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Making Sense of Marketplace Facilitator Tax Laws

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In this article, Grossman examines the growing issues for online sellers regarding sales tax nexus for digital sales and how marketplace facilitators and remote sellers can stay in compliance.

Remote sellers and marketplace facilitators face a myriad of increasingly complex sales and use tax laws relating to e-commerce. All jurisdictions that impose a sales tax can confer a sales tax filing obligation on remote sellers based solely on sales or transactional volume. Commonly referred to as the *Wayfair* sales tax nexus, these laws and their corresponding thresholds vary by state. Many jurisdictions have also adopted marketplace facilitator laws that govern the interplay between a customer and end user and a marketplace seller who uses a third-party marketplace facilitator to make taxable retail sales through a marketplace owned or controlled by the marketplace facilitator. Upon satisfying the thresholds, the marketplace facilitator must collect and remit state and local sales taxes on facilitated retail sales between the marketplace seller and the customer.

Because these laws vary by state, sales tax nexus for digital sales is a growing issue for online sellers. To stay in compliance, marketplace facilitators and remote sellers should understand the differences in the laws of each state in which they do business.

The Evolution of Sales Tax Nexus In the Digital Age

Sales tax nexus — the connection between a remote seller and a state that requires the remote seller to register, collect, and remit sales tax — has changed significantly in recent years because of the rise of digital commerce and a landmark 2018 U.S. Supreme Court decision.[1]

Before 2018, a taxpayer typically needed physical presence, such as property, agents, or physical operations in a jurisdiction, before a jurisdiction could confer sales tax nexus on it. Physical presence was the linchpin for a jurisdiction to confer sales tax nexus and the corresponding tax liabilities and obligations. When a remote seller's employees physically entered a jurisdiction, it triggered sales tax nexus. Conversely, if a remote seller did not have the requisite physical presence in the jurisdiction, regardless of its sales volume, the jurisdiction could not confer sales tax nexus on the remote seller.

For example, under the former construct, a vendor or seller with nominal sales in a jurisdiction but that leased a 1,200-square-foot office, performed two repairs in a year in the jurisdiction, or engaged in infrequent or solicitation activities, would have the requisite sales tax nexus and the corresponding filing obligation. In contrast, a remote seller that had billions of dollars in sales in a jurisdiction and millions of customers but lacked the physical presence would not have an obligation to register for sales tax. Instead, the millions of the remote seller's distinct customers would have the

[1] *South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080 (2018).

obligation to remit use tax on their otherwise taxable purchases.

From the jurisdiction's perspective, administering use tax compliance for millions of customers who purchased from a single remote seller was challenging and inefficient as opposed to administering the sales tax compliance of a single remote seller with sales tax nexus that sold to millions of customers.

In the early 2000s, the explosion of remote sales and the shift to a more service-based economy led regulators to reconsider sales tax nexus. Many feared the status quo requiring traditional presence to be satisfied before sales tax nexus could be conferred may hinder tax revenue collections as more sales moved online. Jurisdictions were eager to shift the sales tax nexus paradigm. Still, previous Supreme Court rulings[2] held that only businesses with a physical presence in a state could be required to collect a state's sales tax.

Quill affirmed that physical nexus was a prerequisite for conferring sales tax nexus on a remote seller. In response, in March 2000 some states began simplifying sales and use tax administration to minimize tax compliance burdens and to argue for legislative and judicial action. These efforts culminated in the creation of the Streamlined Sales and Use Tax Governing Board and in approximately 24 states revising existing statutes.

The board's notable accomplishments included:

- adopting uniform decisions concerning key terms (such as sales price) and definitions;
- creating a centralized platform to facilitate registration among the member states; and
- issuing a uniform resale exemption certificate that would be accepted by the member states.

It was well-intentioned and achieved a degree of uniformity in sales tax compliance. However, it did not provide seamless uniformity since, among other factors, the taxability of transactions still was determined at the state level, and many of the more populous states like California, Illinois, Texas, and Florida did not become Streamlined members.

