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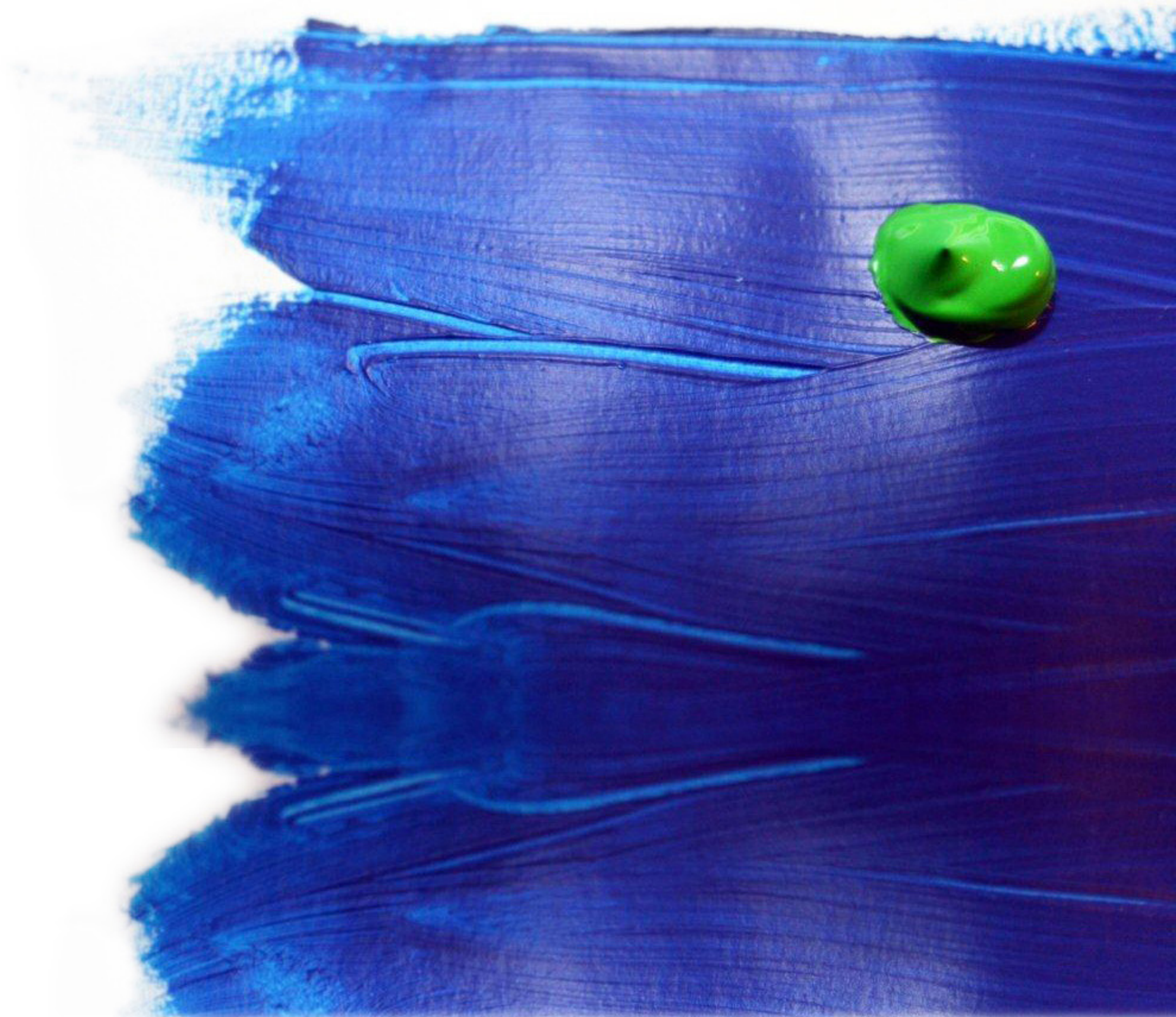
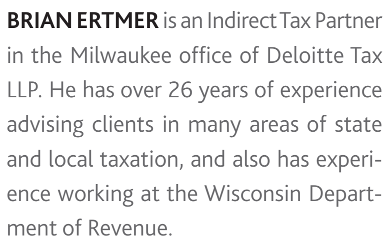


Risky Business: The Evolution of Sales/ Use Tax Policy in the E-Commerce Era

By Brian R. Ertmer, Joe Eleniewski, and Eric Schaefer[1]

Brian R Ertmer, Joe Eleniewski and Eric Schaefer describe the sales and use tax laws and compliance challenges facing remote sellers in retail transactions.



