

Impact of New State Sales and Use Tax Laws on Remote Commerce

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After the reversal of long-standing precedent, more than 35 states have introduced bills or passed laws over the last year that would permit the collection of sales and use tax on remote transactions previously excluded from state taxation. Recognizing the novel attributes of internet commerce, these new laws contemplate collecting sales tax from internet platforms that serve as marketplaces for other sellers, including marketplaces that offer their own virtual currencies for customers to use for transactions.

This article series examines the impact of these laws on remote commerce generally, and specifically on cryptocurrency, trading and Ethereum, and online gaming.

New Climate

States have traditionally been unable to compel out-of-state sellers to collect and remit sales and use tax for out-of-state transactions where the seller lacked a “state nexus,” based on prior Supreme Court interpretations of the U.S. Constitution’s Commerce Clause. “State nexus” was established if the seller had a “physical presence” in the state, meaning that the seller either was incorporated in or maintained property or people in the state.

Without state nexus, the state could not require an out-of-state retailer to collect and remit sales tax for in state purchases. However, the Supreme Court decided *South Dakota v. Wayfair* in June 2018 and abandoned the state nexus physical presence standard in favor of a new “economic nexus” test that permits states to force remote sellers and marketplace facilitators to collect and remit sales and use tax for remote transactions provided there is a demonstrated level of “economic and virtual contacts” affecting the state. States have rushed to pass new laws allowing them to access this new source of revenue.

These new remote sales tax laws generally permit states to collect taxes on transactions, assuming that remote sellers have economic contacts with the state that surpass certain revenue or activity thresholds—typically between \$100,000-\$250,000 in gross revenue for taxable goods and services into the state per year, or a minimum of 200 transactions per year into the state. For example, Virginia’s new law sets its thresholds at \$100,000/200 transactions per year.

Lately, however, the trend has been for states to abandon the transaction threshold and apply only a revenue threshold. North Dakota’s threshold is \$100,000 and does not include a transaction quantity threshold; similarly Texas has set its threshold at \$500,000. Most large online merchants will meet these thresholds and will owe sales tax to each state into which they sell sufficient quantities of taxable goods or services.

These bills and laws include provisions that are structured to reflect the current state of internet commerce, addressing platforms that allow other merchants to list goods and services for sale, like Amazon, eBay, or Shopify, which are generally described in these laws as “marketplace facilitators,” or “marketplace providers.” Sellers that use a marketplace facilitator’s platform and that are not controlled by the facilitator are typically defined in these new bills and laws as “marketplace sellers.”

Generally, these new laws obligate marketplace facilitators to collect and remit sales tax for sales conducted by marketplace

sellers through their platforms. This delegation of responsibility makes sense, as marketplace facilitators are generally large companies that are better positioned to handle the burdens of ensuring tax compliance than marketplace sellers, many of whom may be mom-and-pop businesses that cannot afford to implement compliance measures for multiple states' and municipalities' sales tax laws.

Likewise, by obligating the marketplace facilitators, state tax authorities have a narrower set of financially viable targets to hold responsible in case of noncompliance. So that marketplace facilitators are not functionally made guarantors of marketplace sellers' sales tax liabilities, many of these new laws include a safe harbor for marketplace facilitators when an error is made due to reasonable reliance on information provided by the marketplace seller or the purchaser (e.g., the marketplace seller lies, makes a mistake, or fails to disclose information necessary to allow the marketplace facilitators to properly report and pay sales tax owed). In that case, liability attaches to the marketplace seller. Marketplace facilitators are also generally made subject to state taxing authority audits.

This seems simple, logical, and straightforward. However, the varying definitions of marketplace facilitator and marketplace seller may create more confusion than intended. To understand whether a given transaction would qualify for sales and use taxation under these new statutes, we must first examine the definitions of marketplace facilitator and marketplace seller and review what sort of transactions generally qualify as taxable.