South Dakota eventually brought a case to the U.S. Supreme Court. It argued that the physical presence standard should be overturned or reconsidered to allow states to impose sales tax nexus responsibilities on purely remote sellers. In 2018 the Court ruled in *Wayfair*[3] that the state could require the collection of its sales tax on sales to its residents by out-of-state internet retailers.[4] In writing for the majority in *Wayfair*, the Court said, "Concerns that complex state tax systems could be a burden on small businesses are answered in part by noting that . . . there are various plans already in place to simplify collection."

Since *Wayfair*, every state that imposes a sales tax has enacted rules for remote sellers. On January 1, 2023, Missouri became the final state to require remote sellers to register, collect, and remit sales taxes.

Permitting sales tax nexus to be conferred on taxpayers that lack physical presence expanded the traditional sales tax paradigm. However, revising the existing laws to account for the interplay between remote sellers, their customers, and a third party facilitating those sales further expanded the paradigm. Most jurisdictions also have implemented marketplace facilitator laws that shift sales tax compliance obligations from remote sellers to the company facilitating the sale.[5]

Yet four years later, many remote sellers and marketplace facilitators lack clarity on the sales tax administration and the interplay between remote sellers and marketplace facilitators. One survey found that while marketplace facilitator laws are increasingly complex, awareness among small businesses is near an all-time low.[6]

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[2] *National Bellas Hess Inc. v. Illinois Department of Revenue*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[3] *Wayfair*, 138 S. Ct. 2080.

[4] Joseph Bishop-Henchman, "The History of Internet Sales Taxes From 1789 to the Present Day: *South Dakota v. Wayfair*," Cato Institute (Sept. 17, 2018).

[5] Jared Walczak, "State Sales Taxes in the Post-*Wayfair* Era," Tax Foundation (Dec. 12, 2019).

[6] Gail Cole, "*Wayfair* Aftershocks Persist With Marketplace Laws," Avalara (June 13, 2022).

Wayfair Sales Tax Nexus Varies by State

Nearly every jurisdiction in the country now can confer sales tax nexus on remote sellers that reach a certain threshold and can confer filing and reporting obligations on marketplace facilitators. While these states require remote sellers and marketplace facilitators to collect sales tax, the administration of these taxes is not uniform.

Sales tax nexus is also becoming a more significant issue for many businesses as e-commerce has sharply risen since the beginning of the pandemic. For the first quarter of 2023, e-commerce represented 15.1 percent of all U.S. retail sales, up from less than 10 percent when *Wayfair* sales tax nexus laws were enacted in 2018.[7]

While not all-encompassing, there are four primary areas in which marketplace facilitators and remote sellers should pay close attention to each state's tax guidance, recognizing that a marketplace facilitator or provider also might be a "remote seller."

Marketplace Facilitator Definitions and Reporting Thresholds

The definition of a marketplace facilitator and the thresholds that trigger the corresponding collection and remittance rules and obligations vary by state. In Texas, for example, a remote seller does not need to have a permit and start collecting and remitting tax until all sales through its marketplace exceed the $500,000 threshold or they are otherwise engaged in business in the state. Texas defines a marketplace facilitator as an organization that contracts with third parties to sell goods or services on its platform and that facilitates retail sales.[8]

Pennsylvania, which defines a marketplace facilitator as facilitating retail sales of tangible personal property, has a lower threshold of only $100,000.[9] Nevada defines a marketplace facilitator as a person or affiliate that directly or indirectly lists, makes available, or advertises tangible personal property for sale. Its established threshold is when all facilitated retail and direct sales exceed $100,000 or 200 separate transactions in the previous or current year.[10]

Segregated Markets

In some states, marketplace facilitators must reflect sales from third parties separately and distinctly from their own sales when filing a sales tax return. For example, Georgia requires marketplace facilitators to identify, on a separate return, sales made on behalf of marketplace facilitators. These sales must be reported under a separate sales and use tax account number. A marketplace facilitator that chooses to report its retail sales on the same return as facilitated sales must have a master sales and use tax account. The master sales tax return allows a marketplace facilitator to report sales from multiple sales and use tax accounts on one return.[11]

Meanwhile, Arkansas does not require remote sellers and marketplace facilitators to identify facilitated sales separately from their direct sales on a return. These businesses can continue to collect and remit sales and use taxes to the state as they currently do.[12]

Separate Tax Returns

While some states require marketplace facilitators to segregate facilitated sales from their own sales when filing a return, others require them to file these sales revenues on an entirely separate return.

