

## State and Local Tax



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### Some Online Sellers of Goods to Pennsylvania Buyers May Need to Take Action by March 1, 2018

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*Out-of-state sellers of sales-taxable goods to Pennsylvania customers may need to file an election form with the Pennsylvania Department of Revenue by March 1, 2018, agreeing to follow Pennsylvania's new reporting and notice requirements or, alternatively, begin collecting Pennsylvania sales tax.*

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On January 26, 2018, the Pennsylvania Department of Revenue ("DOR") issued Sales and Use Tax ("SUT") Bulletin 2018-01, explaining the election and reporting requirements enacted late in 2017 for certain sellers and facilitators of sales of goods to Pennsylvania consumers. The requirements apply to "marketplace facilitators" (e.g., ebay), "remote sellers" (e.g., an out-of-state seller who sells on its own website), and "referrers" (e.g., a person who is paid to advertise a seller's products and refers potential buyers to a seller, and who also may be a seller) who do not maintain a place of business in Pennsylvania but had aggregate taxable sales in Pennsylvania worth at least \$10,000 in the prior 12 months. By March 1, 2018, these persons must file an election on DOR Form REV-1830, either to collect sales tax going forward, or to comply with the State's notice and reporting requirements.

Failure to submit an election results in a "deemed" election to comply with the notice and reporting requirements. A marketplace facilitator or remote seller that elects to collect

sales tax has to obtain a sales tax license from the DOR and begin collecting and remitting sales tax on its taxable sales.

A marketplace facilitator or remote seller that elects to follow the notice and reporting rules must (i) notify Pennsylvania buyers before and at the time they buy that they may be liable for SUT on their purchases, (ii) submit an annual report to each buyer listing the buyer's purchases, and (iii) submit an annual report to the DOR identifying its Pennsylvania buyers, their addresses, and purchases. These requirements are slightly altered for a referrer that elects to follow the notice and reporting rules.

A person who elects or is deemed to have elected to comply with the notice and reporting rules but fails to do so is subject to a penalty of the lesser of \$20,000 or 20 percent of Pennsylvania sales during the prior 12 months. The penalty can be assessed separately for each violation but only once each year.

We note that a State's authority to force an out-of-state seller to collect sales tax historically has required the seller to have a physical presence in the state, but this requirement has been disregarded by several states in recent enactments and is being tested in a case to be heard by the Supreme Court of the United States (*South Dakota v. Wayfair*) this spring. The Court's decision in *Wayfair* may impact Pennsylvania's and other states' authority to require out-of-state sellers to collect and remit sales tax, but is unlikely to address notice and reporting requirements which are not at issue in the case. Similar notice and reporting

requirements were upheld by the Tenth Circuit Court of Appeals in a 2016 case challenging Colorado's rules. The U.S. Supreme Court refused to review the Tenth Circuit's decision.

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