

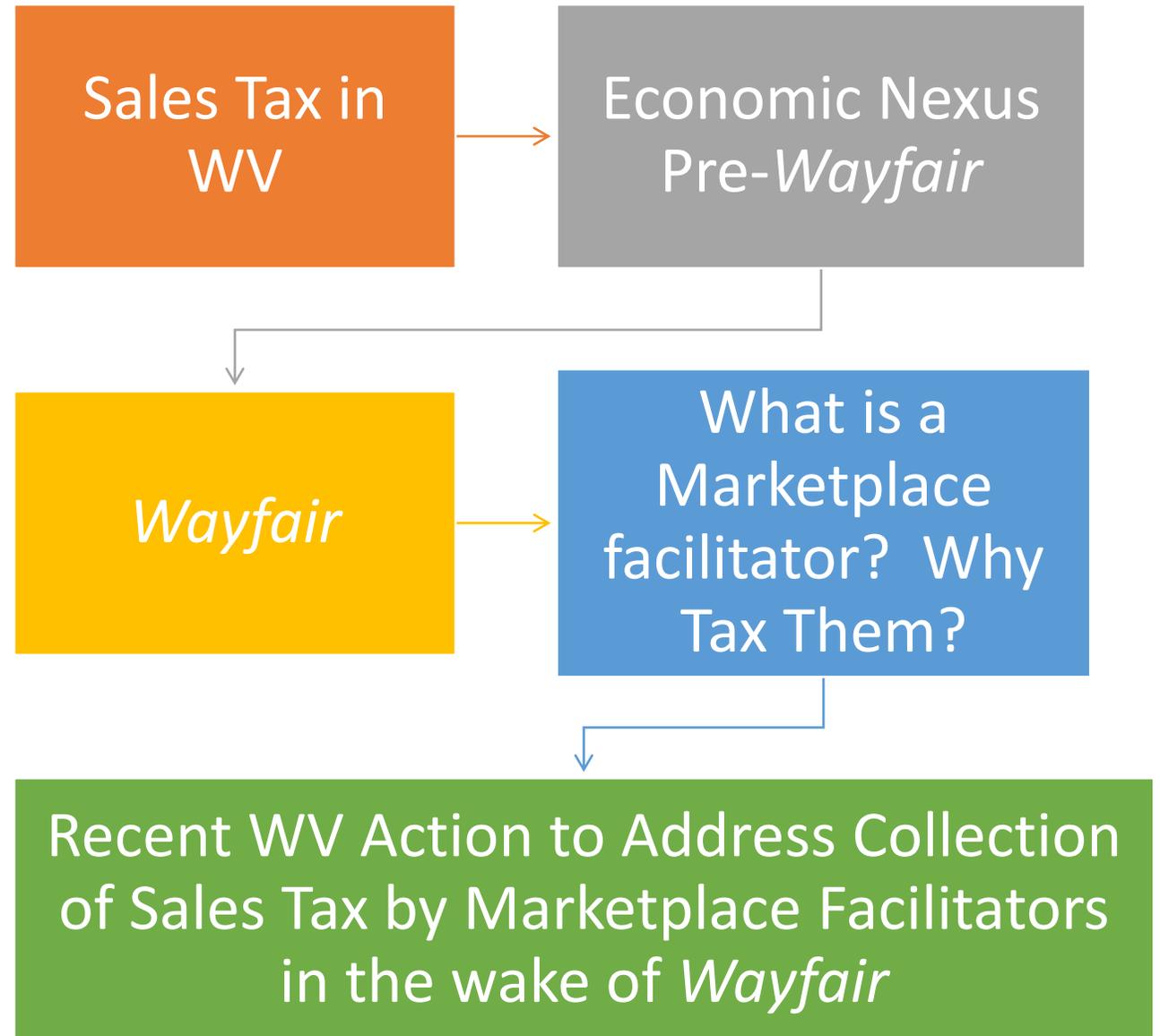


- West Virginia Tax Institute
- 70th Annual Meeting
- October 27-29, 2019



MARKET PLACE FACILITATORS

Overview



History of the Sales Tax and the Use Tax

- At the end of WWI, sales tax existed outside the U.S. to assist with post-war expenses and increasing inflation
- Great Depression of 1930's saw adoption of sales tax in U.S., which was originally intended as a temporary measure
- Sales tax first adopted by WV in 1933 (2%), made permanent in 1937
- Use Tax adopted 1951





Overview of the Sales Tax

Imposed on ultimate user
Presumption that all
transactions involving
sales of tangible personal
property, custom
software, or taxable
services are subject to tax

Overview of the Use Tax

The Use Tax is imposed upon the “use” of tangible personal property, custom software or taxable services in West Virginia.

Enacted to prevent the avoidance of the Sales Tax by requiring taxpayers purchasing goods out-of-state and using those goods in-state to pay the Use Tax on such purchases.

Purchases which would be exempt from the Sales Tax if purchased in-state are also exempt from the Use Tax.



What is a “sale”?



- “Sale,” “sales” or “selling,” for Sales and Use Tax purposes, includes any transfer of possession or ownership of tangible personal property or custom software for a consideration, including a lease or rental, when the transfer or delivery is made in the ordinary course of the transferor’s business and is made to the transferee or his or her agent for consumption or use or any other purpose.
- W. Va. Code §§ 11-15-2(b)(17) and 11-15A-1(b)(9) and (10); WVCSR §§ 110-15-2.15, 110-15-2.79.)

