



MULTISTATE TAX COMMISSION

Maximizing the synergies of multi-state tax cooperation

To: MTC Uniformity Committee

From: Sheldon H. Laskin, Counsel

Date: March 3, 2017

Subject: MTC Use Tax Notice and Reporting Project

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.

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 542 Session of 2017

INTRODUCED BY THOMAS AND D. COSTA, FEBRUARY 17, 2017

REFERRED TO COMMITTEE ON FINANCE, FEBRUARY 17, 2017

AN ACT

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

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

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

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

23 "Unless you paid Pennsylvania sales tax on this purchase,

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

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

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

13 Section 2. This act shall take effect in 60 days.

SENATE BILL No. 111

By Committee on Assessment and Taxation

1-31

1 AN ACT concerning sales and use taxation; relating to the administration
2 thereof; required notices and reports.

3
4 *Be it enacted by the Legislature of the State of Kansas:*

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

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

7 (b) "Kansas purchase" means:

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

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

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

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

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

22 (c) "Kansas purchaser" means:

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

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

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

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

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

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

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

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

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

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

40 Sec. 3. (a) (1) Each retailer that does not collect Kansas sales tax shall
41 notify Kansas purchasers that sales or use tax is due on all purchases made
42 from the retailer that are not exempt from sales tax and that the state of
43 Kansas requires the purchaser to report use taxes due on their K-40 tax

1 form. Such notice must be provided with respect to each transaction
2 between the retailer that does not collect Kansas sales tax and a Kansas
3 purchaser. Such notice must be clearly legible, reasonably prominent and
4 located in close proximity to the total price.

5 (2) The notice required by this section shall contain the following
6 information:

7 (A) A statement indicating that the retailer does not collect Kansas
8 sales or use tax;

9 (B) the purchase is not exempt from Kansas sales or use tax merely
10 because it is made over the internet or by other remote means; and

11 (C) the state of Kansas requires a Kansas purchaser to report the use
12 tax due on such purchaser's K-40 tax form.

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

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

23 (2) The notice required by this subsection shall include the following
24 information:

25 (A) The name of the retailer;

26 (B) the total amount paid by the Kansas purchaser for Kansas
27 purchases made from the retailer in the previous calendar year. Such
28 notification shall also include, if available, the dates of purchase, the
29 amounts of each purchase and the category of the purchase, including, if
30 known by the retailer, whether the purchase is exempt or not exempt from
31 taxation;

32 (C) that the state of Kansas requires use taxes due to be reported on
33 the K-40 tax form;

34 (D) that the retailer is required by law to provide the Kansas
35 department of revenue with the total dollar amount of purchases made by
36 the Kansas purchaser, however, no information about the purchase other
37 than the dollar amount will be provided to the department; and

38 (E) any other information required by the director.

39 (3) If the retailer is required by another state to provide a similar
40 notice, and the retailer provides a single such notice to all purchasers with
41 respect to items purchased for delivery in all states, the notice required by
42 subsection (b) shall be sufficient if it contains substantially all the
43 information required in a form that is generalized to any state.

1 (4) Any retailer that does not collect Kansas sales tax that is required
2 to send an annual notice to Kansas purchasers as required by this
3 subsection shall not be required to send the notice to any de minimis
4 Kansas purchaser. A de minimis Kansas purchaser shall be a Kansas
5 purchaser whose total Kansas purchases for the prior calendar year are less
6 than \$500. Such retailer shall make commercially reasonable business
7 efforts, based on the business's existing billing, customer-tracking or other
8 systems, to identify multiple purchases made by a single Kansas purchaser.

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

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

18 (1) The name of each Kansas purchaser;

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

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

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

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

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

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

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

41 Sec. 5. Any information obtained by the department of revenue in
42 connection with the administration of sections 1 through 4, and
43 amendments thereto, shall be subject to the same confidentiality provisions

1 as set forth in K.S.A. 79-3614, and amendments thereto.

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

5 Sec. 7. This act shall take effect and be in force from and after its
6 publication in the statute book.

Stricken language would be deleted from and underlined language would be added to present law.

1 State of Arkansas *As Engrossed: H1/31/17 H2/3/17*

2 91st General Assembly

A Bill

3 Regular Session, 2017

HOUSE BILL 1388

4

5 By: Representative D. Douglas

6 *By: Senator Files*

7

8

For An Act To Be Entitled

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

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Subtitle

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

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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:

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(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:

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(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.

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(B) A seller that fails to provide the notice required



1 under this subdivision (f)(1) is subject to a penalty of five dollars (\$5.00)
2 for each failure to provide notice, unless the seller shows reasonable cause
3 for the failure to provide notice;

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

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

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

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

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

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

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

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

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

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

32 (i) The name of the purchaser;

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

35 (iii) Each delivery or shipping address provided by
36 the purchaser to the seller.

1 (2) The legislature recognizes that states may not impose sales
2 or use tax collection obligations on an out-of-state business unless
3 the business has a substantial nexus with the taxing state. The
4 legislature also recognizes that under the United States supreme
5 court's decision in *National Bellas Hess v. Dep't of Revenue of Ill.*,
6 386 U.S. 753 (1967), substantial nexus under the commerce clause
7 requires a physical presence by the seller in the taxing state.
8 Relying on the doctrine of stare decisis, the United States supreme
9 court reaffirmed the physical presence nexus standard twenty-five
10 years later in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

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

27 (4) The legislature further finds that *Bellas Hess* was decided
28 one year before the first plans were developed for the computer
29 network that became the basis of the internet. The legislature
30 further finds that since *Quill* was decided e-commerce has grown
31 substantially, generating retail sales of over three hundred forty-
32 one billion dollars in 2015, which have been growing at a rate of
33 about fifteen percent for the last five years. The legislature
34 further finds that like their brick and mortar competitors, online
35 businesses receive benefits and opportunities provided by their
36 market states, such as transportation networks, infrastructure, laws
37 providing protection of business interests, access to the courts to
38 protect valuable rights, and a regulated marketplace. However, the
39 legislature finds that under the current physical presence nexus
40 standard, online only sellers have an unfair competitive advantage

1 over in state brick and mortar stores to the detriment of main street
2 retailers. Online only businesses have no geographical limitations to
3 their marketplace; no costs of maintaining local physical retail
4 stores, such as infrastructure costs, employee costs, and property
5 taxes; and may not have to collect sales tax on sales to customers in
6 states in which they do not have a physical presence, all of which
7 lead to their ability to price their goods at a lower cost to
8 consumers. The legislature further finds that even if the physical
9 presence nexus standard was once a wise rule of law, it is no longer
10 justifiable.

