

WSR 21-07-065

PROPOSED RULES

DEPARTMENT OF REVENUE

[Filed March 16, 2021, 11:26 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-22-090.

Title of Rule and Other Identifying Information: WAC 458-20-282
Marketplace tax collection and reporting.

Hearing Location(s): On April 28, 2021, at 10:00 a.m. This meeting will be conducted over the internet/telephone. Contact Keith Dacus at KeithD@dor.wa.gov for login/dial-in information.

Date of Intended Adoption: May 24, 2021.

Submit Written Comments to: Darius Massoudi, P.O. Box 47453, Olympia, WA 98504-7453, email DariusM@dor.wa.gov, fax 360-534-1606, 360-534-1572.

Assistance for Persons with Disabilities: Contact Julie King or Renee Cosare, phone 360-704-5733 or 360-704-5734, TTY 800-833-6384.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: This rule clarifies the reporting responsibilities of a marketplace facilitator required to collect sales and use tax on behalf of marketplace sellers making retail sales through the facilitator's marketplace.

Reasons Supporting Proposal: The department of revenue intends to provide guidance to taxpayers regarding EHB 2163, which was enacted by the legislature during the third special session of 2017, and SSB 5581, which was enacted by the legislature during the regular session of 2019.

Statutory Authority for Adoption: RCW 82.32.300, 82.01.060(2).

Statute Being Implemented: RCW 82.08.0531, 82.08.010, 82.08.052, 82.02.250, 82.02.260, 82.32.762.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Darius Massoudi, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1572; Implementation and Enforcement: John Ryser, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1605.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. This rule is not a significant legislative rule as defined by RCW 34.05.328.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. The proposed rule language for WAC 458-20-282 provides clarification to marketplace facilitators regarding their existing reporting responsibilities under EHB 2163 (2017) and SSB 5581 (2019). The proposed rule does not impose more-than-minor costs on businesses, as it does not propose any new tax rate, tax measure, reporting or recordkeeping requirements not already established by this statute.

March 16, 2021
Atif Aziz
Rules Coordinator

OTS-2750.2

NEW SECTION**WAC 458-20-282 Marketplace tax collection and reporting.** (1)

Introduction. This rule explains the reporting responsibilities of a marketplace facilitator required to collect sales and use tax on behalf of marketplace sellers making retail sales through the facilitator's marketplace. See Substitute Senate Bill 5581 (2019). This rule presumes the marketplace facilitator has substantial nexus with Washington to incur a sales or use tax collection obligation.

(2) **Other rules.** In addition to this rule, readers may want to refer to the following rules for additional information:

- WAC 458-20-103 Gift certificates—Sale deemed to occur and retail sales tax collected at time of redemption.
- WAC 458-20-108 Selling price—Credit card service fees, foreign currency, discounts, patronage dividends.
- WAC 458-20-145 Local sales and use tax.
- WAC 458-20-193 Interstate sales of tangible personal property.
- WAC 458-20-193C Imports and exports—Sales of goods from or to persons in foreign countries.
- WAC 458-20-221 Collection of use tax by retailers and selling agents.

(3) **Rule examples.** This rule includes examples that identify a set of facts and then state a conclusion. These examples are only a general guide. The department will evaluate each case on its particular facts and circumstances.

(4) **Organization of rule.** This rule is divided into six parts:

- Part I - Definitions.
- Part II - Defining a Marketplace Facilitator.
- Part III - Tax Collection Responsibilities.
- Part IV - Liability Relief.
- Part V - Providing Sales Information to Marketplace Sellers.
- Part VI - Marketplace Audits.

Part I - Definitions

The definitions in this part are provided in RCW 82.08.010 and apply throughout this rule unless the context clearly requires otherwise.

(101) (a) "Affiliated person" means a person that, with respect to another person:

- (i) Has an ownership interest of more than five percent, whether direct or indirect, in the other person; or
- (ii) Is related to the other person because a third person, or group of third persons who are affiliated persons with respect to each other, holds an ownership interest of more than five percent, whether direct or indirect, in the related persons.

