or Commission proposal violates the Constitution. Second, there would be costs, as well as benefits, associated with waiting for this issue to be conclusively resolved. The hearing officer believes that when the magnitude and likelihood of both costs and benefits are considered, the analysis weighs in favor of proceeding with the proposal.

1. Does the Commission Proposal Discriminate or Impose an Undue Burden in Violation of the Constitution?

Neither AICPA nor Washington State DOR argue that the proposal violates the United States Constitution in any way. However, the AICPA suggests that the proposal would saddle out-of-state sellers with an unnecessary burden so significant that it would exceed the benefit to the state and cause these sellers to submit to State collection and remittance requirements, like in-state sellers, instead. (AICPA points 2, 3, 4; pp. 1-3).

If this proposal truly burdened interstate commerce relative to in-state commerce – as AICPA suggests – the proposal could arguably be discriminatory in violation of the dormant commerce clause. (AICPA, point 3, p. 4) Indeed, the Federal District Court in Colorado preliminarily found that although the Act does not explicitly target out-of-state sellers, it is likely to ultimately be determined discriminatory because “in practical effect, [it] impose[s] a burden on interstate commerce that is not imposed on in-state commerce.”

But this comparison is incomplete. It only takes into consideration the requirements imposed on interstate sellers. To compare the treatment of interstate sellers with in-state sellers, one must consider the requirements imposed on in-state sellers as well. And in making this comparison, it is not enough to show that the requirements are pending the ultimate resolution of the dormant commerce clause issue. The decision granting preliminary injunction is available at:

7 Direct Marketing Association v. Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue, USDC Dist. of Co., Civil Action No. 10-cv-01546-REB-CBS, Order Granting Motion for Preliminary Injunction (January 26, 2011)

8 It should also be mentioned that the proposal does not literally distinguish between in-state and interstate commerce. It distinguishes between sellers that are required to collect and remit the tax and those that are not required to collect and remit the tax. Under current U.S. Supreme Court precedent, this distinction is in-state and interstate sellers with a physical presence vs. interstate sellers without a physical presence. Interstate sellers that have no physical presence in a state would be subject to the requirements of the proposal.

9 See, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (other related laws should be taken into account in determining whether an Act discriminates in violation of the dormant commerce clause.)
simply different – rather, the dormant commerce clause is violated only if the difference creates an advantage for in-state commerce.\(^\text{10}\)

When a proper comparison is made, it appears unlikely that the proposal would burden interstate remote sellers to such an extent they would be placed at a disadvantage relative to in-state sellers. At the time of each transaction, an in-state seller is must know the state and local tax rates and communicate these rates to the buyer; calculate the amount of tax due on the transaction and communicate that amount to the buyer; evaluate tax exemption certificates supplied by the buyer; and, if no exemption applies, collect the tax due. Then, at regular intervals throughout the year, the in-state seller must complete and file a tax return with the department and remit the tax collected during that interval to the department. The in-state seller may also be required to process buyers’ refund requests. In order to perform these obligations, the in-state seller must seek and obtain a license from the State. The in-state seller has on-going responsibility to create and maintain records, and may be subject to audit. In contrast, the proposal simply requires remote sellers to notify buyers that a state tax may be due, to submit a report to the department once a year \((\text{See Commission Proposal, Exhibit A, §§(c)(1)-(3)}\)). Thus, the Hearing Officer believes that the reasonable requirements imposed on remote sellers under the proposal are not more burdensome than the reasonable requirements currently imposed on in-state sellers under state sales and use tax laws.

