Maryland General Assembly
Department of Legislative Services

Emergency/Proposed Regulations
Comptroller of the Treasury

(DLS Control No. 18-214)

Overview and Legal and Fiscal Impact

This regulation requires certain out–of–state vendors without a physical presence in Maryland to collect the State's sales and use tax on tangible personal property or taxable services delivered in the State.

The regulation presents no legal issues of concern.

General fund revenues increase by a potentially significant amount beginning in fiscal 2019. Expenditures are not expected to be materially affected.

Regulation of COMAR Affected

Comptroller of the Treasury:
Sales and Use Tax: Sales and Use Tax: COMAR 03.06.01.33

Legal Analysis

Background

Until recently, pursuant to a 1992 U.S. Supreme Court ruling (*Quill Corp. v. North Dakota*), Internet and mail-order retailers were only required to collect sales and use tax from out-of-state customers if the retailer maintained a physical presence (e.g., a store, office, or warehouse) in the customer's state. Although these retailers were not required to collect the tax, consumers purchasing taxable tangible goods from businesses outside of Maryland were responsible for remitting Maryland's use tax if the merchandise was used in Maryland. However, Maryland use tax compliance by individual consumers has traditionally been very low.

Over the last decade, a number of states enacted laws in an effort to require the sales tax to be collected and remitted for sales made by out–of state sellers to their residents. In 2016, South Dakota passed legislation requiring certain online sellers to collect that state's sales tax. The law requires those sellers with sales of over $100,000 or with more than 200 different transactions to residents in the state to collect taxes. South Dakota subsequently sued several companies in state court over their failure to comply with the state law. The South Dakota Supreme Court ruled in favor of the companies, but South Dakota appealed to the U.S. Supreme Court. In *South Dakota v. Wayfair, Inc.*, the U.S. Supreme Court overturned *Quill's* physical presence rule.

Summary of Regulation

Existing Regulation .33A requires a person who engages in the business of an out–of–State vendor to collect and remit the sales and use tax on all taxable sales for use in the State.

Regulation .33B identifies activities that, if engaged in, will result in a person being considered an out–of–State vendor. New Regulation .33B(5) provides that a person engages in the business of an out–of–State vendor if (1) the person sells tangible personal property or taxable services for delivery in the State, if, during the previous calendar year or the current calendar year, the person (a) has gross revenue from the sale of tangible personal property or taxable services delivered in the State that exceeds $100,000 or (b) sold tangible personal property or taxable services for delivery into the State in 200 or more separate transactions.

New Regulation .33C provides that the requirements of Regulation .33B(5) are effective beginning October 1, 2018.

Legal Issues

The regulation presents no legal issues of concern.

Statutory Authority and Legislative Intent

The Comptroller cites § 2–103 of the Tax – General Article as statutory authority for the regulation. Section 2–103 provides the Comptroller with broad authority to adopt reasonable regulations to administer the provisions of the sales and use tax laws. The regulation is consistent with the provisions of the Tax – General Article relevant to the sales and use tax. S ection 11–403 requires a vendor to collect the applicable sales and use tax for the buyer. Section 11–101(o)(1)(i) defines vendor to include a person engaging in the business of an out–of–state vendor. Section 11–701(b)(1) defines engaging in the business of an out–of–state vendor to mean selling or delivering tangible personal property or a taxable service for use in the State.

This authority is correct and complete. The regulation complies with the legislative intent of the law.

Emergency Status

The Comptroller requests emergency status beginning October 1, 2018 and expiring March 30, 2019. This emergency period is within the normal time frames approved by the Joint Committee on Administrative, Executive, and Legislative Review. The Comptroller indicates the emergency status is necessary to address inquiries regarding the impact of the *Wayfair* decision on the Comptroller's authority to compel remote sellers to collect the State's sales and use tax.

Fiscal Analysis

General fund revenues increase by a potentially significant amount beginning in fiscal 2019. Expenditures are not expected to be materially affected.