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Current State Tax Climate

We live in an environment in which e-commerce continues to grow and evolve while state legislators attempt to catch up to the ever-changing technology. On a global scale, e-commerce sales are growing at approximately 19 percent a year and are expected to exceed $1 trillion in 2014, while e-commerce is growing steadily at 10 percent a year in the U.S. and is expected to surpass $250 billion in 2014.[2] Many consumers shop online to save time, avoid crowds, easily compare prices, save money, and access greater variety. Interestingly, a survey conducted by Invesp.com suggests that one reason 30 percent of consumers prefer to shop online is to avoid paying sales tax.[3]

This brings us to the dilemma of why some online retailers charge sales tax to consumers, while others do not. A state's ability to impose its sales and use tax collection requirements on a seller has historically hinged on whether the seller has the requisite connection, or "nexus," with the state. Traditionally for sales and use tax purposes, nexus is established through a physical presence within the state, such as having a store or warehouse, inventory, employees, agents, salespeople entering the state, or other activities as specified by the taxing jurisdiction, subject to constitutional limitations. In recent years, many states have enacted legislation that expands nexus statutes to include in-state activities of affiliated businesses or advertising relationships that are attributed to an out-of-state or "remote" seller.

If a seller does not have substantial nexus within a state, that seller is generally not required to collect sales or use tax from its customers or remit that tax to the state. Thus, many e-commerce retailers operating in the Internet age are able to sell products to customers throughout the U.S., all while operating in a limited geographic region

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and not creating a sales tax collection obligation. However, if a seller does not collect the applicable sales tax, the purchaser is generally required to report and remit use tax directly to the taxing jurisdiction. This requirement to self-assess use tax is sometimes overlooked or difficult to comply with for both individuals and businesses.

Not surprisingly, states are looking for ways to impose sales and use tax collection requirements on remote sellers. Most notably, states argue that by not charging tax, remote sellers have a distinct competitive advantage over local, traditional brick-and-mortar businesses, which must charge tax as a result of their physical presence in a particular state. By obligating remote sellers to charge tax, states wish to create a level playing field for both in-state and out-of-state businesses.

Of course, another impetus for state sales tax legislation is the revenue states are losing on remote seller transactions where sales tax is not collected. According to a report published by BNA, estimates of tax revenue lost by states varies from $3.9 billion a year, according to economists at Navigant Consulting, Inc., to $23 billion a year, based on a study performed by an economist at the University of Tennessee.[4]

In the absence of federal legislation, states are becoming increasingly active in their efforts to address the problem of remote sellers that do not collect sales tax. Below, we discuss a few approaches that states are taking to address this issue. We then discuss the pending federal Marketplace Fairness Act of 2013, including our general assessment of the likelihood of adoption of this proposed federal law and recent developments in July 2014. Finally, we address the impact of potential federal and state legislation, as well as possible approaches that remote sellers may wish to consider to address related business risks and potential unanticipated infrastructure costs. As with many other areas of the law, the tax code must evolve with the technological advances of the business world and, as the law catches up, businesses must be prepared to understand and comply with the new requirements.

Streamlined Sales Tax

Sales and use tax laws vary widely from state to state. Not only are the laws often dissimilar in terms of products and services subject to tax, but exemptions and compliance requirements can also be vastly different.

Recognizing the burden arising from these complex and diverse tax laws, the U.S. Supreme Court in *Quill Corporation v. North Dakota* ruled in 1992 that constitutional protection applies to remote sellers that lack the "substantial nexus" required by the U.S. Commerce Clause.[5] In rendering its decision involving North Dakota use tax, the Court acknowledged that diverse tax schemes "might unduly burden interstate commerce" and noted that the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [a mail-order house] in a virtual welter of complicated obligations ... ."[6]

In March 2000, the Streamlined Sales Tax Governing Board was established to find solutions for the complexity in state sales tax systems.[7] The result of these efforts is the Streamlined Sales and Use Tax Agreement ("SSTA"), which attempts to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance. There are currently 23 SSTA full-member states and one associate member. By adopting the SSTA, states agree to a number of simplifying measures, including uniformity in the state and local tax base and various tax base definitions. Additionally, the SSTA provides uniform sourcing rules, simplified administration of exemptions, simplified tax returns, and protection of consumer privacy.

For taxpayers, there are a few significant benefits. Most notably, sellers volunteering to register under the SSTA may receive an amnesty with certain states, currently Ohio and Tennessee, subject to limitations. Another benefit is taxpayers have the ability to register with all SSTA states at one time and are able to utilize one identification number to file and pay taxes for the registered states.