(b) For purposes of this subsection:

- (i) "Ownership interest" means the possession of equity in the capital, the stock, or the profits of the other person; and
- (ii) An indirect ownership interest in a person is an ownership interest in an entity that has an ownership interest in the person or in an entity that has an indirect ownership interest in the person.

(102) "Consumer" has the same meaning as provided in chapters 82.04, 82.08, and 82.12 RCW.

(103) "Marketplace" means a physical or electronic place including, but not limited to, a store, a booth, an internet website, a catalog or a dedicated sales software application, where tangible personal property, digital codes and digital products, or services are offered for sale.

(104) (a) "Marketplace facilitator" means a person that:

(i) 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 marketplace owned or operated by the person (collectively "facilitates sales for consideration");

(ii) Engages directly or indirectly, through one or more affiliated persons, in transmitting or otherwise communicating the offer or acceptance between the buyer and seller (collectively "transmits offer or acceptance"). For purposes of this subsection, mere advertising does not constitute transmitting or otherwise communicating the offer or acceptance between the buyer and seller; and

(iii) Engages directly or indirectly, through one or more affiliated persons, in any of the following activities with respect to the seller's products:

(A) Payment processing services;

(B) Fulfillment or storage services;

(C) Listing products for sale;

(D) Setting prices;

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

(F) Taking orders; or

(G) Providing customer service or accepting or assisting with returns or exchanges (collectively "specified activities").

(b) (i) "Marketplace facilitator" does not include:

(A) A person who provides internet advertising services, including listing products for sale, so long as the person does not also transmit offer or acceptance and engage in any specified activities; or

(B) A person with respect to the provision of travel agency services or the operation of a marketplace or that portion of a marketplace that enables consumers to purchase transient lodging accommodations in a hotel or other commercial transient lodging facility.

(ii) The exclusion in (b) of this subsection does not apply to a marketplace or that portion of a marketplace that facilitates the retail sale of transient lodging accommodations in homes, apartments, cabins, or other residential dwelling units.

(iii) For purposes of (b) of this subsection, the following definitions apply:

(A) "Hotel" has the same meaning as in RCW 19.48.010.

(B) "Travel agency services" means arranging or booking, for a commission, fee or other consideration, vacation or travel packages, rental car or other travel reservations or accommodations, tickets for domestic or foreign travel by air, rail, ship, bus, or other medium of transportation, or hotel or other lodging accommodations.

(105) "Marketplace seller" means a seller that makes retail sales through any marketplaces operated by a marketplace facilitator, regardless of whether the seller is required to be registered with the department as provided in RCW 82.32.030.

(106) "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, limited liability company, association, soci-

ety, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof.

(107) "Product" has the same meaning as provided in RCW 82.32.023.

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

(109) "Retail sale" and "sale" have the same meaning as provided in chapter 82.04 RCW.

(110) "Seller" has the same meaning as provided in RCW 82.08.010.

Part II - Defining A Marketplace Facilitator

(201) (a) **Who is a marketplace facilitator?** A marketplace facilitator is a person who facilitates sales for consideration of a marketplace seller's products through a marketplace, transmits offer or acceptance between the buyer and seller, and engages in at least one of the specified activities listed in subsection (104) (a) (iii) of this rule. A person must meet all three parts of the definition to be a marketplace facilitator. Generally, a person is facilitating a sale when the sale is conducted through the person's marketplace.

(b) **Who is not a marketplace facilitator?**

(i) **Advertisers.** Persons that merely advertise goods for sale, including listing products for sale in the advertisement, and do not handle transactions do not meet the definition of a marketplace facilitator, as long as those persons do not meet the other requirements of the marketplace facilitator definition. Additionally, mere advertising does not constitute transmitting or otherwise communicating the offer or acceptance between the buyer and seller for the purposes of subsection (104) (a) (ii) of this rule of the marketplace facilitator definition.