Agency Estimate of Projected Fiscal Impact

The Comptroller's Office estimates that the regulation increases general fund revenues by a significant amount, potentially between $50 million and $150 million annually, beginning October 1, 2018. The Department of Legislative Services generally concurs with the assessment that general fund revenues increase by a potentially significant amount; however, the department advises that the actual revenues collected, particularly in the short term, could be different than anticipated – depending on the actual number and amount of remote sales, the compliance of remote sellers, legislative and/or regulatory changes, and any subsequent litigation.

Impact on Budget

The Comptroller's Office advises that it can implement the regulation with its existing budgeted resources. The office reports that, since the U.S. Supreme Court ruling, several states are forming a consortium to identify various online sellers and to work together to audit these sellers, which will likely help with administrative and auditing costs that the office would have incurred prior to the court ruling. The Department of Legislative Services generally concurs with this assessment, based on the higher sales threshold for sellers to be subject to the State sales and use tax compared to the sales threshold under Senate Bill 855/House Bill 1213 of 2017. The Comptroller's Office advised that expenditures could have increased by a significant amount to comply with the requirements of those bills, including licensing and collection activity, notification, auditing, and potential legal action. It was estimated that these expenditures could total $144,700 in fiscal 2018, and increase by an additional $343,400 in fiscal 2020.

Agency Estimate of Projected Small Business Impact

The Comptroller's Office advises that the regulation has a meaningful impact on small businesses in the State. The Department of Legislative Services concurs with this assessment and advises that some small businesses could be positively affected to the extent that Maryland consumers are not able to avoid the State sales tax by shopping online and, therefore, have less incentive to make online purchases.

Additional Comments

A 2011 study by the Comptroller's Office estimated that uncollected sales taxes from remote sales to Maryland residents could total approximately $295 million in calendar 2018. More recently, a 2017 study by the U.S. Government Accountability Office estimated that annual uncollected sales tax revenues from remote sales in Maryland could total between $165 million (low scenario) and $252 million (high scenario). However, several factors could significantly impact the amount of sales tax revenues the State may ultimately collect from remote sales.

The most significant factor impacting the Comptroller's revenue estimate from 2011 is that it does not take into account changes in the tax collection behavior of remote sellers since that time. For example, Amazon.com began collecting Maryland sales taxes in October 2014. Initial estimates were that Amazon.com would collect and remit around $80 million in State sales taxes in fiscal 2017. However, due to confidentiality requirements, the amount actually remitted by Amazon.com is not available. It is also not known how many other remote sellers have begun collecting Maryland sales tax since 2011, but the number is thought to be substantial. The actual amount of sales taxes collected and remitted by Amazon.com, in addition to sales taxes collected by other remote sellers since 2011, therefore, significantly reduces the annual amount of uncollected taxes as estimated in the Comptroller's study.

It is also not known how many remote sellers actually sell to Maryland customers. The Comptroller's Office has been in communication with other states to discuss methods to identify out-of-state sellers that sell to Maryland residents. The Comptroller's Office is also exploring commercially available databases of online retailers, such as Vertical Web Media and Internet Retailer Top 1000, to determine if they will be effective in identifying out-of-state sellers. Some states are also using third-party audit firms to assist with their discovery and compliance programs. It should be noted that the regulation exempts certain smaller remote sellers so that some out-of-state sellers would not be required to collect and remit the sales tax. It is not known what percentage of uncollected sales taxes is made by these smaller remote sellers.

The *Wayfair* case also does not address the issue of whether entities such as Amazon.com will be required to collect and remit the sales tax on behalf of their affiliates (third-party sellers) or whether the affiliates themselves would be responsible for tax collection. The Comptroller's Office indicates that this issue could lead to future litigation, as some taxpayers may begin to voluntarily collect and remit sales taxes on those sales while others may argue that they are merely providing a platform or market to facilitate the sales.

Contact Information

Legal Analysis: Matthew Bennett – (410) 946/(301) 970-5350
Fiscal Analysis: Michael D. Sanelli – (410) 946/(301) 970-5510