

Introduced by

Senator Cook

Representative Dockter

1 A BILL for an Act to create and enact sections 57-39.2-02.3 and 57-40.2-02.4 of the North  
2 Dakota Century Code, relating to collection of sales and use tax by marketplace facilitators; to  
3 amend and reenact subsection 22 of section 57-39.2-01, and subsections 6 and 7 of section  
4 57-40.2-01 of the North Dakota Century Code, relating to the definition of retailer and retail sale;  
5 and to provide an effective date.

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

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

9 22. "Retailer" or "seller" includes every person engaged in the business of leasing or  
10 renting hotel, motel, or tourist court accommodations, and every person engaged in  
11 the business of selling tangible goods, wares, or merchandise at retail, or furnishing of  
12 steam, gas, and communication services, excluding internet access service, or tickets  
13 or admissions to places of amusement, entertainment, and athletic events, or  
14 magazines or other periodicals; and includes any person as herein defined who by  
15 contract or otherwise agrees to furnish for a consideration a totally or partially finished  
16 product consisting in whole or in part of tangible personal property subject to the sales  
17 tax herein provided, and all items of tangible personal property entering into the  
18 performance of such contract as a component part of the product agreed to be  
19 furnished under said contract shall be subject to the sales tax herein provided and the  
20 sales tax thereon shall be collected by the contractor from the person for whom the  
21 contract has been performed in addition to the contract price agreed upon, and shall  
22 be remitted to the state in the manner provided in this chapter; and shall include the  
23 state or any municipality furnishing steam, gas, or communication service to members  
24 of the public in its proprietary capacity. For the purpose of this chapter, retailer shall

1           also include every clerk, auctioneer, agent, or factor selling tangible personal property  
2           owned by any other retailer. A retailer also includes every person who engages in  
3           regular or systematic solicitation of a consumer market in this state by the distribution  
4           of catalogs, periodicals, advertising fliers, or other advertising, or by means of print,  
5           radio or television media, by mail, telegraphy, telephone, computer database, cable,  
6           optic, microwave, or other communication system.

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

9           **57-39.2-02.3. Marketplace facilitator tax collection requirement.**

10          1. For the purposes of this section:

11           a. "Exemption certificate" means documentation furnished by a buyer to a seller to  
12           claim an exemption from sales tax or use tax. The term includes a resale  
13           certificate or other documentation authorized in section 57-39.2-10 furnished by a  
14           buyer to a seller.

15           b. "Marketplace" means a physical or electronic place where one or more  
16           marketplace sellers sell or offer for sale tangible personal property or other  
17           products or services subject to tax under section 57-39.2-02.1, regardless of  
18           whether the marketplace seller has a physical presence in this state. A physical  
19           or electronic place includes a store, booth, internet website, catalog, television,  
20           radio broadcast, or a dedicated sales software application.

21           c. (1) "Marketplace facilitator" means a person that:

22                   (a) Contracts with sellers to facilitate for consideration, regardless of  
23                   whether deducted as fees from the transaction, the sale of the seller's  
24                   products through a physical or electronic marketplace operated by the  
25                   person; and

26                   (b) Engages directly or indirectly, through one or more affiliated persons,  
27                   in any of the following:

28                           [1] Transmitting or otherwise communicating the offer or acceptance  
29                           between the buyer and seller;

30                           [2] Owning or operating the infrastructure, electronic or physical, or  
31                           technology that brings buyers and sellers together;

1 [3] Providing a virtual currency that buyers are allowed or required  
2 to use to purchase products from the seller; or

3 [4] Software development or research and development activities  
4 related to any of the activities described in subparagraph a, if  
5 such activities are directly related to a physical presence or  
6 electronic marketplace operated by the person or an affiliated  
7 person; and

8 (c) Engages in any of the following activities with respect to the seller's  
9 products:

10 [1] Payment processing services;

11 [2] Fulfillment or storage services;

12 [3] Listing products for sale;

13 [4] Setting prices;

14 [5] Branding sales as those of the marketplace facilitator;

15 [6] Order taking;

16 [7] Advertising or promotion; or

17 [8] Providing customer service or accepting or assisting with returns  
18 or exchanges.

19 (2) The term does not include a payment processor business appointed by a  
20 merchant to handle payment transactions from various channels, such as credit  
21 cards and debit cards, and whose sole activity with respect to marketplace sales  
22 is to handle transactions between two parties.

