

## Conforming Comments

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

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

## MTC Model Use Tax Reporting Statute

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

- (1) **“Department”** means the [State Department of Revenue].
- (2) **“Director”** means the [Director/Commissioner of the State Department of Revenue].
- (3) **“Marketplace”** is any means, whether physical or electronic, through which one or more sellers may advertise and sell or lease tangible personal property, such as a catalog, Internet website, or television or radio broadcast, regardless of whether the tangible personal property or the seller are physically present in the state.
- (4) **“Marketplace facilitator”** means a person that operates or controls a marketplace and facilitates transactions by engaging, directly or indirectly, in communicating the offer and acceptance between a purchaser and a seller. *[Drafter’s Note: states might want to consider adding “payment processing” to the definition]* A marketplace facilitator that also engages in transactions as a seller is treated as a seller with respect to those transactions.
- (5) **“Marketplace seller”** means a seller that sells or leases tangible personal property through a third-party marketplace.
- (6) **“Marketplace transaction”** means a transaction facilitated by a marketplace facilitator.
- (7) **“Non-Collecting Seller”** means a seller that sells or leases tangible personal property and does not collect tax due under [State Sales And/Or Use Tax Act] on a transaction.
- (8) **“Order form”** is the means by which a purchaser conveys to a seller, prior to the transaction, the purchase of specifically identified tangible personal property.

(9) **“Person”** includes any individual, firm, corporation, partnership, limited liability company, joint venture, estate, trust, or group or combination acting as a unit.

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

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

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

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

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

(C) Received in the prior year, in the aggregate, at least \$10,000 in consideration from sellers or sellers’ representatives for referrals as defined in (a)(10) (B).

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

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

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

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

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

(A) The notice must state that no sales or use tax is being collected or remitted upon the transaction or marketplace transaction, or that the seller is not required to collect sales or use tax and that the purchaser may be required to remit any tax owed directly to the Department.

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

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

(2) **Annual Transactions Report to Purchaser.** Non-collecting sellers and marketplace facilitators shall provide the annual transaction report to purchasers as further provided in this paragraph (b)(2). Subject to the exceptions provided in subsection (e) of this section, an annual transactions report shall be provided to each purchaser who entered into, in the aggregate during the previous calendar year, more than \$200 in transactions that are subject to the notice requirement of paragraph (1) of this subsection. *Note to Uniformity Committee: there is a split of opinion among the workgroup regarding the minimum threshold for the annual transaction report to purchaser.*

(A) The annual transactions report shall include:

1. A statement that sales or use tax was not collected on the transactions in the prior calendar year and that the purchaser may be required to remit any tax owed directly to the Department;

2. A list of transactions entered into during the prior calendar year by the purchaser, if subject to the notice requirement of paragraph (1) of this subsection, showing, with respect to each transaction:
    - a. The amount paid;
    - b. The date of the transaction;
    - c. The type of tangible personal property purchased or leased; and
    - d. The shipping address.
  3. A statement that a report will be submitted to the Department, pursuant to paragraph (b)(3) of this Section, stating only the purchaser's name, address, and total dollar amount of the purchaser's transactions; and
  4. Additional information the Director may reasonably require.
- (B) The report required under this paragraph is due by January 31 of each year following the year for which the report is due.
- (C) Except as provided in subparagraph (D) of this paragraph, the report shall be sent to the purchaser's billing address, or if unknown, the purchaser's shipping address, in an envelope marked prominently with words indicating important tax information is enclosed. If no billing or shipping address is known, the report shall be sent electronically to the purchaser's last-known e-mail address with a subject heading indicating important tax information is enclosed.
- (D) If the purchaser's billing or shipping address is known, the report may be provided to the purchaser electronically, if:
1. No earlier than December 1<sup>st</sup> of the year to be covered by the report and no later than January 15<sup>th</sup> of the year following the year to be covered by the report, the purchaser agrees to receive the report electronically, and

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

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

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

(A) The report shall include:

1. The name of the purchaser;
2. The billing address and, if different, the last known mailing address;
3. The shipping address of all tangible personal property sold or leased to such purchaser for delivery to a location in this state; and
4. The total dollar amount by shipping address of all transactions subject to the notice requirement of (b)(1) that were made by the purchaser during the prior calendar year. .