Even if a state law is found to be discriminatory, it may still be upheld as constitutional if it serves a legitimate state purpose and there is no reasonable, nondiscriminatory alternative.\(^\text{11}\) AICPA suggests interstate remote sellers need not be subject to the requirements of the Commission proposal because “there are other ways to address the problem of low use tax compliance rates,” including: remittance lines on individual and business entity income tax returns; clearer tax form instructions; targeted amnesty programs; a safe harbor allowing taxpayer’s to report a percentage of gross income instead of the actual amount due; and educating citizens through mass mailings, radio, and television advertisements. \((\text{AICPA, point 2, pp.3-4)}\) These are good suggestions that could be adopted in addition to the proposal – indeed some are already in place in some states – but none is truly a substitute for the requirements of the proposal. Income tax return lines and clear tax forms enable taxpayers to remit the use tax once they know it is due, but these are remittance processes. They do not focus on helping taxpayers understand that the tax is due, as the notice requirements of the proposal would. Nor do they help taxpayers calculate the amount of the tax due, as the year-end report to consumers would. And they do not assist the department in carrying out its charge to enforce the tax, as the year-end report to the department would. Amnesty programs and safe harbor payment options are helpful on an occasional basis, but they are not aimed at promoting proper long-term enforcement or administration of the tax, as the reports to customers and the department are. Likewise, mass mail, radio, and television

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\(^{10}\) See, Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980) (prohibiting a differential treatment that discriminates against interstate commerce).

\(^{11}\) Or. Waste Systems, Inc. v. Dep’t of Environmental Quality of the State of Or., et al., 511 U.S. 93 (1994).
advertisements may help educate taxpayers, and there is no reason these cannot be provided by the state in addition to the notices required to be provided by the seller under the proposal. But mass advertising is a blunt instrument. It may or may not reach in-state taxpayers purchasing from sellers that are not collecting and remitting the tax. In contrast, the notice required by the proposed model would reach exactly those individuals. The Hearing Officer agrees that there are additional efforts that could be undertaken, but does not agree that these alternatives serve the same administrative and enforcement purposes of the proposed model statute.

A law that does not discriminate against interstate sellers may none-the-less violate the dormant commerce clause if it creates – as AICPA believes the proposal does – burdens on commerce that are excessive in relation to state benefits.\textsuperscript{12} AICPA suggests the notice and department reporting required under the proposal may have little benefit because buyers may ignore the notice at the time of transaction, and the department may not have the resources necessary to make use of the data reported. (AICPA, point 4, pp. 4-5) Certainly some buyers may ignore the notice. But many simply do not understand they are obligated to pay the tax to the department if it is not collected by the seller. The notice required under the proposed model, if implemented as intended, is critical to eliminating the impression that tax is not due. Reporting to the state is also critical, so that buyers can realize that the state has the ability to enforce the tax. (If the reports are filed electronically, they should be adequately accessible for enforcement purposes.) In this environment of poor understanding and low compliance, the notice and reporting required under the proposal will produce significant benefits because they are essential to states’ strong interest in effectively administering and enforcing their sales and use taxes.

In sum, the Hearing Officer believes that the proposal’s notice and reporting requirements are an administratively efficient means of administering and enforcing sales and use tax without discriminating against, or imposing an undue burden upon, interstate commerce. As such, the proposed model helps to eliminate the perception and practical reality that in-state sales are subject to tax while interstate remote sales are not. Thus, the proposal effectively promotes the fundamental objective of the commerce clause, which is to preserve level competition in national markets.\textsuperscript{13}

\textbf{2. Should the Commission Proposal be Stayed Pending Conclusion of Litigation?}

As noted above, the AICPA recommends against adopting a model based on a law which is currently being challenged. Similarly, the Washington State DOR notes that it is unclear what the ultimate outcome will be if the concept is further litigated and suggests considering “whether it makes sense to adopt a model approach now before the idea has had time to be more fully developed through experimentation in the laboratory of the


\textsuperscript{13} See H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949). See also, General Motors v. Roger W. Tracy, Tax Commissioner of Ohio, 519 U.S. 278 (1997) (the dormant commerce clause’s fundamental objective is preserving national markets for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors)
many states.” (WA DOR, 4th bullet point). The benefit of waiting to propose a model until its legal issues are conclusively resolved is, of course, certainty. But it could be a long time before such certainty is achieved in this matter. The Colorado litigation is in its early stage, with only one federal district court determination and only on preliminary injunction. And as the concept is tested in other state or federal Courts, those Courts may view the issues differently than the Colorado court.