While the SSTA is an ongoing effort, there is still much work to be done. Most notably, many of the largest states, such as California, Florida, Illinois, New York, Pennsylvania, and Texas, have yet to adopt the SSTA and, instead, choose to maintain their current laws and regulations, definitions, *etc*. Also, SSTA member states sometimes disagree on existing definitions. Often, an option applies that allows each state to determine whether or not to tax the product, which again leads to difficulties for businesses to comply with differing laws and definitions.

Click-Through Nexus

One approach that various state legislatures have taken is known as "Click-Through Nexus." In April 2008, New York enacted the first click-through nexus statute. The law created a rebuttable presumption that an out-of-state seller is soliciting business in the state (and thus is required to register for sales tax purposes and collect and remit tax) if two conditions are met: 1) the seller enters into an agreement with a New York resident under which, for a commission or other consideration, the resident directly or indirectly refers customers to the seller; and 2) the total cumulative gross receipts from sales to New York customers as a result of these referrals is more than $10,000 during the previous tax year.[8]

Although the New York law was challenged in state court, it was ultimately deemed to be constitutional. In

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addition to New York, as of the writing of this article, 13 other states have currently applicable laws or formal administrative policies related to click-through nexus, including California, Connecticut, Georgia, Kansas, Missouri, New Jersey, Pennsylvania, and Vermont.[9]

Affiliate Nexus

Another approach adopted by some states is to extend sales and use tax collection and reporting requirements to remote business entities that are related to, or affiliated with, businesses that have established nexus with the state.

Illustrative of the affiliate nexus concept is the Court of Appeal of California's decision in *Borders Online v. State Bd. of Equalization*.[10] The case involved the question of affiliate nexus applicable to Borders Online, an out-of-state internet retailer making sales to California residents. Although Borders Online did not itself own or lease property in California or have employees in the state, the company had a return policy under which merchandise sold by the online retailer could be returned to Borders' brick-and-mortar bookstores (Borders, Inc.) located within the state. Due to this return policy, the court determined that the online retailer had nexus with California through its affiliated entity, Borders, Inc.

The *Borders Online* case demonstrates the importance of identifying the business activities of affiliates that may create a significant collection and reporting obligation for a related business entity.[11]

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Sales and Use Tax Notification Requirements

Rather than mandate collection requirements on remote sellers, some states are attempting to impose notification requirements. These laws typically require remote sellers to notify customers that they owe use tax on their purchases. In certain cases, the law goes a step further and requires the remote seller to submit to the applicable tax authority a list of sales made to customers located within the state. These statutes are generally structured in such a way that if a seller makes sales to in-state customers above a certain threshold, the seller is subject to the notification and reporting requirements.

Colorado is one example of a state attempting to impose notification requirements on remote sellers. The Colorado legislature passed H.B. 10-1193 in February 2010, which included a provision requiring remote sellers to notify their Colorado customers that use tax is due on certain purchases.[12] The retailer must also file an annual statement with the Colorado Department of Revenue detailing sales made to Colorado customers, including identifying those customers.

Not surprisingly, these notification reporting requirements are highly controversial. Many businesses cite privacy concerns over submitting customer lists to taxing jurisdictions. Also, these notification requirements, and subsequent action by the taxing authorities, may cause significant customer relation and retention issues for businesses. From the state's perspective, these notification requirements may be difficult to enforce and impose on remote sellers. In addition to Colorado, the states of Kentucky, Oklahoma, South Dakota, and Vermont impose some form of notification requirements on out-of-state sellers. Some of these laws are currently being challenged in court. On July 1, 2014, the U.S. Supreme Court granted a petition for writ of *certiorari* in *Direct Marketing Association v. Brohl*, which calls into question Colorado's notification and reporting requirements.[13]

Remote Seller Incentives

Yet another approach taken by some states is to offer a financial incentive to remote sellers who voluntarily register and collect sales tax from their customers on behalf of the state. For example, beginning on January 1, 2014, Utah will permit remote sellers, who are not otherwise required to collect or remit Utah sales and use tax, to retain 18 percent of all sales tax collected associated with their sales to Utah customers.[14] To qualify, such remote sellers must agree to voluntarily collect and timely remit the applicable Utah sales tax. An incentive of this type may encourage remote sellers to voluntarily register and collect tax on behalf of a state, though there are certainly other considerations that must be taken into account.