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

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

33 (7) The legislature finds that because Washington is unique in
34 that it relies so heavily on sales tax to fund education and other
35 vital state services, and because Washington has frequently been at
36 the forefront of advancing technology and tax policy, it is incumbent
37 upon this state to lead the way to a more fair and equitable modern
38 marketplace where online businesses and brick and mortar businesses
39 can compete based on quality of products and other nontax factors,
40 which benefits all consumers. The legislature recognizes that the

1 fast pace of technological change seen with the rapid growth of
2 electronic commerce puts pressure on states to update their tax codes
3 just as this state did (a) in 2007 in adopting Senate Bill No. 5089,
4 which enacted significant simplifications in sales and use
5 administration and brought Washington into full compliance with the
6 streamlined sales and use tax agreement, (b) in 2009 in adopting
7 Engrossed Substitute House Bill No. 2075 addressing the excise
8 taxation of digital products, and (c) in 2010 in adopting economic
9 nexus and market-based apportionment for business and occupation tax
10 purposes in Second Engrossed Substitute Senate Bill No. 6143. The
11 legislature finds that making such changes is not radical or to be
12 unexpected, but is a rational means to avoid an ever shrinking tax
13 base resulting from an outdated tax code that has not kept up with
14 significant changes in technology and the economy.

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

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

26 (10) Therefore, the legislature intends by this act to address
27 the significant harm and unfairness brought about by the physical
28 presence nexus rule by testing the boundaries of the rule. This act
29 also sets up a legal challenge to the physical presence nexus rule
30 that could potentially lead to the United States supreme court
31 reevaluating *Bellas Hess* and *Quill* or congress enacting legislation
32 authorizing and establishing the requirements for states to impose a
33 sales tax collection duty on remote sellers. To achieve these
34 objectives, part II of this act establishes clear statutory
35 guidelines for determining when sellers are required to collect
36 Washington's sales tax. These guidelines clarify the extent of the
37 traditional physical presence standard and also adopt an "economic
38 nexus" standard under which a remote seller would establish a
39 substantial nexus with this state solely by making a meaningful
40 amount of sales into this state. Part II of this act also extends the

1 economic nexus standard for the business and occupation tax imposed
2 on retail sales taxed under RCW 82.04.250(1) and 82.04.257(1). Part
3 III of this act adopts a sales and use tax notice and reporting law
4 based on the multistate tax commission's draft model sales and use
5 tax notice reporting statute, which is similar to Colorado's sales
6 and use tax notice reporting law.

7 (11) The legislature recognizes that the enactment of part II of
8 this act places remote sellers in a complicated position, precisely
9 because existing constitutional doctrine calls certain provisions of
10 part II of this act into question. Accordingly, the legislature
11 intends to clarify that the obligations created by this law on
12 sellers with a substantial nexus with this state under section
13 206(1)(b) of this act would be appropriately stayed by the courts
14 until the constitutionality of section 206(1)(b) of this act has been
15 clearly established by a binding judgment, including, for example, a
16 decision from the supreme court of the United States abrogating its
17 existing doctrine, or a final judgment applicable to a particular
18 taxpayer.

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

23 Part II

24 Nexus for Excise Tax Purposes

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

27 "Engaging within this state" and "engaging within the state,"
28 when used in connection with any apportionable activity as defined in
29 RCW 82.04.460 or (~~wholesale sales~~) selling activity taxable under
30 RCW 82.04.250(1), 82.04.257(1), or 82.04.270, means that a person
31 generates gross income of the business from sources within this
32 state, such as customers or intangible property located in this
33 state, regardless of whether the person is physically present in this
34 state.

35 **Sec. 202.** RCW 82.04.067 and 2016 c 137 s 2 are each amended to
36 read as follows:

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

4 (a) An individual and is a resident or domiciliary of this state;

5 (b) A business entity and is organized or commercially domiciled
6 in this state; or

7 (c) A nonresident individual or a business entity that is
8 organized or commercially domiciled outside this state, and (~~in the~~
9 ~~immediately preceding tax year~~) the person had:

10 (i) More than (~~fifty~~) fifty-three thousand dollars of property
11 in this state;

12 (ii) More than (~~fifty~~) fifty-three thousand dollars of payroll
13 in this state;

14 (iii) More than two hundred (~~fifty~~) sixty-seven thousand
15 dollars of receipts from this state; or

16 (iv) At least twenty-five percent of the person's total property,
17 total payroll, or total receipts in this state.

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

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

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

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

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

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

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

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

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

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

30 (e) Notwithstanding anything else to the contrary in this
31 subsection, property counting toward the thresholds in subsection
32 (1)(c)(i) and (iv) of this section does not include a person's
33 ownership of, or rights in, computer software as defined in RCW
34 82.04.215, including computer software used in providing a digital
35 automated service; master copies of software; and digital goods and
36 digital codes residing on servers located in this state.

37 (3)(a) Payroll counting toward the thresholds in subsection
38 (1)(c)(ii) and (iv) of this section is the total amount paid by the
39 taxpayer for compensation in this state during the immediately
40 preceding tax year plus nonemployee compensation paid to

1 representative third parties in this state. Nonemployee compensation
2 paid to representative third parties includes the gross amount paid
3 to nonemployees who represent the taxpayer in interactions with the
4 taxpayer's clients and includes sales commissions.

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

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

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

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

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

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

24 (c) For persons taxable under RCW 82.04.250(1), 82.04.257(1), or
25 82.04.270 (~~((with respect to wholesale sales))~~), the gross proceeds of
26 sales taxable under those statutory provisions and sourced to this
27 state in accordance with RCW 82.32.730.

28 (5)(a) Each December, the department must review the cumulative
29 percentage change in the consumer price index. The department must
30 adjust the thresholds in subsection (1)(c)(i) through (iii) of this
31 section if the consumer price index has changed by five percent or
32 more since the later of June 1, 2010, or the date that the thresholds
33 were last adjusted under this subsection. For purposes of determining
34 the cumulative percentage change in the consumer price index, the
35 department must compare the consumer price index available as of
36 December 1st of the current year with the consumer price index as of
37 the later of June 1, 2010, or the date that the thresholds were last
38 adjusted under this subsection. The thresholds must be adjusted to
39 reflect that cumulative percentage change in the consumer price
40 index. The adjusted thresholds must be rounded to the nearest one

1 thousand dollars. Any adjustment will apply to tax periods that begin
2 after the adjustment is made.

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

7 (6)(a)(i) Except as provided in (a)(iii) of this subsection (6),
8 subsections (1) through (5) of this section only apply with respect
9 to the taxes on persons engaged in apportionable activities as
10 defined in RCW 82.04.460 or making wholesale sales taxable under RCW
11 82.04.257(1) or 82.04.270.

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

21 (iii) For purposes of the taxes imposed under this chapter on the
22 business of making sales at retail taxable under RCW 82.04.250(1) or
23 82.04.257(1), a person is also deemed to have a substantial nexus
24 with this state if the person's receipts from this state, pursuant to
25 subsection (4)(c) of this section, meet either criterion in
26 subsection (1)(c)(iii) or (iv) of this section, as adjusted under
27 subsection (5) of this section.