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

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

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

**(c) Reports by Referrer.**

(1) A referrer shall make a report, as may be required from time to time by the Department, of the identity of each seller to which it makes referrals, as provided in Subsection (a)(10)

**(d) Reporting Requirements As Applied to Related Parties.** Any member of a group of related parties may file the reports required herein with respect to any non-collecting seller or marketplace facilitator among the related parties. The annual transactions report to the purchaser, as required by paragraph (b)(2), shall contain sufficient information to allow the purchaser to determine the identity of the non-collecting seller or marketplace facilitator making each transaction reported. The annual report to the Department shall indicate all non-collecting sellers or marketplace facilitators whose transactions are included.

**(e) Exceptions.**

**(1) De minimis Transactions.**

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

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

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

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

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

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

(f) **Penalties.**

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

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

1. a total of \$Y in one calendar year, if such person remedied each failure by providing the notice required by paragraph (b)(2) of this section prior to the date or within 45 of the date for providing the report required by paragraph (b)(1), and

2. a total of \$Z in one calendar year where subsection (g)(1)(A)(1.) of this Section does not apply.

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

1. a total of \$Y in one calendar year if such person remedied each failure by providing such notices within 45 days of the date such report was required to be provided, and
2. a total of \$Z in one calendar year where subsection (g)(1)(B)(1.) of this Section does not apply.

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

1. a total of \$Y in one calendar year if such person remedied the failure by providing the report within 45 days of the date such report was required to be provided, and
2. a total of \$Z in one calendar year where section (g)(1)(C)(1.) of this Section does not apply.

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

1. a total of \$Y in one calendar year if such person remedied the failure by providing the report within 45 days of the date such report was required to be provided, and
2. a total of \$Z in one calendar year where section (g)(1)(D)(1.) of this Section does not apply.

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

*the same. However, common lettering is used to note that the amounts are imposed for similar purposes in each lettered subparagraph.]*

- (2) **Estimates Authorized.** When assessing a penalty pursuant to subsection (g) of this Section, the Director may use any reasonable sampling or estimation technique where necessary or appropriate to determine the number of failures in any calendar year.
- (3) **Protest.** A person may protest the assessment of any such penalty or interest by filing a written objection with the Director within [number of days equal to the number of days allowed for protest of a use tax assessment or refund denial] days of the date of assessment. Disposition of a timely filed protest shall be in accordance with [state tax protest procedures]. If no such protest is filed within the time allowed, the assessment shall become final and subject to [judgment, warrant, collection procedures].
- (4) **Interest.** Interest shall accrue on the amount of the total penalty that has been assessed and become final for each calendar year pursuant to subsection (g) at the rate established pursuant to [state code section setting interest rate for tax underpayment].
- (5) **Waiver.** Upon written request received within the time established for protest pursuant to subsection (g)(3), the Director, in his or her sole discretion, may waive any portion or all of the penalty or interest applicable under this section for good cause shown.
- (6) **Exceptions.** No penalty shall be assessed with respect to any transaction subject to the exceptions described in subsection (e) of this section.

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

regarding confidential taxpayer information disclosure exceptions and penalties] shall apply to disclosure of information received by the Department pursuant to this Section.

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

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

- (i) **Construction with Other Laws.** Nothing in this Section shall relieve a person who is subject to [the state's sales tax act or the Sales And/Or Use Tax Act] from any responsibilities imposed thereunder. Nor shall anything in this Section prevent the Director from administering and enforcing [the state's sales tax act or the Sales And/Or Use Tax Act] with respect to any person who is subject to them.
- (j) **Limitations on liability.** Except for the penalties provided in subsection (f) of this section, no seller, marketplace facilitator, or referrer shall be liable to any person for the provision or failure to provide the notices or reports required by this Section.
- (k) **Severability.** The provisions of this Section are severable and if any section, sentence, clause or phrase of this Section shall for any reason be held to be invalid or unconstitutional, such holding shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Section, which shall remain in effect.
- (l) **Administration.** The Department [shall/may - state should adopt appropriate term depending on drafting standards] perform all functions necessary and proper for the administration and enforcement of this

Section, including promulgating regulations and reviewing protests in accordance with the [State Administrative Procedures Act].]