

## Joining trend, New York State proposes marketplace tax system

**G**ov. Andrew Cuomo's 2019 budget proposal contains a new sales tax collection system for sales through online marketplaces such as Amazon.

The proposal would shift tax collection responsibilities from the seller to the marketplace itself, upending basic principles about how sales tax collection is administered—and effectively ending tax-free shopping on many internet sites.

This proposal is part of a nationwide trend. It comes at the same time as the Supreme Court's *Wayfair* decision, which expanded the ability of states to require out-of-state sellers to collect sales tax. Taken together, these trends are reducing the ability of shoppers to avoid sales tax by making purchases online.

Until the Supreme Court's recent decision in *Wayfair*, companies were not required to collect sales tax in states where they did not have a physical presence.

With the rise of internet sales, purchasing goods from out-of-state retailers—once relatively rare—became commonplace, as has deliberately purchasing costly items online to avoid paying sales tax.

To combat the growing revenue loss, states started taking the matter into their own hands. Many established so-called “Amazon laws,” which held that e-commerce retailers had nexus if they paid state residents a commission to refer sales—a common practice in the e-commerce industry.

While this practice generated nexus for big retailers, such as Amazon, it often did not touch smaller retailers, such as sellers in the Amazon marketplace.

Some states have tried to collect tax from smaller retailers by taking the position that the storage of goods in in-state warehouses (such as those used by Fulfillment by Amazon) generates nexus—and demanding records showing if sellers have goods there. However, New York has not followed this approach.

Cuomo's proposal would establish a marketplace sales tax collection system in New York. “Marketplace providers”—companies that provide a forum online for people to sell stuff—would be required to collect and remit tax on those sales.

For a seller to be a marketplace provider, it must both provide the forum in which the



### TAXING MATTERS

Josh Gewolb

sale takes place and either collect the receipt paid by a customer or contract with a third party to do so.

If a vendor sells goods through a marketplace provider, it is relieved of the obligation to collect sales tax on those sales. Instead, the marketplace provider takes care of that collection responsibility. The marketplace provider would bear the burdens of administration, including determining the rate applicable to the customer and whether the customer is exempt from tax. (Expect that marketplace providers will charge for this service.)

New York sees big dollars at stake. The governor's memorandum in support of the proposal states that it will increase revenues by \$125 million in 2020 and \$250 million annually thereafter.

The proposed rules are quite broad. Unlike prior proposals, they apply to all marketplace providers, not just providers over a certain size. Additionally, they could apply to marketplaces selling software online, and even to a real-world physical marketplaces (though it's not clear where this rule would apply or how it would work). The application of the law to peer-to-peer marketplaces, where the buyer pays the seller directly, is not clear.

New York has proposed this law before, but it has not passed. In the meantime, however, a number of states have enacted similar rules. The e-commerce giants, such as Amazon, Ebay, Etsy and Walmart have begun to comply with them.

These laws expand the scope of states where sales tax is collected on sales. Big marketplace providers are likely to have nexus in more states than smaller sellers.

But, with *Wayfair*, the states in which sellers have nexus generally are expanding.

In the *Wayfair* case, the Supreme Court

blessed a law that imposes a tax on remote sellers if they have more than 200 taxable South Dakota sales in a year or sell more than \$100,000 in taxable products there annually.

In the wake of the decision, many states have revised their laws or regulations to require out of state sellers with connections to the state similar to those approved by the Supreme Court in *Wayfair* to collect tax.

New York now deems there to be nexus for sales tax purposes where a seller's annual sales to the state exceed \$300,000, and such person made more than 100 sales of tangible personal property delivered in the state annually.

If the marketplace provider rule were to pass, however, these sellers with nexus would not have to collect and remit tax on sales through qualifying marketplaces (this would be the responsibility of the marketplace) but only on their sales outside the marketplace. The sales tax collection system would be bifurcated.

For customers, one interesting implication of the evolving law relates to use tax. New Yorkers that buy untaxed goods from out-of-state online are required to pay use tax, though in my experience there is significant non-compliance. New York gives taxpayers the option to pay a deemed use tax based on income. For example, an individual paying between \$100,000 and \$150,000 would pay \$102 for 2018.

In the past, I have always recommended that clients elect this option. But given the expanded nexus rules after *Wayfair*, and the potential the marketplace provider rules, the average individual taxpayer may no longer have many untaxed sales, making this approximation method a bad deal.

The sales tax landscape is changing rapidly in New York and across the country. Companies that sell remotely need to make sure that they keep track of the laws of each state in which sales are made. The landscape is likely to continue to shift rapidly in the coming months and years. Immediate attention—and continued review as the law develops in multiple jurisdictions—is essential to ensure compliance and avoid audit exposure.

*Josh Gewolb is a tax partner at Harter Secret & Emery LLP.*