

**Sixty-sixth Legislative Assembly of North Dakota
In Regular Session Commencing Thursday, January 3, 2019**

SENATE BILL NO. 2338
(Senator Cook)
(Representative Dockter)

AN ACT to create and enact sections 57-39.2-02.3 and 57-40.2-02.4 of the North Dakota Century Code, relating to collection of sales and use tax by marketplace facilitators; to amend and reenact subsection 22 of section 57-39.2-01, and subsections 6 and 7 of section 57-40.2-01 of the North Dakota Century Code, relating to the definition of retailer and retail sale; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 22 of section 57-39.2-01 of the North Dakota Century Code is amended and reenacted as follows:

22. "Retailer" or "seller" includes every person engaged in the business of leasing or renting hotel, motel, or tourist court accommodations, and every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or furnishing of steam, gas, and communication services, excluding internet access service, or tickets or admissions to places of amusement, entertainment, and athletic events, or magazines or other periodicals; and includes any person as herein defined who by contract or otherwise agrees to furnish for a consideration a totally or partially finished product consisting in whole or in part of tangible personal property subject to the sales tax herein provided, and all items of tangible personal property entering into the performance of such contract as a component part of the product agreed to be furnished under said contract shall be subject to the sales tax herein provided and the sales tax thereon shall be collected by the contractor from the person for whom the contract has been performed in addition to the contract price agreed upon, and shall be remitted to the state in the manner provided in this chapter; and shall include the state or any municipality furnishing steam, gas, or communication service to members of the public in its proprietary capacity. For the purpose of this chapter, retailer shall also include every clerk, auctioneer, agent, or factor selling tangible personal property owned by any other retailer. ~~A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer database, cable, optic, microwave, or other communication system.~~

SECTION 2. Section 57-39.2-02.3 of the North Dakota Century Code is created and enacted as follows:

57-39.2-02.3. Marketplace facilitator tax collection requirement.

1. For the purposes of this section:
 - a. "Exemption certificate" means documentation furnished by a buyer to a seller to claim an exemption from sales tax or use tax. The term includes a resale certificate or other documentation authorized in section 57-39.2-10 furnished by a buyer to a seller.
 - b. "Marketplace" means a physical or electronic place where one or more marketplace sellers sell or offer for sale tangible personal property or other products or services subject to tax under section 57-39.2-02.1, regardless of whether the marketplace seller has a physical presence in this state. A physical or electronic place includes a store, booth, internet website, catalog, television, radio broadcast, or a dedicated sales software application.

- c. (1) "Marketplace facilitator" means a person that:
- (a) Contracts with sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the seller's products through a physical or electronic marketplace operated by the person;
 - (b) Engages directly or indirectly, through one or more affiliated persons, in any of the following:
 - [1] Transmitting or otherwise communicating the offer or acceptance between the buyer and seller;
 - [2] Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;
 - [3] Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller; or
 - [4] Software development or research and development activities related to any of the activities described in subparagraph a, if such activities are directly related to a physical presence or electronic marketplace operated by the person or an affiliated person; and
 - (c) Engages in any of the following activities with respect to the seller's products:
 - [1] Payment processing services;
 - [2] Fulfillment or storage services;
 - [3] Listing products for sale;
 - [4] Setting prices;
 - [5] Branding sales as those of the marketplace facilitator;
 - [6] Order taking;
 - [7] Advertising or promotion; or
 - [8] Providing customer service or accepting or assisting with returns or exchanges.
- (2) The term does not include a payment processor business appointed by a merchant to handle payment transactions from various channels, such as credit cards and debit cards, and whose sole activity with respect to marketplace sales is to handle transactions between two parties.
- d. "Marketplace seller" means a retailer that sells or offers for sale tangible personal property or other products or services subject to tax under section 57-39.2-02.1, through a marketplace that is owned, operated, or controlled by a marketplace facilitator.
2. Notwithstanding any other provision of law, any marketplace facilitator facilitating sales of tangible personal property or other products or services subject to tax under section 57-39.2-02.1, which does not have a physical presence in this state, is a retailer subject to chapters 57-39.2 and 57-40.2 and shall remit sales or use tax if the marketplace facilitator facilitates or makes sales through the marketplace that, when the sales are combined, meet the threshold amount in section 57-39.2-02.2. A marketplace facilitator exceeding the sales threshold shall obtain a permit under section 57-39.2-14, and begin collecting the tax on sales

during the following calendar year or beginning sixty days after the threshold is met, whichever is earlier.

