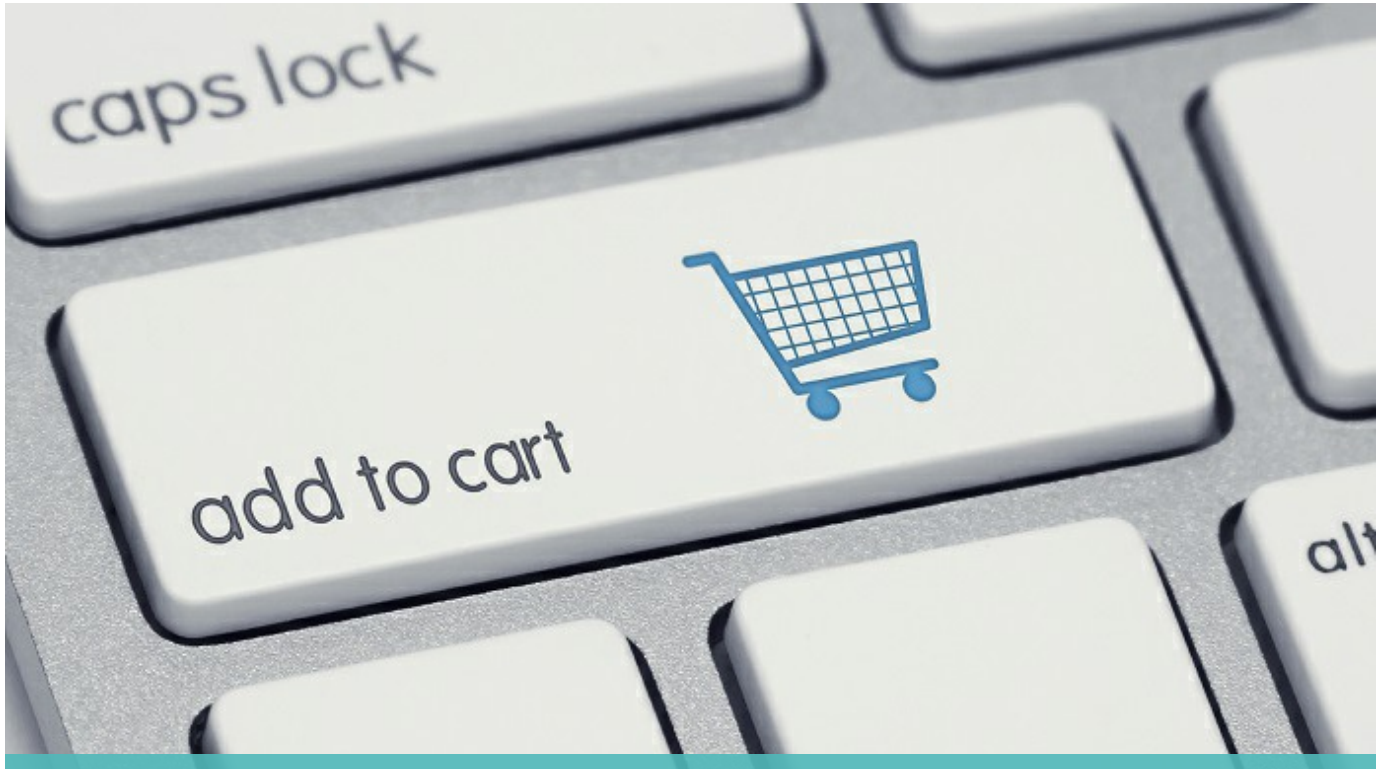


States pursue legislation requiring online retailers to collect taxes



David M. Kall | Sunday, February 22, 2015

The Marketplace Fairness Act, the federal bill requiring states to collect and remit sales and use taxes for remote sales, has been floating around in Congress in various iterations for 20 years, according to Bloomberg/BNA (Bloomberg). The Senate passed the [most recent version](#) in May 2013, but the bill went no further.

States are losing millions of tax revenue dollars, as we have pointed out in recent articles. For example, Colorado lost \$352.6 million in sales and use taxes that went uncollected from customers of online and catalog retailers in 2012, while Indiana estimates that it lost e-commerce related sales taxes in the range of \$39.6 million to \$114.3 million for fiscal year 2012.

Bloomberg explains that 14 states have enacted “click through nexus laws,” which authorize them to tax out-of-state businesses if an in-state source refers customers to their websites. Though the constitutionality of these laws is unclear, as shown by the Colorado case *Direct Marketing Association v. Brohl*, states continue to take matters into their own hands. *Bloomberg* suggests that this puts out-of-state vendors in a precarious position: a failure to pay interstate taxes when required could be costly, but these companies are also vulnerable to class-action customer lawsuits for collecting sales tax when not mandated.

New York

In 2008, a tax law took effect that required sellers to collect and remit taxes on all sales made to customers in New York. In May of that year, *The New York Times* announced that Amazon.com had sued the state. The complaint alleged that the law, containing a “novel definition of what constitutes presence in the state,” violated the United States Constitution. Amazon was unsuccessful in its argument that it should not be forced to collect the tax on behalf of New York.

In Gov. Cuomo’s budget proposal for fiscal year 2015-16, the [2015 Opportunity Agenda](#), he proposed expanding the sales tax collection requirements for online marketplace providers when they “facilitate the sale.” Under the new legislation, a “person” who facilitates a sale is subject to the tax collection and a remittance requirement when it collects the monies paid by a customer, and provides the forum or means by which collections take place.

According to the National Review, the marketplace provider as the sale facilitator would be required to collect and remit the tax as if it were the vendor. Because there is no change to the nexus requirements in the new proposal, it appears that a marketplace provider would be subject to the requirements only if it has nexus with New York.

Illinois

In [December](#), we wrote that Amazon.com will open its first warehouse in 2015, requiring it to collect sales taxes in Illinois.

In addition, Illinois enacted [Public Act 98-1089](#), which requires other out-of-state retailers to collect use tax from online purchases. The original effective date was Jan. 1, 2015, but according to [Bizjournals.com](#), that

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date was postponed a month. Thus, as of Feb. 1, 2015, not just online retailers like Amazon.com, but all other remote out-of-state retailers with annual gross receipts of more than \$10,000 in sales to Illinois customers began to collect and remit the 6.25 percent tax. Examples of other remote out-of-state retailers are those that sell through catalogues, mail order, and home shopping channels.

Illinois' informational bulletin sets forth the criteria that creates a rebuttable presumption that the out-of-state retailer is transacting business in Illinois and required to collect and remit the tax:

- The out-of-state retailer has a contract with a person in Illinois;
- Under the contract, the person in Illinois refers potential customers to the retailer and the retailer pays the person in Illinois a commission or other consideration based on the sale of tangible personal property by the retailer;
- The person in Illinois provides to the potential customers a promotional code or other mechanism that allows the retailer to trace the purchases made by these customers; and
- The retailer made cumulative gross sales of \$10,000 during the preceding four quarterly periods to customers referred by persons located in Illinois, regardless of the location of the customers.

The seller can rebut the presumption by presenting proof to the Department of Revenue that “the persons in Illinois that referred customers to it had so little connection to Illinois that the nexus standards in the Commerce Clause of the U.S. Constitution prohibit imposing registration and collection requirements.”



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