“Use” defined

- “Use” is defined as the exercise by any person of any right or power over tangible personal property or custom software incident to the ownership, possession or enjoyment of such property, or by any transaction in which possession of or the exercise of any right or power over tangible personal property, custom software or the result of a taxable service is acquired for a consideration, including any lease, rental or conditional sale of tangible personal property or custom software or the use or enjoyment in this state of the result of a taxable service.
- The Use Tax is designed to include purchases, transfers or exchanges which take place outside of West Virginia and are therefore not subject to the Sales Tax, provided such transactions would otherwise be taxable under the Sales Tax had the transaction taken place within West Virginia.

Rates of the Sales Tax

- The general Sales Tax rate is six cents per dollar (6%) of the purchase price. (W. Va. Code § 11-15-3).
 - Exceptions
 - Mobile homes (6% of 50% of purchase price)
 - Gasoline and special fuels are subject to both to Sales Tax and Use Tax and to the Motor Fuels Excise Tax. (W. Va. Code §§ 11-15-18b and 11-14C-1 et seq.).
 - The Motor Fuels Excise Tax : a flat rate equal to \$.205 per gallon plus a variable (Sales Tax) component equal to 5% of the average wholesale price of the fuel. (W. Va. Code §§ 11-15-18b and 11-14C-5).
 - The Motor Fuel Excise Tax is imposed on the consumer of the fuel but is required to be paid at the time the fuel is imported into this state for delivery to the consumer or retailer or when the fuel is removed from a bulk transfer/storage system location within this state. (W. Va. Code § 11-14C-6).



Subtotal	3.59
Sales Tax (6.%)	0.22
Total	\$ 3.81

Collection of the Sales Tax



- Collected from consumer by vendor
- Retained and paid to the state
- Cash sales: due at consummation of sale
- Credit sales: vendor must remit tax due on return filed for month in which sale occurred
- Leases: tax computed and collected upon each rental payment

Sourcing rules

- West Virginia has adopted destination sourcing and the sourcing rules in the Streamlined Sales and Use Tax Agreement. See [West Virginia Code § 11-15B-14](#), 14a and 15
- The general rule is that the transaction is sourced to the location where the purchaser receives the tangible personal property purchased or makes first use of the service purchased. The hierarchy of sourcing rules is found in [West Virginia Code § 11-15B-15\(a\)](#).

Collection of the Use Tax by out-of-state retailers

- “Every retailer engaging in business in this state and making sales of tangible personal property, custom software or taxable services for delivery into this state, or with the knowledge, directly or indirectly, that the property or service is intended for use in this state, that are not exempted under the provisions of section three of this article, shall at the time of making the sales, whether within or without the state, collect the tax imposed by this article from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the Tax Commissioner, if the Tax Commissioner prescribes by rule.” W.Va. Code 11-15A-6
- Soliciting orders by tv shopping network; tv, radio, or print ads aimed at state; recurring mailers, etc.
- Previously required “physical presence”, but changed as a result of *Wayfair*



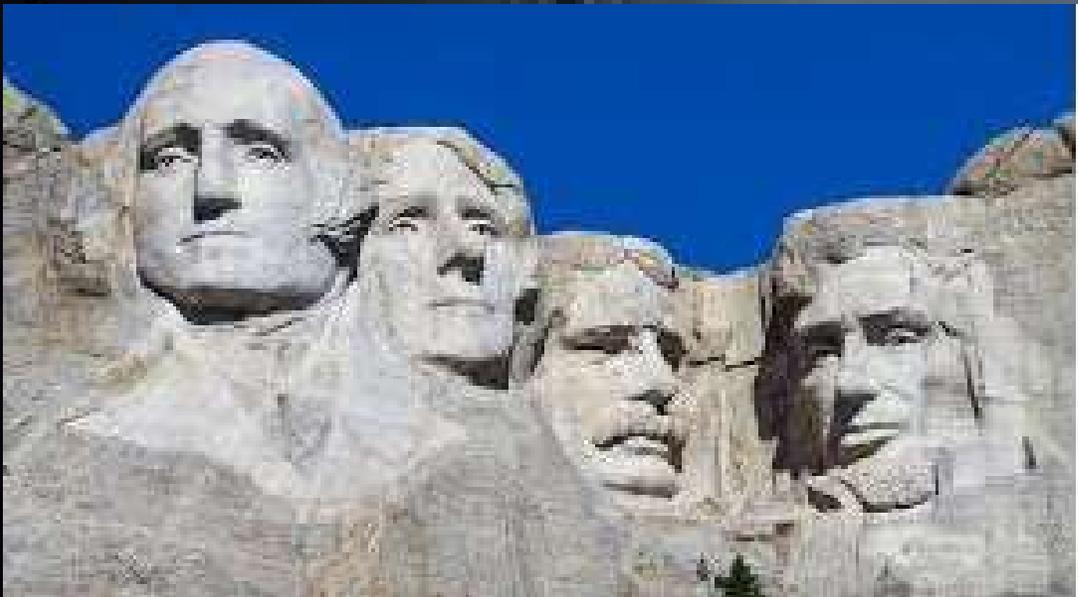
“such retailer [must have] physical presence in this state in the form of employees, offices, agents or sales outlets in this state, or any other presence that provides the necessary minimum contacts for a constitutionally sufficient nexus for a state to require such a retailer to collect and remit use taxes.” (W. VA. CODE, §§ 11-15A-6a, 11-15A-1(b)(8)).

