

Nikki Dobay ([00:00](#)):

Hello and welcome to GeTtin' SALTy, a state and local tax policy podcast hosted by Greenberg Traurig. My name is Nikki Dobay, shareholder in the Portland, Oregon and Sacramento, California offices. This episode, we are going beyond the regular old SALT mine and we are going to catch up with Madeline Orlando, who is one of my colleagues in the Sacramento office. And, we are going to continue our conversation about extended producer responsibility laws, EPRs as they've been known. Maddie, thank you so much for rejoining the podcast for this really crazy topic.

Madeline Orlando ([00:39](#)):

Thank you. I've been counting down the days before I could come back and join you again.

Nikki Dobay ([00:45](#)):

Well, that's what everybody on the podcast says, but there's been some updates since we spoke just a few months ago, and so we've been chatting about those updates and thought it would be a good idea to kind of regroup on the podcast and talk about how the compliance season went with Oregon and then there was a lawsuit filed in Oregon. So, you're going to fill us in on that. But, one of the other things that I just want to say to the listeners is I think that this is a really significant topic and we're just starting to scratch the surface so thank you so much again for coming back on and talking to us about this because there's chatter starting out there and I think you're at the forefront.

Madeline Orlando ([01:30](#)):

Yeah. And, I think as we see some of these states come online with their real compliance obligations, when you start having the reporting and the fee obligations come up, that's when a lot of this becomes tangible for businesses where you are starting to have to make those changes that we've kind of talked about in the abstract for a while. And, we're at the forefront of that and thinking about long-term indefinitely, as of right now, all of these states having these laws, it's interesting to think five, 10 years from now, where will we be in this space? But since we last spoke, there have been a few developments. I'll start off with the less-

Nikki Dobay ([02:16](#)):

Controversial.

Madeline Orlando ([02:17](#)):

... less [inaudible 00:02:18] ones. First is that we have two more states that pass their EPR packaging program. So, Maryland and Washington, in this legislative session, passed their own EPR packaging laws so now we have seven states that have these laws. As well we had Colorado had their initial reporting deadline just last week, July 31st. That reporting went a little bit smoother than I would say the Oregon reporting was. It followed a similar framework from what Oregon had, but now second time around people were a little bit more familiar with what they had to do, what the compliance obligations looked like there.

([03:00](#)):

And then, just pop over to California real quick, everyone's favorite state to talk about. I think we discussed last time that California is in a little bit of a state of limbo with their regulations. And, since we last spoke, we've seen some more activity from CalRecycle, the state agency on that front so they have draft regulations that they're working with. These are their second round of draft regulations. So they

worked on it last year. They got to a place where they were going to finalize them and then Governor Newsom came out and said, "You can't do this," so they started over and we're in that process right now and California has a reporting deadline of November 15th. So, I think everyone's kind of looking at the clock, looking at calendar, waiting to see what will be done before then. So, those are our non-Oregon updates and kind of some more administrative things.

Nikki Dobay (03:58):

And, a couple thoughts there. It's interesting. So, just going back to our regular SALT world, Maryland and Washington have been very active on some very interesting new types of taxes so it's kind of interesting they're also coming into this EPR law world as well. So, obviously very tax friendly. I will say I'm using that not probably in the way that taxpayers think of as friendly. They're friendly to any type of tax. So, two states stepping into this.

(04:31):

And then, curious on Colorado. So, they're also using the Circular Action Alliance, so CAA. Is there a standardized reporting that's going to happen for all these states as they come online, or is it truly like other state and local taxes that we see where the states all have their own individual forms?

Madeline Orlando (04:55):

So, for right now, all of the reports are submitted on an individual state level, doing it through the same online portal, but you are submitting individual reports. And, part of that is because the states cover different types of materials so what's covered in California is a little bit different than Oregon is a little bit different than Colorado. So, it's hard to do one standardized report when all of the laws are materially different. And, as of right now, because they're all coming online at different times, all the reporting dates are different. Hopefully in the future we will have one annual harmonized reporting date, but as of right now, that's not the case.

Nikki Dobay (05:38):

Yeah. And, if I'm crystal balling it based on how the states operate in the tax world, that will never come to fruition. But, I don't want to be the bearer of bad news, so I'll be hopeful with you. All right. So, I think the other big item that happened since we talked was Oregon issued some invoices. How'd that go?

