Online Merchants Guild
Wayfair Implementation and Marketplace Facilitator Work Group
Comments
August 23, 2018

- Online Merchants Guild (“OMG”) is a trade association representing our community of millions of online merchant businesses worldwide.
- OMG officially launched in March of 2018, just in time to submit its amicus brief in the Wayfair case.
- OMG members do not include the marketplace operators, large retail websites, or other sales channel platforms (e.g. as Shopify).
- OMG members range from those (few) merchants that annually gross over $100,000,000, to the vast majority of merchants that gross less than $1,000,000, and with profit margins that are typically less than ten percent.
- OMG was created to give the online merchant community a voice in eCommerce law and policy matters, such as taxation.
- OMG supports 100 percent tax collection on all marketplace sales by sellers worldwide.
- OMG believes that the only sensible way to attain 100% marketplace tax collection is to require marketplaces to collect sales tax.
- OMG believes effective tax regimes and burden free eCommerce are not mutually exclusive.
- OMG wishes to collaborate with the MTC and its member states in the hopes that such collaboration will lead to sensible tax policies that won’t compromise state tax revenues, and are compatible with our ever-changing eCommerce economy.
Preventing Sales Tax Fraud Via Marketplace Collection

- Without Marketplace Collection States are Highly Susceptible to Sales Tax Fraud
- Example of Potential Fraud Scheme
  1. Fraudster creates new company, “FRAUDCO” files for FEIN and registers for sales tax collection.
  2. Fraudster opens a new Marketplace seller account, registering it under FRAUDCO
  3. FRAUDCO sources well ranked products that will drive high sales velocity, especially when products are competitively priced below market value
  4. FRAUDCO quickly attains substantial sales volume, as its products are priced to be below market, including tax
  5. FRAUDCO pricing is sustainable because it will recoup losses via the sales tax it collects but does not remit to the states
  6. FRAUDCO may also use multiple accounts to flood the market with similar below market price goods in order to suppress competition, thereby maximizing its sales velocity/volume.
  7. FRAUDCO may also deal in counterfeit goods and the sales tax fraud is the icing on the cake
  8. During this time Amazon will hold FRAUDCO's funds for two weeks, at which time it will electronically transfer the sales proceeds, including sales tax, into fraudster’s Amazon linked bank account
  9. After tax is transferred to seller as part of the sales proceeds, there is no accountability for ensuring the taxes are actually remitted
  10. After receiving the funds from Amazon, Fraudco subsequently moves funds from Amazon via a network of foreign bank accounts, or even more likely crypto-currency accounts, making funds untraceable
  11. FRAUDCO is likely one piece of a large scale sales tax fraud ring, with multiple seller accounts be used to perpetuate the fraud
Sales Tax Fraud is Most Likely Prevalent In The Marketplaces

- Incentive to engage in this type of sales tax fraud is high as there is very little risk of being caught
  - Sales tax fraudsters are most likely operating in a foreign country
  - Sales tax fraudsters are are experts at hiding behind a vast number of US and foreign entities, as well as multiple marketplace accounts; they are essentially untraceable
- Lack of internal controls, low risk of getting caught, zero accountability for taxes once disbursed to the fraudster, and a highly lucrative opportunity makes for the perfect fraud recipe
- Sophisticated sales tax fraud enterprises are probably already operating around the world, and will continue to operate unless marketplaces are required to collect sales tax
- Similar VAT fraud rings have been found in Europe.
- Tax fraud schemes involving transaction taxes are known to fund terrorist activities worldwide. This has been well documented by VAT fraud experts around the world, including former New Hampshire Department of Revenue Attorney and NYU VAT professor, Richard Ainsworth. Ainsworth is considered to be the leading US authority on VAT fraud and has written extensively on how VAT fraud is being used to fund terrorism.
Overlooking the Obvious
Why Marketplaces Must Collect Tax

When Marketplaces Collect States Will

- Instantly mitigate future financial losses resulting from uncollected use tax
- Avoid fueling a competitive tax advantage for foreign based sellers that sell into the US, as such sellers have little regard for the consequences of not collecting sales tax
- Actually level the local retail playing field
  - Wayfair did not level the playing field – Amazon and other marketplaces still don’t collect sales tax
  - Tax motivated shoppers have less choice, but can still buy products tax free via the “marketplace” exception that states have allowed marketplaces like Amazon to escape tax collection on over half of its retail sales
- Promote interstate commerce as opposed to unduly burdening it
  - Online merchants cannot afford national tax compliance, and given the obvious and less burdensome alternatives it makes no sense to require them to collect.
  - It’s substantially less burdensome for marketplaces to do collect, and states that have already implemented such rules have proven that it is possible and pain-free to implement.
  - States that have little concern about burdens placed on out-of-state e-commerce businesses should consider the impact that sister states placing similar burdens on local businesses will have on their local economy of ecommerce merchants, especially those that employ locally and who sustain main street businesses by also operating as an online business.
  - Individual sales tax enforcement will only cause states to realize that foreign sellers now have an edge over domestic since they have little regard for the sales tax rules, and will choose not to comply in order to maintain a competitive advantage.
Overlooking the Obvious
Why Marketplaces Must Collect Tax
(cont’d)

