

## DEPARTMENT OF STATE REVENUE

## Information Bulletin #89

## Sales Tax

June 2019

Effective Dates: October 1, 2018 (where noted); July 1, 2019 (where noted)

**SUBJECT:** Registration, Collection, and Remittance Requirements for Remote Sellers and Marketplace Facilitators

**REFERENCES:** [IC 6-2.5-1-21.7](#); [IC 6-2.5-1-21.9](#); [IC 6-2.5-2-1](#); [IC 6-2.5-4-18](#); [IC 6-2.5-6-13.5](#); [IC 6-2.5-9-3](#); [IC 6-2.5-9-3.5](#); [IC 6-8.1-3-7.1](#); [IC 6-8.1-9-7](#); [IC 6-9-29-6](#); [IC 6-9-29-7](#); [IC 6-9-29.5-2](#).

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## I. INTRODUCTION

The purpose of this bulletin is to provide guidance to sellers without a physical presence in Indiana that sell products into Indiana through the internet, by catalog, or through some other means ("remote sellers"), and businesses that connect sellers to purchasers by use of the business's marketplace and facilitate the sales of the seller's products in Indiana through the marketplace ("marketplace facilitators").

## II. BACKGROUND

Historically, the department's requirements and standards for remote sellers operating in Indiana followed the decisions of the United States Supreme Courts in *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and then *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992), both of which concerned a retail merchant's physical presence or contacts with the state in order to impose a requirement on the retail merchant to collect and remit Indiana sales tax. *Quill Corp. v. North Dakota* in particular provided that sellers without a physical presence in a state could not be required to collect and remit sales tax to that particular state.

However, the Indiana General Assembly passed a law in 2017 which requires a remote seller to obtain a registered retail merchant's certificate and to collect and remit applicable sales tax, if the seller meets certain economic thresholds (discussed in Section II below). Although the law was effective July 1, 2017, the Department began enforcing this statute effective October 1, 2018. Prior to October 1, the Department was enjoined from enforcing [IC 6-2.5-2-1\(c\)](#), in part because the United States Supreme Court was considering the constitutionality of a nearly identical law in the matter of *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018). The opinion was finally issued in June of 2018. The state statute in that case also required sellers without a physical presence in South Dakota (i.e., remote sellers) to collect sales tax because they met certain thresholds of having an "economic nexus" in the state. The United States Supreme Court upheld the statute's constitutionality, and furthermore overturned the court's prior decision in *Quill Corp. v. North Dakota*, such that physical presence is no longer required for sellers to be obligated to collect and remit sales taxes.

As a direct result of the *Wayfair* decision, on **October 1, 2018**, Indiana began imposing the statutory economic nexus test on retail merchants instead of merely determining whether the merchant has a physical presence in Indiana. However, the 2017 legislation did not include any provisions directly impacting marketplace facilitators. Instead, prior to the passage of the 2019 legislation described below, the thresholds applied to a remote seller that utilized a marketplace facilitator and not to the marketplace facilitator itself, assuming the remote seller was legally making sales to Indiana customers and not the marketplace facilitator (i.e., the facilitator was not buying the goods from the remote seller and then reselling them to Indiana customers).

Consequently, additional legislation was passed in 2019 (HEA 1001) to address the sales made on a marketplace facilitator's platform. This new legislation requires marketplace facilitators that meet certain requirements to collect and remit the sales tax on behalf of all of their sellers for sales made into Indiana. This legislation is effective **July 1, 2019**.

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### III. ECONOMIC NEXUS THRESHOLDS

If a retail merchant has physical presence in Indiana, the thresholds below do not apply and the retail merchant must be registered with the department. If a retail merchant does not have a physical presence in Indiana, but the merchant meets either or both of the following economic thresholds in the current or preceding calendar year, they must register with the department as a registered retail merchant and collect and remit Indiana sales tax on retail transactions made in Indiana as an agent for the state:

- The retail merchant has gross revenue from any combination of:
  - the sale of tangible personal property that is delivered into Indiana;
  - a product transferred electronically into Indiana; or
  - a service delivered in Indiana;that exceeds \$100,000.
- The retail merchant sells any combination of:
  - tangible personal property that is delivered into Indiana;
  - a product transferred electronically into Indiana; or
  - a service delivered in Indiana;in 200 or more separate transactions.

A person that meets one or both of the economic thresholds is also required to comply with all applicable procedures and requirements of Indiana's sales tax laws as if the retail merchant had a physical presence in Indiana.

