

Industry Best Practices for Tax & Surcharge Presentation on the Invoice, Bundled Charge Issues, Customer Data Protection and Privacy Compliance

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Agenda

- What can go wrong? Overview
- What are you allowed to bill?
- Legal Presentation Requirements
- Tax Billing for Bundles
- Multi-party Billing and Revenue Sharing
- Privacy Concerns
- FCC Enforcement Actions

What can go wrong?

Overview

Telecom Billing: What's the Big Deal?

Most heavily transaction taxed service in the U.S. - **PERIOD!!**

- Thought to be over 300 tax types applied to more than 685 potentially different tax bases.
- Potentially over 48,000 filings due annually at the Federal, State, County, City, and District levels.

What can go wrong?

- Sourcing to the correct state & local jurisdiction
- Applying the correct customer taxes to the correct service or property types
- Displaying the taxes with the required amount of detail and specificity
- Remitting all the correct taxes
- Tax on tax calculation issues
- Dealing with customer exemptions (e.g. exempt from one tax is not necessarily exempt from all)

What are you allowed to bill
to customers?

What Can You Bill?

Collect and remit taxes and fees

- Sales/Use
- Telecom Excise (CST, TET, UUT)
- Most 911s

Surcharge Items

- State & Local Industry Specific Gross Receipts Tax*
- Federal and State Regulatory Fees and Funds*
- Local license or business and occupation taxes/fees*
- Certain 911 Fees*

*May require specific contractual language for customer pass-through

What Can You Bill?

Trend Toward Additional Charges Unrelated to Revenue
“Discriminatory” Property Tax*

- Cost Recovery Fee*
- Administrative Cost Fee*
- Network Access Fee*

These Cost-related Surcharge Items are usually included in the definition of “Sales Price”, so are generally included in the measure of tax

*May require specific contractual language for customer pass-through

What Can't You Bill?

- Washington State B&O tax pass-through prohibited Peck v. AT&T, 275 P. 2d 304 (WA S. Ct. 2012)
- Kentucky Statute prohibited customer pass-through of the KY GRT. 6th Circuit Court held Kentucky's blanket prohibition on itemizing the GRT violated the First Amendment to the U.S. Constitution. The service providers have a right to print what they want. The judge ruled the description was not misleading or confusing. BellSouth v. Farris, 542 F.3d 499 (2008).
- KY still objects to the word “Tax” – invoice as “Gross Receipts Surcharge”.

What Can You Bill?

- Sprint notified Texas customers that it would begin imposing a "Texas Margin Fee Reimbursement" in January 2007.
- In February, AG filed suit to stop deceptive trade practice. AG later dropped the case.
- Letters 201008847L & 201008851L (8/6/10) allow for and provide guidance for pass-through.

Legal Presentation Requirements

Bill Presentation: USF

- Providers may pass through USF contributions to customers using line item charges.
- Line item USF charges may not exceed “the interstate telecommunications portion of that customer’s bill times the relevant contribution factor.”
- It can be difficult to correctly pass through USF charges.
 - Quarterly changes in the contribution factor
 - Coordination between reporting and billing
 - Uncertainty about classification, bundling, jurisdiction
 - Prepaid/Postpaid Challenges

Bill Presentation

- Truth-in-billing requirements both FCC and State
- Billing should not be misleading to customers
- Surcharge items including taxes imposed on the carrier should NOT be misleadingly labeled as customer taxes
- Best practice is separate invoice sections for “taxes” and “other charges and credits”

Bill Presentation

- Federal taxes should be grouped into two general categories:
 - (1) taxes/fees imposed directly on the consumer or required to be passed on by the provider; and
 - (2) surcharges/fees which a carrier is legally allowed to recover from its subscribers.
- Likewise, state & local surcharges should be separated from taxes.
- State taxes should generally be separately itemized by tax type and by state or local components.

Bill Presentation

Mandated Billing Language: You should be aware that some state and local agencies demand that a tax/fee must be presented using a specific description.

For example, some creative ways of saying 911 fee

- “San Leandro Emergency Communications System Access Tax”
- “Police Fire and Protection Fee”
- “Commission Approved 911”

Tax in A Brave New World Without Actual Bills

New online and in-app sales platforms are creating a quandary: How do you represent tax to the customer when there is no tangible bill?