Meanwhile, state commentators have recommended states consider adopting this or similar approaches, beginning as early as 2000 when the Commission issued its Resolution in Support of States Achieving Disclosure to Consumers of Their Potential Liability for Use Taxes (Res. No. 00-05). More recently, a published article by experts at the New York State Department of Taxation and Finance reviews the constitutional issues and recommends, consistent with the proposed model, that states require sellers to make reports to the department and provide notice to buyers:

[S]tates should seek to assert due process nexus when the facts do not support commerce clause nexus. For example, a state could not, under current law, impose sales tax collection duties on a pure e-tailer … despite millions of dollars of sales by the e-tailer to in-state customers. The state could, however, successfully assert due process nexus under Quill and on that basis require the e-tailer to submit information returns providing data on sales by the e-tailer delivered to customers in the state. The e-tailer would not be required to make any determination as to the tax status of a transaction or the correct amount of tax. It would not be asked to invoice, collect, or pay over the tax, which was the burden cited in National Bellas Hess and Quill. Rather, it would simply be required to transmit data from its own records in a form that would allow the state to pursue use tax from its own residents. A state could also assert due process nexus to require e-tailers to disclose to customers making purchases for delivery into the state, at the time of the transaction, some or all of the following information:

• that their purchases, if taxable when purchased at a store in the state, are also taxable when purchased from a remote vendor even when the vendor doesn’t collect the tax;
• how to pay the tax directly to the state;
• that the state may require the remote vendor to provide it with transaction information regarding purchases delivered into the state; and
• that taxpayers failing to timely pay the required tax are subject to interest and penalties.

Colorado and two other states have now enacted laws along these lines, and legislation has been introduced in others. Having a model available now – one that has benefited from the input of tax experts in multiple states through the Commission uniformity process – would assist states in adopting legally sound legislation in the first place. A model available now would also assist states in adopting more uniform legislation, which is important to minimizing the potential for administrative burden on interstate remote sellers. Several states have enacted New York style associate nexus legislation, despite the fact that litigation on that concept is not final in even one state, and the Commission’s uniformity committee is only now beginning to consider a similar model. The longer the Commission waits to adopt a notice and reporting model, the less need there will be for one as states unilaterally consider and enact their own versions of the legislation. The Hearing Officer believes that this proposed notice and reporting model is sufficiently well grounded in constitutional principle, and will be of sufficient benefit to the states, to justify Commission adoption at this time.

C. Administrative Issues –Seller and Buyer Perspectives

Because the proposal imposes notice and reporting responsibilities, it creates administrative obligations, and both AICPA and Washington State DOR address some of these in their comments. AICPA raises administrative concerns for sellers. Most of these are discussed above in the context of states’ constitutional limitations in imposing burdens on interstate commerce. In addition, AICPA lists the multiple activities sellers will be required to perform under the proposed model and points out that “this compliance burden will substantially increase as the number of states adopting the model statute grows.” (AICPA, point 4, pp. 4-5) The Hearing Officer suggests that this point may weigh in favor of adopting a model in order to promote uniformity and minimize the potential burden of multiple different state notice and reporting requirements.

The Washington State DOR points out that the model does not offer solutions for administrative issues that will be faced by the ultimate taxpayer, the buyer. (WA DOR, bullet point 2). By way of example, Washington State notes that some, but not all, states provide a remittance line on the state’s income tax return. To the extent the proposal could successfully result in more use tax compliance by consumers, it could exacerbate administrative shortcomings that currently exist in the states. It is true that this model does not address those sorts of issues. The Hearing Officer suggests states that adopt this model will want to make sure their consumer use tax remittance processes are adequate to handle increased compliance. The Washington State DOR also points out that not all sales and use tax sourcing issues have been resolved in all states (for example, digital goods sourcing) and suggests this could lead to confusion on where notices must be sent with the possible result that sellers may send notice to multiple states. (WA DOR, bullet points 2 and 3) In recognition that sourcing rules will continue to be developed by states acting upon their own or through co-operative efforts, the model does not require the seller to know where the transaction is sourced under any particular state law. The model only requires the seller to send notice to the “purchaser,” and “purchaser” is defined as “any person who purchases or leases a product for delivery to a location in this state.”

14 See footnote 2.
V. Conclusion

The Hearing Officer recommends the proposal be adopted, without further amendment, and that the resolution evidencing this adoption explicitly confirm the Commission’s continued support for efforts to achieve collection and remittance by sellers as opposed to buyers.