Although the department began enforcing this on October 1, 2018, economic nexus can be triggered if the thresholds are met in the current or preceding calendar year. As a result, **a retail merchant that met one or both of the thresholds at any point during calendar year 2018 is required to immediately begin collecting and remitting sales tax on sales into Indiana.**

The threshold applies regardless of whether any of the 200 transactions would have been subject to Indiana sales or use tax or whether any of the \$100,000 of revenue was generated by taxable sales. Wholesalers are considered to be retail merchants. Thus, a remote seller will still be required to register and file returns even if it believes that none of its sales will be subject to Indiana sales or use tax.

Both of the economic thresholds include revenue from services delivered in Indiana. According to Indiana's sourcing laws, a service is sourced to Indiana if it is first used in Indiana. However, with a few exceptions, Indiana generally does not impose sales tax on services. Therefore, a service provider will not be required to register if it meets either component of Indiana's economic nexus threshold, but does not sell tangible personal property or provide taxable services to Indiana residents.

Marketplace facilitators must include both transactions made on its own behalf **and** transactions facilitated on behalf of their sellers when making the determination as to whether the economic nexus thresholds apply. Additionally, the transactions that a seller makes on a marketplace are not counted toward the seller for purposes of determining whether the seller has met the thresholds (except in instances where the marketplace facilitator has not met the thresholds themselves).

*Example #1:* Company LMN operates out of Illinois, and has no physical presence in Indiana. Company LMN sells widgets on their own website and on Marketplace Facilitator ABC. Company LMN makes five sales of \$10,000 each on their own website into Indiana, and fifty sales for a total of \$200,000 in sales on Marketplace ABC into Indiana. Only the sales made on their own website count towards Company LMN's economic threshold calculation, and therefore Company LMN is not required to register with the department. Marketplace Facilitator ABC does count the \$200,000 towards its economic threshold calculation and is therefore required to be registered.

**NOTE:** A retail merchant with annual collections of less than \$1,000 will only be required to file a return annually. If a seller that is already registered no longer meets one of the thresholds due to the use of a registered marketplace facilitator, they may close their account.

### IV. MARKETPLACE FACILITATORS

For purposes of Indiana's sales and use tax, food and beverage tax, county innkeeper's tax, auto-rental excise tax, and vehicle sharing excise tax laws, a "marketplace facilitator" means a person who: (1) owns, operates, or

otherwise controls a "marketplace;" and (2) facilitates a retail transaction. Included within this definition are any affiliates (as determined by the relationship standards in Section 267(b) of the Internal Revenue Code) of the person who meets these two qualifications.

However, the term "marketplace facilitator" does not include a payment processor business that is appointed by a merchant to handle payment transactions from various channels (including credit cards and debit cards), and whose sole activity with respect to marketplace sales is to handle payment transactions between two parties.

*Example #2:* Purchasers on Website XYZ are taken to Checkout Chum, a third-party payment processor that contracted with Website XYZ to process payments. Checkout Chum's sole activity is to process the payments of customers for several retail merchants. Checkout Chum is not a marketplace facilitator.

## **A. Marketplace**

Regarding the first qualification, a "marketplace" means a forum that a marketplace facilitator uses to connect sellers to purchasers for the purpose of making retail transactions involving a seller's products by means of any of the following:

- Listing, making available, or advertising products.
- Transmitting or otherwise communicating an offer or acceptance of a retail transaction of products between a seller and a purchaser.
- Providing or offering fulfillment or storage services for a seller.
- Setting prices for a seller's sale of the seller's products.
- Providing or offering customer service to a seller or a seller's customers, or accepting or assisting with taking orders, returns, or exchanges of products sold by a seller.
- Branding sales as those of the marketplace facilitator.

The forum that constitutes the marketplace can be either physical or electronic. The seller's products at issue may include tangible personal property, specified digital products, rooms, lodgings, or accommodations, or enumerated services.

## **B. Facilitation**

Regarding the first qualification, a retail transaction is "facilitated" by a marketplace facilitator for sellers on its marketplace when it does any of the following on behalf of the seller:

- Collects the sales price or purchase price of the seller's products.
- Provides access to payment processing services, either directly or indirectly.
- Charges, collects, or otherwise receives fees or other consideration for transactions made on its electronic marketplace.