Use Tax Payments by Buyers

As noted previously, where a remote seller does not collect sales tax on a transaction, the purchaser is generally required to pay use tax to the applicable state. In an effort to help ease the administrative burden of this requirement and facilitate the payment of use tax, some states create a way to approximate the amount of use tax due. For instance, in California, an individual may remit, on its state income tax return, use tax on purchases made throughout the year that are less than $1,000. The amount of use tax due is an approximation based on the taxpayer's adjusted gross income (AGI).[15] For example, in 2013, a taxpayer with $75,000 of AGI would remit $25 in use tax on their return. Alternatively, an individual may calculate and remit the actual amount of use tax due.

Recent Activity

After seeing its first click-through nexus statute struck down as a violation of the Internet Tax Freedom Act, the Illinois

legislature has taken a revised approach. The Illinois legislature has passed S.B. 352 through both the State Senate and House of Representatives, which broadens the click-through provision to apply to all remote sellers who receive referrals from an Illinois company under an agreement in which the referrals are tracked and the referring company receives a commission or other consideration. These referrals may include Internet links, radio promotional codes, or similar mechanisms. The bill passed the legislature on May 30, 2014, and as of the time of this writing, the bill awaits Illinois Governor Quinn's signature.

On June 6, 2014, Colorado Governor Hickenlooper signed H.B. 1269 into law, expanding the existing affiliate nexus statute. This new law effectively narrows the original affiliate nexus provisions, passed in February 2010, by specifying that the following activities, as performed by an affiliate, may give rise to nexus:

i) selling under the same or a similar business name;
ii) maintaining a physical location in Colorado to facilitate the delivery of affiliate's products and services;
iii) using trademarks, service marks, or trade names in Colorado that are the same or substantially similar to affiliate's;
iv) delivering, installing, or assembling affiliate's products in Colorado, or performing maintenance or repair services on affiliate's products in Colorado; or
v) facilitating the delivery of affiliate's products to Colorado customers by allowing the customers to pick up the products at affiliate's Colorado location.[16]

These recent developments in Colorado and Illinois are by no means an exhaustive list,[17] but they illustrate the trend in state tax legislation when it comes to addressing the remote seller issue. Furthermore, both the Colorado and the Illinois legislation are in response to challenges to the earlier legislation passed, either judicially or otherwise. Even when challenged, states are likely to pursue legislation to reach remote sellers, unless there is a workable federal solution.

Issues with Efforts to Reach Remote Sellers

Various legislative and other techniques have been implemented across both states that have adopted the SSTA and those that have not. Approximately half of the states overall have adopted some sort of remote seller legislation, 14 of which are streamlined states. If one thing is certain, it is that states will continue to seek creative solutions to the problem of remote sellers, unless Congress steps in.

One complication to these law changes is that it is extremely difficult to track the additional revenue gained. As discussed earlier, estimates of lost state revenue range from $3.9 billion to $23 billion. Beyond the uncertainty, many of the largest online retailers are registering and collecting tax in more and more jurisdictions, while some states are creating practical ways for purchasers to remit use tax on their purchases.

Another significant issue with remote seller legislation is that such laws may actually lead to reduced revenue. In a report from BNA published in January 2014, North Carolina estimates that it has collected $39 million since its remote seller legislation was passed in 2009.[18] However, many observers believe the state actually lost revenue overall as many large retailers and remote sellers cut ties with affiliate marketers located within the state as a direct result of such legislation.

By now you can appreciate the uncertainty and complexity of remote seller legislation: the impact on state revenue, varied approaches to taxation of remote seller transactions, protection of the rights of remote sellers and their customers, *etc*. Some states will continue to be aggressive in attempting to impose sales tax collection responsibilities on remote sellers, while many taxpayers will continue to experience uncertainty that could carry a great deal of risk.

This environment may, however, provide some businesses with an opportunity to evaluate and quantify potential risk and proactively prepare for the possibility of the enactment of federal legislation.

Marketplace Fairness Act

In the wake of state controversy surrounding the issue of sales tax collection by remote sellers, Congress has proposed to step in with pending federal legislation known as the Marketplace Fairness Act ("MFA"). Past iterations of the MFA have gained little traction in the legislative process, but an MFA bill (S. 743) was approved by the Senate in the current congressional session on May 6, 2013. Companion legislation was also introduced in the House of Representatives (H.R. 684), but to date has failed to make it out of the House Judiciary Committee. The limited number of legislative days left in the 113th Congress, coupled with the general inability to move initiatives in today's divisive political environment, may prove too much for MFA supporters in Congress to overcome, resulting in the legislative process starting over next year in the new Congress. With that being said, as we go to print, a Senate bill has recently been proposed to merge the MFA with the Internet Tax Freedom Act, which is described below.