23 d. "Marketplace seller" means a retailer that sells or offers for sale tangible personal  
24 property or other products or services subject to tax under section 57-39.2-02.1,  
25 through a marketplace that is owned, operated, or controlled by a marketplace  
26 facilitator.

27 2. Notwithstanding any other provision of law, any marketplace facilitator facilitating sales  
28 of tangible personal property or other products or services subject to tax under section  
29 57-39.2-02.1, which does not have a physical presence in this state, is a retailer  
30 subject to chapters 57-39.2 and 57-40.2 and shall remit sales or use tax if the  
31 marketplace facilitator facilitates or makes sales through the marketplace that, when

1 the sales are combined, meet the threshold amount in section 57-39.2-02.2. A  
2 marketplace facilitator exceeding the sales threshold shall obtain a permit under  
3 section 57-39.2-14, and begin collecting the tax on sales during the following calendar  
4 year or beginning sixty days after the threshold is met, whichever is earlier.

5 3. A marketplace facilitator shall be considered the retailer of each sale the facilitator  
6 facilitates on its forum for a marketplace seller. Each marketplace facilitator shall:

7 a. Be required to collect and remit for each sale any tax imposed under chapters  
8 57-39.2 and 57-40.2.

9 b. Be responsible for all obligations imposed under chapter 57-39.2 as if the  
10 marketplace facilitator was the retailer of the sale.

11 c. In accordance with the provisions of section 57-39.2-10, keep such records and  
12 information as may be required by the tax commissioner to ensure proper  
13 collection and remittance of tax.

14 d. Certify to its marketplace sellers that it will collect and remit state and local sales  
15 and use tax on sales of tangible personal property or other products or services  
16 subject to tax under section 57-39.2-02.1 made through the marketplace. A  
17 marketplace seller that accepts a marketplace facilitator's collection certificate in  
18 good faith may exclude sales made through the marketplace from the  
19 marketplace seller's return of gross receipts under section 57-39.2-11.

20 e. Be subject to audit by the tax commissioner with respect to all retail sales for  
21 which it is required to collect and pay the tax imposed under chapters 57-39.2  
22 and 57-40.2. If the tax commissioner audits the marketplace facilitator, the tax  
23 commissioner is prohibited from auditing the marketplace seller for the same  
24 retail sales unless the marketplace facilitator seeks relief under subsection 4.

25 4. A marketplace facilitator is not liable under this section for failure to collect and remit  
26 sales and use tax if the marketplace facilitator demonstrates to the satisfaction of the  
27 department that:

28 a. The marketplace facilitator has a system in place to require the seller to provide  
29 accurate information and has made a reasonable effort to obtain accurate  
30 information from the seller about a retail transaction;

- 1           b. The failure to collect and remit the correct tax was due to reliance upon incorrect  
2           or insufficient information provided to the marketplace facilitator by the seller. If  
3           the marketplace facilitator is relieved of liability under this subsection, the seller  
4           and the purchaser are liable for any amount of uncollected, unpaid, or unremitted  
5           tax; and
- 6           c. The marketplace facilitator and marketplace seller are not affiliated. A  
7           marketplace facilitator and a marketplace seller are affiliated if:  
8           (1) Either owns more than five percent of the other; or  
9           (2) Both are subject to the control of a common entity that owns more than five  
10           percent of each.
- 11        5. Notwithstanding any other provision of law, the tax imposed under this section may be  
12        refunded under the following conditions:
- 13           a. A person qualifying for an exemption under subsections 5, 6, 24, 32, 43, 48, or 52  
14           of section 57-39.2-04 may apply in writing to the tax commissioner on a form and  
15           in the manner as the tax commissioner may prescribe reciting sufficient facts  
16           establishing the exempt status of the sale.
- 17           b. The refund is five dollars or more. Qualifying sales may be accumulated for  
18           periods not in excess of one calendar year in order to reach the five dollar limit.
- 19        6. A class action may not be brought against a marketplace facilitator on behalf of  
20        purchasers arising from or in any way related to an overpayment of sales or use tax  
21        collected by the marketplace facilitator, regardless of whether such action is  
22        characterized as a tax refund claim.
- 23        7. No marketplace facilitator is required to collect or remit sales or use tax under this  
24        section on any sale made before October 1, 2019.