When such facilitation occurs, the marketplace facilitator is considered the retail merchant of each retail transaction that is facilitated on its marketplace. This includes retail transactions involving the rental or furnishing of rooms, lodgings, or accommodations (for further information as to how the marketplace facilitator laws apply to the furnishing of rooms, lodgings, or accommodations, please consult Sales Tax Information Bulletin #41, available online at [www.in.gov/dor/6051.htm](http://www.in.gov/dor/6051.htm)).

## **C. Meeting Both Elements**

Both the element of owning, operating, or controlling a marketplace and the element of facilitating a transaction must be met in order for a person to be considered a marketplace facilitator. It is possible to meet one element and not the other, in which case the person is not a marketplace facilitator.

*Example #3:* Company DFG advertises third-party products on its website, but in order to buy the products, a customer is taken by link or other automated process to the third-parties' websites to purchase said products from the third-parties. Company DFG is not involved in collecting the sales or purchase price for the transaction, is not providing access to payment processing services, nor is the transaction made on its marketplace, as the transactions occur on those third-party websites, although they do receive a fee or commission from the third-parties after the fact. Because Company DFG does not facilitate the transactions, it is not a marketplace facilitator.

*Example #4:* Company QRS is an owner of strip malls and shopping malls and leases retail spaces to various retail merchants. Although it could be argued that Company QRS makes available its retail merchants' products indirectly through the leasing of the retail spaces, Company QRS is not involved in any of their lessees' retail transactions, as Company QRS does not collect payment or provide access to payment processing services. Further, the lease payments and any management, advertising or percentage of sales payments received by Company QRS related to the lease of the retail spaces used by the retail merchants in making retail transactions are not the type of fees considered under the third provision above because Company QRS is not operating an electronic marketplace. Company QRS does not facilitate the transactions of its tenants and is therefore not a marketplace facilitator.

#### **D. Collection, Remittance, and Administration**

If a marketplace facilitator is required to be registered with the department to collect Indiana sales tax because they have physical presence in the state or have economic nexus, the marketplace facilitator is also required to do the following for each retail transaction made on its marketplace (whether made on its own behalf or facilitated on behalf of a seller):

- Collect and remit the gross retail tax, even if a seller for whom a transaction was facilitated does not have a registered retail merchant certificate or would not have been required to collect gross retail tax had the transaction not been facilitated by the marketplace facilitator.
- Comply with all applicable procedures and requirements imposed under the sales tax law as the retail merchant in such transaction.

Because all procedures and requirements of the sales tax law apply to a marketplace facilitator that is required to register with the department, once the marketplace facilitator is a registered retail merchant they are permitted to retain the applicable collection allowance available to them as an individual registered retail merchant.

A marketplace facilitator that facilitates transactions involving the rental or furnishing of rooms, lodgings, or accommodations is also required to collect and remit any county innkeepers taxes ("CITs") that apply to the transaction. Similarly, a marketplace facilitator that facilitates transactions involving the sale of food and beverage subject to a county or municipal food and beverage ("FAB") tax is also required to collect and remit those taxes as well. Although in some instances CITs and FAB taxes are remitted to the particular county (or municipality, in the case of some FAB taxes) that enacted the tax, they must be remitted to the department instead when collected by a marketplace facilitator. Similar to the requirements above for sales tax, marketplace facilitators are also required to comply with all applicable procedures and requirements imposed under the laws providing for CITs and FAB taxes as retail merchants in such transactions where they are imposed.

The department is required to enter into information sharing agreements with the fiscal officers of political subdivisions of the state that adopt a CIT or FAB tax in order to annually furnish the names of each business collecting these taxes in the political subdivision and the amount of money collected from each business. For a CIT or FAB tax remitted through a marketplace facilitator, the information must include the name of each business and the amount of money collected from each business by a marketplace facilitator acting on behalf of the business.

Furthermore, upon the request of the department or a political subdivision, marketplace facilitators are required to provide information listing the CIT or FAB taxes it collected on behalf of each of its sellers for the period specified by the requesting entity (in the case of a political subdivision, for only the FAB or CIT collected for transactions occurring within the subdivision). If the department requests the information, the department may share the information with the political subdivision in which the transactions occurred in accordance with the agreements described above. If the information is requested by a political subdivision, the political subdivision is entitled only to information pertaining to transactions that occurred within the political subdivision.

For further guidance on FAB taxes, please refer to Commissioner's Directive #30, available online at [www.in.gov/dor/3617.htm](http://www.in.gov/dor/3617.htm). For further guidance on CITs, please refer to Departmental Notice #40, available online at [www.in.gov/dor/3618.htm](http://www.in.gov/dor/3618.htm).