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

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

36 (ii) A remote seller as defined in RCW 82.08.052 is presumed to
37 be engaged in activities in this state that are significantly
38 associated with the remote seller's ability to establish or maintain
39 a market for its products in this state if the remote seller is
40 presumed to have a substantial nexus with this state under RCW

1 82.08.052. The presumption in this subsection (6)(c)(ii) may be
2 rebutted as provided in RCW 82.08.052. To the extent that the
3 presumption in RCW 82.08.052 is no longer operative pursuant to RCW
4 82.32.762, the presumption in this subsection (6)(c)(ii) is no longer
5 operative. (~~Nothing in this section may be construed to affect in~~
6 ~~any way RCW 82.04.424, 82.08.050(11), or 82.12.040(5) or to narrow~~
7 ~~the scope of the terms "agent" or "other representative" in this~~
8 ~~subsection (6)(c).)~~)

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

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

16 (2)(a) A person who has a substantial nexus with this state in
17 (~~any tax year under the provisions of RCW 82.04.067 will be deemed~~
18 ~~to have a substantial nexus with this state for the following tax~~
19 ~~year)) the current calendar year under the provisions of RCW
20 82.04.067, based solely on the person's property, payroll, or
21 receipts in this state during the current calendar year, is subject
22 to the tax imposed under this chapter for the current calendar year
23 only on business activity occurring on and after the date that the
24 person established a substantial nexus with this state in the current
25 calendar year.~~

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

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

34 NEW SECTION. **Sec. 205.** A new section is added to chapter 82.08
35 RCW to be codified between RCW 82.08.050 and 82.08.052 to read as
36 follows:

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

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

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

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

12 (b) The seller's receipts from retail sales in this state,
13 pursuant to RCW 82.04.067(4), meet either criterion in RCW
14 82.04.067(1)(c) (iii) or (iv), as adjusted under RCW 82.04.067(5).

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

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

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

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

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

36 (C) Maintains, occupies, or uses an office, distribution
37 facility, warehouse, storage place, or similar place of business in
38 this state to facilitate the delivery or sale of tangible personal
39 property sold by the seller to the seller's purchasers in this state;

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

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

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

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

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

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

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

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

37 (i) The marketplace facilitator or any affiliated person
38 maintained a physical presence in this state during any portion of
39 the current or immediately preceding calendar year to engage in any

1 of the activities described in subsection (5)(a)(i) or (ii) of this
2 section; or

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

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

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

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

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

29 (i) Any of the following:

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

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

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

36 (D) Software development or research and development activities
37 related to any of the activities described in (a)(i)(A) through (C)
38 or (ii)(A) through (H) of this subsection (5), if such activities are
39 directly related to a physical or electronic marketplace operated by
40 the person or an affiliated person; and

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

3 (A) Payment processing services;

4 (B) Fulfillment or storage services;

5 (C) Listing products for sale;

6 (D) Setting prices;

7 (E) Branding sales as those of the marketplace facilitator;

8 (F) Order taking;

9 (G) Advertising or promotion; or

10 (H) Providing customer service or accepting or assisting with
11 returns or exchanges.

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

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

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

21 (6) This section is subject to RCW 82.32.762.

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

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

34 (2) A marketplace facilitator is relieved of liability under this
35 chapter for failure to collect the correct amount of tax to the
36 extent that the marketplace facilitator can show to the department's
37 satisfaction that the error was due to incorrect information given to
38 the marketplace facilitator by the marketplace seller, unless the
39 marketplace facilitator and marketplace seller are affiliated

1 persons. Where the marketplace facilitator is relieved of liability
2 under this subsection (2), the marketplace seller is solely liable
3 for the amount of uncollected tax due.

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

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

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

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

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

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

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

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

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

3 (b) "Marketplace facilitator" has the same meaning as in section
4 206 of this act.

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

9 (7) This section is subject to RCW 82.32.762.

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

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

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

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

34 (3) Except as otherwise provided in this section, if any seller
35 fails to collect the tax imposed in this chapter or, having collected
36 the tax, fails to pay it to the department in the manner prescribed
37 by this chapter, whether such failure is the result of the seller's
38 own acts or the result of acts or conditions beyond the seller's

1 control, the seller is, nevertheless, personally liable to the state
2 for the amount of the tax.

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

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

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

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

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

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

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

37 (c) Sellers are relieved from personal liability for the amount
38 of tax if they obtain a blanket exemption certificate for a purchaser
39 with which the seller has a recurring business relationship. The
40 department may not request from a seller renewal of blanket exemption

1 certificates or updates of exemption certificate information or data
2 elements if there is a recurring business relationship between the
3 buyer and seller. For purposes of this subsection (7)(c), a
4 "recurring business relationship" means at least one sale transaction
5 within a period of twelve consecutive months.

6 (d) Sellers are relieved from personal liability for the amount
7 of tax if they obtain a copy of a direct pay permit issued under RCW
8 82.32.087.

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

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

30 (10) Where a buyer has failed to pay to the seller the tax
31 imposed by this chapter and the seller has not paid the amount of the
32 tax to the department, the department may, in its discretion, proceed
33 directly against the buyer for collection of the tax. If the
34 department proceeds directly against the buyer for collection of the
35 tax as authorized in this subsection, the department may add a
36 penalty of ten percent of the unpaid tax to the amount of the tax due
37 for failure of the buyer to pay the tax to the seller, regardless of
38 when the tax may be collected by the department. In addition to the
39 penalty authorized in this subsection, all of the provisions of
40 chapter 82.32 RCW, including those relative to interest and

1 penalties, apply. For the sole purpose of applying the various
2 provisions of chapter 82.32 RCW, the twenty-fifth day of the month
3 following the tax period in which the purchase was made will be
4 considered as the due date of the tax.

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

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

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

11 ~~(ii) The taking of orders; or~~

12 ~~(iii) The processing of payments; and~~

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

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

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

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

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

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

36 (1) For purposes of this chapter, a remote seller is presumed to
37 have a substantial nexus with this state and is obligated to collect
38 retail sales tax during the current calendar year if the remote
39 seller enters into an agreement with a resident of this state under

1 which the resident, for a commission or other consideration, directly
2 or indirectly refers potential customers, whether by a link on an
3 internet web site or otherwise, to the remote seller, if the
4 cumulative gross receipts from sales by the remote seller to
5 Washington customers (~~(in this state)~~) who are referred to the remote
6 seller by all residents with this type of an agreement with the
7 remote seller exceed ten thousand dollars during the current or
8 immediately preceding calendar year. This presumption may be rebutted
9 by proof that the resident with whom the remote seller has an
10 agreement did not engage in any solicitation in this state on behalf
11 of the remote seller that would satisfy the nexus requirement of the
12 United States Constitution during the calendar year in question.
13 Proof may be shown by (a) establishing, in a manner acceptable to the
14 department, that (i) each in-state person with whom the remote seller
15 has an agreement is prohibited from engaging in any solicitation
16 activities in this state that refer potential customers to the remote
17 seller, and (ii) such in-state person or persons have complied with
18 that prohibition; or (b) any other means as may be approved by the
19 department.

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

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

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

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

36 (~~4~~)) This section is subject to RCW 82.32.762.

37 **Sec. 210.** RCW 82.12.040 and 2015 c 169 s 9 are each amended to
38 read as follows:

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

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

35 (3) The tax required to be collected by this chapter is deemed to
36 be held in trust by the retailer until paid to the department, and
37 any retailer who appropriates or converts the tax collected to the
38 retailer's own use or to any use other than the payment of the tax
39 provided herein to the extent that the money required to be collected
40 is not available for payment on the due date as prescribed is guilty

1 of a misdemeanor. In case any seller fails to collect the tax herein
2 imposed or having collected the tax, fails to pay the same to the
3 department in the manner prescribed, whether such failure is the
4 result of the seller's own acts or the result of acts or conditions
5 beyond the seller's control, the seller is nevertheless personally
6 liable to the state for the amount of such tax, unless the seller has
7 taken from the buyer a copy of a direct pay permit issued under RCW
8 82.32.087.

