

Marketplace Facilitator Legislation

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What is a marketplace?

A physical or electronic forum where **marketplace sellers** can **sell or offer for sale** tangible personal property or taxable services.

What is a marketplace seller?

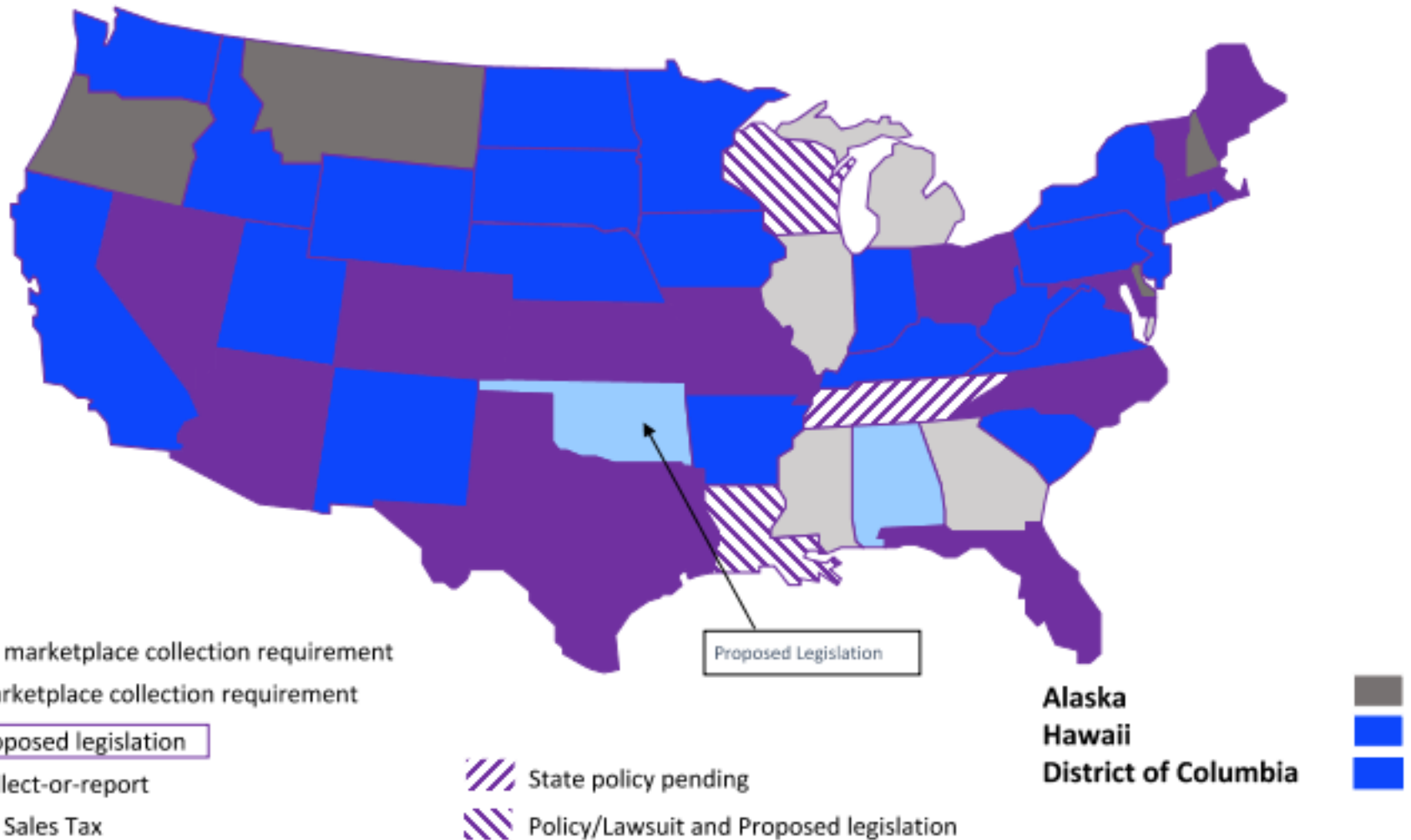
A person who has an agreement with a **marketplace facilitator** and makes retail sales of tangible personal property or taxable services **through a marketplace**.

Why are states enacting marketplace collection laws?

- Marketplace sales are **growing** and are now a significant portion of ecommerce.
- Prior to *Wayfair*, states began enacting marketplace **collection or reporting requirements**, as marketplace sellers without nexus could not be required to collect tax, and compliance was low, even when such sellers had nexus.
- After *Wayfair*, marketplace collection responsibility provides states with a **more efficient method of collecting tax**.
- In addition, marketplaces are being required to collect tax on behalf of **millions of small marketplace sellers** who might not reach the new economic nexus thresholds individually.

Marketplace Collection Requirements... So far

As of May 8, 2019



Marketplace facilitator as collector/reporter

Enacted in 2017:

- **Minnesota** (HF 1 news release published 7/25/18--collect eff. 10/1/18 if place of business in MN)
- **Pennsylvania** (HB 542 collect or report if sales >\$10,000/yr; Bulletin 2019-01, mandatory collection for sales >\$100,000/yr. eff. 7/1/19)
- **Rhode Island** (H5175A collect or report if sales/yr \$100,000/200 trans eff. 8/17/17; 2019 H. 5278 Sub A and S. 251 Sub A enacted, removing reporting requirements and requiring collection)
- **Washington** (HB 2163 collect eff. 1/1/18; 2019 HB 5581 enacted, repealing notice/reporting eff. 7/1/19)

Marketplace facilitator as collector/reporter

Enacted in 2018 pre-*Wayfair*:

- **Alabama** (HB 470 collect if sales/yr \$250,000 or report eff. 1/1/19)
- **Connecticut** (SB 417 collect/referrer report if sales/yr \$250,000 + 200 trans eff. 12/1/18)
- **Iowa** (SF 2417 collect/referrer report if sales/yr \$100,000/200 trans eff. 1/1/19)
- **Oklahoma** (HB 1019XX collect if sales/yr \$10,000 or report eff. 7/1/18)

Marketplace facilitator as collector

Enacted in 2018 post-*Wayfair*:

South Dakota (SB 2 collect if sales/yr >\$100,000/200 trans eff. 3/1/19)

New Jersey (A. 4496 collect if sales/yr >\$100,000/200 trans eff. 11/1/18)

DC (B22-1070 collect eff. 4/1/19)

Enacted in 2019:

Nebraska (LB 284) eff. 4/1/19

South Carolina (SB 214) eff. 4/26/19

Idaho (HB 259) **New York** (S. 1509, part G) eff. 6/1/19

Arkansas (SB 576) **Indiana** (HB 1001) **Kentucky** (HB 354) **New Mexico** (HB 6)
Rhode Island (H. 5278 Sub A, S. 251 Sub A) **Virginia** (HB 1722, SB 1083) **West
Virginia** (HB 2813) **Wyoming** (HB 69) eff. 7/1/19

California (AB 147) **North Dakota** (SB 2338) **Utah** (SB 168) eff. 10/1/19

Hawaii (SB 396/SD 1) eff. 1/1/20

2019 Marketplace facilitator as collector bills

Arizona: HB 2702 first reading

Colorado: HB 1240 sent to governor

Florida: SB 1112 introduced 2/15/19

Georgia: HB 276, SB 128 passed differing versions, no agreement, session ended

Kansas: HB 2033 sent to governor, veto expected

Louisiana: HB 524, HB 547 pre-filed 3/20/19

Maine: HB 1452 introduced 4/2/19

Maryland: SB 728 sent to governor, eff. 10/1/19

Massachusetts: Governor's FY 19 Budget Message; H. 1, S. 1637, S. 7762 introduced

Missouri: SB 46, 50 passed Sen. W & M Com. 2/12/19, eff. 1/1/20

2019 Marketplace facilitator collection bills

Nevada: AB 445 introduced 3/25/19

North Carolina: HB 966 passed House

Ohio: included in governor's FY20 budget proposal

Oklahoma: SB 513 passed Senate, HB 2352 and HB 2201 passed House (option to collect or report)

Texas: HB 1525 pending, eff. 10/1/19

Vermont: H 117 introduced

Wisconsin: marketplace facilitator collection requirements proposed in governor's FY 2019-21 Biennial Budget Proposal 2/28/19

Marketplace facilitator litigation/policy

Louisiana (*Normand v. Wal-Mart.com* litigation re obligation of marketplace facilitator to collect at parish level as “dealer;” Wal-Mart’s petition to review to Louisiana S. Ct. accepted)

South Carolina (Amazon litigation pending—trial held Feb. 4-8, 2019, decision expected in April; SC DOR considers marketplace to be the retailer; ruling #18-14 requiring collection if sales/yr >\$100,000 effective 11/1/18)

New York State Tax and Finance Dept. Adv. Op. TSB-1-19(1)S 3/7/19: software vendor operating online marketplace facilitating taxable sales by other software vendors considered co-vendor, required to collect

Tennessee A. G. Op. No. 19-03 (3/12/19): department authorized to promulgate regs to require in-state marketplace facilitators to collect as “dealers”

Wisconsin Department of Revenue FAQ (eff. 10/1/18): A marketplace that is a remote seller but does not qualify for the small seller exception (>\$100,000 sales/200 transactions/yr) is required to register and collect Wisconsin sales or use tax on taxable sales made on behalf of third-party sellers.

MTC “White Paper” on Marketplace Facilitator Collection Laws: topics addressed

- Definitions: marketplace, marketplace seller, marketplace facilitator
- Marketplace facilitator, not marketplace seller, should register.
- Marketplace facilitator should be the entity audited.
- Economic nexus threshold should include both marketplace seller and facilitator sales. Eliminate the “transactions” threshold.
- Marketplace facilitator should receive and maintain exemption certificates.
- Liability protection should be provided to marketplace facilitators for collection errors due to erroneous information from marketplace seller.
- Marketplace facilitators should be protected against risk of class action lawsuits.

Marketplace facilitator definition: narrow

Any person who **facilitates a retail sale** by a marketplace seller by:

- (1) **listing or advertising** for sale by a marketplace seller in a marketplace, tangible personal property or taxable services; and
- (2) either directly or indirectly through agreements or arrangements with third parties **collecting payment** from the customer and transmitting that payment to the marketplace seller.

Marketplace facilitator definition: broad

A marketplace facilitator contracts with marketplace sellers to **facilitate the sale** of products or services through a marketplace **and** engages in both;

- Directly or indirectly in any of the following:
 - **Communicating the offer or acceptance** between buyer and seller;
 - Owning or **operating the infrastructure** that brings buyers and sellers together;
 - **Providing a virtual currency** used to purchase products from the seller; or
 - Software development or **R&D** activities related to the activities described below
- And in any of the following activities with respect to the seller's products:
 - **Payment processing** services;
 - **Fulfillment** or storage services;
 - **Listing products** for sale;
 - **Setting prices**;
 - **Branding** sales as those of the marketplace facilitator;
 - **Order taking**;
 - **Advertising or promotion**; or
 - Providing **customer service** or accepting or assisting with **returns or exchanges**