Marketplace Facilitators

The definition of marketplace facilitator or marketplace provider varies considerably among state bills and laws. For instance, Florida's proposed statute, section 212.05965, which recently stalled out in legislative committee, defines a marketplace provider as an actor who facilitates the sale of a marketplace seller's product through a marketplace for payment, and engages directly or indirectly in any of the following with respect to bringing the buyer and seller together:

- Transmitting or otherwise communicating the offer or acceptance between the buyer and seller
- Owning or operating the infrastructure, electronic or physical, or the technology that brings buyers and sellers together
- Providing a virtual currency that buyers can use to purchase products from the seller
- Software development or research and development activities related to any activities with respect to the seller's products listed below, if such activities are directly related to a marketplace operated by the person or an affiliated person
- Does any of the following with respect to the seller's products: payment processing services, fulfillment or storage services, listing products for sale, setting prices, branding sales as those of the marketplace facilitator, order taking, advertising or promotion, and providing customer service or accepting or assisting with returns or exchanges

Other states' remote nexus sales tax laws feature much simpler and broader definitions of marketplace facilitator. Hawaii's SB 396, which was recently signed into law, defines a marketplace facilitator as a person or entity who sells or assists in the sale of tangible personal property, intangible property, or services on behalf of another seller by:

- Providing a forum, whether physical or electronic, in which sellers list or advertise tangible personal property, intangible property, or services for sale, and
- Collecting payment from the purchaser, either directly or indirectly through an agreement with a third party.

South Dakota's statute (S.D. Codified Laws § 10-65-3) is also broader. It defines a marketplace provider as any person that facilitates a sale for a marketplace seller through a marketplace by offering for sale by the marketplace seller, by any means, tangible personal property, products transferred electronically, or services for delivery into this state; and directly, or indirectly through any agreement or arrangement with third parties, collecting payment from a purchaser and transmitting the payment to the marketplace seller, regardless of whether the person receives compensation or other consideration in exchange for facilitating the sale or providing any other service.

The marketplace facilitator is paid for the service, usually through fees. Most of these bills and laws exclude websites that merely advertise goods for sale and that do not handle transactions (or otherwise engage in "nexus producing

activities”). Likewise, mere payment processors generally do not qualify.

Marketplace Sellers

State law definitions of marketplace seller likewise vary. In many cases, the definitions specify the type of seller and what type of sales are taxable. Florida's proposed statute defines a marketplace seller as “a person who has an agreement with a marketplace provider and makes retail sales of tangible personal property or services taxable under this chapter through a marketplace owned, operated, or controlled by a marketplace provider.”

Hawaii's law does not specifically define a marketplace seller; its marketplace facilitator definition refers broadly to “sellers” of specifically described categories of property. South Dakota's law (S.D. Codified Laws § 10-65-4) defines a marketplace seller as “a retailer that sells or offers for sale tangible personal property, products transferred electronically, or services for delivery into this state, through a marketplace that is owned, operated, or controlled by a marketplace provider.” The varying definitions of marketplace seller suggests that certain types of vendors may have obligations under certain but not all state laws.

Types of Sales Implicated by These Laws

There is no uniformity among the types of sales implicated by these new laws. Florida's proposed statute, for instance, requires “retail sales of tangible personal property or services taxable under this chapter,” which suggests that transactions are taxable if they are “retail sales” of “tangible personal property or services” already taxable under the existing state sales tax law, sold by a marketplace seller via a marketplace provider's platform.

Hawaii's law, however, makes no such distinction and expressly includes “sale of tangible personal property, intangible property, or services,” without reference to any other provision of its state sales tax law. Likewise, there is no requirement that the sale be a “retail sale.” South Dakota's law includes “tangible personal property, products transferred electronically, or services for delivery into this state.” States generally have varying definitions of what types of transactions qualify for sales and use taxes, and what sort of products and services are exempted. These additional descriptions of types of transactions may further complicate or introduce ambiguities into the analysis.

Although the state bills and laws discussed in this article all attempt to impose state sales and use tax on remote internet transactions, they do so using varying language that will probably require a large-scale seller to engage in a state-by-state analysis to determine if its sales require the payment of sales and use taxes to those states.

The definitions provided in these new state laws include vague or uncertain terms which will probably give rise to a variety of questions, many of which will take years, requests for administrative opinions from regulators, and appealed lawsuits to answer. A business that conducts widespread internet or remote commerce should consult with qualified legal counsel to assess potential exposure to sales and use taxes across various states.

For more information, read parts 2 and 3 of the series.

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