Tennessee, for example, requires a separate return.[13] Marketplace facilitators with an active Tennessee registration can log into their Tennessee Taxpayer Access Point account and create a new location ID under their sales tax account to report facilitated sales. This location ID should be used for reporting and remitting only taxes for facilitated sales. The marketplace facilitator's own sales should be reported, and the

[7] U.S. Census Bureau, "Quarterly Retail E-Commerce Sales: 1st Quarter 2023" (May 18, 2023).

[8] Texas Comptroller of Public Accounts, Marketplace Providers and Marketplace Sellers.

[9] Pennsylvania Department of Revenue, Online Retailers Selling Goods and Services to Pennsylvania Customers (undated).

[10] Nevada Department of Taxation, Marketplace Facilitators and Marketplace Sellers (undated).

[11] Georgia Department of Revenue, Marketplace Facilitators (undated).

[12] Arkansas Department of Finance and Administration, Sales and Use Tax: Remote Sellers (undated).

[13] Tennessee Department of Revenue, "MF-9 — Instructions for Marketplace Facilitator to Report Its Own Sales Separate From Facilitated Sales" (Apr. 14, 2022).

tax should be remitted under one or more separate location IDs, as applicable, under the same sales tax period.

Meanwhile, Indiana and North Carolina allow separate returns for facilitated third-party sales. In North Carolina, taxpayers seeking to file a separate return for marketplace-facilitated returns should register for a second sales and use tax account identification number by submitting a completed form NC-BR, "Business Registration Application for Income Tax Withholding, Sales and Use Tax, and Other Taxes and Service Charge." In Indiana, a marketplace facilitator should use the paper BT-1, "Business Tax Application," only if it wishes to a create separate registration.[14]

Certification

States also have different codes for if and how marketplace facilitators are required to certify they are collecting sales taxes on behalf of remote sellers. Most states do not expressly require a marketplace facilitator to certify that it is collecting sales tax on behalf of the marketplace seller. However, a few states require transparency and certification that the marketplace facilitator is collecting and remitting on behalf of the marketplace seller. For example, a marketplace facilitator in Wisconsin must notify the marketplace seller that it is collecting and remitting sales or use tax. While the state does not specify a notification method, the seller must indicate the marketplace facilitator is collecting and remitting sales and use tax on all taxable sales in the state.[15]

Washington state requires marketplace facilitators to provide each of their marketplace sellers with access to information regarding gross Washington sales made on their behalf during the previous month. Facilitators must send this report to sellers by the 15th of each month.

In another nuance, while Indiana does not require certification, marketplace facilitators may issue an ST-105, "General Sales Tax Exemption Certificate," to the seller by checking the box marked "other" in section 4 and writing in "marketplace sales." The marketplace facilitator should complete section 1, including its Indiana taxpayer ID, and check the box for blanket purchases in section 3.

Conduct a State-by-State Review

The complexity and lack of administrative clarity is a growing issue for online sellers and marketplace facilitators. Remote sellers and marketplace facilitators cannot assume the rules are uniform. Moreover, in many jurisdictions, the rules are not codified in statutes or regulations but are based on informal guidance offered by the state department of revenue.

To ensure that they are not unknowingly noncompliant and subject to fines and penalties, taxpayers should work with their adviser to determine their sales tax nexus posture, calculate potential sales tax, explore remediation efforts, and comply with remote seller and marketplace facilitator requirements. ■

[14]Indiana Department of Revenue, What Is and Is Not a Marketplace Facilitator? (undated).

[15]Wisconsin Department of Revenue, Marketplace Provider Common Questions (Oct. 5, 2021).