Tax readiness: A year after *Wayfair* - How do marketplace sellers and facilitators comply with indirect taxes?

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In brief

A year after the US Supreme Court's *Wayfair* decision, marketplace sellers and facilitators continue to struggle with applying new state thresholds, effective dates, definitions, and other provisions. Many questions remain as companies update their processes and systems while monitoring for new marketplace compliance requirements.

PwC on September 11 hosted a webcast featuring specialists who discussed these issues. This insight highlights those discussions.

The next Tax Readiness webcast — Section 451 proposed regulations: The all-events test under new Section 451(b) — is scheduled for September 26, from 1:00 PM - 2:00 PM (EDT).

In detail

Wayfair impacts one year later

While state revenue departments evaluate the *Wayfair* revenue received, taxpayers must address the indirect tax compliance concerns related to recently enacted remote seller legislation. Remote sellers are grappling with several issues, including the application of thresholds, measurement periods, and which sales should be included, among other items. Due to new sales and use tax collection and remittance requirements, taxpayers need to monitor whether nexus results from selling goods and services on a more frequent basis. Remote sellers should determine quarterly (or annually), on a state-by-state basis (1) whether nexus is established, (2) how the threshold effective dates apply, (3) whether any contingent loss reserves should be updated, (4) whether to stop filing, (5) if trailing nexus exists, (6) potential local jurisdiction issues, and (7) whether errors occur with enterprise resource planning (ERP) and billing systems. In this new environment, taxpayers also should evaluate their purchase transactions for any use tax consequences that may arise.

Observation. The US Supreme Court did not limit the *Wayfair* decision to domestic taxpayers. Foreign sellers with remote sales into US states will need to examine their nexus footprint regularly.

Marketplace facilitator laws and practical implications

In addition to laws addressing remote sellers, over 30 states have enacted marketplace facilitator legislation to date. Each state's law defines which taxpayers qualify as a marketplace facilitator, provides key features that apply, and describes the tax collection requirements. These laws vary by state regarding the definition of a marketplace facilitator, whether a marketplace seller can opt to collect tax, how the threshold is applied, etc. For example, California's Section 6041 provides a detailed description of which types of activities qualify a taxpayer as a 'marketplace facilitator' and provides specific exclusions from the definition for (1) delivery network companies, and (2) newspapers, internet websites, and other entities that advertise tangible personal property for sale, refer purchasers to the seller by telephone, internet link, or other similar means to complete the sale, and do not participate further in the sale. Other states, such as New York, do not enumerate the same exclusions from the definition and may provide a different threshold for collection. Due to these nuances, marketplace facilitators must evaluate how each state's law affects their sales and use tax nexus footprint and tax collection and remittance responsibilities.

Observation. When asked during the September 11 webcast to identify the most challenging aspect of a seller's marketplace compliance, 14% said providing taxability information to the marketplace on their products; 20% said reconciling marketplace sales from other sales and tax collection thereon; 17% said handling audit issues; and 48% said all of the above.

Common practical issues

As taxpayers begin to comply with new state laws for marketplace facilitators, several questions arise:

- How should items sold be classified?
- How do exemptions and certificate documentation apply?
- Which party (facilitator or seller) must make tax determinations or characterizations?
- Does the seller or facilitator have nexus?
- How do the states address audits and contracts to limit liability?
- For customer returns, which party applies for the refund?

The Multistate Tax Commission (MTC) formed a marketplace facilitator working group to address the myriad of questions. The group identified the 'top 13' issues regarding marketplace facilitator statutes, and is gathering comments to create a white paper for state legislatures' usage in 2020. Several stakeholders in the business community are providing comments in the MTC working group to assist the states regarding taxpayers' uncertainty in complying with the new laws.

Other tax issues

Certain industries may have additional questions regarding marketplace facilitator legislation. For example, some states specify in their statutes whether the new law applies to lodging providers or food delivery service companies. Other states remain silent in enacted legislation regarding these industries. These industries often are subject to additional tax collection responsibilities outside of sales tax (such as food and beverage taxes), which further complicates the compliance determinations.

Other areas of complexity for taxpayers include (1) the joint marketing of products and whether marketplace laws can be consolidated in sales tax filings, (2) marketplace sellers hoping to 'opt out' of the facilitator's tax collection (wanting to collect tax themselves), (3) upgrading and/or managing tax engine issues, and (4) the legal liability for tax. Marketplace facilitators may interpret state laws differently and may differ widely in contract language addressing the collection and remittance of tax.

Observation. When asked during the September 11 webcast to identify additional issues related to marketplace laws that are of concern, 10% said occupancy taxes; 7% said food and beverage taxes; 51% said local taxes; and 32% said legal liability for tax.

Observation. States are beginning to provide additional guidance for marketplace facilitators through the adoption of state regulations and guidance interpreting the statutes. As a result of the MTC workgroup, we will likely see greater clarity regarding complex taxpayer issues with marketplace facilitator laws.

Contingent liabilities and financial statement impacts

An additional consequence of marketplace facilitator laws is the impact on a taxpayer's required sales and use tax reserves. Accounting Standards Codification (ASC) 450 provides accounting and disclosure requirements for loss contingencies. Under ASC 450, taxpayers may need to reassess, for reserve purposes, which party is liable for sales tax as a result of the newly enacted laws. The analysis should include a state-by-

state examination of remote seller and marketplace facilitator laws, contracts between the parties, tax decisions, and the nature of any errors that may exist.

Observation. Due to the new remote seller and marketplace facilitator laws with varying effective dates and measurement periods, companies may need to review the reserves more regularly (for example, on a quarterly basis).

The takeaway

During 2018 and 2019, an unprecedented number of states enacted legislation in response to *Wayfair*. State tax administrators realize that marketplace facilitators are assisting in large numbers of sales transactions in the current ecommerce business environment. In response, states enacted, at lightning speed, marketplace facilitator laws that provide an easier method for obtaining sales and use tax revenue.

However, state tax departments are only beginning to understand the complexities and uncertainties that these laws create for taxpayers. Multistate groups, including the MTC, are asking taxpayers to voice their concerns and suggest solutions. For businesses, compliance with marketplace facilitator laws requires new processes and a new way of viewing sales transactions and the resulting multistate tax consequences. Taxpayers should monitor forthcoming state guidance for greater clarity on their sales and use tax obligations.

Let's talk

If you would like to discuss how these developments may affect your business, please contact:

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