



Issue Brief

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Colorado Makes Sales Tax Compliance Even Worse With Delivery Excise Tax

Four years after the Supreme Court's decision in *South Dakota v. Wayfair*, Congress still has yet to act to provide small businesses with relief from the substantial tax compliance burdens imposed by economic nexus tax obligations. With this in mind, NTUF has put together a [menu of solutions](#) for Congress to consider to reduce the burdens small businesses are facing in the sales tax space. But while reform to the sales tax landscape is badly needed, further efforts by states to tax and regulate outside their borders only continues to make things harder for small businesses around the country.

Recently, NTUF published a [series of reports](#) on California and New York's efforts to continue the steady erosion of federal Public Law 86-272 and its protections against states levying income taxes against businesses whose only activity in a state is the sale of tangible goods. This threatens to further degrade existing barriers preventing states from going after the business income of out-of-state businesses.

But it's not just sales and income taxes where states are pushing the boundaries of their borders. The latest effort by Colorado, having gone into effect earlier this month, will add fees to the mix of state actions hampering interstate commerce.

Key Facts:



Four years after the *Wayfair* decision, state sales tax compliance remains extremely complex and burdensome for small online retailers.



Colorado, already a difficult state to comply with due to having many local taxing jurisdictions, recently exacerbated this problem by tacking on a delivery "fee" to its sales tax, which functions as a tax and must be separately stated on invoices.



To add insult to injury, some local jurisdictions may even attempt to levy taxes on the delivery fee itself due to its status as a "fee" rather than a "tax."

Colorado's Delivery Fee

In June of last year, Colorado passed a sweeping infrastructure package, [SB21-260](#), into law. Contained in this bill was a new “delivery fee” that retailers making package deliveries using a motor vehicle, or contracting with third parties that made deliveries on their behalf, were required to collect and remit to the state.

The “delivery fee” is actually six separate fees that combine to \$0.27 per delivery. This will apply to all sellers with nexus in the state. Retailers affected by the fee are also required to list it as a separate line-item on invoices and statements.

This may seem to be a minor requirement at first glance, but small businesses are likely to struggle to comply with it. This is particularly true for predominantly out-of-state online retailers, who are expected to add in a separate line-item for the delivery fee when their websites may not support such a feature.

The state's Department of Revenue has suggested that it will not aggressively enforce this requirement in the short term. But whether now or later, coming into compliance will require a great deal of back-end work for businesses.

Colorado's Department of Revenue has also clarified that the fee only applies to taxable sales, though it does apply to sales that include both taxable and nontaxable items. This means that the state's *de minimis* threshold for economic nexus effectively applies to the delivery fee as well, as well as other sales tax exemptions such as wholesale sales.

Nevertheless, the fee is expected to exacerbate the difficulty of sales tax compliance in what is already one of the most complex states for out-of-state sellers to handle. Colorado is a “home rule” state, with 70 separate jurisdictions administering their own sales taxes — potentially exposing retailers to that many more taxing jurisdictions just by selling into a single state.

Colorado has implemented a centralized Sales and Use Tax System (SUTS) that allows out-of-state retailers to utilize a single point of remittance for the state's home rule jurisdictions. Yet many of the home rule jurisdictions have yet to sign on to the SUTS system, a likely unconstitutional situation leaving retailers in a state of uncertainty as to their obligations.

A Fee or a Tax?

Colorado legislators have in recent years gotten into the habit of imposing “fees” in lieu of new taxes as a means of avoiding the state requirement under its Taxpayer Bill of Rights (TABOR) constitutional amendment that tax increases be approved by voters. However, regardless of the verbiage that Colorado chooses to use, the “delivery fee” is better described as a tax.

As distinguished from a tax, fees recoup the cost of some form of service from the person who benefits from it. Yet the government of Colorado is providing no service at all that consumers are benefiting from when a private business delivers a good to a Colorado customer.

On the other hand, the “delivery fee” functions very much the same as a tax. It is collected by the state at the same time as the sales tax, and even falls under the same exemption requirements. Functionally, it is no different than an increase to the size of the state's sales tax, except that it is assessed at a flat rate rather than a percentage of the sale.

The questionable nature of this legal workaround creates further issues given Colorado's status as a home rule state. Because it is not considered part of the sales tax, some localities have already indicated that they will [tax the fee as part of the sale](#), thereby adding insult to injury.

As some major sales tax compliance software companies [do not provide compliance support for “fees,”](#) the distinction has a practical impact on sellers as well. Out-of-state businesses relying upon tax software to reduce the compliance burdens they face, many of which may not even be aware of a new fee instituted in another state, will be on the hook for figuring out that they even need to collect and remit this “fee” from Colorado customers, let alone how.

Conclusion

The tax and regulatory compliance burdens that small businesses face only continue to grow as states stretch their jurisdictional authority ever further. As states add new and difficult-to-comply-with burdens to out-of-state businesses caught up in their web, the burden on interstate commerce will only continue to grow.

The U.S. Senate Finance Committee recently [held a hearing](#) on how just one of these interconnected issues — economic nexus sales tax obligations — has affected small businesses around the country. While it is good to see Congress waking up to this growing disaster, Congress must realize the scope of threats to interstate commerce is so much larger than this single issue.

In the meantime, states like Colorado must become more cognizant that their expanded and overlapping tax jurisdictions cause greater compliance burdens for businesses of all sizes, and act accordingly to reduce these burdens. Poorly-considered revenue raisers no longer burden just a state’s own businesses. The new rule should be that with greatly expanded taxing power comes a far greater responsibility to simplify one’s tax code.

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