Madeline Orlando (05:59):

Yes. Well, seeing that we're here on the podcast talking about it, I think the listeners can guess how that went. So, Oregon had the first reporting deadline come up on March 31st. They had what they called a grace period through April 30th. So, those companies that reported by April 30th got their invoices late May, early June. So, a couple interesting pieces about that.

(06:26):

We always knew that the fees were not going to be final until producers submitted their reports. And, that's because the fees are corresponding to the amounts of materials that producers are submitting and the state looks at the producer reports, understands what's there for each category, and then the fees are finalized that way.

(06:53):

What we didn't expect, or at least what I didn't expect until we got time to talking about the fees, is that Circular Action Alliance, the third party organization that's handling implementation, was not going to

publicize what the final fees were. So, they had a draft fee schedule going into the reporting, but once they finalized it, that was never publicized. It was only accessible to those producers that reported and then, without further conversation, they just got invoices. So, what's interesting to me about that is-

Nikki Dobay (07:38):

The lack of transparency? Sorry. I jumped ahead.

Madeline Orlando (07:43):

You're exactly right. And, it makes it hard from someone that, maybe you missed a reporting deadline, you're wanting to get up to speed, you're wanting to get into compliance, you know have to pay fees, but you still don't know what those fees will look like. So, how do you plan? That was one interesting part about it.

(08:02):

The other parts that we didn't really know going into it was just the range of invoices that we would see and obviously that's reflective of amount of materials that someone reported that could be also reflective of their business operations in the state. It was very sector dependent, so you had a lot of consumer packaged goods companies saw higher invoices than something maybe in the manufacturing space where there are more exemptions for products in that space than your run-of-the-mill consumer packaged goods.

(08:41):

And, that's a little bit of a hard conversation to have when you're doing business. You want to expand your business, you want to keep doing better, you want customers to be happy, all of these things. And then, you get an invoice for hundreds of thousands of dollars from one state and is this what it's going to be every single year now with seven states doing this program? And, it was a real wake-up call I think for a lot of businesses that got into this, knowing that it was going to be expensive, but then you see it on a piece of paper with a due date, this is your company, this is what you have to pay and very uncomfortable. So, we knew that was coming, but then seeing it play out I think was still very shocking.

Nikki Dobay (09:33):

Yeah. And, let's contrast this to something that's like a tax provision. And, this is kind of a tax, so I'm using my words carefully, a fee, a tax, but in the general tax realm, you usually see very public debate at the legislature about what the tax liability or tax burden will look like for various businesses. And, they're generally able to understand, when the legislation is introduced or passed, what they will be looking at. Now, there's always the, the devil's in the details and state agencies can write regulations that could have an impact, but this, as I've kind of looked at this through my lens, has always just seemed to be a complete black box that this third-party organization really has complete control over.

(10:30):

And that, to me, is what is the most scary thing about this whole program, especially as more states come online. And, I think you're right. It's really unpredictable. It's hard to know how to price your products and goods. And, at least what we've seen on the tax side is, when a state goes really far down the path of being aggressive and wanting to impose really steep taxes, businesses have to start making business decisions about where they're going to do business and I think this is just so much harder because they have no idea.

Madeline Orlando ([11:09](#)):

And, correct me if I'm wrong on the tax front, all of the taxes are included in the statutes or regulations in that state in the federal government, where here none of these states, because they delegate that authority to Circular Action Alliance this third party to create the fees and issue those invoices, things like that, the fees are not in the statute or the regulations and there's really no fee guidance in the law. So, someone that's just learning about this, you can't really turn to Oregon Code 459 A blah, blah, blah and see what you're going to pay. That just doesn't exist here.

([12:00](#)):

And, it really makes compliance incredibly challenging, not only for companies trying to get into compliance, but also for long-term projections when these fees will change every single year. So, this is not a set in stone, every single year you're paying this amount. It can change maybe drastically year to year and long-term planning is going to be very difficult.

Nikki Dobay ([12:25](#)):

Yeah. The only similar thing I've seen in the state tax context is in Maryland, for example. They, a few years ago, passed a digital advertising tax and there we knew what the rate schedule was, but the one thing that Maryland did was delegate the authority to figure out how to, in the state tax world what we call source, the receipts. They delegated that to the Department of Revenue. Taxpayers were very concerned about that because generally there are statutory kind of guardrails for something that significant when it comes to how you're going to impose the tax or actually calculate it, but there at least it was being delegated to the agency tasked with collecting taxes in Oregon.