Respectfully Submitted,

_____________________
Shirley K. Sicilian
Hearing Officer
May 18, 2011

Mr. Joe Huddleston
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Multistate Tax Commission
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Ms. Shirley Sicilian
General Counsel
Multistate Tax Commission
444 N. Capitol St. NW, Suite 425
Washington, DC 20001

Re: MTC Draft Model Sales & Use Tax Notice and Reporting Statute (Dated April 18, 2011)

Dear Mr. Huddleston and Ms. Sicilian:

In May 2010, Ms. Sicilian asked the AICPA’s State & Local Taxation Technical Resource Panel (SALT TRP) for input on the MTC Model Sales & Use Tax Notice and Reporting Statute (Model Statute), which at that time was still in the Policy Checklist phase. Our comments below, prepared by our SALT TRP and approved by our Tax Executive Committee, relate to the published MTC draft dated April 18, 2011. We appreciate the offer to provide our specific input.

The proposed uniform statute incorporates concepts contained in legislation recently adopted by the state of Colorado. The Colorado Department of Revenue has been enjoined and restrained by the U.S. District Court of Colorado from enforcing that legislation and the accompanying regulations based on, among other reasons, likelihood that the alleged constitutional challenges of discrimination and undue burden brought in a complaint filed by the Direct Marketing Association will be upheld.

The MTC Model Statute is designed to impose uniform sales and use tax notice and reporting requirements on out-of-state retailers towards both consumers and Departments of Revenue. For the reasons specified in the following pages, the AICPA believes that the MTC draft should not be adopted.

The AICPA is the national professional organization of certified public accountants comprised of nearly 370,000 members. Our members advise clients on federal, state and international tax matters, and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized business, as well as America’s largest businesses.

If you have any questions, please contact me at (401) 831-0200 or patt@pgco.com; Harlan J. Kwiatek, Chair of the State and Local Taxation Technical Resource Panel at (314) 290-3271 or

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1 CO H.B. 10-1193; §39-21-112(3.5)
Mr. Joe Huddleston  
Ms. Shirley Sicilian  
May 18, 2011  
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Harlan.kwiatek@rubinbrown.com; or Marc A. Hyman, AICPA Technical Manager at (202) 434-9231 or mhyman@aicpa.org.

Sincerely,

[Signature]

Patricia A. Thompson, CPA  
Chair, Tax Executive Committee

cc: Greg Matson, MTC Deputy Director  
    Elliott Dubin, MTC Director of Policy Research
The AICPA believes that the MTC draft Model Sales & Use Tax Notice and Reporting Statute (Model Statute) should not be adopted for the following reasons:

1. **The MTC Model Statute undermines the work of the Streamlined Sales and Use Tax Project.**

For over ten years, the Streamlined Sales and Use Tax Project has made efforts to modernize state sales and use tax laws and create uniformity among the numerous sales tax jurisdictions in this country. With input from state taxing agencies, businesses and lawmakers, a model sales tax act—the Streamlined Sales and Use Tax Agreement—has been drafted and over twenty states have conformed their laws to the definitions and provisions contained in the Agreement. One impetus behind the effort to simplify state sales and use tax laws is the potential that Congress will adopt legislation partially overturning *Quill*’s physical presence requirement, thus requiring non-collecting retailers making sales into “Streamlined” states to collect and remit sales tax. Should this occur, it is expected that sales tax revenue loss associated with e-commerce will be reduced.

Although federal legislation has not yet been enacted, those involved in the Streamlined effort have attempted to confront the issue of revenue loss associated with e-commerce by making state sales tax regimes simpler and more uniform. These efforts do not involve coercion or side-stepping constitutional barriers. The years of collaboration and the give and take involved in the Streamlined effort would be significantly undermined if states could essentially force businesses in other states to collect simply to avoid burdensome notice and reporting requirements.

The MTC, as an organization that promotes uniformity among states, including many states that are actively involved in the Streamlined process, should not adopt a model statute that ignores the uniformity and collaborative achievements made within the Streamlined project.