Under the currently proposed MFA, SSTA member states, as well as states adopting "minimum simplification requirements," would be allowed to require remote sellers to collect and remit sales and use taxes on sales to in-state residents. The MFA would provide an exception for small

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sellers with annual gross receipts from U.S. remote sales of $1 million or less. A state that is not an SSTA member would be allowed to exercise such collection authority if the state adopts certain "minimum simplification requirements" relating to the administration of the tax, including a single audit for all state and local taxing jurisdictions within the state, a single sales and use tax return, and uniformity of the tax base.[19] In addition, nonmember states must provide remote sellers with free software for calculating sales and use taxes due on each transaction at the time the transaction is completed and for purposes of filing state sales and use tax returns.[20]

Other relevant provisions of the proposed MFA include the following:

- A statement that the MFA shall not be interpreted to create any nexus or alter the standards for determining nexus.[21]
- An acknowledgement that remote sellers may deploy or utilize a certified software provider of their choice.[22]
- A cascading sourcing rule to determine the location where products and services are sold.[23]

The MFA would exclude small businesses whose annual gross receipts from remote sales in the U.S. do not exceed $1 million.[24] Furthermore, SSTA members would be able to exercise authority under the act beginning 180 days after publishing a notice of intent to exercise such authority, but no earlier than the first day of the calendar quarter that is at least 180 days after the date of enactment.[25] Authority on behalf of nonmember states would not commence until the first day of the calendar quarter that is at least six months after the date that the state enacts legislation satisfying the minimum simplification requirements.[26] In preparation for the MFA, some states have already enacted such legislation, including Colorado, Ohio, Rhode Island, and Virginia.[27]

On September 18, 2013, the House Judiciary Committee issued a press release describing "Basic Principles on Remote Sales Tax":

- tax relief;
- tech neutrality;
- no regulation without representation;
- simplicity;
- tax competition;
- states' rights; and
- privacy rights.[28]

More recently, on March 12, 2014, the House Judiciary Committee held its first public hearing since releasing its "Basic Principles." Committee Chairman Bob Goodlatte (R-Va.) stated the pending MFA "suffers from fundamental defects [;]" and that "the Committee[,] sympathetic to the plight of traditional retailers[,] is serious about searching for a solution that the various parties can accept."[29]

Six witnesses were invited to testify at the hearing and present alternative proposals that varied significantly, from leaving states' sales tax regimes largely unchanged but authorizing remote collection within a federally defined framework, to mandating origin sourcing for all sales.[30] One proposal also suggested authorizing legislation that would require remote sellers to provide sales information to the states and to purchasers to facilitate self-reporting of use tax.[31]

No particular alternative appeared to emerge as the clear preferred solution to Chairman Goodlatte or other lawmakers at the hearing. After the hearing, Goodlatte told reporters: "there was much to take in and we will now continue to further examine these and any other proposals that are submitted through a collaborative process."

Though Goodlatte expressed his commitment to finding a solution that the various parties could accept, he did not provide a timeline or a process of next steps. While the hearing could be viewed as a step toward further legislative action, Goodlatte continues to express concerns over compliance burdens and the small-business exemption threshold. House Judiciary member Jason Chaffetz (R-Utah) indicated to reporters in May that he has been making progress on revised remote seller legislation with Goodlatte and that the legislation could be introduced soon, but it remains uncertain when or if that will occur.

Internet Tax Moratorium—Separately, the House approved The Permanent Internet Tax Freedom Act ("PITFA"), by voice vote on July 14, 2014, which would permanently extend the current moratorium on Internet access taxes and on multiple and discriminatory taxes on electronic commerce. Without congressional action, the temporary ban—The Internet Tax Freedom Act ("ITFA"), first enacted in 1998—will expire on November 1, 2014.

The bill now goes to the Senate where Senate Finance Committee Chairman Ron Wyden (D-Ore.) has indicated that he would support a permanent extension. There could be some pressure by MFA supporters to attach the remote seller legislation, but Wyden—who is opposed to attaching MFA legislation—will likely push to keep the two issues separate. That view is consistent with Chairman Goodlatte as well. During markup of PITFA in the Judiciary Committee, Chairman Goodlatte clarified that, "PITFA does not address the remote sales tax issue. It merely prevents Internet access taxes and unfair multiple or discriminatory taxes on e-commerce, whether inside the taxing state or without." A number of Democratic members expressed support for attaching the remote seller legislation to the permanent moratorium, but Goodlatte stressed the importance of keeping these issues separate during the markup. The ranking

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Democrat on the Committee, John Conyers (D-Mich.) later asked Goodlatte to schedule a mark-up if the Senate passed MFA legislation prior to the August recess.