- Onscreen tax detail? Emailed Purchase Details?
- Limited information about the customer/situs?
- Can you satisfy an auditor's appetite for invoices when all you have to give them is electronic data?

Tax Billing for Bundles

Tax Billing for Bundles: FCC

- Many providers bundle information services and telecommunications services.
 - Classic example: “Triple Play” of video, voice and broadband.
 - But lots of innovation means many offerings do not fit this model.
- FCC has safe harbors to allocate bundled revenue, but the safe harbors are often a poor fit.
 - 100% of revenue is assessable or
 - Use stand-alone pricing to allocate
- Providers may use other “reasonable” allocation methods.
 - What is reasonable? Will the Universal Service Administrative Company (USAC), administrator of the USF, agree?

Bundling Issues: Charge Allocation

- Typically based on “books and records”, but what are they?
 - MTSA
 - ITFA
 - SSTP State Rules
 - Various other states
- FUSF Safe Harbor or Traffic Study for Inter/Intra

Bundling Issues: Charge Allocation

- Departments may claim on audit that the amount allocated to telecommunications is insufficient and inconsistent with “books and records.”
- Free is Rarely Free - Be particularly cautious about “free usage” included with the bundle.
- Are your allocations fresh? Bundled offerings are often revised by marketing or technological changes over time – are you updating your “books and records” appropriately?

Bundling Issues: Telecommunications

- New York draft policy circulated to permit unbundling of wire-line intrastate and interstate telecommunications charges regardless of whether a provider offers intrastate or interstate plans separately.
- New York has refused to adopt the same policy for mobile telecommunications charges.
 - Not a sound tax policy?
 - Potential violations of state and federal law?

Multi-Party Billing and Revenue Sharing

Multi-Party Billing

- Are you billing for more than one legal entity in your group?
- Disclosure issues – Do you need to disclose the actual service providers?
- What entity books what revenue?
- What entity files the tax compliance?

Multi-Party Billing

- If you bring third parties onto your bill, you will need a strategy for keeping the tax & revenue clean
- Who is taking ownership of the tax process?
- Beware the pitfalls of categorizing someone else's products
- Is the correct party remitting?
- If not, what records are available to support audit inquiries?

“Revenue Sharing”

- Understand the revenue share arrangement
- Is there a valid wholesale/retail arrangement?
- Is it a commission arrangement?
- Character of the payment to the non-vendor?
- Someone still needs to be the vendor
- The vendor must deal with tax billing and compliance issues.
- FCC may seek USF on commission or similar payments.

Privacy Concerns & FCC Enforcement Actions

Privacy Concerns

- Customer Data Privacy Issues for Tax Audits &
- Federal Statute 18 USC 2703(c) & (e)
- Neither the carrier or it's employees can be held responsible in a lawsuit for giving out a customer's:
 - Name
 - Address
 - Telephone connection/billing records
- If they were provided to a governmental agency pursuant to a federal or state subpoena.

Privacy Concerns

- The FCC has robust privacy requirements for customer information (CPNI) and carrier information.
- The FCC recently extended its oversight to “proprietary information.”
 - Personal information about customers not directly related to their use of telecommunications services
- The new Open Internet Order extends the FCC’s privacy jurisdiction to broadband Internet access services.

Broadband Transparency

- FCC Open Internet Order imposes detailed broadband transparency requirements
 - Network Practices
 - Performance Characteristics
 - Commercial Terms
 - Including pricing (monthly charge, applicable promotions, other fees or surcharges, data caps and allowances)
- Duty includes duty to disclose and duty to maintain accuracy of disclosures

Recent Enforcement Actions

- TerraCom/YourTel
 - \$10 million fine proposed for failure to protect proprietary information
 - Expanded privacy oversight
 - Adoption of FTC approach
- AT&T
 - \$25 million settlement for data breaches
 - Largest FCC privacy enforcement to date
- FTC
 - Asserts jurisdiction over some AT&T services

What does this mean?

- CPNI
 - Detailed obligations are already in place
 - Providers should have careful compliance programs
- Proprietary Information
 - Requirements still emerging
 - At minimum, ensure “reasonable precautions” to protect any customer information

Broadband Internet Access Service

- New Regime
 - Formerly regulated by FTC
- New rules are coming soon.
 - What is broadband CPNI?
 - Browsing information?
 - Location information?
- Will the FCC apply FTC-like enforcement in the meantime?
- Will the FTC seek opportunities to assert its authority ?

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