2. **Out-of-state businesses that are not required to collect and remit sales tax should not be required to police individual use tax noncompliance.**

The Model Statute essentially puts the burden of policing purchaser use tax compliance on out-of-state businesses. While we recognize, as noted earlier, that states are dealing with serious budget issues, there are other ways to address the problem of low use tax compliance rates. One way is through better educating citizens of their use tax obligations such as through mass mailings, radio and television advertisements, clearer tax form instructions and targeted amnesty programs. Another option that has been adopted by
several states is to insert a line item on individual and business entity income tax returns where taxpayers are required to report use tax owed on remote purchases. Yet another option is for a state to provide an optional safe harbor allowing the taxpayer to report an amount equal to a percentage of the taxpayer’s adjusted gross income in that state instead of the actual amount of their use tax.

While use tax noncompliance is a serious concern, out-of-state retailers should not be burdened with enforcement of the use tax laws in states in which they do not have a physical presence.

3. **The Model Statute would likely compel businesses that are not required to do so under Quill to collect sales and use tax; forcing this result through the imposition of a burdensome reporting regime is bad tax policy.**

One of the major criticisms of Colorado’s information reporting requirements is that the state essentially coerces out-of-state businesses into collecting Colorado sales and use tax as a way for such businesses to opt out of complying with the state’s information reporting requirements and the potential penalties associated with noncompliance or error. The Model Statute, as written, would have the same effect.

We recognize that revenue loss associated with use tax noncompliance is a serious concern for the states, particularly in light of widespread deficits that many states are still experiencing. However, as a matter of tax policy, states should not be able to require out-of-state businesses to report vast amounts of information to in-state consumers and state taxing authorities. These requirements, particularly the reporting requirements, clearly obligate these out-of-state businesses to perform tasks and expend effort that is more appropriately undertaken by the relevant state tax authorities themselves thus blurring the line between the responsibilities appropriate to businesses that collect and remit sales and use taxes to a particular state, and business that do not have such responsibilities.

Businesses should have some level of certainty as to whether they have to fulfill sales and use tax compliance obligations. If they do not have actual physical presence in a state, they should not be subjected to a process, such as the one advocated by the Model Statute, of collecting and remitting information to both in-state customers and the Department of Revenue that is equally or more burdensome than had they been subject, under Quill\(^2\), to sales and use tax collection requirements for that state. Clearly, this violates the “undue burden” analysis of Quill and related cases.

4. **The costs of compliance with the Model Statute are likely to far outweigh the benefits received by the states receiving the reported information.**

Businesses will incur new or increased costs of compliance under the model statute, while governments may not have the resources to utilize or take advantage of additional information provided by expanded reporting. The benefits of this additional information most likely will not justify the additional costs to businesses.

\(^2\) *Quill Corp v. North Dakota*, 504 U.S. 298 (1992)
**Costs**

For out-of-state and other retailers who do not collect and remit sales taxes to a state, the costs of complying with a law based on the Model Statute will be significant. Businesses will have to dedicate human and material capital to:

- reprint their paper invoices, purchase orders and sales/lease receipts to display statutorily required boilerplate language that may likely be ignored by most purchasers;
- reprogram their website pages that replicate invoices, purchase orders and sales receipts to display the same information;
- produce an annual report to each of its in-state purchasers, under threat of penalty for omissions, detailing the type of product purchased or leased, how to remit the tax to the state authority and other information;
- keep track of each state’s required method for use tax remittance by taxpayers so that the business is able to properly inform the taxpayers in the annual report;
- complete and submit an accurate, annual report to the applicable state tax authority, under threat of substantial penalties, listing all of the business’ in-state purchasers, multiple addresses for each purchaser, dollar amounts and other information.

This compliance burden will substantially increase as the number of states adopting the Model Statute grows.

**Benefits**

It is not clear how receipt of information on thousands of internet purchases will translate into revenue for the states. Given the lack of resources most state taxing agencies are facing in light of recent state budget cuts, it is unlikely that states are equipped to handle collecting, compiling and analyzing the voluminous amount of information that will be required to be reported. Thus, the information—reported at great cost to non-collecting retailers—will not readily enable a state to collect unpaid use taxes.