Marketplace collection avoids states having to defend against future taxpayer constitutional and statutory challenges:
- Wayfair was a Prong 1 matter only. Anticipates future burden challenges, particularly from smaller businesses (Prong 3 Challenge)
- Due process nexus for Amazon FBA sellers is highly questionable
- State agreements with Amazon not to collect from its online marketplace doesn’t allow
- National sales tax compliance is expensive, especially for the majority of kitchen table enterprises
- It’s an unnecessary cost given the obvious and less costly alternatives (Pike v. Bruce Church)

The 200 transaction test will fail:
- Marketplace sellers are essentially merchants. Amazon’s economic presence is what drives marketplace sales
- Therefore transactions in every state is not hard for most full time merchants
- The average Amazon item sells for approximately $28.00, meaning economic nexus could be achieved with as little as $5,600 in sales in a single state.
- Sellers could be subject to national collection obligations with merely $300,000 in GROSS sales nationwide

State agreements with Amazon not to collect from its online marketplace are illegal, unconstitutional and unenforceable:
- States cannot waive their obligation to require retailers to collect sales tax via closing agreements. e.g. Per the Mississippi DOR “Any sales made by a third-party independent seller, even though made through the Amazon marketplace, are not covered under the [ Amazon closing] agreement.” https://bit.ly/2BJQqh3
- If a marketplace truly operates as a retailer under state law, the state is obligated to require them to collect tax.
- It’s selective enforcement
- By not enforcing the law evenly against all retailers states are facilitating an unfair price advantage that allows one company to sell goods cheaper than other businesses

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Overlooking the Obvious
Why Marketplaces Must Collect Tax
(cont’d)

Recap

**Requiring Marketplaces to Collect Will:**

- Instantly Level the Playing Field; brick and mortar Retailers Can Finally Compete With Amazon on price
- Instantly stop further use tax losses
- Instantly remove the sales tax burden on small online businesses – reducing the likelihood of post-Wayfair constitutional challenges
- Instantly Prevent Future Sales Tax Fraud
- **Instantly Stop Sales Tax Fraudsters From Fund Global Terrorist Activities!**
Online Marketplaces Operate as Retailers
And Should Already be Collecting Tax

- The following infographics were developed to highlight many of the lesser facts about what selling on Amazon is really like.
- These infographics support OMG’s position that claims by marketplaces, such as Amazon, that they are merely an online equivalent of offline marketplaces, flea-markets or shopping malls is false.
  - State tax laws have always been substance over form (e.g. every income tax transfer pricing case).
  - Marketplaces like Amazon walk and talk like a retailer; sellers aren’t even allowed to “own the customer” in the same sense that all other retailers in the area normally able to.
  - Policies that allow businesses to avoid sales tax collection merely by dictating in their supplier contracts that they are merely marketplaces, and the suppliers the sellers, would open the floodgates for legal sales tax avoidance, both online and offline (e.g. why couldn’t a big box retailer copy the Amazon “seller” model and start calling its store a marketplace and avoid sales tax (e.g. Sold by Apple – Facilitated by Costco).
  - “To permit such formal ‘contractual shifts’ to make a constitutional difference would open the gates to a stampede of tax avoidance.” Scripto v. Carson, 362 U.S. 207 (1960)
- In light of the following infographics we ask that the Wayfair Implementation and Marketplace Facilitator Work Group address whether their treatment of Amazon as a marketplace is consistent with current state tax laws.

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TRUE MARKETPLACE VS AMAZON MARKETPLACE
AMAZON MARKETPLACE: FORM OVER SUBSTANCE

APPROX. 40-45% OF AMAZON ORDERS DO NOT CHARGE SALES TAX BECAUSE AMAZON CLAIMS IT’S NOT THE SELLER

Amazon.com-owned product

3rd party supplier ("FBA Supplier")

<table>
<thead>
<tr>
<th>Item</th>
<th>Quantity</th>
<th>Sold by</th>
<th>Order Summary</th>
<th>Total before tax</th>
<th>Estimated tax to be collected</th>
<th>Order total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Epson T252220 (252) DURABrite Ultra Ink, Cyan (EPST252220)</td>
<td>1 Change</td>
<td>Amazon.com</td>
<td>$22.58</td>
<td>$32.96</td>
<td>$1.53</td>
<td>$34.19</td>
</tr>
<tr>
<td>Epson T252220 (252) DURABrite Ultra Ink, Cyan (EPST252220)</td>
<td>1 Change</td>
<td>Company</td>
<td>$21.99</td>
<td>$32.06</td>
<td>$0.00</td>
<td>$32.06</td>
</tr>
</tbody>
</table>

Amazon states that sales of 3rd party-owned items are not its sales obligated to pay tax on those orders. Amazon relies on the FORM of its adhesive contracts with sellers, despite the SUBSTANTIVE reality that it truly is the retailer.