(ii) **Travel agents and hotel marketplaces.** A person operating a marketplace is not considered a marketplace facilitator for any portion of its marketplace that provides travel agency services or enables consumers to purchase transient lodging accommodations in a hotel or other commercial transient lodging facility. This exclusion does not apply to any portion of a marketplace that facilitates the retail sale of transient lodging accommodations in homes, apartments, cabins, or other residential dwelling units.

(c) **Responsibilities depend on role in transaction.** A person can be a retailer for some transactions and a marketplace facilitator for some transactions, but it can only be one of these designations in any particular transaction. A person's specific reporting responsibilities as a retailer or marketplace facilitator depends on its particular role in the transaction.

Example 1. Intergalactic Fulfillment Portal (IFP) lists products sold by third parties at retail on its website. IFP communicates the offer and acceptance between the seller and buyer for the sale of these third-party products. IFP completes the sales transactions on its website, processes the payments, and is paid a percentage of the sales price. IFP is a marketplace facilitator, as it meets all three parts of the marketplace facilitator definition (facilitates sales for consideration, transmits offer or acceptance, and engages in at least one specified activity--processing payments).

Example 2. Same facts as Example 1, except IFP uses a third party to process the payments. IFP still meets the definition of a marketplace facilitator, as it still meets all three parts of the marketplace facilitator definition (facilitates sales for consideration,

transmits the offer or acceptance, and engages in a specified activity--listing products for sale). A person does not need to process payments to meet the definition of a marketplace facilitator, as any one of the specified activities listed in subsection (104)(a)(iii) of this rule is sufficient.

Example 3. Taste of Andromeda (TOA) is a business that contracts with various restaurants to allow them to prepare and sell food (all of which is subject to retail sales tax) in the business's food court. Customers order and collect their food from the restaurants, but TOA, not the third-party restaurants, completes the sale and accepts payment for the prepared food. TOA gives the third-party restaurants the remaining proceeds of the sale net of the amount TOA retains for itself. TOA meets the definition of a marketplace facilitator, as it meets all three parts of the marketplace facilitator definition (facilitates sales for consideration, transmits offer or acceptance, and engages in a specified activity--processing payments).

Example 4. First Alpha Centauri Technology (FACT) performs the payment processing for an online marketplace. Neither FACT nor any of FACT's affiliates performs any other function related to the operation or sale of products on the marketplace. FACT does not meet the definition of a marketplace facilitator, as it only satisfies one of the three parts of the marketplace facilitator definition, in this case engaging in a specified activity. FACT does not meet the other two parts of the marketplace facilitator definition (it is neither facilitating sales for consideration, nor is it transmitting offer or acceptance).

Example 5. Neptunian Connection (NC) is a business that lists products sold by third parties on its website. NC does not facilitate the sale of these products for consideration. When purchasers want to purchase a listed product, NC transfers the purchaser to the third-party seller's website to complete the sale. NC has no involvement in the sales transaction. NC does not meet the definition of a marketplace facilitator (NC neither gets paid to facilitate a sale for consideration on a marketplace, nor transmits offer or acceptance).

Example 6. Antares Travel Solutions (ATS) owns and operates a marketplace for used teleporters and gets paid for facilitating sales of used teleporters by third-party sellers. ATS facilitates sales for consideration, but neither transmits offers or acceptances, nor engages in a specified activity. However, ATS owns 19% of the capital stock of the Scorpius-Centaurus Association (SCA). SCA owns 11% of the capital stock of Mahtab Affiliated Technologies (MAT), which transmits the offers and acceptances on the ATS marketplace, and processes payments for the ATS marketplace. Since ATS has an indirect ownership interest in MAT, MAT is an affiliated person with respect to ATS. As a result, ATS meets all three parts of the definition of a marketplace facilitator (facilitates sales for consideration, transmits offers or acceptances indirectly through an affiliated person, and engages in a specified activity indirectly through affiliated person--payment processing services).

