

Online Marketplace Operators – The Latest Sales Tax Target

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The Pillsbury logo, featuring the word "pillsbury" in a lowercase, sans-serif font. The letters are a reddish-brown color. The logo is positioned on a white rectangular background that is slightly offset to the right and bottom of the slide.

Agenda

- Marketplace Operators
- Why The Sudden Target?
- State Legislation
- State Litigation
- Multistate Tax Commission
- What now?

Marketplace Operators

Marketplace Operators

- Online Marketplaces offer third-party sellers a ready-made platform that provides access to potential purchasers.
 - Third-party sellers leverage online marketplace vendor's infrastructure to warehouse items, pack and ship orders to customers, and provide customer service.
 - Third-party sellers were generally treated as the “seller” of the goods and services making them responsible for sales and use tax collection.
- States have not been able to track and capture sales and use tax on sales transactions conducted on online marketplaces from out-of-state third party sellers that do not have an in-state physical presence.

Why The Sudden Target?

Why The Sudden Target? – Nexus Overview

- *Scripto, Inc. v. Carson (1960)*
- *National Bellas Hess Inc. v. Dep't of Revenue Ill. (1967)*
- *Quill Corp. v. North Dakota (1992)*
- *South Dakota v. Wayfair, Inc., et al. (2018)*

Why The Sudden Target? – Physical Presence Redefined

- States have applied various approaches to limit or circumvent *Quill's* physical presence requirement.
- Examples:
 - Agency Nexus
 - Affiliate Nexus
 - Intangible Nexus
 - Click-Through Nexus
 - Economic Nexus

Why The Sudden Target? – State Litigation

- *Direct Marketing Association v. Brohl* (2015)
 - DMA sought injunction to prevent enforcement of Colorado’s notice and reporting obligations for out-of-state retailers.
 - Supreme Court denied review.
 - Justice Kennedy, went out of his way to invite reconsideration of *Quill*.
 - “Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court’s holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier It should be left in place only if a powerful showing can be made that its rationale is still correct.”

State Legislation

State Legislation – Enacted

- Several states have enacted laws requiring marketplaces to collect sales tax or comply with certain informational reporting requirements:
 - Alabama
 - Arizona
 - Connecticut
 - Iowa
 - Minnesota
 - New Jersey
 - Oklahoma
 - Pennsylvania
 - Rhode Island
 - South Carolina
 - South Dakota
 - Washington
 - Wisconsin

Polling Question One

- Which state was the first to create a sales tax collection requirement for marketplace operators?
 1. Washington
 2. New Jersey
 3. Minnesota
 4. California

State Legislation – Collection v. Reporting

- Minnesota:
 - Requires online marketplaces that facilitate sales within the state to collect sales tax on those sales.
- Rhode Island:
 - Imposes informational reporting requirements on “retail sale facilitators” that facilitate sales into the state.
- Oklahoma & Washington:
 - Marketplaces must collect and remit tax or comply with reporting requirements.

Polling Question Two

- True or False: All states define “marketplace facilitator” the same.
 1. True
 2. False

State Legislation – “Marketplace Facilitator”

There is not a common definition of “marketplace facilitator” implemented across the states, but each state generally requires a marketplace facilitator to:

1. Facilitate sales for third party retailers, and
2. Collect payments from customers and transmit the payments to the third party retailers.

State Legislation – Thresholds

States economic nexus thresholds must clearly indicate whether the threshold applies only to remote sellers or both remote sellers and marketplace facilitators.

- Washington:
 - Issued new guidelines distinguishing between “Threshold One” and “Threshold Two.”
- Iowa:
 - Clearly indicates the threshold is identical to the threshold established for remote sellers.

State Legislation – Proposed

Since *Wayfair* states have proposed or legislation is pending that requires marketplaces to collect sales tax or comply with the certain informational reporting requirements:

- California
 - The governor’s draft bill language defines the term “retailer” to include marketplace facilitators and would require marketplace facilitators that meet the \$500,000 economic threshold to collect and remit sales tax on behalf of their marketplace sellers.
- D.C.
 - Considering emergency “*Wayfair*” legislation, which the D.C. Office of Tax and Revenue has recommended expand the definition of “retailer” to include marketplace facilitators.

State Legislation – Revenue Impact

States are continuously looking for ways to raise revenue, which is one reason they have turned to Marketplace Facilitators:

- Oklahoma estimates an annual increase of \$20.5 million in use tax collection from its marketplace facilitator legislation; and
- Pennsylvania estimates a 2017-18 increase of \$10 million in revenue and \$50.5 million in 2018-19 from its marketplace facilitator legislation.

State Legislation – Why is Legislation Needed?

- Online marketplaces are not the “seller” or “retailer” as those terms are commonly used in existing sales or use tax statutory schemes.
- Online marketplaces are akin to advertisers or a referral source.
 - Do the new statutes apply to traditional advertisers?

State Litigation

Active Marketplace Litigation

- *Amazon Services LLC v. South Carolina Department of Revenue*
 - Marketplace provider tax collection dispute.
 - Trial rescheduled from November 2018 to February 2019.

Multistate Tax Commission

Multistate Tax Commission – Post-*Wayfair*

- Wayfair Implementation and Marketplace Facilitator Work Group
- “This work group is intended to discuss and develop concepts or ideas for consideration by states desiring to require marketplace facilitators to collect and remit sales/use tax on marketplace sales, in order to maximize compliance while minimizing the burden on marketplace facilitators and marketplace sellers.”
- Goal
 - To present a memo for the Uniformity Committee to consider in November
- Some issues under consideration:
 - Should there be common definitions for terms such as “marketplace,” “marketplace seller,” and “marketplace facilitator”?
 - If the marketplace facilitator is required to register, collect and remit the sales/use tax on facilitated sales, then is there a need for the marketplace seller to register or report those same sales?
 - Should states provide liability protection to marketplace facilitators when errors in collection and remittance are due to marketplace seller providing erroneous information to the marketplace facilitator?

Polling Question Three

- Is your company participating in the MTC's Wayfair Implementation and Marketplace Facilitator Work Group?
 1. Yes, we are actively involved.
 2. No, but we intend to in the near future.
 3. No.

Post-*Wayfair*— Taxpayer Responses

- Participation in the MTC new work group
 - Amazon.com, Inc., eBay Inc., Microsoft Corp., NetChoice, American Catalog Mailers Association, among others.
- eBay Inc.
 - eBay will begin collecting and remitting sales tax in Washington, Pennsylvania and Oklahoma.
- Etsy, Inc.
 - Etsy is urging Congress to create a federal solution for small businesses.

What Now?

What Now? – Marketplace Operators

- Continue to track state legislation.
- Beware of double collection.
- Evaluate the risk of class action lawsuits.
- Who's responsible for erroneous reporting?

Questions?

Contact Us

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