“A retailer without the necessary minimum contacts for a constitutionally sufficient nexus for West Virginia to require such retailer to collect and remit use tax shall not be considered a ‘retailer engaging in business in this State.’” (W. VA. CODE ST. R. § 110-15-2.78).

The Wayfair Decision

South Dakota

Wayfair (and other large
online retailers)



*Quill v. North
Dakota (1992)*



Search:

Quill Corporation v. North Dakota, 504 U.S. 298 (1992)

QuillPLUS Points

Free enrollment with your order!

Join Now

Quill Corporation v. North Dakota involved whether Quill Corporation, a mail

Bright-line rule requiring physical presence

Ink & Toner Coupon

FREE gifts when you buy ink & toner.

Get Coupons

Excludes HF, arx | E, JS, Conf.

Pyrex® 4-pc. storage set

brother at your side TN-730

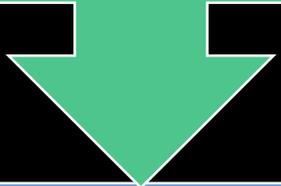
required to... on sales... North Dakota... ers by telephone

Quill Cont'd

Quill Corporation had no physical presence in North Dakota, but solicited business from North Dakota customers by telephone and mail order, and delivered merchandise by common carriers.



The United States Supreme Court upheld the physical presence requirement confirmed in another sales tax case, *National Bellas Hess v. Illinois Department of Revenue*, 386 U.S. 753 (1967). The Court ruled that a taxpayer must have a physical presence in a state in order to require sales tax for purchases made by in-state customers. The existence of customers alone did not create sufficient nexus under the Commerce Clause.



The Court clarified the distinctions between the Due Process Clause and the Commerce Clause, and concluded that the vendor had sufficient “minimum contacts” under the Due Process Clause, but did not have “substantial nexus” under the Commerce Clause.



The rise of online shopping



- Global retail e-commerce sales have more than doubled from \$1.3 to \$2.8 trillion since 2014
- South Dakota has no state income tax and derives approximately 60% of general fund revenues from sales and use taxes

South Dakota v. Wayfair

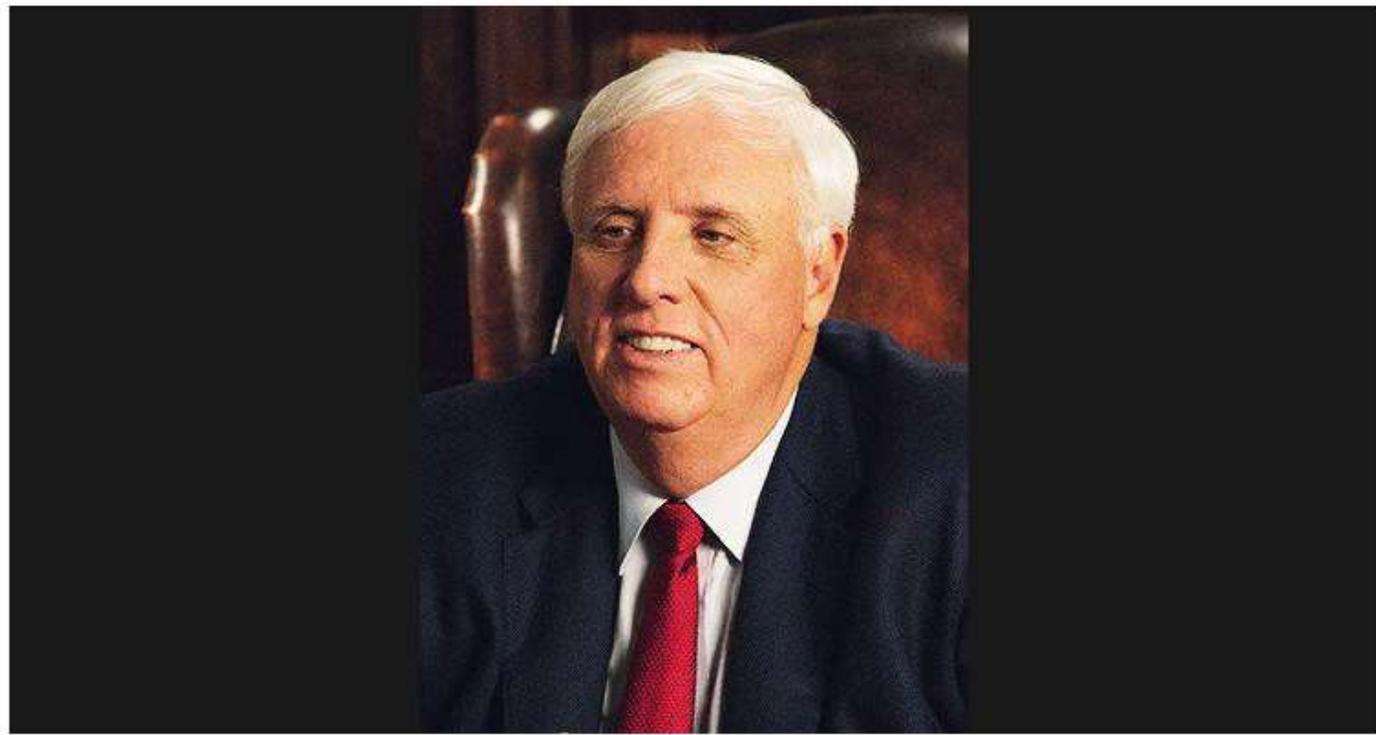
- South Dakota S.B. 106
 - On March 22, 2016, South Dakota enacted S.B. 106, which requires sales tax collection and remittance for any entity exceeding an annual sales threshold of \$100,000 or 200 separate transactions in South Dakota. S.B. 106 also provided an expedited appeals process to challenge Quill.
 - Following enactment of S.B. 106, South Dakota filed a declaratory judgement action against remote sellers with no physical presence in the state. South Dakota sought a determination that it may require the remote sellers to collect and remit sales tax.
 - On September 13, 2017, the South Dakota Supreme Court held that the state's economic nexus provisions were unconstitutional. Quill remained the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes.