Again, it would certainly appear to be the hope of states that enacting such a notice and reporting statute would compel out-of-state and other non-collecting retailers to start collecting the sales tax as a means to avoid compliance with the information reporting statute. This would seem to be the only way a significant amount of revenue could be generated with minimal administrative cost to the states.

The information reporting and notice rules impose significant financial burdens on non-collecting retailers and promise little discernable benefit for states outside of compelling collection and remittance of the sales tax.
5. **The principles addressed in the draft Model Statute, if adopted by the states, will continue to be challenged on constitutional grounds.**

The Direct Marketing Association (DMA), in its lawsuit alleging that Colorado’s reporting requirements violate the U. S. and Colorado Constitutions, have already been successful in obtaining an injunction in the Federal District Court of Colorado. The lawsuit alleges that the enactment:

- discriminates against out-of-state retailers lacking physical presence in the state relative to in-state retailers;
- imposes an improper and burdensome regulation of interstate commerce;
- tramples the right to privacy of Colorado residents and certain nonresidents;
- chills the exercise of free speech by certain purchasers and vendors of products that have expressive content;
- exposes confidential information regarding consumers and their purchases to the risk of data security breaches; and
- deprives retailers, without due process or fair compensation, of both the value of their proprietary customer lists and the substantial investment made to protect such lists from disclosure.

On January 26, 2011, the court issued a preliminary injunction that blocks the Colorado Department of Revenue’s enforcement of the notice and reporting requirements on out-of-state retailers while the DMA case is pending. The court ruled that DMA has shown a substantial likelihood of success on its constitutional claims.

A proposed model statute based on a law that is currently being challenged on constitutional grounds, and which is likely to be struck down in that challenge, simply should not be used as a template for other states’ use.
Dear Ms. King:

The State of Washington thanks the Multistate Tax Commission (MTC) for its efforts in this area and for giving us the opportunity to provide comments related to the “Proposed Model Sales and Use Tax Notice and Reporting Statute.” Washington state relies heavily on sales and use taxes to fund state services and we are acutely aware of the problems posed by the issue of remote seller collection authority, which this model proposal is designed, in part, to address. With this background in mind we have the following comments:

- **Incomplete solution:** The proposed model act does much to help notify consumers of their tax obligations and may result in some increased tax collections from voluntary compliance and targeted enforcement. However, the solution is incomplete and does not address the substantial costs and barriers that will continue to exist with respect to collecting sales and use taxes from consumers directly. Therefore, we think it is important that the states recognize the limited utility of this approach and strongly support or continue to support a comprehensive solution that would give states remote seller collection authority over sellers through federal action, including federal legislation.

- **Taxpayer convenience and compliance:** A purpose of the MTC Tax Compact is to promote uniformity in significant components of tax systems and to facilitate taxpayer convenience and compliance in administration. This proposal focuses on the sellers of goods, but does not offer solutions for the ultimate taxpayer relating to administration. Admittedly, some states provide a method for use tax compliance that may compliment the proposed model act, but for taxpayers in states like Washington that does not have an income tax return for use tax reporting the options are less clear. If this proposal moves forward, this issue should be addressed.

- **Sourcing of sales and digital products:** A purpose of the MTC Tax Compact is to promote compatibility in significant components of tax systems. This proposal requires notice for sales or leases subject to tax in a state. However, the proposal does not adopt or recommend any consistent method of sourcing. Therefore, it is possible that two states adopting this proposed model act may subject a single transaction to the seller notice requirements and related penalties. This is especially likely in the area of digital products. This situation creates great potential that sellers will have to send notices to multiple states for the same taxpayer or face penalties. It is unclear how this result would promote compatibility in significant components of tax systems. If this proposal moves forward, this issue should be addressed.

- **Issue development:** This approach has been the subject of recent litigation and it is unclear what the ultimate outcome will be if further litigated. However, the MTC membership should consider whether it makes sense to adopt a model approach now before the idea has had time to be more fully developed through experimentation in the laboratory of the many states.

Thank you again for allowing Washington this opportunity to provide comments.
Very truly yours,

/s/
Tim Jennrich
WA Department of Revenue
Draft Model Sales & Use Tax Notice and Reporting Act
As Approved by Executive Committee for Public Hearing – April 11, 2011

(a) Administration. The [State Department of Revenue] shall perform all functions necessary and proper for the administration and enforcement of this Act, including promulgating regulations and reviewing protests in accordance with the [State Administrative Procedures Act].