As this goes to print, Senator Mike Enzi (R-Wyo.) introduced S. 2609, a bill that would merge MFA with a 10-year extension of the IFTA through November 1, 2024, rather than a permanent measure. It is unclear what the result of this proposed legislation will be, but it demonstrates that MFA remains an important and active topic for Congress.

Business Considerations

Given the current state tax climate and further anticipated changes, there is a great deal for businesses to consider. First, it is important to assess the organization's current state tax footprint for sales and use tax purposes in order to evaluate and quantify the current amount of risk and exposure, as well as the additional risk and exposure the organization may take on should federal remote seller collection authority be enacted. Next, it is important to determine which departments in the organization may be impacted. Once the business knows how it may be affected and understands how significant the impact will be, it is time to develop a plan based on risk appetite—both a short-term plan and a long-term plan—that will allow the organization to mitigate current and future risk/exposure. Finally, the organization should consider implementing both its short-term and long-term plans of action.

Step 1: Risk Consideration

In light of the rate at which remote seller legislation is already being adopted, companies should consider preparing now to avoid any costly surprises down the road. The first step in this process is to understand: (1) the company's current business activities; (2) the jurisdictions to which these activities should be sourced; and (3) the jurisdictions in which the business is currently registered, collecting, and remitting sales/use tax. If transactions are sourced to a jurisdiction that doesn't require a tax calculation, determine potential systemic constraints. It is important to conduct this first step on a separate legal entity basis, then address any sales and use tax responsibilities arising from affiliate or click-through nexus.

Once there is an understanding of the current state tax footprint, the next step is to begin evaluating and quantifying the amount of current and potential exposure. Is the company currently meeting all of its existing sales and use tax reporting and collection responsibilities? Are there any significant exposure items that should be addressed immediately? Many states offer programs in which taxpayers may voluntarily come forward, register, and remit tax (and applicable interest) due. In exchange, most taxing jurisdictions will agree to waive penalties (depending on the circumstances) and limit the "lookback" period for which the business must remit tax due for prior years.

Next, a business should consider the potential reporting and collection responsibilities that it may develop should the MFA or similar federal remote seller legislation be enacted. Will there be enough time to address the additional requirements? How much of a strain would this create on the organization's existing resources (in terms of people, processes, and technology, with the latter potentially requiring months of onboarding to be functional)? Will the business need to hire additional tax or IT professionals or purchase software capable of handling these additional sales and use tax obligations? Does the company have sufficient resources to effectively address sales and use tax audits, which are becoming an increasing focus among taxing authorities?

Clearly, once one considers the impact that existing and future legislation may have, it can be an expensive and time-consuming effort to address current and future risk. The final, and possibly most important, step in this first phase is to consider your organization's risk appetite. While companies strive to comply with all of their tax obligations, some organizations do not have the right tools or resources, especially when facing significant law changes adopted by multiple state and local taxing jurisdictions.

When considering potential risks in this area, a business should keep in mind that if the exposure is related to tax not collected from customers, the state will generally look to the seller to pay the tax along with applicable interest and penalties. While the seller may then be able to recover the tax from its customers, where contractually or otherwise legally permissible, it may not be practical to do so, based on customer-relation issues or the large volume of customers.

Step 2: Determine which Personnel will be Impacted

The next step in the process of preparing for potential remote seller legislation, or addressing current risk, is to determine the areas of the business that will be affected by new sales and use tax obligations. Most notably, the organization's tax function will be impacted significantly due to increased sales and use tax filing obligations. It can be an extremely difficult proposition to effectively handle sales and use tax rate changes, tax jurisdiction law changes, filing frequency changes, sales and use tax audits, *etc*. Many companies are using third-party tax professionals to outsource all or part of the tax function, including sales and use tax filings. Some companies may need to hire

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additional resources or implement powerful software to streamline the invoicing and, ultimately, the sales/use tax collection and remittance process.

Beyond the tax department, there may be significant investment necessary in the IT department to integrate either a bolt-on system or a Software-as-a-Service calculation delivery methodology. Not only may it be necessary to purchase software, but a company may need to purchase additional IT infrastructure to house new software or to store added volumes of data. Additionally, the granularity of existing master data within enterprise resource planning ("ERP") systems typically requires rework due to the increasing complexity of rules by the different jurisdictions. Many businesses realize the value of IT personnel in the early stages of a tax audit in terms of pulling queries and records necessary as part of the audit. That effort would likely increase to absorb other production-related tax system maintenance.