- The Wayfair decision, giving states the freedom to reach beyond their borders to compel sellers to collect and remit tax, is the most groundbreaking event in US state taxation in decades.
- Court ruled, by 5 to 4, in favor of South Dakota
- Quill physical presence standard overturned - “unsound and incorrect”
- The “substantial nexus” requirement articulated in Complete Auto—can be met with a “substantial virtual connection”
- Majority opinion refers to Quill as a “judicially created tax shelter”
- All 9 justices agreed that Quill was wrong, but disagreed over the proper solution

FEATURED

Governor, Finance chair do not support internet sales tax

By Jackie Whetzel For The Register-Herald Jun 22, 2018



LATEST PHOTOS

PREV

To view or purchase photos, visit photos.register-herald.com.



ADMINISTRATIVE NOTICE 2018-18

2018 OCT -3 4 19 08

Re: Collection of State and Municipal Sales and Use
Taxes by Certain Out-of-State Retailers

In *South Dakota v. Wayfair, Inc., et al*, 585 U.S. ____ (June 21, 2018), the United States Supreme Court concluded that "the physical presence rule of *Quill* is unsound and incorrect. The Court's decisions in *Quill Corp. v. North Dakota*, 504 U. S. 298 (1992), and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753 (1967), should be, and now are, overruled." Slip opinion at page 22. The Court additionally found that "the nexus [here] is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more than \$100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. S. B. 106, §1. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual

West Virginia's response:
Administrative Notice 2018-18

- Beginning Jan. 1, 2019 out-of-state vendors must collect tax if:
 - More than \$100k of goods or services to WV in 2018; OR
 - 200 or more separate transactions in 2018

What is a marketplace facilitator?



- A marketplace facilitator is a business or organization that contracts with third parties to sell goods and services on its platform and facilitates retail sales.
- Marketplace facilitators enable these sales by:
 - listing the products,
 - taking the payments,
 - collecting receipts,
 - and in some cases assisting in shipment.



• Dropshipping

Tax Implications for Dropshippers

If the retailer has nexus in the state where the sale occurs, the retailer would collect sales tax from the customer, even if the retailer engages a third-party drop shipper to deliver the product.

- Even when drop shipping is used as the method of delivery, the retailer collects sales tax from the customer, unless the transaction is exempt.

If the retailer and the drop shipper do not have nexus in the state in which the sale occurs, the customer is subject to use tax.

- The retailer and the third party drop shipper cannot be required to collect sales or use tax on the retail sale, but the customer is required to remit use tax unless the transaction is tax-exempt.

If the retailer doesn't have nexus in the state in which the sale occurs, but the drop shipper does, the drop shipper could be responsible for collecting sales tax.

- Generally, the transaction between the retailer and the drop shipper would not be a taxable transaction, as long as proper documentation is provided to the third party drop shipper (namely, a resale certificate).

- Drop shipments are the logistical arrangement where a seller of a good, either manufacturer or wholesaler, delivers the good at the behest of a third party to the third party's customer.
- Drop shipments are viewed as two transactions:
 - (1) the sale between the manufacturer and the retailer or wholesaler as the third party vendor; and
 - (2) the sale from the retailer or wholesaler as the third party vendor to the customer.
- The West Virginia Tax Code allows the third party vendor to claim a resale exemption via an exemption certificate provided by its customer. For the second transaction between the third party vendor and the customer, the vendor is required to collect the tax from the purchaser and pay that amount to the Tax Commissioner.

The Reasoning Behind Marketplace Facilitator Laws

- State can collect all of the required sales tax from one entity rather than from hundreds of thousands of smaller companies.
- If a third-party seller didn't have nexus (triggered by a physical location, employee staff, store inventory, or reach a certain amount or number of transactions) then it didn't have to collect sales tax for sales in that state.
 - Lost revenue
- Additional resources to pursue each individual non-compliant seller.
- By placing the onus of sales tax on the facilitator (rather than the seller), forces compliance across the entire state, and dramatically reduces the cost of compliance for the states to claim their revenue.



Goal of the Laws: Marketplace Facilitators responsible for calculating, collecting, remitting





ENROLLED

Committee Substitute

for

House Bill 2813

BY DELEGATES HOUSEHOLDER AND CRISS

[BY REQUEST OF THE STATE TAX DIVISION]

[Passed March 8, 2019; in effect ninety days from

passage.]

