SALT BUZZ HF

Remote Seller Nexus Chronicles - The Push for Retail Equality: Is There Strength in Numbers?

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Introduction

This SALT Buzz will be tracking the states' efforts to create a sales tax nexus standard that does not require a physical presence, which contradicts the U.S. Supreme Court's decision in *Quill Corporation v. North Dakota*, 504 U.S. 298 (May 7, 1992). The number of states enacting remote seller laws is growing rapidly, and the old adage "there is strength in numbers" may prove true if they are able to force the Supreme Court to revisit its decision in *Quill*. Until that happens, we can expect states will continue to pass laws designed to force internet retailers and other remote sellers into "voluntary" compliance.

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Ohio Update

The proposed changes to the Ohio Revised Code (O.R.C.) discussed in the May 17, 2017 Buzz below, that would have required sellers with no physical presence in the state to register to collect and remit tax, have been stricken from the state's '18/19 operating budget. Other language, however, has been added to Am. Sub. House Bill 49 (the Bill) that serves the same function. The Bill, signed by Governor Kasich on June 30, 2017, contained changes to O.R.C. 5741.01(I)(2) that will require out-of-state sellers to register for tax collection if they are engaged in certain activities that are now presumed to establish the seller has "substantial nexus" with the state.

The Bill enacted two new provisions, effective January 1, 2018, that allow the state to presume a seller has substantial nexus with the state provided the following criteria are met:

- Gross receipts from the sale of tangible personal property or services to Ohio consumers of more than $500,000 in the current or preceding calendar year; ***and***

- Uses in-state software to sell or lease taxable tangible personal property or services; ***or***
- Provides website information to consumers through an in-state content distribution network.

There has been some debate about exactly what constitutes in-state "software" and whether small pieces of data, such as "cookies," constitute vendor software stored on a consumer's computer. The state defines "computer software" to mean "a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task." O.R.C. 5731.01(BBB).

What is a 'cookie?'

In short, a cookie is a text file stored on a consumer's computer that contains information specific to that user's internet browsing history or past activity. Websites can place cookies onto a consumer's device to help improve their overall browsing experience, or for other reasons. For example, cookies allow a user's username and password to be generated automatically when they visit a particular website. Cookies are also what enables a seller to keep items in a customer's 'shopping cart' when they return to a website after closing their internet browser. Essentially, a cookie is an electronic identification card that only the creator and placer of the cookie can read.

Whether a "cookie" would be considered software is open to debate. Although the file may not cause any processes to be performed on the consumer's computer, it could be argued that the file causes processes to be performed on the provider's computer. On the other hand, if a cookie does not contain coded instructions (in the traditional sense of computer programming), rather only a unique signature specific to a consumer, cookies may fall out of the definition of computer software.

Content Distribution Network - briefly explained:

A content distribution network (CDN) is a way for businesses to get website information to their consumers faster. Rather than a consumer's computer located in Pittsburgh fetching website data from company-owned servers located in Seattle, a content distribution network allows for the data to be fetched from a server located in Philadelphia that is maintained by a CDN provider. The result is much faster website load times and a more positive experience for the consumer. CDN providers typically have a vast network of primary and auxiliary servers located across the country (or world) aimed at delivering web content to consumers as fast as possible.

Below are a few network services providers that hold themselves out to be providers of CDN services and likely maintain servers in Ohio:

- Level 3
- Total Server Solutions
- Amazon CloudFront

Additionally, network services provider Fastly, who also maintains a CDN, plans to open a data center in Ohio in the future. CDN giant Akamai may also maintain servers in the state, however, they do not make the locations of their network servers publically available. Based on the new law, remote sellers meeting the state sales threshold and utilizing a CDN to deliver web content to their customers should contact their provider to confirm whether they maintain servers in Ohio.

Massachusetts Update

On June 28, 2017, the state issued Directive 17-2, effectively revoking Directive 17-1 issued less than two months prior. Directive 17-1 required out-of-state vendors to collect and remit sales tax if they had more than $500,000 in Massachusetts sales and in more than 100 transactions in the preceding 12 months. Directive 17-2 has been issued in anticipation of the Department of Revenue proposing a regulation that will mirror Directive 17-1, but follow the rule making process as required by the state's General Law.

Nebraska Update

Nebraska Senator Ernie Chambers successfully filibustered Legislative Bill (L.B.) 44, which would have required remote sellers to collect and remit the state's sales tax or adhere to reporting requirements about sales made into the state. L.B. 44 was introduced by Sen. Dan Watermeier January 5, 2017 and received overwhelming support by the Senate before coming to an abrupt halt. It is likely Sen. Watermeier will rein-

troduce a similar bill next year.

Maine

The Maine Legislature voted to override Governor Paul LePage's veto of Senate Paper (S.P.) 483, which requires remote sellers to collect tax if they have more than $200,000 in taxable Maine sales or 200 or more separate transactions delivered into the state in the previous or current calendar year. The enacted language in S.P. 483 is practically identical to that used in South Dakota's remote seller law, including the requirement for a direct appeal to the state's Supreme Judicial Court. The new law becomes effective October 1, 2017 and does not reference any physical presence requirement, by software or otherwise, for a remote seller to be required to collect and remit tax provided the previously stated thresholds are met.