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

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

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

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

19 ~~(ii) The taking of orders; or~~

20 ~~(iii) The processing of payments; and~~

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

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

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

1 (~~(8)~~) (6) Notwithstanding subsections (1) through (4) of this
2 section, any person making sales is not obligated to collect the tax
3 imposed by this chapter if the state is prohibited under the
4 Constitution or laws of the United States from requiring the person
5 to collect the tax imposed by this chapter.

6 (~~(9)~~) (7) Notwithstanding subsections (1) through (4) of this
7 section, any licensed dealer facilitating a firearm sale or transfer
8 between two unlicensed persons by conducting background checks under
9 chapter 9.41 RCW is not obligated to collect the tax imposed by this
10 chapter.

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

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

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

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

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

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

3 (1) A taxpayer that, for the purposes of the tax collection
4 obligations in chapter 82.08 RCW, has a substantial nexus with this
5 state solely under the provisions of section 206(1)(b) of this act
6 and is complying with the requirements of chapter 82.08 RCW,
7 voluntarily or otherwise, may only seek a recovery of sales taxes,
8 penalties, or interest from the department by following the recovery
9 procedures established under RCW 82.32.060. However, no claim may be
10 granted on the basis that the taxpayer lacked a physical presence in
11 the state and complied with the tax collection provisions of chapter
12 82.08 RCW voluntarily while covered by the prohibition on enforcement
13 provided in section 211 of this act.

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

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

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

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

34 (2) For purposes of this section:

35 (a) A change in federal law conflicts with RCW 82.08.052, section
36 206 of this act, or section 207 of this act if the change clearly
37 allows states to impose greater sales and use tax collection
38 obligations on remote sellers than provided for, or clearly prevents
39 states from imposing sales and use tax collection obligations on

1 remote sellers to the extent provided for, under RCW 82.08.052,
2 section 206 of this act, or section 207 of this act.

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

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

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

17 (b) Must include information on its web site informing taxpayers
18 and the public (i) of the provision or provisions of RCW 82.08.052,
19 section 206 of this act, or section 207 of this act that will have no
20 further force and effect, (ii) when such change will become
21 effective, and (iii) about how to participate in any rule making
22 conducted by the department in accordance with (a) of this subsection
23 (3).

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

26 Part III

27 Sales and Use Tax Notice and Reporting Requirements

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

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

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

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

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

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

38 (6) "Sale" has the same meaning as in RCW 82.04.040.

1 (7) "Seller" has the same meaning as in RCW 82.08.010, and
2 includes a marketplace facilitator as defined in section 206 of this
3 act.

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

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

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

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

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

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

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

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

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

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

1 (a) The report under this subsection (3) must include:

2 (i) A statement that the seller did not collect sales or use tax

3 on the consumer's transactions with the seller and that the consumer

4 may be required to remit such tax directly to the department;

5 (ii) A list, by date, generally indicating the type of product

6 purchased or leased during the immediately preceding calendar year by

7 the consumer from the seller sourced to this state under RCW

8 82.32.730 and the price of each product;

9 (iii) Instructions for obtaining additional information from the

10 department regarding whether and how to remit the sales or use tax to

11 the department;

12 (iv) A statement that the seller is required to submit a report

13 to the department pursuant to subsection (4) of this section stating

14 the total dollar amount of the consumer's purchases from the seller;

15 and

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

17 (b) The report required under this subsection (3) must be sent to

18 the consumer's billing address, or if unknown, the consumer's

19 shipping address, in an envelope marked prominently with words

20 indicating important tax information is enclosed. If no billing or

21 shipping address is known, the report must be sent electronically to

22 the consumer's last known email address with a subject heading

23 indicating important tax information is enclosed.

24 (4) A seller subject to the notice and reporting requirements of

25 this section must, no later than January 31st of each year, file a

26 report with the department.

27 (a) The report under this subsection (4) must include, with

28 respect to each consumer to whom the seller is required to provide a

29 report under subsection (3) of this section by January 31st of the

30 current calendar year:

31 (i) The consumer's name;

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

33 mailing address;

34 (iii) The shipping address for each product sold or leased to

35 such consumer for delivery to a location in this state during the

36 immediately preceding calendar year; and

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

38 consumer.

39 (b) The report under this subsection (4) must be filed

40 electronically in a form and manner required by the department.

1 (5) The following exemptions to the notice and reporting
2 requirements of this section apply:

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

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

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

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

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

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

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

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

37 (c) The department must assess a penalty against any seller who
38 fails to file a report as required by section 302(4) of this act, in
39 addition to any other applicable penalty, equal to ten dollars times

1 the number of such consumers that should have been included on such
2 report.

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

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

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

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

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

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

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

35 (A) Provide notice under section 302(2) of this act to at least
36 ninety-five percent of the consumers entitled to such notice in any
37 given calendar year or portion of the initial calendar year in which
38 the agreement required under this subsection was in effect if the
39 agreement was in effect for less than the entire calendar year;

1 (B) Timely provide the reports required under section 302(3) of
2 this act to all consumers who received notice from the seller under
3 section 302(2) of this act during any calendar year, unless the
4 department finds that any such failure was due to circumstances
5 beyond the seller's control; or

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

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

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

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

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

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

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

1 calendar year immediately following the calendar year in which the
2 taxable retail sale occurred.

3 (2) This section does not apply to the reporting and payment of
4 taxes imposed under chapters 82.08 and 82.12 RCW:

5 (a) On the retail sale or use of motor vehicles, vessels, or
6 aircraft; or

7 (b) By consumers who are engaged in business, unless the
8 department has relieved the consumer of the requirement to file
9 returns pursuant to RCW 82.32.045(4).

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

16 **Sec. 307.** RCW 82.32.045 and 2010 1st sp.s. c 23 s 1103 are each
17 amended to read as follows:

18 (1) Except as otherwise provided in this chapter or chapter
19 82.--- RCW (the new chapter created in section 404 of this act),
20 payments of the taxes imposed under chapters 82.04, 82.08, 82.12,
21 82.14, and 82.16 RCW, along with reports and returns on forms
22 prescribed by the department, are due monthly within twenty-five days
23 after the end of the month in which the taxable activities occur.

24 (2) The department of revenue may relieve any taxpayer or class
25 of taxpayers from the obligation of remitting monthly and may require
26 the return to cover other longer reporting periods, but in no event
27 may returns be filed for a period greater than one year. For these
28 taxpayers, tax payments are due on or before the last day of the
29 month next succeeding the end of the period covered by the return.

30 (3) The department of revenue may also require verified annual
31 returns from any taxpayer, setting forth such additional information
32 as it may deem necessary to correctly determine tax liability.