#### **E. Enforcement**

The law concerning marketplace facilitators only applies to retail transactions occurring after June 30, 2019. A retail transaction is considered to have occurred after June 30, 2019, to the extent that delivery of the property or services constituting selling at retail is made to the purchaser after June 30 (or to the place of delivery designated

by the purchaser after June 30). However, a transaction is considered to have occurred before July 1, 2019, to the extent that the agreement of the parties to the transaction was entered into before July 1, 2019, and payment was furnished before July 1, 2019, even if the delivery of the property or services occurs after June 30, 2019.

In other words, the marketplace facilitator is **not** required to collect sales tax if:

- The agreement (sales order), payment (in full) and delivery occur prior to July 1, 2019; or
- The agreement (sales order) and payment (in full) occur prior to July 1, 2019.

However, the marketplace facilitator is required to collect sales tax if:

- The agreement (sales order), payment and delivery all occur after June 30, 2019; or
- The payment and delivery occur after June 30, 2019.

*Example #5:* Michael orders a widget from Widget Co. through a marketplace facilitator on June 28, 2019, making full payment for the widget. However, the widget is not delivered until July 3, 2019. Because the sales order and payment occur prior to July 1, the transaction is considered to have occurred prior to July 1, 2019.

*Example #6:* Tabitha orders a widget from Widget Co. through a marketplace facilitator on June 28, 2019. However, payment is due upon receipt of the widget, and the widget is not delivered until July 3, 2019. Because payment and delivery occur after June 30, 2019, the transaction is considered to have occurred after June 30, 2019.

## V. GROSS RETAIL INCOME

The gross retail income for any transaction made by or facilitated by a marketplace facilitator is equal to the total amount of consideration paid by the purchaser. This includes the payment by the purchaser of any fee (including a facilitation fee), commission, or other charge by the marketplace facilitator. However, the gross retail income does not include any taxes on the transaction that are imposed directly on the consumer.

*Example #7:* Company DEF is a marketplace facilitator. For each sale made on behalf of the sellers, they retain 5% of the transaction amount, which under their contract with their sellers, they label as a service fee. Company DEF must charge sales tax on the full amount charged to the customer, including this service fee, regardless as to whether the fee is separately stated on the invoice.

## VI. EXEMPT SALES

A remote seller (including a marketplace facilitator) is required to adhere to the same requirements as all other Indiana registered retail merchants, including as it pertains to transactions that are exempt from Indiana sales tax. This means that the remote seller is required to obtain either an Indiana General Sales Tax Exemption Certificate (ST-105) or a Streamlined Sales Tax Agreement certificate of exemption from the purchaser if the purchaser is eligible for an exemption from the sales tax.

Although not required by law, when a purchaser makes a return of tangible personal property to a retail merchant (including a marketplace facilitator), the merchant will often refund the sales tax collected by the merchant. The merchant will then make an adjustment on their next sales tax return to the department to recover from the department the sales tax that they refunded.

However, when sales tax is **overpaid** to a marketplace facilitator by a purchaser, meaning transactions involving otherwise taxable items where the purchaser was entitled to an exemption that pertained to the purchaser's exempt use or exempt status (e.g., because they were eligible for the manufacturing items; the purchaser was a nonprofit; etc.) or transactions involving items that are otherwise exempt regardless of the purchaser's status (e.g., exempt food and food ingredients) but the marketplace facilitator collected the sales tax in error, the purchaser does not have a cause of action to bring suit against the marketplace facilitator to claim the sales tax paid to the facilitator. Instead, the purchaser may file a claim for refund with the department for the recovery of the overpayment of sales tax.

Furthermore, a class action may not be brought against the marketplace facilitator on behalf of purchasers arising from or in any way related to the overpayment. This is true regardless of whether such action is characterized as a tax refund claim. However, a purchaser still has the right to file a claim for refund with the department for the recovery of the overpayment of sales tax.

A purchaser wishing to file a claim for refund must file a Claim for Refund, Form GA-110L, with the supporting documentation required by the department. If a purchaser properly files a valid claim for refund, the department will refund to the purchaser the amount of the overpayment of sales tax with respect to the transaction.