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

- 27        6. "Retailer" includes every person engaged in the business of selling tangible personal  
28        property for use within the meaning of this chapter, but, when in the opinion of the  
29        commissioner, it is necessary for the efficient administration of this chapter to regard  
30        any salesman, representative, trucker, peddler, or canvasser as the agent of the  
31        dealer, distributor, supervisor, employer, or other person under whom that person

1 operates or from whom that person obtains the tangible personal property sold by that  
2 person, whether that person is making sales in that person's own behalf or in behalf of  
3 such dealer, distributor, supervisor, employer, or other person, the commissioner may  
4 regard that person as such agent, and may regard the dealer, distributor, supervisor,  
5 employer, or other person as a retailer for the purposes of this chapter. ~~A retailer also  
6 includes every person who engages in regular or systematic solicitation of a consumer  
7 market in this state by the distribution of catalogs, periodicals, advertising fliers, or  
8 other advertising, or by means of print, radio or television media, by mail, telegraphy,  
9 telephone, computer database, cable, optic, microwave, or other communication  
10 system.~~

- 11 7. "Retailer maintaining a place of business in this state", or any like term, means any  
12 retailer having or maintaining within this state, directly or by a subsidiary, an office,  
13 distribution house, sales house, warehouse, or other place of business, or any agent  
14 operating within this state under the authority of the retailer or its subsidiary, whether  
15 such place of business or agent is located in the state permanently or temporarily, or  
16 whether or not such retailer or subsidiary is authorized to do business within this state.  
17 ~~It also includes every person who engages in regular or systematic solicitation of sales  
18 of tangible personal property in this state by the distribution of catalogs, periodicals,  
19 advertising fliers, or other advertising, by means of print, radio or television media, or  
20 by mail, telegraphy, telephone, computer database, cable, optic, microwave, or other  
21 communication system for the purpose of effecting retail sales of tangible personal  
22 property.~~

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

25 **57-40.2-02.4. Marketplace facilitator tax collection requirement.**

- 26 1. For the purposes of this section:  
27 a. "Exemption certificate" means documentation furnished by a buyer to a seller to  
28 claim an exemption from sales or use tax. The term includes a resale certificate  
29 or other documentation authorized in section 57-40.2-04 furnished by a buyer to  
30 a seller.

- 1           b. "Marketplace" means a physical or electronic place where one or more  
2           marketplace sellers sell or offer for sale tangible personal property or other  
3           products or services subject to tax under section 57-40.2-02.1, regardless of  
4           whether the marketplace seller has a physical presence in this state. A physical  
5           or electronic place includes a store, booth, internet website, catalog, television,  
6           radio broadcast, or a dedicated sales software application.
- 7           c. (1) "Marketplace facilitator" means a person that:
- 8                   (a) Contracts with sellers to facilitate for consideration, regardless of  
9                   whether deducted as fees from the transaction, the sale of the seller's  
10                  products through a physical or electronic marketplace operated by the  
11                  person;
- 12                  (b) Engages directly or indirectly, through one or more affiliated persons,  
13                  in any of the following:
- 14                       [1] Transmitting or otherwise communicating the offer or acceptance  
15                       between the buyer and seller;
- 16                       [2] Owning or operating the infrastructure, electronic or physical, or  
17                       technology that brings buyers and sellers together;
- 18                       [3] Providing a virtual currency that buyers are allowed or required  
19                       to use to purchase products from the seller; or
- 20                       [4] Software development or research and development activities  
21                       related to any of the activities described in subparagraph a, if  
22                       such activities are directly related to a physical presence or  
23                       electronic marketplace operated by the person or an affiliated  
24                       person; and
- 25                  (c) Engages in any of the following activities with respect to the seller's  
26                  products:
- 27                       [1] Payment processing services;
- 28                       [2] Fulfillment or storage services;
- 29                       [3] Listing products for sale;
- 30                       [4] Setting prices;
- 31                       [5] Branding sales as those of the marketplace facilitator;

- 1                            [6] Order taking;
- 2                            [7] Advertising or promotion; or
- 3                            [8] Providing customer service or accepting or assisting with returns
- 4    or exchanges.

5                    (2) The term does not include a payment processor business appointed by a  
6    merchant to handle payment transactions from various channels, such as  
7    credit cards and debit cards, and whose sole activity with respect to  
8    marketplace sales is to handle transactions between two parties.