FBA claims to be merely a marketplace but it operates as a retailer in all respects. Whether Amazon sells its own or FBA supplied products, Amazon controls 100% of the customer transaction & experience.

- FBA supplied items sent to Amazon’s warehouses and are essentially sold on consignment
- Amazon handles all payments processing & receives funds on all orders
- After the FBA supplied product sold, Amazon pays a portion of the sale to the FBA supplier

Amazon handles order details such as:
- Payments
- Order confirmation & tracking
- Customer service
- Order refunds & returns

Amazon controls the shopping experience:
- Amazon branding:
  - Ubiquitous Amazon logos
  - Packaging
  - Emails
- Return policy & customer disputes
- Product listings
- FBA suppliers lack access to customers

Amazon Wants the FBA & 1p Experience to be the Same for the Consumer

Amazon branded shipping boxes
Amazon branded communications & order tracking info
Amazon.com Product

FBA Merchant Product

The information contained in this document is provided for informational purposes only, and cannot be relied upon for any purpose, or construed as legal advice pertaining to any matter.

Amazon and FBA sellers often sell the same item - only collects tax when Amazon is listed as seller.
AMAZON HANDLES CUSTOMER PAYMENTS AND CREDIT CARD PROCESSING FOR BOTH TYPES OF ITEMS

Once the customer buys the item, Amazon receives payment and ships it to the customer.

Both products were identically priced at $99.99 making the total amount due in the single retail shopping cart $199.98.

With a Connecticut tax rate of 6.35%, the tax collected of $6.35 is only being applied to one of the two shopping cart items, despite the fact that the sale is consummated in the same transaction.

How can Amazon only be a retailer for one of two items sold in a single checkout?

Even when an item Amazon sells and an FBA item are purchased in the same shopping cart, Amazon claims it is only the retailer for one of the two items, even though the checkout process is through Amazon. Via this false distinction, Amazon is only charging state tax on the item it lists itself as the seller, and not it credits to the third party, despite being a singular retail transaction for the consumer.
AMAZON HANDLES CUSTOMER PAYMENTS AND CREDIT CARD PROCESSING FOR BOTH TYPES OF ITEMS

Whether buying from Amazon or an FBA Merchant, Amazon receives payment and ships the product directly to the customer.

Whether sold by Amazon.com or by a FBA merchant, the order is completed (i.e. checkout, payment processing, returns and customer service) via Amazon’s website. Proceeds for FBA merchants are typically held by Amazon for two weeks, and used to offset potential buyer claims against the seller, which are decided at Amazon’s discretion. FBA merchants can’t refuse to take back an item, and are often forced by Amazon to take back items well beyond the Amazon mandated return policy of 30 days.
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ONLY AMAZON CAN BENEFIT From Cross-Selling In An FBA Transaction

Amazon Store Branded Credit Card Offer - 3p Merchants Can’t Extend Own Line of Credit

Only mention of 3p Merchant

Note: Customer is bound by Amazon’s Terms and Conditions, and has no privity of contract with 3p Merchant

Amazon Offers 3p Warranty, Not “Seller”

Despite all of this, Amazon doesn’t collect sales tax because it claims it isn’t a retailer in this situation
Amazon Capitalizes on Its Perceived Sales Tax Loophole
Takes Tax Into Account And Ensure Customer Knows When Tax Free Options Are Available

Amazon uses terms like “shipped from” a thinly veiled attempt to dress itself up as a retailer in order to avoid obvious sales tax collection obligation

Even when FBA product is sold for pick up inside Amazon owned retail outlet and/or Amazon branded locker, Amazon still claims it’s not a retailer
EXAMPLE: Amazon Customer Confirmation Email
No Mention of FBA Seller

Confirmation Email: Amazon Takes All Credit For the Order, No Mention of FBA Merchant in Confirmation Email.
Pricing by Amazon
Amazon Offers Its Own Discounts on 3P Products
Meaning Amazon Can Control the Price of 3P Items
Prohibiting Sellers From Acting Like Retailers
FBA Terms and Conditions (Verbatim)


Attempts to divert transactions or buyers:

• Any attempt to circumvent the established Amazon sales process or to divert Amazon users to another website or sales process is prohibited. Specifically, any advertisements, marketing messages (special offers) or “calls to action” that lead, prompt, or encourage Amazon users to leave the Amazon website are prohibited. This may include the use of email or the inclusion of hyperlinks, URLs, or web addresses within any seller-generated confirmation email messages or any product/listing description fields.