([13:14](#)):

Here we don't see any kind of guardrails in the statute as to, this is the upper end, this is worst case, you can charge up to this and then it's just being completely delegated to this third party that, yes, has to, I think, answer to the states in some respect, but I think it was created in this way so that the states really didn't have to deal with it.

Madeline Orlando ([13:44](#)):

Yeah. And, in Oregon, they did work with the Department of Environmental Quality to finalize the fee schedule, but that was all done confidentially and those discussions and the methodology behind that is not public, which I am really not sure what to make of it. I'm sure there were well-thought-out intentions behind how they came up with those figures, but it is hard to digest that when you don't have any insight into the process.

Nikki Dobay ([14:23](#)):

Yeah. And, I have to imagine there's certain public records laws that actually apply to all these things. So, generally this isn't how government is supposed to work. Well, I feel like more to come on that, but the big, I guess, news was this lawsuit. So, tell us about this lawsuit and what's going on on that front.

Madeline Orlando ([14:48](#)):

Yes. So, on July 30th, the National Association of Wholesaler Distributors sued State of Oregon, Oregon Department of Environmental Quality, the State Attorney General. And, the premise of the lawsuit was that kind of what we were just discussing, that the state unconstitutionally delegated this authority to run this program and kind of specifically come up with the fees and that producers don't have any say,

there wasn't really any type of legal checks on this process and that the process of delegating to Circular Action Alliance was essentially just entirely arbitrary.

[\(15:38\)](#):

They made some specific challenges alleging violations of the non-delegation doctrine, the dormant commerce clause, and some violations of due process. It's hard to say where this will go, and we can maybe discuss that in a minute, but I think it does present some very interesting questions and just kind of initial reactions are, we are waiting for someone to do this. I don't think that it was a surprise that someone challenged it and challenged it directly with the state and not Circular Action Alliance. As discussed in the lawsuit, when producers joined Circular Action Alliance, they sign these contracts and in them are binding arbitration provisions. So, you're agreeing to not sue Circular Action Alliance in court. So, I think that's one thing of note here maybe why Circular Action Alliance is not a named defendant.

[\(16:40\)](#):

There have not really been a lot of lawsuits in this area. The only other one I was able to find in kind of an EPR space was in Connecticut a couple of years ago. Connecticut has an electronics EPR program and Vizio challenged that. Different type of challenge. There were some different issues with the fee schedule there. That challenge was not successful. A motion to dismiss was granted. That was upheld at the second circuit and that's kind of been it in this space.

[\(17:17\)](#):

So, the questions that this lawsuit presents are very... I think everyone's really waiting to see what happens with this. And, I think the discussion of the non-delegation issues is maybe the most pertinent part of the challenge because, as we've discussed today and my last time on the show, it's a very strange situation where you have this third party group that's acting essentially as quasi-governmental figure, but is not the party that's enforcing it and is not the party that at the end of the day is the state that is able to make these decisions. But, this is going to be interesting. I don't know if you had some additional thoughts that you wanted to share after reading the complaint.

Nikki Dobay [\(18:11\)](#):

Yeah. I have so many thoughts about this. Well, I'll try to limit them. I mean, on the non-delegation front, I think they have a strong argument and Oregon, they have a pretty strong non-delegation clause in the Oregon constitution. So, I think that is likely the strongest claim.

[\(18:32\)](#):

Now, that being said, assuming these EPR programs and this iteration, this much broader sweeping laws that we're seeing is going to move forward, having a third party administer this is actually on one hand kind of helpful because it creates some uniformity. I mean, the fact that you all have a single website where you can go and file things right now, taxpayers have been talking about that in the sales tax world for, I don't know, decades. So, there's some value in that having a centralized administrator. But then, there's a lot of issues with this lack of transparency and maybe lack of authority. So, I definitely think that's an interesting one to see how that shakes out.

[\(19:29\)](#):

The constitutional challenges are interesting to me, and I understand the reasons those were the claims that were raised. One of the very interesting things about this is, is it a tax or is it a fee? Because if this was determined to be a tax, it would be barred from federal court, which is where this was filed by the Tax Injunction Act. So, I understand why they've not put anything in the complaint to indicate that this is a tax and that the complete auto four-pronged test should apply for purposes of the Commerce Clause.

(20:04):

That said, I feel like there's the four-pronged test of complete auto, these EPRs raise a lot of issues under there because one of the biggest things in the tax context is you have to fairly apportion these taxes. And, when I read the complaint, that's one thing that kind of screams out to me is, once multiple states come online... And yes, you're providing information about what's going into that state specifically, but if you're getting a huge bill from a state that is like Oregon which, in many ways, is a small state, is that fairly apportioned? Does it fairly reflect the business that's being done in that state? So, I think that it raises many of those issues.