33 (4) Notwithstanding subsections (1) and (2) of this section, the
34 department may relieve any person of the requirement to file returns
35 if the following conditions are met:

36 (a) The person's value of products, gross proceeds of sales, or
37 gross income of the business, from all business activities taxable
38 under chapter 82.04 RCW, is less than:

1 (i) Twenty-eight thousand dollars per year; or
2 (ii) Forty-six thousand six hundred sixty-seven dollars per year
3 for persons generating at least fifty percent of their taxable amount
4 from activities taxable under RCW 82.04.255, 82.04.290(2)(a), and
5 82.04.285;

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

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

12 **Part IV**
13 **Miscellaneous**

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

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

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

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

25 NEW SECTION. **Sec. 403.** For purposes of determining whether a
26 person engaged in the business of making sales at retail has a
27 substantial nexus with this state under the provisions of RCW
28 82.04.067(6)(a)(iii) or section 206 (1)(b), (2), or (3)(a)(ii) of
29 this act for taxable periods beginning on the effective date of this
30 section through December 31, 2017, the person's gross proceeds of
31 sales are based on the entire 2017 calendar year.

32 NEW SECTION. **Sec. 404.** Sections 301 through 306 of this act
33 constitute a new chapter in Title 82 RCW.

1 NEW SECTION. **Sec. 405.** This act is necessary for the immediate
2 preservation of the public peace, health, or safety, or support of
3 the state government and its existing public institutions, and takes
4 effect July 1, 2017.

--- END ---

1 the public education system, health care services, infrastructure,
2 and other vital public services.

3 (2) The legislature recognizes that states may not impose sales
4 or use tax collection obligations on an out-of-state business unless
5 the business has a substantial nexus with the taxing state. The
6 legislature also recognizes that under the United States supreme
7 court's decision in *National Bellas Hess v. Dep't of Revenue of Ill.*,
8 386 U.S. 753 (1967), substantial nexus under the commerce clause
9 requires a physical presence by the seller in the taxing state.
10 Relying on the doctrine of stare decisis, the United States supreme
11 court reaffirmed the physical presence nexus standard twenty-five
12 years later in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

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

29 (4) The legislature further finds that *Bellas Hess* was decided
30 one year before the first plans were developed for the computer
31 network that became the basis of the internet. The legislature
32 further finds that since *Quill* was decided e-commerce has grown
33 substantially, generating retail sales of over three hundred forty-
34 one billion dollars in 2015, which have been growing at a rate of
35 about fifteen percent for the last five years. The legislature
36 further finds that like their brick and mortar competitors, online
37 businesses receive benefits and opportunities provided by their
38 market states, such as transportation networks, infrastructure, laws
39 providing protection of business interests, access to the courts to
40 protect valuable rights, and a regulated marketplace. However, the

1 legislature finds that under the current physical presence nexus
2 standard, online only sellers have an unfair competitive advantage
3 over in state brick and mortar stores to the detriment of main street
4 retailers. Online only businesses have no geographical limitations to
5 their marketplace; no costs of maintaining local physical retail
6 stores, such as infrastructure costs, employee costs, and property
7 taxes; and may not have to collect sales tax on sales to customers in
8 states in which they do not have a physical presence, all of which
9 lead to their ability to price their goods at a lower cost to
10 consumers. The legislature further finds that even if the physical
11 presence nexus standard was once a wise rule of law, it is no longer
12 justifiable.

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

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

35 (7) The legislature finds that because Washington is unique in
36 that it relies so heavily on sales tax to fund education and other
37 vital state services, and because Washington has frequently been at
38 the forefront of advancing technology and tax policy, it is incumbent
39 upon this state to lead the way to a more fair and equitable modern
40 marketplace where online businesses and brick and mortar businesses

1 can compete based on quality of products and other nontax factors,
2 which benefits all consumers. The legislature recognizes that the
3 fast pace of technological change seen with the rapid growth of
4 electronic commerce puts pressure on states to update their tax codes
5 just as this state did (a) in 2007 in adopting Senate Bill No. 5089,
6 which enacted significant simplifications in sales and use
7 administration and brought Washington into full compliance with the
8 streamlined sales and use tax agreement, (b) in 2009 in adopting
9 Engrossed Substitute House Bill No. 2075 addressing the excise
10 taxation of digital products, and (c) in 2010 in adopting economic
11 nexus and market-based apportionment for business and occupation tax
12 purposes in Second Engrossed Substitute Senate Bill No. 6143. The
13 legislature finds that making such changes is not radical or to be
14 unexpected, but is a rational means to avoid an ever shrinking tax
15 base resulting from an outdated tax code that has not kept up with
16 significant changes in technology and the economy.

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

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

28 (10) Therefore, the legislature intends by this act to address
29 the significant harm and unfairness brought about by the physical
30 presence nexus rule by testing the boundaries of the rule. This act
31 also sets up a legal challenge to the physical presence nexus rule
32 that could potentially lead to the United States supreme court
33 reevaluating *Bellas Hess* and *Quill* or congress enacting legislation
34 authorizing and establishing the requirements for states to impose a
35 sales tax collection duty on remote sellers. To achieve these
36 objectives, part II of this act establishes clear statutory
37 guidelines for determining when sellers are required to collect
38 Washington's sales tax. These guidelines clarify the extent of the
39 traditional physical presence standard and also adopt an "economic
40 nexus" standard under which a remote seller would establish a

1 substantial nexus with this state solely by making a meaningful
2 amount of sales into this state. Part II of this act also extends the
3 economic nexus standard for the business and occupation tax imposed
4 on retail sales taxed under RCW 82.04.250(1) and 82.04.257(1). Part
5 III of this act adopts a sales and use tax notice and reporting law
6 based on the multistate tax commission's draft model sales and use
7 tax notice reporting statute, which is similar to Colorado's sales
8 and use tax notice reporting law.

9 (11) The legislature recognizes that the enactment of part II of
10 this act places remote sellers in a complicated position, precisely
11 because existing constitutional doctrine calls certain provisions of
12 part II of this act into question. Accordingly, the legislature
13 intends to clarify that the obligations created by this law on
14 sellers with a substantial nexus with this state under section
15 206(1)(b) of this act would be appropriately stayed by the courts
16 until the constitutionality of section 206(1)(b) of this act has been
17 clearly established by a binding judgment, including, for example, a
18 decision from the supreme court of the United States abrogating its
19 existing doctrine, or a final judgment applicable to a particular
20 taxpayer.

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

25 Part II

26 Nexus for Excise Tax Purposes

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

29 "Engaging within this state" and "engaging within the state,"
30 when used in connection with any apportionable activity as defined in
31 RCW 82.04.460 or (~~wholesale sales~~) selling activity taxable under
32 RCW 82.04.250(1), 82.04.257(1), or 82.04.270, means that a person
33 generates gross income of the business from sources within this
34 state, such as customers or intangible property located in this
35 state, regardless of whether the person is physically present in this
36 state.

1 **Sec. 202.** RCW 82.04.067 and 2016 c 137 s 2 are each amended to
2 read as follows:

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

6 (a) An individual and is a resident or domiciliary of this state;

7 (b) A business entity and is organized or commercially domiciled
8 in this state; or

9 (c) A nonresident individual or a business entity that is
10 organized or commercially domiciled outside this state, and (~~in the~~
11 ~~immediately preceding tax year~~) the person had:

12 (i) More than (~~fifty~~) fifty-three thousand dollars of property
13 in this state;

14 (ii) More than (~~fifty~~) fifty-three thousand dollars of payroll
15 in this state;

16 (iii) More than two hundred (~~fifty~~) sixty-seven thousand
17 dollars of receipts from this state; or

18 (iv) At least twenty-five percent of the person's total property,
19 total payroll, or total receipts in this state.