HB 2813

23 (e) Economic nexus. - A marketplace facilitator, referrer, or retailer, who does not have a
24 physical presence in this state, shall collect the tax imposed by §11-15A-2 of the code when:

25 (1) The seller that has gross revenue from West Virginia sales equal to or exceeding
26 \$100,000 for an immediately preceding calendar year, or a current calendar year; or

27 (2) The seller makes West Virginia sales in 200 or more separate transactions for an
28 immediately preceding calendar year or a current calendar year.

§11-15A-6b.
Collection of
tax by
marketplace
facilitators and
referrers.

- (e) Economic nexus. — A marketplace facilitator, referrer, or remote seller shall collect the tax imposed by §11-15A-2 of the code when:
- (1) The marketplace facilitator, referrer, or remote seller makes or facilitates West Virginia sales on its own behalf or on behalf of one or more marketplace sellers equal to or exceeding \$100,000 in gross revenue for an immediately preceding calendar year, or a current calendar year; or
- (2) The marketplace facilitator, referrer, or remote seller makes or facilitates West Virginia sales on its own behalf or on behalf of one or more marketplace sellers in 200 or more separate transactions for an immediately preceding calendar year or a current calendar year.

Tax Dept Guidance on
HB 2813

Administrative Notice 2019-21



Dave Hardy
Secretary of Revenue

Dale W. Steager
State Tax Commissioner

STATE TAX DEPARTMENT

ADMINISTRATIVE NOTICE 2019-21

Consumers Sales and Service Tax – Marketplace Facilitators Having Economic Nexus With West Virginia Required to Collect West Virginia Sales and Use Tax on Sales Made on and After July 1, 2019.

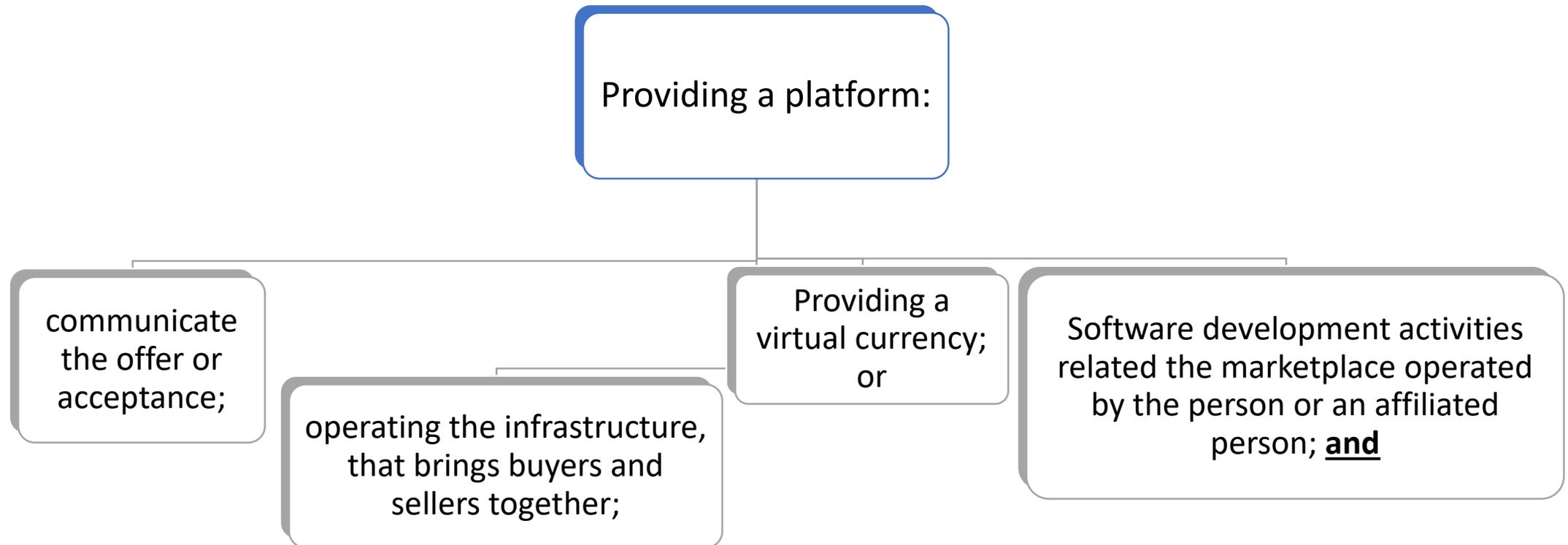
During the recently completed Regular Session of the West Virginia Legislature, House Bill Substitute for H. B. 2813 was enacted. This bill requires marketplace facilitators having economic nexus with West Virginia to begin collecting and remitting West Virginia sales and use taxes on sales of goods and services they facilitate on or after July 1, 2019.