Example 7. Triangulum Transient Geological Excursions (TTGE) operates a marketplace specializing in transient lodging for individuals interested in geology. TTGE's marketplace facilitates the retail sale of transient lodging accommodations in residential cabins offering views of volcanoes. TTGE's marketplace also allows for the sale of transient lodging located in a hotel next to a tectonic fault. TTGE is a marketplace facilitator for the sales of transient lodging located in the residential cabins, but is not a marketplace facilitator for

the sales of the transient lodging located in the hotel. TTGE does not need to report its sales of the transient lodging located in the hotel.

Part III - Tax Collection Responsibilities

(301) What must be collected and remitted?

(a) **Requirement to collect and remit sales or use tax.** A marketplace facilitator must collect and remit sales or use tax on all taxable retail sales sourced to Washington on behalf of any marketplace seller making retail sales through the marketplace facilitator's marketplace.

(i) **Determining the correct combined state and local sale of use tax rate.** The marketplace facilitator must determine the correct combined state and local sales or use tax rate to charge for sales sourced to Washington. The state tax rate is established in RCW 82.08.020. For information on determining the applicable local tax rate, see WAC 458-20-145.

(ii) **Relief for marketplace seller.** Except as otherwise provided in subsection (401)(b) of this rule, a marketplace seller is not required to collect or remit sales or use tax on taxable retail sales through a marketplace facilitator's marketplace if the marketplace seller has obtained documentation from the marketplace facilitator indicating that the marketplace facilitator is registered with the department and will collect all applicable taxes due under chapters 82.08 and 82.12 RCW on all taxable retail sales made on behalf of the marketplace seller through the facilitator's marketplace. The required documentation must be in writing, but may be transmitted electronically. The required documentation may be included in agreements between the marketplace seller and the marketplace facilitator or in information distributed or accessible to marketplace sellers through the facilitator's marketplace. Marketplace sellers should retain this documentation with their own tax records. The documentation must clearly state the marketplace facilitator's intention to collect sales or use tax on behalf of the marketplace seller, along with the department-issued tax account ID number that the marketplace facilitator will use to report and remit the sales or use tax collected on behalf of the marketplace seller. If the marketplace seller does not obtain documentation from the marketplace facilitator, then it may be held liable for any uncollected sales tax on sales through that facilitator's marketplace.

(b) Requirement to collect and remit other taxes and fees.

(i) (A) **Taxes and fees authorized in chapter 82.08 RCW.** In addition to collecting and remitting sales or use tax, a marketplace facilitator must also collect and remit all other applicable taxes and fees authorized in chapter 82.08 RCW on all retail sales sourced to Washington on behalf of any marketplace seller making retail sales through the marketplace facilitator's marketplace.

(B) **Taxes and fees in chapter 82.08 RCW.** Applicable taxes and fees in chapter 82.08 RCW may include, but are not limited to:

(I) Motor vehicle sales tax (see RCW 82.08.020(2)).

(II) Spirits taxes (see RCW 82.08.150).

(ii) (A) **Other applicable taxes and fees.** Beginning January 1, 2020, a marketplace facilitator must also collect and remit all other applicable taxes and fees on all retail sales sourced to Washington on behalf of any marketplace seller making retail sales through the marketplace facilitator's marketplace. For the purposes of this subsection, "taxes and fees" means any monetary exaction, regardless of its

label, imposed on a buyer and that the seller is required to collect and pay over to the department.

(B) **Examples of taxes and fees.** Other applicable taxes and fees may include, but are not limited to:

(I) Lodging taxes and charges (see WAC 458-20-166).

(II) Solid fuel burning device fee (see RCW 70A.15.3620).

(III) Tire fees (see RCW 70A.205.405, 46.37.427, and WAC 458-20-272).

(302) **Exemptions.**

(a) **Verification.** In cases where a marketplace facilitator seeks to determine whether an exemption applies to a particular retail sale, the marketplace facilitator may request required documentation from the marketplace seller or purchaser to determine whether the exemption applies. This subsection does not obligate a marketplace facilitator to accept a purchaser's claim of an exempt sale.

