Helping Clients Comply in a Post-*Wayfair* World

By Randy Hilger, CPA, CGMA, CMA, CMI

A number of MOCPA members have asked how to help clients understand and comply with new sales tax collection responsibilities in the wake of the United States Supreme Court decision invalidating the "physical presence" nexus standard for multistate sellers *(South Dakota v. Wayfair Inc. et al, U.S. Supreme Court, #17-494)*. Either in anticipation of—or in response to—the Court's June 21, 2018, *Wayfair* decision, most states have revised their sales and use tax statutes or regulations to impose a tax collection responsibility on remote sellers with no physical presence in a state. Commonly referred to as "economic nexus" standards or thresholds, these statutes or regulations require remote sellers that make more than a certain dollar amount of sales annually, or transact more than a certain volume of sales transactions into a state each year, to register and collect and remit that state's sales or vendors use tax. This sea change impacts tens of thousands of businesses—not just small businesses that make sales crossing state lines or with an online market presence, but also large multinational corporations. Many large corporate entities have multiple subsidiaries that sell taxable goods or services across the United States but do not have a physical presence in one or more states, so they were not registered to collect and remit tax in those states. Let's look at how to help both large and small sellers cope with this change.

First, we need to understand what the new collection requirements are. Two sources of comprehensive aggregated information regarding new state collection requirements are the Federation of Tax Administrators, and my firm, Ryan, LLP. For links to both, visit *mocpa.org/tax*. The Ryan chart also points out which states have what you might call "sleeper" nexus provisions and provides statutory and regulatory citations for nexus standards in each state, along with their economic nexus effective or enforcement date. Many states passed aggressive nexus statutes in the early 1980s—laws that were largely unenforceable under the Court's *Quill* "physical presence" standard—so they just slept quietly on the law books. States with such "sleeper" statutes may not have to pass new statutes, or even promulgate new regulations, to enforce tax collection responsibilities on remote sellers now that "physical presence" is no longer the minimum requirement.

OK, after finding each state's requirements, how can practitioners help clients comply? Consider this checklist of possible efforts:

- An analysis of the client's sales into each state should be conducted to determine if they exceed the state's economic nexus threshold. While many states have adopted a $100,000 or 200 transactions per year threshold similar to South Dakota, other states have adopted different thresholds. It is important to understand what transactions count toward the thresholds; some states base it on all sales ("gross receipts"), some states only include "retail sales" (excluding sales for resale), and others base it on "taxable sales," which would exclude sales of exempt goods, nontaxable services and sales to exempt purchasers. These variations in measurement for the thresholds may have a huge impact on which states a seller may have nexus.
- In addition to examining sales volumes for economic nexus thresholds, it is important to consider whether the client had a taxable nexus under the prior "physical presence" standard, but was not registered, and therefore may have exposure for taxes that should have been collected for prior periods. Many companies were not aware—or ignored—that having independent sales reps, storing goods in warehouses, or performing infrequent service calls into a state constituted a taxable physical presence. Practitioner-client discussions regarding *Wayfair* and the new economic nexus standards frequently lead to a realization (or an admission) that the seller should have been registered to collect tax for prior periods. Practitioners can help such sellers calculate the potential liability and then evaluate available mitigation tactics such as voluntary disclosure agreements or state amnesty programs.

- After a determination is made that the client must register and begin to collect tax in additional states, that may cascade into a whole new set of action items:
  - Register in multiple states.
  - Determine the taxability of goods or services sold into those states.
  - Determine the tax status of customers and obtain exemption certificates for customers/states where the seller previously did not collect tax. In situations where sellers now have to obtain and manage thousands of new customer exemption certificates, identify and put into place appropriate procedures and controls for coding customers and possibly, exemption certificate management software.
  - Analyze whether the procedures and software tools used to process sales—which may have been adequate when tax was only being collected in one or two states—will be adequate when the seller has to collect tax in 10 or 20 or even more states.
  - Determine a source for tax rates in multiple states, counties and cities, which appropriately interfaces with the client's sales system.
  - Develop return preparation and filing procedures, such as whether to perform those tasks in-house or outsource them to the practitioner or a third-party service provider.

Each of these is an opportunity for the tax practitioner to help the client achieve tax compliance in the post-*Wayfair* world. It is also worth noting that in the current legislative session, the Missouri Legislature is actively considering the implications of *Wayfair* on Missouri's sales and use tax. Several bills (House Bills 41, 548 and 593, and Senate Bills 46, 50 and 189) have been introduced that would implement an economic nexus threshold for remote sellers making sales into Missouri. One of those legislative proposals (Senate Committee Substitute for SB 46 and 50) would both implement an economic nexus threshold and revise Missouri sales tax law to be in conformity with the Streamlined Sales Tax Agreement. Implementation of streamlined sales tax in Missouri would present another opportunity for MOCPA tax practitioners to help their clients through an ever-changing tax landscape.

Randy Hilger was the partner-in-charge of Ryan, LLP's St. Louis office and served on MOCPA's Taxation Committee. He retired in February and will be focusing on fishing rather than tax.

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