New Reporting Requirements Adopted by Several States

Colorado

Colorado pioneered the effort to force out-of-state retailers and remote sellers to notify purchasers of their obligation to pay use tax to the state with legislation introduced in 2010. Action was quickly brought against the state under the premise that the law placed undue burden on interstate commerce. After the Supreme Court issued a ruling earlier this year, that upheld Colorado's new law, the door was opened for other states to follow suit.

Colorado's notification requirements affecting retailers that do not collect the state's sales tax went into effect earlier this month. Effective July 1, 2017, a "[r]etailer that does not collect Colorado sales tax," and who had total gross sales to Colorado purchasers in excess of $100,000 in the prior calendar year, must comply with a lengthy list of reporting and notification requirements set forth by Colorado Revised Statute 39-21-112.3.5(c).

Below are some notable exclusions contained within Regulation 39-21-112.3.5 that clarifies the law:

- A "retailer that does not collect Colorado sales tax" does not include retailers that only make sales in Colorado by means of downloaded digital goods or software.
- A Colorado purchase does not include purchases or rentals of DVDs or other video materials that disclosure of the purchasers of such items would violate 18 U.S.C. 2710.
- Total gross sales does not include the sale of services.

Louisiana

Last year, the Louisiana Governor signed House Bill 1121 into law, requiring remote sellers that do not register and collect Louisiana sales tax ("remote retailers") to comply with new reporting and notification requirements provided certain thresholds are met. The act became effective this month and, thus, effective July 1, 2017, remote retailers making more than $50,000 of retail sales of tangible personal property or taxable services, per calendar year, into the state must do the following:

- Notify Louisiana purchasers that their purchases may be subject to Louisiana use tax, as well as the method for reporting the tax and the timeframe in which it is due; and

- Provide Louisiana purchasers, by January 31, a report that contains the total amount of their purchases from the retailer in the preceding calendar year, in addition to other language and information that must be contained in the report.

- Provide the state, by March 1, an annual statement for each purchaser that includes the total amount paid by the purchaser in the immediately preceding calendar year. Additionally, the state may require these statements be filed electronically by remote retailers that have over $100,000 of sales into the state.

Louisiana has been on the forefront of action against remote sellers. The provisions above complement last year's expansion of the state's definition of persons required to collect tax, by which click-through and affiliate nexus were added to Louisiana statute.

Vermont

Two new laws recently became effective earlier this month that affect out-of-state vendors and other "noncollecting vendors." The following legislation was passed in May 2016 and became effective July 1, 2017:

- The state's definition of "vendor" was expanded to include vendors located outside the state that 1) engage in regular, systematic, or seasonal sales of tangible personal property in the state and 2) made sales of $100,000 or more or 200 separate transaction into the state during the immediately preceding 12-month period; and

- “Noncollecting vendors” are required to notify Vermont purchasers of their obligation to remit use tax to the state on their purchases. Additionally, by January 31, the vendor must provide Vermont purchasers, who have made over $500 in purchases in the previous calendar year, notification of the total amount of purchases made that may be subject to use tax and other information required by the state.

A “noncollecting vendor” is defined as a “vendor that sells tangible personal property or services to purchasers who are not exempt from the sales tax under this chapter, but that does not collect the Vermont sales tax.” 32 V.S.A. 9701(54)

Washington

Washington State Governor Jay Inslee recently signed legislation into law that requires remote sellers, “marketplace facilitators,” and “referrers,” to comply with new registration or reporting requirements. Effective January 1, 2018, sellers that meet certain economic thresholds must either register to collect and remit the state’s sales and business & occupation (B&O) taxes or adhere to information reporting requirements similar to those set forth by Colorado.

Puerto Rico

The Commonwealth of Puerto Rico recently passed legislation that requires vendors who sell into the commonwealth, through internet, catalog, television, or other means, but do not collect sales tax, adhere to new registration, reporting, and notification requirements. Effective July 1, 2017, the commonwealth expanded their definition of nexus-creating activities and persons engaged in business in the commonwealth to include sellers that create a substantial link with the commonwealth through marketing activities, and cause taxable items to be transported into Puerto Rico continuously, recurring, and in the ordinary course of business. Click-through nexus provisions have also been added to Puerto Rico’s administrative law, which went into effect July 1, 2017.

Additionally, sellers not otherwise considered to be engaged in business in Puerto Rico, but sell to residents of the commonwealth through mail-order or ordered through any means, must comply with information and notification requirements by which they are required to notify Puerto Rico purchasers of their use tax obligation, among other information required by the commonwealth. These provisions also went into effect July 1, 2017.

In Summary

Businesses that make significant sales into any of these states should evaluate whether they are required by law to comply with new registration, reporting, or notification requirements. Failure to comply could result in hefty fines and penalties typically being applied under these laws on a per-transaction and per-statement basis. Puerto Rico, in particular, has very steep penalties associated with non-compliance.

If you would like to discuss whether your business may have potential compliance issues related to any of these new regulations, please contact a ZHF professional for more information.

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