“Marketplace facilitator” is defined in W. Va. Code § 11-15A-1(b)(8) and means a person who enters into contracts with one or more sellers to facilitate for consideration, regardless of whether the fee is deducted as fees from the transaction, the sale of the seller’s products through a physical or electronic marketplace operated by the person, and engages:

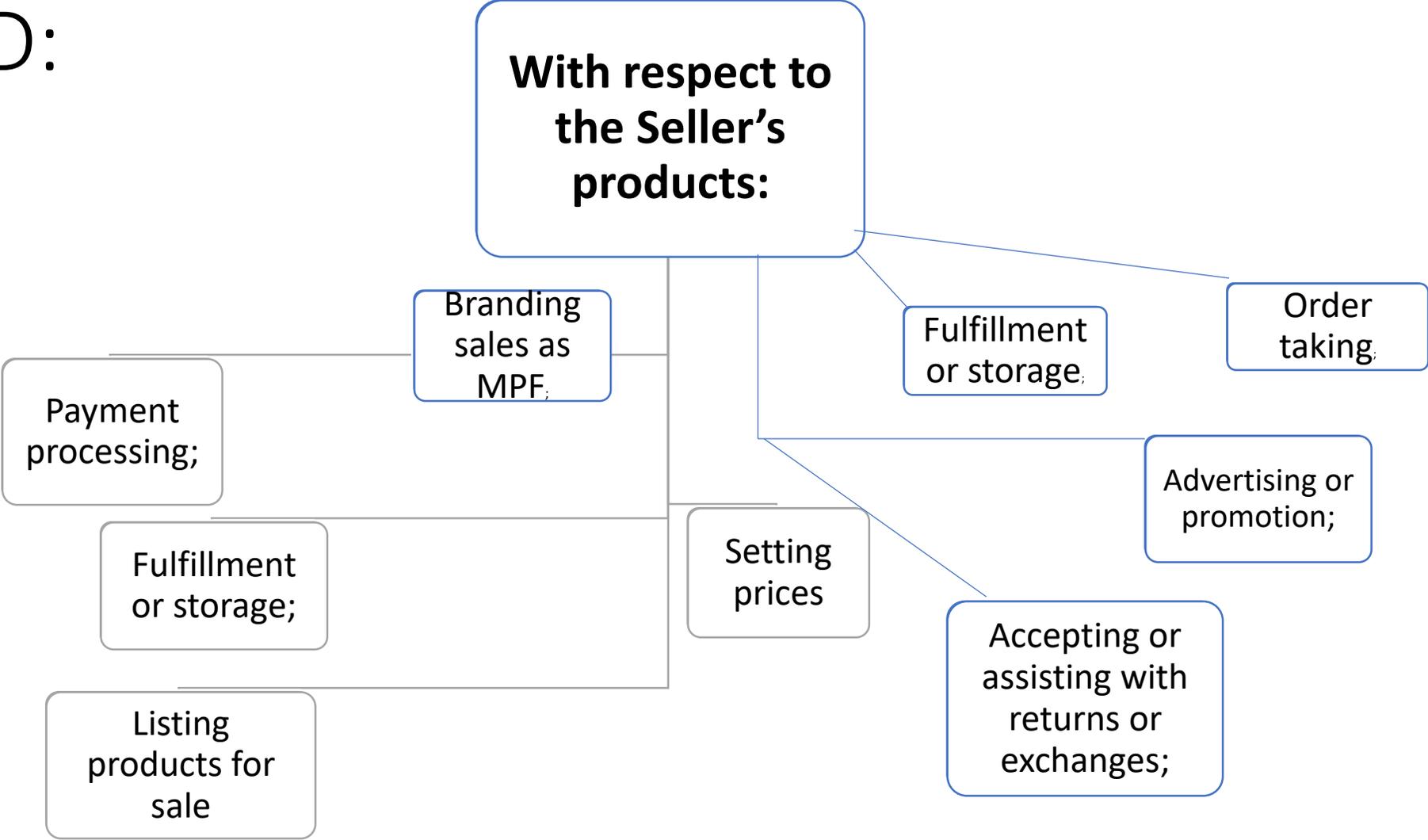
(A) Directly, or indirectly, through one or more affiliated persons, in any of

- The term marketplace facilitator is defined in [West Virginia Code § 11-15A-1\(b\)\(8\)](#) and means a person that contracts with one or more 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

AND engages:



AND:



Does NOT include credit card companies



- The term *marketplace facilitator* 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 payment transactions between two parties.

Affiliated Person

- The term *affiliated person* is defined in [West Virginia Code § 11-15A-1\(b\)\(1\)](#) and means a person that, with respect to another person:
 - Has an ownership interest of more than 5%, whether direct or indirect, in the other person; or
 - 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 5%, whether direct or indirect, in the related persons.

Marketplace Seller

- The term *marketplace seller* is defined in [West Virginia Code § 11-15A-1\(b\)\(9\)](#) and means a seller that makes retail sales through any physical or electronic marketplaces operated by a marketplace facilitator or directly resulting from a referral by a referrer, regardless of whether the seller is required to be registered with the Tax Commissioner as provided in [§ 11-12](#) et seq. of this code.





Platform

- The term *platform* is defined in West Virginia Code [§ 11-15A-1\(b\)\(12\)](#) and means an electronic or physical medium, including, but not limited to, a website or catalog, operated by a referrer.

- The term *referral* is defined in West Virginia Code [§ 11-15A-1\(b\)\(17\)](#) and means the transfer by a referrer of a potential customer to a marketplace seller who advertises or lists products for sale on the referrer's platform.

