

From: Yesnowitz, Jamie
Sent: Tuesday, June 19, 2018 12:00 AM
To: Helen Hecht
Subject: MTC -- comments on proposed model statute on sales and use tax notice and reporting requirements

Hi Helen – it was good seeing you and the rest of the MTC team last week at the public hearing covering the proposed model statute on sales and use tax notice and reporting requirements. Per your request, I wanted to email you the comments on the statute that I raised at the hearing.

Please let me know if you have any questions – noting that I will be out of the office until June 27.

- General comments:
 - I agree with the AICPA's recommendations in its June 13, 2018 letter to the MTC.
 - The Model Statute is being applied to impose notice and reporting requirements on marketplace facilitators, sellers and transactions, as well as referrers. While the *DMA* case may have affirmed the constitutionality of the Colorado notice and reporting requirement statute, such statute did not apply to the marketplace or referrer concepts. States are currently adopting legislation designed to impose collection and remittance responsibilities on marketplace actors and referrers, and these provisions are likely to be tested in litigation. Extending notice and reporting requirements to marketplace actors and referrers may be similarly problematic, as the Model Statute is attempting to attach obligations to entities that are not parties to the particular sales that may (or may not) be subject to sales/use tax.
 - The *Wayfair* case will be decided by the U.S. Supreme Court in the next couple of weeks. In the case that South Dakota wins the case, and the *Quill* physical presence test is supplanted, allowing for economic nexus provisions to be adopted, will there be any need for the Model Statute?
- Annual transactions report to purchaser – according to the Model Statute, the report must show “the type of tangible personal property purchased or leased,” as a means to provide identifying information to the purchaser of the sale. Depending upon the level of disclosure in the report, this provision could lead to significant privacy issues from the perspective of the purchaser.
- With respect to reports required to be issued by referrers to a state tax authority, referrers may be unwilling, or unable from a confidentiality perspective, to release the names of sellers to which they make referrals.
- *De minimis* exception:
 - With respect to the thresholds for which a non-collecting seller or marketplace facilitator is required to collect and remit, the thresholds should not be based on a national gross sales threshold, as such a threshold should not be used to subject an out-of-state entity to in-state notice and reporting obligations. States should be free to choose an appropriate in-state transactional threshold that should vary based on the size of the state's market.
 - Under the Model Statute, related parties are required to calculate the *de minimis* exception for the entire group. There is no stated definition of the term “related parties” in the Model Statute. A consistent definition in line with a definition used for federal income tax purposes should be adopted, given the complications that might result if states are not uniform in what constitutes a related party.
- While sales with respect to which sales/use tax is not actually due are excluded from the notice and reporting requirement, a determination as to whether a particular sale is excluded must be made by the non-collecting seller or marketplace facilitator, increasing the administrative burden on a party that should not be responsible for interpreting the sales/use tax law of a state in which it does not have physical presence.

- Penalties:
 - The penalty amounts for noncompliance with the notice and reporting requirements are left to the states, which could result in significant variance. The MTC should consider providing a reasonable range of penalty amounts to ensure that states do not overreach in this area.
 - Use of reasonable sampling / estimation methods – this provision appears to give the state tax authority a great deal of discretion. Using sampling and estimation is problematic when used in audits to determine sales/use tax liability. To use these methods to determine a penalty is extremely inequitable to parties who are not physically present in the state.
 - Waiver – the term “good cause,” which is required for a state tax authority to grant a waiver of penalties, is undefined. Does this equate to “reasonable cause”?
- The Model Statute states that regulations will be promulgated to administer the statute – will the MTC be drafting a model regulation for use by the states?

Jamie Yesnowitz | Principal, SALT -- National Tax Office Leader
Grant Thornton LLP
1250 Connecticut Ave NW Suite 400 | Washington, DC | 20036 | United States
www.grantthornton.com