9                    d. "Marketplace seller" means a retailer that sells or offers for sale tangible personal  
10    property or other products or services subject to tax under section 57-40.2-02.1,  
11    through a marketplace that is owned, operated, or controlled by a marketplace  
12    facilitator.

13                    2. Notwithstanding any other provision of law, any marketplace facilitator facilitating sales  
14    of tangible personal property or other products or services subject to tax under section  
15    57-39.2-02.1, which does not have a physical presence in this state, is a retailer  
16    subject to chapters 57-39.2 and 57-40.2 and shall remit sales or use tax if the  
17    marketplace facilitator facilitates or makes sales through the marketplace that, when  
18    the sales are combined, meet the threshold amount in section 57-40.2-02.3. A  
19    marketplace facilitator exceeding the sales threshold shall obtain a permit under  
20    section 57-39.2-14, and begin collecting the tax on sales during the following calendar  
21    year or beginning sixty days after the threshold is met, whichever is earlier.

22                    3. A marketplace facilitator shall be considered the retailer of each sale the facilitator  
23    facilitates on its forum for a marketplace seller. Each marketplace facilitator shall:  
24    a. Be required to collect and remit for each sale any tax imposed under chapters  
25    57-39.2 and 57-40.2.  
26    b. Be responsible for all obligations imposed under chapter 57-40.2 as if the  
27    marketplace facilitator was the retailer of the sale.  
28    c. In accordance with the provisions of section 57-40.2-09, keep such records and  
29    information as may be required by the tax commissioner to ensure proper  
30    collection and remittance of tax.



- 1           d. Certify to its marketplace sellers that it will collect and remit state and local sales  
2           and use tax on sales of tangible personal property or other products or services  
3           subject to tax under section 57-40.2-02.1 made through the marketplace. A  
4           marketplace seller that accepts a marketplace facilitator's collection certificate in  
5           good faith may exclude sales made through the marketplace from the  
6           marketplace seller's return of gross receipts under section 57-39.2-11.
- 7           e. Be subject to audit by the tax commissioner with respect to all retail sales for  
8           which it is required to collect and pay the tax imposed under chapters 57-39.2  
9           and 57-40.2. Where the tax commissioner audits the marketplace facilitator, the  
10          tax commissioner is prohibited from auditing the marketplace seller for the same  
11          retail sales unless the marketplace facilitator seeks relief under subsection 4.
- 12          4. A marketplace facilitator is not liable under this section for failure to collect and remit  
13          sales and use tax if the marketplace facilitator demonstrates to the satisfaction of the  
14          department that:
- 15           a. The marketplace facilitator has a system in place to require the seller to provide  
16           accurate information and has made a reasonable effort to obtain accurate  
17           information from the seller about a retail transaction;
- 18           b. The failure to collect and remit the correct tax was due to reliance upon incorrect  
19           or insufficient information provided to the marketplace facilitator by the seller. If  
20           the marketplace facilitator is relieved of liability under this subsection, the seller  
21           and the purchaser are liable for any amount of uncollected, unpaid, or unremitted  
22           tax; and
- 23           c. The marketplace facilitator and marketplace seller are not affiliated. A  
24           marketplace facilitator and a marketplace seller are affiliated if:
- 25           (1) Either owns more than five percent of the other; or  
26           (2) Both are subject to the control of a common entity that owns more than five  
27           percent of each.
- 28          5. Notwithstanding any other provision of law, the tax imposed under this section may be  
29          refunded under the following conditions:
- 30           a. An entity qualifying for an exemption under subsections 5, 6, 24, 32, 43, 48, or 52  
31           of section 57-39.2-04 may apply in writing to the tax commissioner on a form and

1                   in the manner as the tax commissioner may prescribe reciting sufficient facts  
2                   establishing the exempt status of the sale.

3            b. The refund is five dollars or more. Qualifying sales may be accumulated for  
4                   periods not in excess of one calendar year in order to reach the five dollar limit.

5            6. A class action may not be brought against a marketplace facilitator on behalf of  
6                   purchasers arising from or in any way related to an overpayment of sales or use tax  
7                   collected by the marketplace facilitator, regardless of whether such action is  
8                   characterized as a tax refund claim.

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

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