(20:54):

And then, due process, I think we've got some real due process issues here. So, I'm excited about this. But then the other thing this raises for me is, okay, now we have a lawsuit pending. In the tax context, when things like this come up, we're usually able to file things like protective refund claims or there's different methods or things that taxpayers can do to make sure, "Hey. We want to make sure we're going to avail ourselves to a good outcome in this lawsuit," and my sense is CAA, can you file for a refund if you pay the invoice? They probably just don't have those types of procedures in place. And so, how are businesses supposed to navigate that in the interim?

Madeline Orlando (21:47):

My first thought is we should do wall-to-wall coverage on the lawsuit.

Nikki Dobay (21:51):

Yes.

Madeline Orlando (21:51):

I think we should have a reporter in the courtroom during the hearings. We should have a team.

Nikki Dobay (21:57):

Yeah. Yeah.

Madeline Orlando (22:00):

But, no. There's some very perplexing issues here. One of them being, there are a lot of producers that have not reported in Oregon yet. And, what if we get to a point where even implementation, there's a preliminary injunction that is granted that stays the state's activities here. Well, what happens to those producers that paid? And then, you have those that may be reported but just haven't paid yet. There are some just basic fairness questions there. And then, of course, what happens in these other states? So, you have Colorado trailing behind Oregon.

Nikki Dobay (22:42):

Right.

Madeline Orlando (22:42):

Their fees are towards the end of the year this year. Obviously California has a reporting deadline in November. What we've seen too, in a state like Minnesota, they're doing what's called a start-up fee where they are not charging initially based on the supply reporting because the supply reporting is not

up yet. They're charging to basically get the program off the ground and they want producers to help fund the initial program activities for CAA in Minnesota.

(23:16):

Maybe that's going to be based on the producers gross revenue in the United States. I don't believe it's on Minnesota's specific revenue, but that's something that I think is still being finalized. But, what happens there? That's not a supply data-based fee, that is just an initial program basically financing CAA for the next couple of years until they get money from the supply reporting. So, is that treated the same as this issue in Oregon where they came up with a fee schedule for materials? I don't know what the answer to that is.

Nikki Dobay (23:59):

Well, the answer is it's going to be all different all over the country and probably a lot of it will be decided by the courts. I mean, my sense is EPR, this isn't going away but it definitely comes more complicated as we have various state and federal courts weigh in on how it has to be implemented. So, that's all to say your job is going to get harder, not easier, so-

Madeline Orlando (24:36):

Which is not the answer I was looking for.

Nikki Dobay (24:40):

Yes. Again, if the state and local tax world can be a predictor of anything in this world, yeah, it's going to get more complicated.

Madeline Orlando (24:51):

Yeah.

Nikki Dobay (24:51):

And, I'd like to say before it gets less, it gets worse before it gets better, but we haven't been to the tipping point on kind of the tax side of this. So, yeah. I'm the bearer of all bad news from my perspective. But, any kind of final takeaways that... And, obviously this is going to be an ongoing conversation that we have but I assume there'll have to be an answer filed and, if they're seeking a preliminary injunction, something will happen kind of in the near term, but I guess we'll be waiting for probably a month or a couple of months to see what happens right away.

Madeline Orlando (25:33):

Yes. I think we still have some time before they are more reportable developments with this lawsuit. And, in that time, unfortunately things are not slowing down. We're still driving towards all of these compliance dates that we have on the calendar and things are... California, we have a reporting deadline in November. Obviously California has other policy initiatives that it's working alongside with the EPR reporting and fee program. It has other recycling initiatives as well. Those are all still in play and so something to watch. But, as of right now, without any firm guidance from the courts and even at a trial court level, if they get some ruling, I wouldn't be surprised if this is appealed. If it stays in federal court, it goes up to the Ninth Circuit, something like that. So, I think it will be a while before we have any definitive guidance, if any at all, from the court on this.

Nikki Dobay ([26:45](#)):

Yeah. And, I will say over the last couple of months since we've talked, people are talking about this out and about. I've actually been asked at a few different conferences if I've ever heard of these. And, I always send them the first podcast. But, yeah. I mean, I think, again, there's a lot of folks that aren't really, this isn't on their radar and I do actually think some of the state and local tax folks at companies are going to start getting pulled into some of these reporting requirements just because it is similar enough to what we have to do on the tax side. So, definitely more to come in this space.