Other departments are likely to be impacted as well. Accounts payable could take on significant new responsibilities through the tax accrual process. Accounts receivable may have new responsibilities in addressing additional exemption certificate compliance responsibilities. Many companies are converting their record retention systems for AP invoice and/or exemption certificates to electronic systems, which often streamlines the process of storing and retrieving records. Last and certainly not least, the customer experience is likely to be impacted. Some customers are likely to question why they are now being taxed, the taxability of the items purchased, the tax rate charged, *etc*.

The above discussion demonstrates the far-reaching effect remote seller legislation may have on your organization.

Step 3: Develop a Plan for Risk Mitigation

After assessing the level of both short-term and long-term risk, determining which departments will be impacted, and evaluating your organization's risk appetite, it is time for businesses to develop a plan to mitigate existing and potential risk. As discussed in Step 1, there is a variety of options to address current risk. One option is to voluntarily approach taxing jurisdictions in order to comply with existing reporting obligations. Another option is to begin registering in those additional jurisdictions, collecting tax as needed and filing returns prospectively. Some organizations may not have the resources necessary to address every sales and use tax obligation, so it is often necessary to prioritize which significant areas of exposure to address first.

When developing a short-term plan of action, the focus should be on remediating existing risk/exposure, as well as preparing for the possibility of federal remote seller legislation. For example, if federal legislation is enacted in November 2014, how much time does your organization need in order to implement the necessary steps to comply with the new sales and use tax collection and reporting obligations? Implementing the systemic ability to calculate taxes isn't a simple switch and will likely take months before appropriate test cycles are completed and validated. Some organizations may be comfortable merely putting together a plan to implement at the time in which federal legislation is enacted, but not knowing the length of time between proposed and enacted legislation may increase risk and potential exposure.

As part of an organization's plan for risk mitigation, the organization must determine whether it needs to hire professional tax consultants, add tax or accounts payable personnel, invest in IT software and infrastructure, *etc*. Any or all of these steps may be necessary to address short-term needs and existing exposure or as part of a long-term plan to achieve the proper level of compliance required to mitigate risk.

When developing a long-term plan of action, the focus should be on your enterprise's long-term goal of sales and use tax compliance and getting to a point in which your organization is comfortable with the amount of risk it takes on. Typically this long-term plan is looking 5–10 years down the road and at what a business needs to do now to achieve its goals. Does your organization want to invest in technology? Become paperless? Handle all its tax responsibilities internally, externally, or a combination of both? Become centralized or decentralized in terms of tax filings and accounts payable responsibilities? These are all long-term considerations that may be significantly impacted by federal remote seller legislation.

Step 4: Implement Your Plan of Action!

Finally, it is time to implement your organization's short-term and long-term action plans. Timing is everything. As states continue their efforts to assert nexus on remote sellers, it is vital that companies evaluate their current level of risk and promptly implement steps to mitigate exposure. This may involve the assistance of tax professionals and technology experts, exploring specialized tax software, registering in additional taxing jurisdictions, and voluntarily remitting tax to jurisdictions to remediate liability for prior periods.

Conclusion

States continue to pursue ways to assert remote seller nexus. Most recently, a number of states have passed

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legislation related to click-through nexus, affiliate nexus, and notification/reporting requirements. Many states will continue to be aggressive until federal legislation is enacted, which will likely create sales tax collection and reporting requirements on many remote sellers, creating new compliance burdens.

Currently, federal legislation has been approved by the Senate, though as this goes to print, it appears unlikely that this remote seller legislation will be approved by the House and sent to the President's desk during the 113th Congress. The legislation would then have to be reintroduced in 2015.

Companies should consider their level of risk by reviewing their current state tax footprint and quantifying the amount of existing risk and exposure. Companies should then consider the potential effect of federal remote seller legislation if adopted—both in terms of the additional sales and use tax reporting obligations and the company's personnel and customers that may be impacted.

Each organization will develop and ultimately implement its own unique plan of action to achieve its desired level of compliance. Companies will need to consider both long-term and short-term needs, especially as those needs relate to implementing technology, personnel, or additional infrastructure, which is often time consuming and costly.

The primary take away is that change is here and more is likely coming at the state/local level, federal level, or both, and the more prepared you can become now for such change, the less risk and exposure your organization may encounter in the future. It is well worth the time, effort, and investment to address existing and future sales and use tax collection and reporting requirements now, at least in terms of developing a plan of action, rather than reacting to changes in the future.

Future legislative changes in the taxation of remote seller transactions, if and when these changes occur, could leave many companies scrambling to react in a short period of time, which may result in increased costs. However, companies that anticipate change, plan for it, and then execute accordingly, are more likely to succeed by effectively addressing this complex area of sales and use taxation.