(b) Definitions. For purposes of this Act:

(1) “Department” means the [State Department of Revenue].
(2) “Director” means the Director of the [State Department of Revenue].
(3) “Purchaser” means any person who purchases or leases a product for delivery to a location in this state.

(c) Notice and Reports, Required. A person who sells or leases a product; the storage, use, or consumption of which is subject to [State Use Tax Act], or the sale or lease of which is subject to [State Sales Tax Act]; but who does not collect and remit either such tax, shall provide the following notice and reports.

(1) Notice to Purchaser at Time of Transaction. A notice shall be provided to each purchaser at the time of each such sale or lease.

(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. No indication shall be made that sales or use tax is not imposed upon the transaction, unless: (i) such indication is followed immediately with the notice required by this section (c)(1); or (ii) the transaction with respect to which the indication is given is exempt from [State] sales and use tax pursuant to [State] law.

(2) Annual Report to Purchaser. A report shall be provided to each purchaser before January 31st of each year.

(A) The report shall include:
(i) a statement indicating that the person did not collect sales or use tax on the purchaser’s transactions and that the purchaser may be required to remit such tax directly to the Department;
(ii) a list, by date, generally indicating the type of product purchased or leased during the prior calendar year by the purchaser from such person for delivery to a location in this state and the price of each product;
(iii) instruction for obtaining additional information regarding whether and how to remit the sales or use tax to the Department;
(iv) a statement that such person is required to submit a report to the Department pursuant to section (c)(3) of this Act stating the total dollar amount of the purchaser’s purchases; and
(v) any information as the Director shall reasonably require.

(B) 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.

(3) **Annual Report to [State Department of Revenue].** A report shall be provided before January 31st of each year to the Department.

(A) The report shall include, with respect to each purchaser:
   (i) the name of the purchaser;
   (ii) the billing address and, if different, the last known mailing address;
   (iii) the shipping address for each product sold or leased to such purchaser for delivery to a location in this state; and
   (iv) the total dollar amount of all such purchases by such purchaser which were made during the prior calendar year for delivery to each such address.

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

(d) **Exceptions.**

(1) **Small Seller.** A person who made less than $A [original SST threshold for small seller was $100,000] in total gross sales during the prior calendar year shall not be required to provide notice or file reports pursuant to section (c) of this Act.

(2) **De minimis In-State Sales.** A person who made less than $B [CO: $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 section (c) of this Act.

(3) **Sales by Registered Vendors.** A person who is registered to collect and remit sales and use tax, and who complies in good faith with the [State Sales and Use
Penalties.

(1) **Amount.** The Director shall assess a penalty upon any person who fails to provide notices and reports as required by this Act 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 section (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:

(i) 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

(ii) a total of $Z in one calendar year where section (e)(1)(A)(i) of this Act does not apply

(B) **Penalty for Failure to Provide Annual Report to Purchaser.** A person who fails to provide a report as required by section (c)(2) shall be assessed a penalty, in addition to any other applicable penalty, of $X for each such failure, not to exceed:

(i) 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

(ii) a total of $Z in one calendar year where section (e)(1)(B)(i) of this Act 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:

(i) 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

(ii) a total of $Z in one calendar year where section (e)(1)(C)(i) of this Act does not apply.

(2) **Estimates Authorized.** When assessing a penalty pursuant to section (e) of this Act, 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 section (e) of this Act 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 section (e)(4) above, 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.

(f) **Confidentiality of Purchaser Information.** Information received by the [State Department of Revenue] pursuant to this Act 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 Act.

(g) **Limitations.** Nothing in this Act shall relieve a person who is subject to [the state’s sales tax act or the use tax act] from any responsibilities imposed thereunder. Nor shall anything in this Act prevent the Director from administering and enforcing [the state’s sales tax act or the use tax act] with respect any person who is subject thereto.

(h) **Severance.** The provisions of this Act are severable and if any section, sentence, clause or phrase of this Act 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 Act, which shall remain in effect.