Referrer

- The term *referrer* is defined in West Virginia Code [§ 11-15A-1\(b\)\(18\)\(A\)](#) and means a person, other than a person engaging in the business of printing a newspaper or publishing a newspaper as defined in [§ 11-15A-1\(b\)\(10\)](#) of this code, who contracts or otherwise agrees with a seller to list or advertise for sale one or more items in any medium, including a website or catalog; receives a commission, fee, or other consideration from the seller for the listing or advertisement; transfers, via telephone, internet link, or other means, a purchaser to a seller or an affiliated person to complete the sale; and does not collect receipts from the purchasers for the transaction.
- The term *referrer* does not include a person that:
 - Provides internet advertising services; and
 - Does not ever provide either the marketplace seller's shipping terms or advertise whether a marketplace seller charges sales and use taxes. West Virginia Code [§ 11-15A-1\(b\)\(18\)\(B\)](#).

Seller & Solicitor

- The term *seller* is defined in West Virginia Code [§ 11-15A-1\(b\)\(26\)](#) and means a retailer, and includes every person selling or leasing tangible personal property or custom software or furnishing a taxable service in a transaction that is subject to the tax imposed by this article;
- The term *solicitor* is defined in West Virginia Code [§ 11-15A-1\(b\)\(27\)](#) and means a person that directly or indirectly solicits business for a retailer.

Municipal sales and use taxes

- Marketplace facilitators registered to collect and remit West Virginia sales and use taxes must collect the applicable municipal sales and use taxes when the shipped-to physical address of the customer is located within the geographic boundaries of a municipality that imposes a sales and use tax, or the service is provided within the municipality.
- Currently, 43 West Virginia municipalities impose a municipal sales and use tax. In most instances the rate of tax is 1% of the sales price, including shipping and handling charges.

Marketplace Continuum



New Law Will Impact
all Major
Marketplace
Faciliators



Pay with

Credit or debit card



Subtotal (1 item)	\$41.79
Shipping	Free
Tax*	\$2.93

Order total **\$44.72**

The state of West Virginia requires eBay to collect sales tax and applicable fees from buyers. eBay will pay the collected tax to the tax authority. [Learn more](#)

Tax*

\$2.93

(304)xxxxx29

[Change](#)

Review item and shipping

Seller: 7thavenuestore | [Message to seller](#)



Batman Costume Adult Superhero Halloween Fancy Dress

Size: L (Large)

\$41.79

Quantity

Delivery

Marketplace Facilitators?



Marketplace

(7) "Marketplace" includes any means by which any marketplace seller sells or offers for sale tangible personal property, custom software, or services, for delivery into this state, regardless of whether the marketplace seller has a physical presence in this state;

And engages:

- Directly, or indirectly, through one or more affiliated persons, in any of the following:
 - Transmitting or otherwise communicating the offer or acceptance between the buyer and seller;
 - Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;
 - Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller; or
 - Software development or research and development activities related to any of the activities described in [§ 11-15A-1\(b\)\(7\)\(B\)](#) of this code, if such activities are directly related to a physical or electronic marketplace operated by the person or an affiliated person; and
- In any of the following activities with respect to the seller's products:
 - (i) Payment processing services;
 - (ii) Fulfillment or storage services;
 - (iii) Listing products for sale;
 - (iv) Setting prices;
 - (v) Branding sales as those of the marketplace facilitator;
 - (vi) Order taking;
 - (vii) Advertising or promotion; or
 - (viii) Providing customer service or accepting or assisting with returns or exchanges.

ARTICLE 15.
CONSUMERS SALES
AND SERVICE TAX.
§11-15-9. Exemptions.

- (14) **Casual and occasional sales of property or services** not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character by a corporation or organization which is exempt from tax under subdivision (6) of this subsection on its purchases of tangible personal property or services. For purposes of this subdivision, the term “casual and occasional sales not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character” means sales of tangible personal property or services at **fundraisers** sponsored by a corporation or organization which is exempt, under subdivision (6) of this subsection, from payment of the tax imposed by this article on its purchases when the fundraisers are of limited duration and are held no more than six times during any twelve-month period and “limited duration” means no more than eighty-four consecutive hours: Provided, That sales for volunteer fire departments and volunteer school support groups, with duration of events being no more than eighty-four consecutive hours at a time, which are held no more than eighteen times in a twelve-month period for the purposes of this subdivision are considered “casual and occasional sales not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of a like character”;

Requires Consideration

(8) “Marketplace facilitator” means a person that contracts with one or more 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, and engages:

› [How can I close my Amazon seller account?](#)

› [Where else can I learn about how selling on Amazon works?](#)

› [Do Amazon sellers make money?](#)

› [How can I sell on the US, Canadian, and Mexican marketplaces?](#)

Pricing

› [How much does it cost to sell on Amazon.com?](#)

Amazon offers two selling plans. The Professional selling plan is available for a \$39.99 monthly subscription fee plus per-item selling fees, which vary by category.

If you plan to sell fewer than 40 items a month, the Individual plan may be best for you. There is no monthly subscription fee. Instead, Individuals pay \$0.99 per item sold plus other selling fees, which vary by category.

Learn more about [Selling on Amazon pricing](#) ›

Additional fees apply when you use Fulfillment by Amazon to pick, pack, ship, and provide customer service for your products.

Learn more about [FBA pricing](#) ›

Seller Fees

We keep the fees simple, so you can focus on your business.