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

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

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

37 (c) The average value of property must be determined by averaging
38 the values at the beginning and ending of the (~~tax~~) applicable
39 calendar year; but the department may require the averaging of
40 monthly values during the (~~tax~~) applicable calendar year if

1 reasonably required to properly reflect the average value of the
2 taxpayer's property.

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

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

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

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

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

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

32 (e) Notwithstanding anything else to the contrary in this
33 subsection, property counting toward the thresholds in subsection
34 (1)(c)(i) and (iv) of this section does not include a person's
35 ownership of, or rights in, computer software as defined in RCW
36 82.04.215, including computer software used in providing a digital
37 automated service; master copies of software; and digital goods and
38 digital codes residing on servers located in this state.

39 (3)(a) Payroll counting toward the thresholds in subsection
40 (1)(c)(ii) and (iv) of this section is the total amount paid by the

1 taxpayer for compensation in this state during the immediately
2 preceding tax year plus nonemployee compensation paid to
3 representative third parties in this state. Nonemployee compensation
4 paid to representative third parties includes the gross amount paid
5 to nonemployees who represent the taxpayer in interactions with the
6 taxpayer's clients and includes sales commissions.

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

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

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

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

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

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

26 (c) For persons taxable under RCW 82.04.250(1), 82.04.257(1), or
27 82.04.270 (~~((with respect to wholesale sales))~~), the gross proceeds of
28 sales taxable under those statutory provisions and sourced to this
29 state in accordance with RCW 82.32.730.

30 (5)(a) Each December, the department must review the cumulative
31 percentage change in the consumer price index. The department must
32 adjust the thresholds in subsection (1)(c)(i) through (iii) of this
33 section if the consumer price index has changed by five percent or
34 more since the later of June 1, 2010, or the date that the thresholds
35 were last adjusted under this subsection. For purposes of determining
36 the cumulative percentage change in the consumer price index, the
37 department must compare the consumer price index available as of
38 December 1st of the current year with the consumer price index as of
39 the later of June 1, 2010, or the date that the thresholds were last
40 adjusted under this subsection. The thresholds must be adjusted to

1 reflect that cumulative percentage change in the consumer price
2 index. The adjusted thresholds must be rounded to the nearest one
3 thousand dollars. Any adjustment will apply to tax periods that begin
4 after the adjustment is made.

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

9 (6)(a)(i) Except as provided in (a)(iii) of this subsection (6),
10 subsections (1) through (5) of this section only apply with respect
11 to the taxes on persons engaged in apportionable activities as
12 defined in RCW 82.04.460 or making wholesale sales taxable under RCW
13 82.04.257(1) or 82.04.270.

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

23 (iii) For purposes of the taxes imposed under this chapter on the
24 business of making sales at retail taxable under RCW 82.04.250(1) or
25 82.04.257(1), a person is also deemed to have a substantial nexus
26 with this state if the person's receipts from this state, pursuant to
27 subsection (4)(c) of this section, meet either criterion in
28 subsection (1)(c)(iii) or (iv) of this section, as adjusted under
29 subsection (5) of this section.

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

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

38 (ii) A remote seller as defined in RCW 82.08.052 is presumed to
39 be engaged in activities in this state that are significantly
40 associated with the remote seller's ability to establish or maintain

1 a market for its products in this state if the remote seller is
2 presumed to have a substantial nexus with this state under RCW
3 82.08.052. The presumption in this subsection (6)(c)(ii) may be
4 rebutted as provided in RCW 82.08.052. To the extent that the
5 presumption in RCW 82.08.052 is no longer operative pursuant to RCW
6 82.32.762, the presumption in this subsection (6)(c)(ii) is no longer
7 operative. (~~Nothing in this section may be construed to affect in
8 any way RCW 82.04.424, 82.08.050(11), or 82.12.040(5) or to narrow
9 the scope of the terms "agent" or "other representative" in this
10 subsection (6)(c).)~~)

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

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

18 (2)(a) A person who has a substantial nexus with this state in
19 (~~any tax year under the provisions of RCW 82.04.067 will be deemed
20 to have a substantial nexus with this state for the following tax
21 year~~) the current calendar year under the provisions of RCW
22 82.04.067, based solely on the person's property, payroll, or
23 receipts in this state during the current calendar year, is subject
24 to the tax imposed under this chapter for the current calendar year
25 only on business activity occurring on and after the date that the
26 person established a substantial nexus with this state in the current
27 calendar year.

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

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

1 NEW SECTION. **Sec. 205.** A new section is added to chapter 82.08
2 RCW to be codified between RCW 82.08.050 and 82.08.052 to read as
3 follows:

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

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

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

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

15 (b) The seller's receipts from retail sales in this state,
16 pursuant to RCW 82.04.067(4), meet either criterion in RCW
17 82.04.067(1)(c) (iii) or (iv), as adjusted under RCW 82.04.067(5).

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

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

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

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

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

1 (C) Maintains, occupies, or uses an office, distribution
2 facility, warehouse, storage place, or similar place of business in
3 this state to facilitate the delivery or sale of tangible personal
4 property sold by the seller to the seller's purchasers in this state;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32 (i) Any of the following:

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

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

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

39 (D) Software development or research and development activities
40 related to any of the activities described in (a)(i)(A) through (C)

1 or (ii)(A) through (H) of this subsection (5), if such activities are
2 directly related to a physical or electronic marketplace operated by
3 the person or an affiliated person; and

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

6 (A) Payment processing services;

7 (B) Fulfillment or storage services;

8 (C) Listing products for sale;

9 (D) Setting prices;

10 (E) Branding sales as those of the marketplace facilitator;

11 (F) Order taking;

12 (G) Advertising or promotion; or

13 (H) Providing customer service or accepting or assisting with
14 returns or exchanges.

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

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

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

24 (6) This section is subject to RCW 82.32.762.

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

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

37 (2) A marketplace facilitator is relieved of liability under this
38 chapter for failure to collect the correct amount of tax to the
39 extent that the marketplace facilitator can show to the department's

1 satisfaction that the error was due to incorrect information given to
2 the marketplace facilitator by the marketplace seller, unless the
3 marketplace facilitator and marketplace seller are affiliated
4 persons. Where the marketplace facilitator is relieved of liability
5 under this subsection (2), the marketplace seller is solely liable
6 for the amount of uncollected tax due.

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

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

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

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

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

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

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

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

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

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

7 (b) "Marketplace facilitator" has the same meaning as in section
8 206 of this act.

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

13 (7) This section is subject to RCW 82.32.762.

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

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

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

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

38 (3) Except as otherwise provided in this section, if any seller
39 fails to collect the tax imposed in this chapter or, having collected

1 the tax, fails to pay it to the department in the manner prescribed
2 by this chapter, whether such failure is the result of the seller's
3 own acts or the result of acts or conditions beyond the seller's
4 control, the seller is, nevertheless, personally liable to the state
5 for the amount of the tax.

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

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

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

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

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

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

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

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

10 (d) Sellers are relieved from personal liability for the amount
11 of tax if they obtain a copy of a direct pay permit issued under RCW
12 82.32.087.