ENDNOTES

1 This article does not constitute tax, legal, or other advice from Deloitte Tax LLP, which assumes no responsibility with respect to assessing or advising the reader as to tax, legal, or other consequences arising from the reader's particular situation.

2 *How Big is E-Commerce?* Invesp. August 9, 2013. (Link: *www.invesp.com/ecommerce.jpeg*).

3 *Id.*

4 *States See Little Revenue From Online Sales Tax Laws, Keep Pressure on Congress*, Mahoney, Baltz, *et. al*. Daily Tax Report: January 8, 2014. (Link: *www.bna.com/states-little-revenue-n17179881226/*).

5 *Quill Corp. v. North Dakota*, SCt, 504 US 298, 112 SCt 1904 (1992).

6 *Id.*, at 313, n.6, (quoting *National Bellas Hess, Inc. v. Department of Revenue*, SCt, 386 US 753, 759-760, 87 SCt 1389 (1967)).

7 "About Us," Streamlined Sales Tax Governing Board, 2005-11. (Link: *www.streamlinedsalestax.org/index.php?page=About-Us*).

8 N.Y. Tax Law § 1101(b)(8)(vi).

9 Cal. Rev. & Tax. § 6203(c); Conn. Gen. Stat. § 12-407(a)(12)(L); Ga. Stat. Ann. § 48-8-2(8)(M); Kan. Stat. Ann. § 79-3702(h)(2)(C); Mo. Rev. Stat. § 144.605(2)(e); N.J.S.A. § 54:32B-2; Pennsylvania Sales Tax Bulletin No. SUT 2011-01 (Dec. 1, 2011); 32 V.S.A. § 9701(9)(l).

10 *Borders Online v. State Bd. of Equalization*, 129 Cal. App. 4th 1179 (Cal. App. 1st Dist. 2005).

11 *See also* the discussion in the Recent Activity section of this article below (at page X) regarding Colorado's new affiliate nexus statute.

12 Colo. Rev. Stat. § 39-21-112(3.5).

13 *Direct Mktg. Ass'n v. Brohl,* U.S., No. 13-1032, *cert*. granted July 1, 2014.

14 Utah Code § 59-12-108(5).

15 2013 Estimated Use Tax—Use Tax Table, California State Board of Equalization.

16 Colo. Rev. Stat. § 39-26-102(3).

17 *See also*, New Jersey A.B. 3486 (adopted Jun. 30, 2014), amending N.J. Stat. Ann. § 54:32B-2(i)(1)(C) (adds "click-through" nexus).

18 *States See Little Revenue From Online Sales Tax Laws, Keep Pressure on Congress*, Mahoney, Baltz, *et. al.*, Daily Tax Report: January 8, 2014. (Link: *www.bna.com/states-little-revenue-n17179881226/*).

19 S.743, Sec. 2(b)(2)(A) & (B).

20 S.743, Sec. 2(b)(2)(D).

21 S.743, Sec. 3(b).

22 S.743, Sec. 3(c).

23 S.743, Sec. 4(7).

24 S.743, Sec. 2(c).

25 S.743, Sec. 2(a).

26 S.743, Sec. 2(b.

27 Colorado H.B. 1295; Ohio H.B. 59; Rhode Island H.B. 5127; Virginia H.B. 2313.

28 "House Judiciary Committee Releases Principles on Internet Sales Tax. (Link: *http://judiciary.house.gov/index.cfm/2013/9/house-judiciary-committee-releases-principles-on-internet-sales-tax*).

29 *See*, Statement of House Judiciary Committee Chairman Bob Goodlatte, available at: *http://judiciary.house.gov/index.cfm/hearings?Id=2F442B02-C3EB-49FA-AE82-2079D732A90D & Statement_id=04F886B6-45C2-4A79-B0EB-A3F42A9C06D2*.

30 *See*, *Testimony of Mr. Stephen P. Kranz*, Partner, McDermott Will & Emery, LLP, available at: *http://judiciary.house.gov/index.cfm?a=Files.Serve & File_id=2235ED3C-A8B1-4C2A-AC92-C79890AE1EC3*. *http://judiciary.house.gov/index.cfm?a=Files.Serve & File_id=D08CDA44-2201-4501-AD70-F2E4A39765DB*.

31 *See*, *Testimony of Mr. James H. Sutton Jr.*, Shareholder, Moffa, Gainor & Sutton, P.A., available at: *http://judiciary.house.gov/index.cfm?a=Files.Serve & File_id=8A5E1E5C-EBE6-44F9-9D71-4B0F11C249F9*.

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