## VII. LIMITED LIABILITY RELIEF

As part of the marketplace facilitator bill, the legislature included a statute providing for limited liability relief for the failure to collect and remit sales or use tax during a three year collection period (beginning after December 31, 2018, through December 31, 2021). It is important to note that the limited liability relief provided by law **only applies** in the context of an audit or other investigation conducted by the department, and is something **granted by the department**. The liability relief may **not** be taken by a marketplace facilitator in any other context, including when calculating the sales tax due for any particular period.

Furthermore, a marketplace facilitator is only relieved of liability for the failure to collect and remit sales or use tax on taxable retail transactions to the extent that the marketplace facilitator can show to the department's satisfaction that:

- The taxable retail transaction was made through the marketplace;
- The marketplace facilitator and the seller are not affiliated persons;
- The failure to collect gross retail or use tax was not due to an error in sourcing the transaction; and
- The transaction facilitated by the marketplace facilitator occurred before January 1, 2022, regardless of when the purchased items are delivered to the purchaser.

If these conditions are met to the department's satisfaction, the department may grant liability relief to a marketplace facilitator for the calendar years that this applies to, limited to the following amounts:

- For calendar year 2019, the liability relief may not exceed 5% of the total sales tax due on taxable retail transactions facilitated by the marketplace and sourced to Indiana during the same calendar year.
- For calendar year 2020, the liability relief may not exceed 3% of the total sales tax due on taxable retail transactions facilitated by the marketplace and sourced to Indiana during the same calendar year.
- For calendar year 2021, the liability relief may not exceed 2% of the total sales tax due on taxable retail transactions facilitated by the marketplace and sourced to Indiana during the same calendar year.

When a marketplace facilitator is relieved of liability, the seller is also relieved of liability for the amount of uncollected tax due.

**NOTE:** This limited liability relief does not otherwise relieve the marketplace facilitator from liability for collecting but **failing to remit** to the department sales and use tax. Furthermore, if a marketplace facilitator exceeds the limits described above, the marketplace facilitator is liable to the state for the payment of any remaining taxes, plus any penalties and interest attributable to those taxes.

*Example #8:* Company 123 is a marketplace facilitator under audit in 2022, with the audit review period being calendar years 2019 through 2021. It is determined by the auditor that Company 123 did not properly collect or remit sales tax approximately seven percent of its sales in 2019, 2020, and 2021. Because the auditor is permitted to provide relief of 5% of the uncollected or unremitted sales in 2019, 3% of the uncollected or unremitted sales in 2020, and 2% of the uncollected or unremitted sales in 2021, Company 123 is liable for the remaining 2% of the uncollected or unremitted sales in 2019, 4% of the uncollected or unremitted sales in 2020, and 5% of the uncollected or unremitted sales in 2021.

For transactions occurring after December 31, 2021, marketplace facilitators will be subject to different liability standards. Except in cases in which the marketplace facilitator and the seller are affiliated, a marketplace facilitator is not liable for failure to collect and remit Indiana sales and use tax if the marketplace facilitator demonstrates to the satisfaction of the department that:

- They have a system in place to require their sellers to provide accurate information and has made a reasonable effort to obtain accurate information from the seller about a retail transaction;
- The failure to collect and remit the correct tax was due to incorrect or insufficient information provided to the marketplace facilitator by the seller; and
- The marketplace facilitator provides information showing who the purchaser was in each transaction for which the tax had not been collected.

If the marketplace facilitator is relieved of liability under this standard, the purchaser is liable for any amount of uncollected, unpaid, or unremitted tax. If the marketplace facilitator cannot meet these standards, then the facilitator is liable for the unpaid taxes.

## VIII. REGISTRATION REQUIREMENTS

If a retail merchant is required to register with the department, the easiest way to register for multiple states, including Indiana, is through the Streamlined Sales Tax Registration System (SSTRS) at: [www.sstregister.org](http://www.sstregister.org). The SSTRS provides a simple means to register for a sales tax account in all full member states of the Streamlined Sales Tax. When a merchant registers through the SSTRS, they receive sales tax accounts to collect and remit sales tax in all Streamlined Sales Tax full member states. A merchant may also choose to register in any associate member states. Once a merchant is registered, they must collect and remit sales and use taxes in those states.

To register directly with Indiana a retail merchant may visit the INBiz portal at: [inbiz.in.gov](http://inbiz.in.gov).

**NOTE:** A remote seller will generally not be required to register with the Indiana Secretary of State. Please refer to the information on the INBiz portal and the Indiana Secretary of State's website for more information.

Marketplace facilitators registering to collect FAB or CIT will need to visit the Department's website for special instructions.

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