(b) **Documentation.** The marketplace facilitator must retain any documentation from the marketplace seller or purchaser needed to verify any exemption claimed. See RCW 82.08.050. Exemption certificates provided by purchasers may designate either the name of the marketplace facilitator or the marketplace seller in the field referring to the seller in order to ensure there is a properly completed exemption certificate.

(c) **Common exemptions.** Applicable exemptions may include, but are not limited to:

(i) Sales of food and food ingredients (see RCW 82.08.0293 and 82.12.0293 and WAC 458-20-244).

(ii) Sales of prescription drugs and prosthetic devices (see RCW 82.08.0281 and WAC 458-20-18801).

(iii) Sales to an Indian tribal member in Indian country (see WAC 458-20-192).

(iv) Sales to the United States government (see WAC 458-20-190).

(d) **Sales for resale.** If a marketplace facilitator chooses to make a sale for resale, it must also accept and retain any documentation from the purchaser needed to verify that a sale is for resale rather than for end use by the purchaser (see RCW 82.04.060 and WAC 458-20-102).

(303) **Tax return reporting.**

(a) **Remitting tax.** A marketplace facilitator may report the sales or use tax, along with any other applicable taxes and fees, collected on behalf of marketplace sellers separately from the sales or use tax collected on its own sales into Washington under a separate tax reporting account or separate legal entity account. Alternatively, a marketplace facilitator may report all such taxes on the same tax reporting account as it reports its own direct sales.

(b) **Business and occupation tax.** Generally, marketplace facilitators do not owe retailing business and occupation (B&O) tax on retail sales facilitated on its marketplace, but do owe retailing B&O tax on products they sell in their own name (see RCW 82.04.480). A marketplace facilitator may be subject to B&O tax under the service and other activities classification on the gross income from any commission, fee, or other compensation earned from facilitating a sale. See WAC 458-20-19401 and 458-20-19402 for more information on when such B&O tax is due.

Part IV - Liability Relief

(401) **Incorrect information provided by marketplace seller.**

(a) **Marketplace facilitator relief.** A marketplace facilitator is relieved of liability for failure to collect the correct amount of sales or use tax, with respect to sales on behalf of marketplace sellers, to the extent that the marketplace facilitator can show to the department's satisfaction that the error was due to incorrect information given to the marketplace facilitator by the marketplace seller, unless the marketplace facilitator and the marketplace seller are affiliated persons. To qualify for the liability relief under this subsection, a marketplace facilitator must have received erroneous information from a marketplace seller that prevented the marketplace facilitator from properly determining the correct tax amount owed. A marketplace facilitator does not qualify for the liability relief under this subsection when a marketplace seller provided information that was correct, but was incomplete or insufficient to make the proper taxability determination.

(b) **Marketplace seller liability.** Where the marketplace facilitator is relieved of liability under (a) of this subsection, the marketplace seller is solely liable for the amount of uncollected tax due.

(402) **Percentage of tax due.**

(a) **Conditions for relief.** Subject to the limits detailed below in (b) and (c) of this subsection, and subsection (403) of this rule, a marketplace facilitator is relieved of liability for the failure to collect sales and use tax on taxable retail sales to the extent that the marketplace facilitator can show to the department's satisfaction that:

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

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

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

(b) **Limitations on relief.** Liability relief for a marketplace facilitator under (a) of this subsection is limited as follows:

(i) For calendar year 2018, the liability relief may not exceed ten percent of the total tax due under chapters 82.08 and 82.12 RCW on taxable retail sales by the marketplace facilitator and collected on behalf of a marketplace seller and sourced to this state under RCW 82.32.730 during the same calendar year.

(ii) For calendar year 2019, the liability relief may not exceed five percent of the total tax due under chapters 82.08 and 82.12 RCW on taxable retail sales by the marketplace facilitator and collected on behalf of a marketplace seller and sourced to this state under RCW 82.32.730 during the same calendar year.