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

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

34 (10) Where a buyer has failed to pay to the seller the tax
35 imposed by this chapter and the seller has not paid the amount of the
36 tax to the department, the department may, in its discretion, proceed
37 directly against the buyer for collection of the tax. If the
38 department proceeds directly against the buyer for collection of the
39 tax as authorized in this subsection, the department may add a
40 penalty of ten percent of the unpaid tax to the amount of the tax due

1 for failure of the buyer to pay the tax to the seller, regardless of
2 when the tax may be collected by the department. In addition to the
3 penalty authorized in this subsection, all of the provisions of
4 chapter 82.32 RCW, including those relative to interest and
5 penalties, apply. For the sole purpose of applying the various
6 provisions of chapter 82.32 RCW, the twenty-fifth day of the month
7 following the tax period in which the purchase was made will be
8 considered as the due date of the tax.

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

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

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

15 ~~(ii) The taking of orders; or~~

16 ~~(iii) The processing of payments; and~~

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

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

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

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

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

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

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

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

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

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

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

40 (~~4~~)) This section is subject to RCW 82.32.762.

1 **Sec. 210.** RCW 82.12.040 and 2015 c 169 s 9 are each amended to
2 read as follows:

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

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

37 (3) The tax required to be collected by this chapter is deemed to
38 be held in trust by the retailer until paid to the department, and
39 any retailer who appropriates or converts the tax collected to the
40 retailer's own use or to any use other than the payment of the tax

1 provided herein to the extent that the money required to be collected
2 is not available for payment on the due date as prescribed is guilty
3 of a misdemeanor. In case any seller fails to collect the tax herein
4 imposed or having collected the tax, fails to pay the same to the
5 department in the manner prescribed, whether such failure is the
6 result of the seller's own acts or the result of acts or conditions
7 beyond the seller's control, the seller is nevertheless personally
8 liable to the state for the amount of such tax, unless the seller has
9 taken from the buyer a copy of a direct pay permit issued under RCW
10 82.32.087.

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

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

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

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

21 ~~(ii) The taking of orders; or~~

22 ~~(iii) The processing of payments; and~~

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

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

34 ~~(7))~~ Notwithstanding subsections (1) through (4) of this
35 section, any person making sales is not obligated to collect the tax
36 imposed by this chapter if the person would have been obligated to
37 collect retail sales tax on the sale absent a specific exemption
38 provided in chapter 82.08 RCW, and there is no corresponding use tax
39 exemption in this chapter. Nothing in this subsection ~~((7))~~ (5) may

1 be construed as relieving purchasers from liability for reporting and
2 remitting the tax due under this chapter directly to the department.

3 ~~((+8))~~ (6) Notwithstanding subsections (1) through (4) of this
4 section, any person making sales is not obligated to collect the tax
5 imposed by this chapter if the state is prohibited under the
6 Constitution or laws of the United States from requiring the person
7 to collect the tax imposed by this chapter.

8 ~~((+9))~~ (7) Notwithstanding subsections (1) through (4) of this
9 section, any licensed dealer facilitating a firearm sale or transfer
10 between two unlicensed persons by conducting background checks under
11 chapter 9.41 RCW is not obligated to collect the tax imposed by this
12 chapter.

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

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

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

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

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

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

3 (1) A taxpayer that, for the purposes of the tax collection
4 obligations in chapter 82.08 RCW, has a substantial nexus with this
5 state solely under the provisions of section 206(1)(b) of this act
6 and is complying with the requirements of chapter 82.08 RCW,
7 voluntarily or otherwise, may only seek a recovery of sales taxes,
8 penalties, or interest from the department by following the recovery
9 procedures established under RCW 82.32.060. However, no claim may be
10 granted on the basis that the taxpayer lacked a physical presence in
11 the state and complied with the tax collection provisions of chapter
12 82.08 RCW voluntarily while covered by the prohibition on enforcement
13 provided in section 211 of this act.

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

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

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

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

34 (2) For purposes of this section:

35 (a) A change in federal law conflicts with RCW 82.08.052, section
36 206 of this act, or section 207 of this act if the change clearly
37 allows states to impose greater sales and use tax collection
38 obligations on remote sellers than provided for, or clearly prevents
39 states from imposing sales and use tax collection obligations on

1 remote sellers to the extent provided for, under RCW 82.08.052,
2 section 206 of this act, or section 207 of this act.

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

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

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

17 (b) Must include information on its web site informing taxpayers
18 and the public (i) of the provision or provisions of RCW 82.08.052,
19 section 206 of this act, or section 207 of this act that will have no
20 further force and effect, (ii) when such change will become
21 effective, and (iii) about how to participate in any rule making
22 conducted by the department in accordance with (a) of this subsection
23 (3).

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

26 Part III

27 Sales and Use Tax Notice and Reporting Requirements

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

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

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

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

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

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

38 (6) "Sale" has the same meaning as in RCW 82.04.040.

1 (7) "Seller" has the same meaning as in RCW 82.08.010, and
2 includes a marketplace facilitator as defined in section 206 of this
3 act.

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

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

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

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

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

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

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

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

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

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

1 (a) The report under this subsection (3) must include:
2 (i) A statement that the seller did not collect sales or use tax
3 on the consumer's transactions with the seller and that the consumer
4 may be required to remit such tax directly to the department;
5 (ii) A list, by date, generally indicating the type of product
6 purchased or leased during the immediately preceding calendar year by
7 the consumer from the seller sourced to this state under RCW
8 82.32.730 and the price of each product;
9 (iii) Instructions for obtaining additional information from the
10 department regarding whether and how to remit the sales or use tax to
11 the department;
12 (iv) A statement that the seller is required to submit a report
13 to the department pursuant to subsection (4) of this section stating
14 the total dollar amount of the consumer's purchases from the seller;
15 and
16 (v) Any information as the department may reasonably require.
17 (b) The report required under this subsection (3) must be sent to
18 the consumer's billing address, or if unknown, the consumer's
19 shipping address, in an envelope marked prominently with words
20 indicating important tax information is enclosed. If no billing or
21 shipping address is known, the report must be sent electronically to
22 the consumer's last known email address with a subject heading
23 indicating important tax information is enclosed.
24 (4) A seller subject to the notice and reporting requirements of
25 this section must, no later than January 31st of each year, file a
26 report with the department.
27 (a) The report under this subsection (4) must include, with
28 respect to each consumer to whom the seller is required to provide a
29 report under subsection (3) of this section by January 31st of the
30 current calendar year:
31 (i) The consumer's name;
32 (ii) The billing address and, if different, the last known
33 mailing address;
34 (iii) The shipping address for each product sold or leased to
35 such consumer for delivery to a location in this state during the
36 immediately preceding calendar year; and
37 (iv) The total dollar amount of all such purchases by such
38 consumer.
39 (b) The report under this subsection (4) must be filed
40 electronically in a form and manner required by the department.

1 (5) The following exemptions to the notice and reporting
2 requirements of this section apply:

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

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

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

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

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

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

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

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

37 (c) The department must assess a penalty against any seller who
38 fails to file a report as required by section 302(4) of this act, in
39 addition to any other applicable penalty, equal to ten dollars times

1 the number of such consumers that should have been included on such
2 report.