Unauthorized and improper business names:

• Your business name (identifying your business entity on Amazon) must be a name that: accurately identifies you; is not misleading; and that you have the right to use (that is, the name cannot include the trademark of, or otherwise infringe on, any trademark or other intellectual property right of any person). Furthermore, you can’t use a business name that contains an email suffix such as .com, .net, .biz, and so on.

Inappropriate email communications:

• Unsolicited emails to Amazon customers (other than as necessary for order fulfillment and related customer service) and emails related to marketing communications of any kind are prohibited.

Appropriate treatment of customer phone numbers:

• Amazon provides Professional sellers who fulfill their own orders access to customer phone numbers so that they can comply with carrier label requirements. If you receive this customer information, you are required to adhere to Amazon’s customer personal information policy, which can be found in our Seller Agreement.

• Please review the policy there and the guidance below to make sure that you are using customers’ phone numbers correctly.

Proper treatment of customer phone numbers:

• Dispose of any customer phone number data that you retain after you have processed the customers’ orders.

• Monitor who in your organization has access to customer phone numbers—protecting this data is your responsibility.

Improper treatment of customer phone numbers:

• Never contact a customer using their phone number. To contact a customer about their order, only use Buyer-Seller Messaging. Please see our Buyer-Seller Messaging FAQ for more information.

• Never share customer phone information with an external party.

• Never pass along customer information of any kind, including phone numbers, outside of Buyer-Seller Messaging.

• Direct email addresses:

Buyers and sellers may communicate with one another via the Buyer-Seller Messaging Service.
Amazon FBA Return Policies
FBA Merchants Have No Autonomy
https://sellercentral.amazon.com/gp/help/200379860?

- **Customer Returns for Orders Placed on Amazon**: Amazon's return policies determine how FBA customer returns are handled and under what circumstances you may be eligible for a full or partial reimbursement for a return accepted by Amazon.

- **Important**: Amazon's decision to accept or decline a return and determinations of the condition of returned item is final.

- **Returns timeframe**: In most cases, customers can request to return an item within 30 days of receiving it. Amazon may make case-by-case exceptions and accept return requests beyond 30 days of receipt.

- **Important**: Amazon does not reimburse for refunded items that cannot be returned by customers per our returns policy, unless it is for a reason for which we take responsibility.

- Amazon does not accept responsibility nor reimburse for returned items that are damaged by a customer, subject to recall, are defective or in violation of Amazon policies, or other similar reasons. We add these items to your unfulfillable inventory when they are returned.
Breaking Amazon News (CNBC)
August 21, 2018
https://cnb.cx/2OTOqV4

“Some Amazon sellers are outraged over a new payment policy designed to attract more corporate buyers”

- Amazon recently rolled out a new payment policy called “Pay by Invoice” so business customers can buy on the marketplace and have more time to pay their bills.

- “[S]ellers are worried that waiting 30 days for payment instead of getting paid every week or two will put them in a cash crunch.”

- Amazon is forcing sellers to absorb 30 day invoice terms so that businesses can buy from marketplace

- It’s not an opt-in and there is no opt-out

- Is this what traditional marketplaces impose on their retail do, is this how malls and flea markets treat their tenants?
Actual marketplaces such as malls don’t prohibit shop owners from redirecting customer traffic to their online websites, or other off-marketplace locations

Conversely, if malls played by Amazon’s rules these types of promotions would be prohibited under Amazon’s Seller Terms and Conditions
1. Per above, Starbucks coffee is sold in many large retail outlets, such as Walmart and Costco.
2. Now assume all three have nexus in "State A."
3. Even though Starbucks has nexus in State A, it would only be accountable for State A sales tax collection in the first scenario depicted, when Starbucks Coffee being sold inside a Starbucks store.
4. In the two other instances it is Walmart & Costco’s responsibility to collect tax in State A, since they are the retailer.
What Happens When FBA Sellers/Amazon Choose To Collect Tax

Sales tax collected is treated by Amazon as part of the “sales proceeds”

When merchants elect to have Amazon collect the tax, Amazon will treat the tax it collects as part of the gross sale proceeds.

The sales proceeds are then held by Amazon, typically for two weeks, during which time Amazon has the right to use the funds to offset any buyer claims, regardless of whether they are related to the transaction that resulted in tax collection.

By including sales tax proceeds in a buyer claims offset pool means that sales tax collected by Amazon could be diverted to settle an unrelated buyer claim and never disbursed to the seller for remittance to the state.