On This Page

Fees on eBay

eBay Stores

2019 Fall Seller Update [See What's New](#)

Fees on eBay

Insertion Fees

Also called listing fees, you get 50 free per month*, and beyond that, the fee for listing in most categories is just \$0.35. [\(See restrictions.\)](#)

Final Value Fees

Also known as selling fees, they're a percentage of an item's total sale price. For most sellers, it's 10% or lower! [\(See restrictions.\)](#)

Listing Upgrades

With optional upgrades like international site visibility, larger photos, and more, you've got the power to attract more buyers.

Fees in Select Categories

Fees are different for certain categories, including [motor vehicles](#), [real estate](#), and select [business and industrial items](#).

Our House Rules

Get to know Etsy's legal terms and policies



[Our House Rules](#) / [All categories](#) ▾

Fees & Payments Policy

Sellers may be charged for using some of Etsy's services. This Fees & Payments Policy explains your fees and taxes and how to pay them.

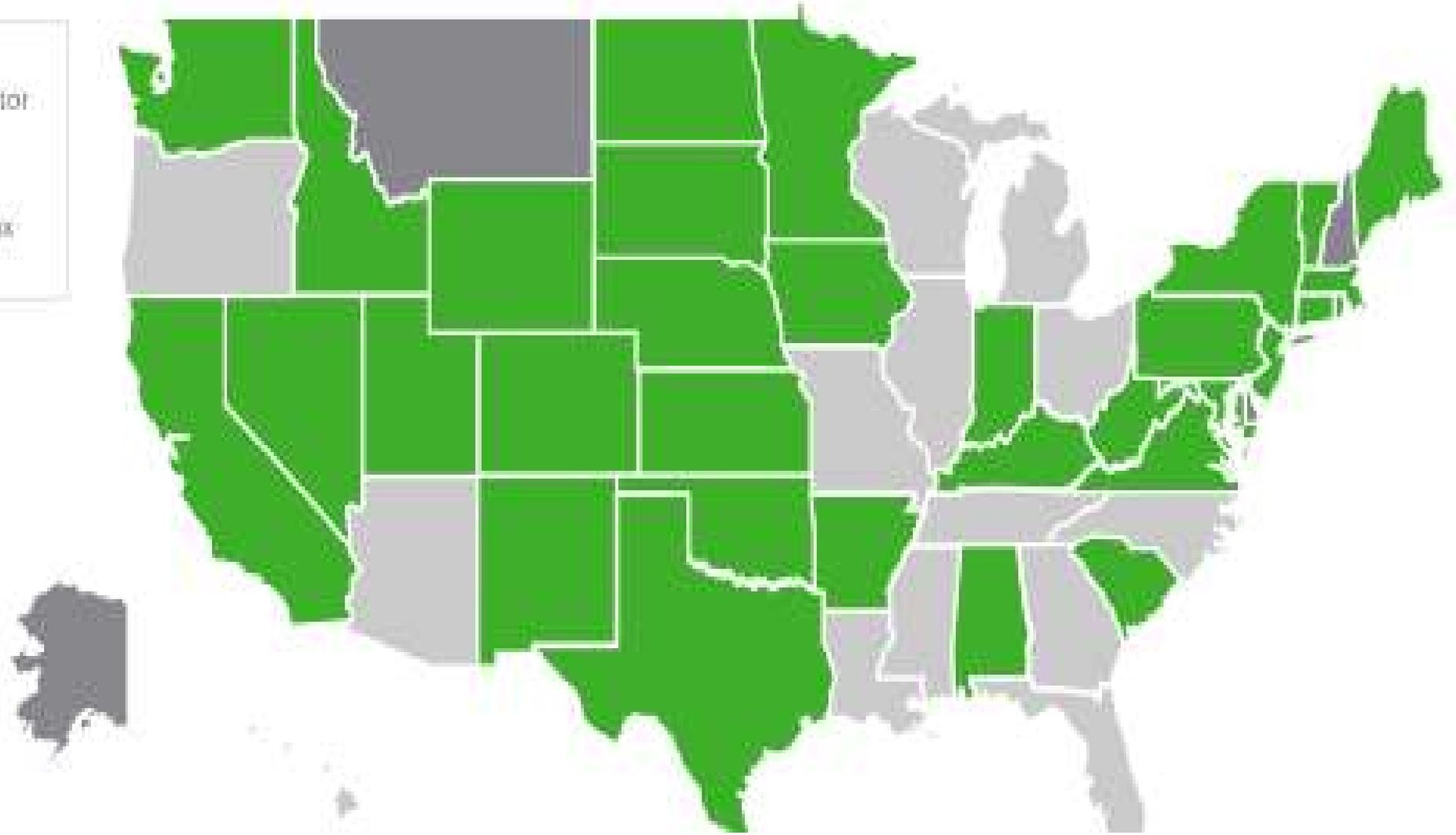
This policy is a part of our [Terms of Use](#). By opening an Etsy shop, you're agreeing to this policy and our Terms of Use.

1. [Types of Fees](#)
2. [Fee Avoidance](#)
3. [Paying Your Etsy Fees](#)
4. [Etsy Payments](#)
5. [Taxes](#)
6. [Etsy Gift Cards and Etsy Credits](#)

1. Types of Fees

Sellers may be required to pay the following types of fees. Please note that all fees are listed exclusive of any value-added tax (VAT) that may apply.

See the Taxes section below for further details.



Marketplace Facilitator Laws in the US
(Updated Oct. 3, 2019)

QUESTIONS