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

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

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

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

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

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

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

35 (A) Provide notice under section 302(2) of this act to at least
36 ninety-five percent of the consumers entitled to such notice in any
37 given calendar year or portion of the initial calendar year in which
38 the agreement required under this subsection was in effect if the
39 agreement was in effect for less than the entire calendar year;

1 (B) Timely provide the reports required under section 302(3) of
2 this act to all consumers who received notice from the seller under
3 section 302(2) of this act during any calendar year, unless the
4 department finds that any such failure was due to circumstances
5 beyond the seller's control; or

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

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

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

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

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

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

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

1 calendar year immediately following the calendar year in which the
2 taxable retail sale occurred.

3 (2) This section does not apply to the reporting and payment of
4 taxes imposed under chapters 82.08 and 82.12 RCW:

5 (a) On the retail sale or use of motor vehicles, vessels, or
6 aircraft; or

7 (b) By consumers who are engaged in business, unless the
8 department has relieved the consumer of the requirement to file
9 returns pursuant to RCW 82.32.045(4).

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

16 **Sec. 307.** RCW 82.32.045 and 2010 1st sp.s. c 23 s 1103 are each
17 amended to read as follows:

18 (1) Except as otherwise provided in this chapter or chapter
19 82.--- RCW (the new chapter created in section 504 of this act),
20 payments of the taxes imposed under chapters 82.04, 82.08, 82.12,
21 82.14, and 82.16 RCW, along with reports and returns on forms
22 prescribed by the department, are due monthly within twenty-five days
23 after the end of the month in which the taxable activities occur.

24 (2) The department of revenue may relieve any taxpayer or class
25 of taxpayers from the obligation of remitting monthly and may require
26 the return to cover other longer reporting periods, but in no event
27 may returns be filed for a period greater than one year. For these
28 taxpayers, tax payments are due on or before the last day of the
29 month next succeeding the end of the period covered by the return.

30 (3) The department of revenue may also require verified annual
31 returns from any taxpayer, setting forth such additional information
32 as it may deem necessary to correctly determine tax liability.

33 (4) Notwithstanding subsections (1) and (2) of this section, the
34 department may relieve any person of the requirement to file returns
35 if the following conditions are met:

36 (a) The person's value of products, gross proceeds of sales, or
37 gross income of the business, from all business activities taxable
38 under chapter 82.04 RCW, is less than:

1 (i) Twenty-eight thousand dollars per year; or
2 (ii) Forty-six thousand six hundred sixty-seven dollars per year
3 for persons generating at least fifty percent of their taxable amount
4 from activities taxable under RCW 82.04.255, 82.04.290(2)(a), and
5 82.04.285;

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

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

12 **Part IV**

13 **Revenues to Fund Housing and Public Assistance Programs**

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

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

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

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

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

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

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

33 The human services safety net account is created in the state
34 treasury. All receipts from section 401(2)(c) of this act must be
35 deposited into the account. Moneys in the account may be spent only
36 after appropriation. Expenditures from the account may only be used
37 for the Washington WorkFirst temporary assistance for needy families

1 program established under chapter 74.08A RCW; the aged, blind, or
2 disabled assistance program established under chapter 74.62 RCW; and
3 the pregnant women assistance program established under chapter 74.62
4 RCW.

5 **Part V**
6 **Miscellaneous**

7 NEW SECTION. **Sec. 501.** If any provision of this act or its
8 application to any person or circumstance is held invalid:

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

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

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

18 NEW SECTION. **Sec. 503.** For purposes of determining whether a
19 person engaged in the business of making sales at retail has a
20 substantial nexus with this state under the provisions of RCW
21 82.04.067(6)(a)(iii) or section 206 (1)(b), (2), or (3)(a)(ii) of
22 this act for taxable periods beginning on the effective date of this
23 section through December 31, 2017, the person's gross proceeds of
24 sales are based on the entire 2017 calendar year.

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

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

--- END ---



MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

**Report of the Hearing Officer
Model Sales & Use Tax Notice and Reporting Statute**

May 31, 2011

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 group¹ 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:

Colorado – §39-21-112(3.5), C.R.S. (2010) (notice and annual reports to purchaser and Department) <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp=> ;
Oklahoma – Stat. §710:65-21-8 (Notice requirement only) <http://www.tax.ok.gov/rules/710-65-21-8%20ADOPTED.pdf>.

South Dakota – SB 146 (2011) session (requires notice)
<http://legis.state.sd.us/sessions/2011/Bills/SB146ENR.pdf>

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)
http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/Policy_S_and_R/2000/00-2.pdf

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.⁵ 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.⁶

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.”⁷ But this comparison is incomplete.⁸ 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.⁹ 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:

<http://www.thedma.org/segment/segmentfiles/catalogers/20110126OrderGrantingPI.pdf>.

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 at the expense of interstate commerce.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 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, and to submit a report to each in-state buyer once a year (*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.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. (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

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.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.¹³

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

¹² *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

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.

A New Way Forward for Remote Vendor Sales Tax Collection; Robert Plattner, Daniel Smirlock, and Mary Ellen Ladouceur; Tax Analysts Special Report; January 18, 2010; p. 187, 194.

Colorado and two other states have now enacted laws along these lines, and legislation has been introduced in others.¹⁴ 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
Executive Director
Multistate Tax Commission
444 N. Capitol St. NW, Suite 425
Washington, DC 20001

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.¹ 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.

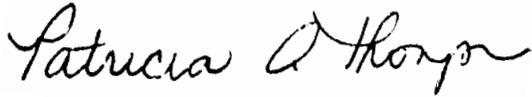
If you have any questions, please contact me at (401) 831-0200 or patt@pgco.com; Harlan J. Kwiatek, Chair of the State and Local Taxation Technical Resource Panel at (314) 290-3271 or

¹ CO H.B. 10-1193; §39-21-112(3.5)

Mr. Joe Huddleston
Ms. Shirley Sicilian
May 18, 2011
Page 2

Harlan.kwiatek@rubinbrown.com; or Marc A. Hyman, AICPA Technical Manager at (202) 434-9231 or mhyman@aicpa.org.

Sincerely,

A handwritten signature in black ink that reads "Patricia A. Thompson". The signature is written in a cursive style with a large initial "P".

Patricia A. Thompson, CPA
Chair, Tax Executive Committee

cc: Greg Matson, MTC Deputy Director
Elliott Dubin, MTC Director of Policy Research

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Comments to the Multistate Tax Commission
Draft Model Sales & Use Tax Notice and Reporting Statute (Dated April 18, 2011)

May 18, 2011

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.

Loretta King

From: Jennrich, Timothy (DOR) <TimJe@DOR.WA.GOV>
Sent: Thursday, May 12, 2011 5:20 PM
To: Loretta King
Cc: Gil Brewer; Chris Coffman; Potegal, Greg; Russ Brubaker
Subject: Proposed Model Sales and Use Tax Notice and Reporting Statute

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 these provide comments.

Very truly yours,

/s/

Tim Jennrich

WA Department of Revenue

Exhibit C



MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

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

Tax Acts], shall not be required to provide notice or file reports pursuant to section (c) of this Act.

(e) **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.