3. A marketplace facilitator shall be considered the retailer of each sale the facilitator facilitates on its forum for a marketplace seller. Each marketplace facilitator shall:
 - a. Be required to collect and remit for each sale any tax imposed under chapters 57-39.2 and 57-40.2.
 - b. Be responsible for all obligations imposed under chapter 57-39.2 as if the marketplace facilitator was the retailer of the sale.
 - c. In accordance with the provisions of section 57-39.2-10, keep such records and information as may be required by the tax commissioner to ensure proper collection and remittance of tax.
 - d. Certify to its marketplace sellers that it will collect and remit state and local sales and use tax on sales of tangible personal property or other products or services subject to tax under section 57-39.2-02.1 made through the marketplace. A marketplace seller that accepts a marketplace facilitator's collection certificate in good faith may exclude sales made through the marketplace from the marketplace seller's return of gross receipts under section 57-39.2-11.
 - e. Be subject to audit by the tax commissioner with respect to all retail sales for which it is required to collect and pay the tax imposed under chapters 57-39.2 and 57-40.2. If the tax commissioner audits the marketplace facilitator, the tax commissioner is prohibited from auditing the marketplace seller for the same retail sales unless the marketplace facilitator seeks relief under subsection 4.
4. A marketplace facilitator is not liable under this section for failure to collect and remit sales and use tax if the marketplace facilitator demonstrates to the satisfaction of the department that:
 - a. The marketplace facilitator has a system in place to require the seller to provide accurate information and has made a reasonable effort to obtain accurate information from the seller about a retail transaction;
 - b. The failure to collect and remit the correct tax was due to reliance upon incorrect or insufficient information provided to the marketplace facilitator by the seller. If the marketplace facilitator is relieved of liability under this subsection, the seller and the purchaser are liable for any amount of uncollected, unpaid, or unremitted tax; and
 - c. The marketplace facilitator and marketplace seller are not affiliated. A marketplace facilitator and a marketplace seller are affiliated if:
 - (1) Either owns more than five percent of the other; or
 - (2) Both are subject to the control of a common entity that owns more than five percent of each.
5. Notwithstanding any other provision of law, the tax imposed under this section may be refunded under the following conditions:
 - a. A person qualifying for an exemption under subsection 5, 6, 24, 32, 43, 48, or 52 of section 57-39.2-04 may apply in writing to the tax commissioner on a form and in the manner as the tax commissioner may prescribe reciting sufficient facts establishing the exempt status of the sale.
 - b. The refund is five dollars or more. Qualifying sales may be accumulated for periods not in excess of one calendar year in order to reach the five dollar limit.

6. A class action may not be brought against a marketplace facilitator on behalf of purchasers arising from or in any way related to an overpayment of sales or use tax collected by the marketplace facilitator, regardless of whether such action is characterized as a tax refund claim.
7. No marketplace facilitator is required to collect or remit sales or use tax under this section on any sale made before October 1, 2019.

SECTION 3. AMENDMENT. Subsections 6 and 7 of section 57-40.2-01 of the North Dakota Century Code are amended and reenacted as follows:

6. "Retailer" includes every person engaged in the business of selling tangible personal property for use within the meaning of this chapter, but, when in the opinion of the commissioner, it is necessary for the efficient administration of this chapter to regard any salesman, representative, trucker, peddler, or canvasser as the agent of the dealer, distributor, supervisor, employer, or other person under whom that person operates or from whom that person obtains the tangible personal property sold by that person, whether that person is making sales in that person's own behalf or in behalf of such dealer, distributor, supervisor, employer, or other person, the commissioner may regard that person as such agent, and may regard the dealer, distributor, supervisor, employer, or other person as a retailer for the purposes of this chapter. ~~A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer database, cable, optic, microwave, or other communication system.~~
7. "Retailer maintaining a place of business in this state", or any like term, means any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, whether such place of business or agent is located in the state permanently or temporarily, or whether or not such retailer or subsidiary is authorized to do business within this state. ~~It also includes every person who engages in regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals, advertising fliers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer database, cable, optic, microwave, or other communication system for the purpose of effecting retail sales of tangible personal property.~~

SECTION 4. Section 57-40.2-02.4 of the North Dakota Century Code is created and enacted as follows:

57-40.2-02.4. Marketplace facilitator tax collection requirement.

1. For the purposes of this section:
 - a. "Exemption certificate" means documentation furnished by a buyer to a seller to claim an exemption from sales or use tax. The term includes a resale certificate or other documentation authorized in section 57-40.2-04 furnished by a buyer to a seller.
 - b. "Marketplace" means a physical or electronic place where one or more marketplace sellers sell or offer for sale tangible personal property or other products or services subject to tax under section 57-40.2-02.1, regardless of whether the marketplace seller has a physical presence in this state. A physical or electronic place includes a store, booth, internet website, catalog, television, radio broadcast, or a dedicated sales software application.
 - c. (1) "Marketplace facilitator" means a person that:

- (a) Contracts with sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the seller's products through a physical or electronic marketplace operated by the person;
 - (b) Engages directly or indirectly, through one or more affiliated persons, in any of the following:
 - [1] Transmitting or otherwise communicating the offer or acceptance between the buyer and seller;
 - [2] Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;
 - [3] Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller; or
 - [4] Software development or research and development activities related to any of the activities described in subparagraph a, if such activities are directly related to a physical presence or electronic marketplace operated by the person or an affiliated person; and
 - (c) Engages in any of the following activities with respect to the seller's products:
 - [1] Payment processing services;
 - [2] Fulfillment or storage services;
 - [3] Listing products for sale;
 - [4] Setting prices;
 - [5] Branding sales as those of the marketplace facilitator;
 - [6] Order taking;
 - [7] Advertising or promotion; or
 - [8] Providing customer service or accepting or assisting with returns or exchanges.
 - (2) The term does not include a payment processor business appointed by a merchant to handle payment transactions from various channels, such as credit cards and debit cards, and whose sole activity with respect to marketplace sales is to handle transactions between two parties.
 - d. "Marketplace seller" means a retailer that sells or offers for sale tangible personal property or other products or services subject to tax under section 57-40.2-02.1, through a marketplace that is owned, operated, or controlled by a marketplace facilitator.
2. Notwithstanding any other provision of law, any marketplace facilitator facilitating sales of tangible personal property or other products or services subject to tax under section 57-39.2-02.1, which does not have a physical presence in this state, is a retailer subject to chapters 57-39.2 and 57-40.2 and shall remit sales or use tax if the marketplace facilitator facilitates or makes sales through the marketplace that, when the sales are combined, meet the threshold amount in section 57-40.2-02.3. A marketplace facilitator exceeding the sales threshold shall obtain a permit under section 57-39.2-14, and begin collecting the tax on sales during the following calendar year or beginning sixty days after the threshold is met, whichever is earlier.

3. A marketplace facilitator shall be considered the retailer of each sale the facilitator facilitates on its forum for a marketplace seller. Each marketplace facilitator shall:
 - a. Be required to collect and remit for each sale any tax imposed under chapters 57-39.2 and 57-40.2.
 - b. Be responsible for all obligations imposed under chapter 57-40.2 as if the marketplace facilitator was the retailer of the sale.
 - c. In accordance with the provisions of section 57-40.2-09, keep such records and information as may be required by the tax commissioner to ensure proper collection and remittance of tax.
 - d. Certify to its marketplace sellers that it will collect and remit state and local sales and use tax on sales of tangible personal property or other products or services subject to tax under section 57-40.2-02.1 made through the marketplace. A marketplace seller that accepts a marketplace facilitator's collection certificate in good faith may exclude sales made through the marketplace from the marketplace seller's return of gross receipts under section 57-39.2-11.
 - e. Be subject to audit by the tax commissioner with respect to all retail sales for which it is required to collect and pay the tax imposed under chapters 57-39.2 and 57-40.2. Where the tax commissioner audits the marketplace facilitator, the tax commissioner is prohibited from auditing the marketplace seller for the same retail sales unless the marketplace facilitator seeks relief under subsection 4.
4. A marketplace facilitator is not liable under this section for failure to collect and remit sales and use tax if the marketplace facilitator demonstrates to the satisfaction of the department that:
 - a. The marketplace facilitator has a system in place to require the seller to provide accurate information and has made a reasonable effort to obtain accurate information from the seller about a retail transaction;
 - b. The failure to collect and remit the correct tax was due to reliance upon incorrect or insufficient information provided to the marketplace facilitator by the seller. If the marketplace facilitator is relieved of liability under this subsection, the seller and the purchaser are liable for any amount of uncollected, unpaid, or unremitted tax; and
 - c. The marketplace facilitator and marketplace seller are not affiliated. A marketplace facilitator and a marketplace seller are affiliated if:
 - (1) Either owns more than five percent of the other; or
 - (2) Both are subject to the control of a common entity that owns more than five percent of each.
5. Notwithstanding any other provision of law, the tax imposed under this section may be refunded under the following conditions:
 - a. An entity qualifying for an exemption under subsection 5, 6, 24, 32, 43, 48, or 52 of section 57-39.2-04 may apply in writing to the tax commissioner on a form and in the manner as the tax commissioner may prescribe reciting sufficient facts establishing the exempt status of the sale.
 - b. The refund is five dollars or more. Qualifying sales may be accumulated for periods not in excess of one calendar year in order to reach the five dollar limit.
6. A class action may not be brought against a marketplace facilitator on behalf of purchasers arising from or in any way related to an overpayment of sales or use tax collected by the

marketplace facilitator, regardless of whether such action is characterized as a tax refund claim.

7. No marketplace facilitator is required to collect or remit sales or use tax under this section on any sale made before October 1, 2019.

SECTION 5. EFFECTIVE DATE. This Act is effective for taxable events occurring after July 1, 2019.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-sixth Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2338.

Senate Vote: Yeas 44 Nays 2 Absent 1

House Vote: Yeas 74 Nays 18 Absent 2

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2019.

Approved at _____ M. on _____, 2019.

Governor

Filed in this office this _____ day of _____, 2019,

at _____ o'clock _____ M.

Secretary of State