Madeline Orlando ([27:29](#)):

Yes. It's a hot potato that no one wants to take responsibility for but someone has to, unfortunately.

Nikki Dobay ([27:37](#)):

Yes. Yes. All right, Maddie. Well, surprise non-tax question before we go. So, I like this one. So, what's the most unusual job you've ever had or done? So, I'll go first. So, probably my most unusual job, it was two summers. It was between my freshman and sophomore year and then sophomore and junior year in college I worked at a cheese packing facility. So, I worked in a factory on a line and we put cheese into packages and sent it away.

Madeline Orlando ([28:14](#)):

Incredible. What kinds of cheese?

Nikki Dobay ([28:16](#)):

All kinds of cheese. So, Swiss cheese, blue cheese, a lot of cheddar cheese. It was all the cheeses. Shredded cheese. So-

Madeline Orlando ([28:25](#)):

Are you cheese averse now after-

Nikki Dobay ([28:27](#)):

No, no, no. I would never be, but you could eat as much cheese as you wanted. That was one of the perks of the job.

Madeline Orlando ([28:33](#)):

Right.

Nikki Dobay ([28:33](#)):

Yes. Yes.

Madeline Orlando ([28:35](#)):

"We don't need to pay you." You're eating cheese all day long. You don't need money.

Nikki Dobay ([28:38](#)):

They still paid us but they let us eat a lot of cheese. And, the blue cheese line, as they called it, when it ran, it was a very divisive line. People, either they loved blue cheese or they don't, but the people that



loved blue cheese, they wanted all the scraps so they could go make blue cheese dressing. It kept me in college, I'll say that. It definitely was one of the drivers for, "You need to go back to college and get your degree." But, the people that worked in the-

Madeline Orlando ([29:09](#)):

After that you wanted to go to law school after it. I mean, you reached the top already with that.

Nikki Dobay ([29:14](#)):

Right, right, right. No. And, the people were wonderful. I loved them all very much. But, yeah. It kept me in school. So, how about you?

Madeline Orlando ([29:24](#)):

Well, I am a little ashamed to admit this is the only real job I've ever had.

Nikki Dobay ([29:30](#)):

All right. So, EPR laws are the most unusual thing you've done?

Madeline Orlando ([29:35](#)):

I mean, I had college jobs. I worked all four years for my school's football team.

Nikki Dobay ([29:41](#)):

Okay.

Madeline Orlando ([29:42](#)):

I wouldn't really say it was unique or crazy in that sense, but I was on the field for the football games, traveled with the team a little bit. That was really fun. We were at the practices all the time. I, growing up, wanted to be a sports gal, so I worked for the football team. I also worked for a TV station, for a sports reporter, and then I worked for the USGA one summer, the United States Golf Association. So, I was very sports-oriented-

Nikki Dobay ([30:12](#)):

Oriented. Okay.

Madeline Orlando ([30:12](#)):

And then, did all of that and decided I was going to do the opposite and go to law school.

Nikki Dobay ([30:19](#)):

Well, any stories that stick out or highlights from hanging out with all these sports folks?

Madeline Orlando ([30:26](#)):

It was fun working on the field during the games, especially college football. So, I went to TCU and when I was there at the time, they were really good. They were number two in the nation. We would go to the bowl games. They were always kind of on the ESPN kickoff kinds of things. So, we had the ESPN Saturdays kickoff set up would be on campus. So, it was all just really fun. It's a good atmosphere, very

biased towards college football. But, no. I mean, it was school in Texas, so it would be like 120 degrees on the field and you're running up and down.

([31:04](#)):

I worked for the media team so when they would score a touchdown, our team cameraman would record it, they'd take out their little disc and hand it to me and I would run it upstairs and upload it on the computer so they could post it on Twitter. So, there's just probably video footage of me on ESPN, sprinting up and down the sidelines in 120 degrees wearing cowboy boots and a polo and just about passing out in the tunnel when I'd be running up there. Those are fond memories of that.

Nikki Dobay ([31:39](#)):

That sounds pretty awesome and unusual, I will say. I don't know that a lot of us could say we've done those types of things. Well, thank you again for joining and, like I said, this conversation is nowhere near the end, so we'll keep folks updated and thank you to the listeners. Contact information for Maddie and I will be in the show notes. I'll be back in a few weeks on the next GeTtin' SALTy.