(c) **Situations when relief is not available.** The liability relief identified in this subsection is not available for retail sales that a marketplace facilitator determined were subject to sales or use tax but chose not to collect the tax, or where the marketplace facilitator otherwise acts fraudulently to avoid collecting tax. Liability relief is also not available when the failure to collect sales or use tax was contrary to specific written instructions provided by the department.

(d) **Marketplace seller relief.** Where the marketplace facilitator is relieved of liability under (a) of this subsection, the marketplace seller is also relieved of liability for the amount of uncollected tax due.

(e) **How to claim the relief.** The liability relief provided in (a) of this subsection may be claimed when the department determines that

additional sales or use tax is due for a particular calendar year on sales meeting the criteria of (a)(i) through (iii) of this subsection. Upon such a determination by the department, the marketplace facilitator may claim relief from liability on such additional tax, subject to the limitations in (b) and (c) of this subsection, and subsection (403) of this rule. Any amounts remaining after application of these limitations are due in full by the taxpayer and subject to any applicable penalty and interest as provided in chapter 82.32 RCW.

(f) **When is a sale facilitated?** For purposes of this subsection, a retail sale is deemed to be facilitated by a marketplace facilitator when the marketplace facilitator either:

(i) Accepts the order for the product;

(ii) Communicates to the marketplace seller the buyer's offer to purchase the product;

(iii) Accepts the buyer's payment for the product; or

(iv) Delivers or arranges for delivery of the product.

(403) **Loss of liability relief.** A marketplace facilitator that does not provide the reports required under subsection (501) of this rule is not eligible for the liability relief provided under subsections (401) and (402) of this rule.

Part V - Providing Sales Information to Marketplace Sellers

(501) **Facilitated Washington sales.**

(a) **Monthly access.** Beginning July 1, 2019, a marketplace facilitator must provide each of its marketplace sellers with access, through a written report or other means, to gross sales information for all Washington sales facilitated on behalf of the marketplace seller during the immediately preceding month. Marketplace facilitators must provide such written report or access within fifteen calendar days following the end of each month. The report must include all information required by the marketplace seller to fulfill its tax reporting obligations with the department, including any delivery charges, fees, or other charges on sales facilitated by the marketplace facilitator.

(b) **Reasonable method of estimating sales.** If a marketplace seller does not receive the gross sales information for all Washington sales through a marketplace facilitator, the marketplace seller may determine its business and occupation tax liability under chapter 82.04 RCW based on a reasonable method of estimating Washington sales as may be required or approved by the department.

(c) **What are Washington sales?** For purposes of this subsection, "Washington sales" means any sale sourced to this state under RCW 82.32.730, regardless of whether the sale is a retail sale or wholesale sale.

(502) **Loss of liability relief.** A marketplace facilitator that does not comply with subsection (501)(a) of this rule is not eligible for the sales tax liability relief provided in subsections (401) and (402) of this rule.

Part VI - Marketplace Audits

(601) **Marketplace audit.** A marketplace facilitator is subject to audit in order to ensure tax is properly reported and remitted on all sales occurring on the marketplace, including sales facilitated on behalf of marketplace sellers.

(602) **Additional documentation.**

(a) **Verifying tax collection and exemptions.** A marketplace facilitator may be required to provide documentation for all sales occurring on its marketplace to verify that the marketplace facilitator:

(i) Remitted all tax charged to customers, charged the correct amount of tax on all taxable retail transactions, and properly sourced all taxable retail sales pursuant to RCW 82.32.730; and

(ii) Properly granted exemptions, if applicable, verified the type of exemption granted, and retained the appropriate supporting documentation to substantiate the exemption as required under RCW 82.32.070 and subsection (302) of this rule.

(b) **Electronic format.** The marketplace facilitator must provide this information electronically, in agreed upon format, at the department's request.

(c) **Frequency.** The department may request this information on a more frequent or periodic basis to supplement its routine audit effort.

(603) **Information from marketplace sellers.** The marketplace facilitator may request additional information from a marketplace seller making sales on its marketplace in order to comply with these audit requirements.

[]