

SALES TAX AND WAYFAIR - WHAT DOES IT MEAN FOR YOUR BUSINESS?



by Karen Poist, CPA

On June 21, 2018, the Supreme Court issued its decision on the South Dakota v. Wayfair, Inc. case (Wayfair). This is the biggest ruling in the sales tax area in more than 25 years. What does Wayfair mean to the business owner? Here is some key information on the Wayfair case and what it may mean for your business and the action steps that can be taken now.

What did Wayfair change regarding sales tax filing requirements?

Prior to Wayfair, a state was only allowed to require a business to assess, collect and remit sales tax if sufficient “nexus” or “connection” existed between a business and a state. A connection was generally established by a business having a physical presence in a state, such as an employee, a salesperson, delivering products in company vehicles, installing products, providing services, etc. Once physical presence was established, the business was required to register for, assess, collect and remit sales tax to the state and local jurisdictions, if applicable.

E-commerce has created many challenges for the states and their current sales tax laws (keeping in mind that the laws were established based on a Supreme Court ruling long before the internet was so widely used). The physical presence standard has now become obsolete. Brick-and-mortar stores are losing sales to online retailers (known as remote sellers) as these remote sellers may not be required to assess, collect and remit sales tax on their sales and consumers are taking advantage of the “sales tax free” sale over the internet - even though the consumer is required to self-assess and pay use tax if sales tax was not assessed on the sale. Thus, state and local jurisdictions are losing the sales and use tax dollars that the remote sellers are not required to assess and consumers are not self-assessing.

To capture these lost sales and use tax dollars, many states, including South Dakota, have enacted economic presence nexus statutes. These statutes are based on the premise that if a business is benefiting from a market in a state, whether or not there is a physical presence in the state, the business should assess, collect and

remit sales tax to that state. There is great difficulty in determining when a business is benefiting from a state. Some states have implemented threshold standards as evidence of economic nexus. This provides a bright-line test for remote sellers to assess, collect and remit sales tax. The new economic nexus standard did not agree with the prior Supreme Court precedence of the physical presence standard and therefore the Supreme Court had to rule on the new nexus standard, hence, Wayfair. It should be noted that the economic nexus standard applies to remote sellers without a physical presence in a state. If your business has a physical presence in a state, the business more than likely already has sales tax nexus.

What are the thresholds that create economic sales tax nexus?

The thresholds that establish economic sales tax nexus vary by state. Most states are adopting thresholds that are tied to sales dollars or to a number of separate sales transactions. Many states have chosen \$100,000 in sales or 200 separate transactions in a 12-month period (or based on prior year sales

Sales Tax and Wayfair... Continued

activity). More states are expected to adopt economic nexus standards and states with statutes in place continue to add and issue additional guidance. Many questions still remain unanswered. Is a business that exceeds a state's economic nexus threshold in one year but does not in the subsequent year still required to assess, collect and remit sales tax to that state? It appears so. Businesses with remote sales that are below the economic nexus thresholds need to be aware that they may have other state reporting requirements. A few states are implementing mandatory sales reporting to gather information of sales to consumers in their state for which sales tax had not been assessed by the seller. The purpose of this reporting is to increase the self-assessment and collection of use tax by consumers.

What does Wayfair mean to your business?

If your business is currently selling products (and in some cases, services) without having a physical presence in a state, then your business may now be required to assess, collect and remit sales tax to that state. If your business has exceeded the minimum economic threshold standards, then you must understand the appropriate sales taxability of your products or services and

have your accounting systems in place to assess, collect and remit sales tax on applicable sales.

What steps should be taken now to prepare for Wayfair?

Some states are implementing the economic nexus sales tax filing requirements on remote sellers October 1, 2018, while others are waiting until January 1, 2019. Many states have not provided details as to when enforcement will start. Now is the time to prepare for Wayfair! A current list of sales tax economic nexus thresholds is listed by state below.

Here are a few steps that can be taken now to prepare for Wayfair:

- ▶ Communicate to relevant parties that the company may be subject to additional sales tax assessment, collecting and reporting responsibilities, based on the Wayfair case. This may include customers, CFO, Legal, IT, Customer Support, A/R, A/P, etc.
- ▶ Review current accounting/billing systems to determine if it has the capabilities to provide the information to determine sales and transactions by state.
- ▶ Look over your current sales tax reporting systems to determine if it has the capabilities to handle the

potential increased filing and reporting requirements.

- ▶ Determine the amount of sales and number of transactions by state for 2017 and YTD 2018. States are looking at both the prior year and the current year to determine if economic nexus thresholds have been met and exceeded.
- ▶ Once a determination is made that the business is subject to filing requirements in a new state, understand the laws of the state and how your products or services will be taxed by the state and localities.

The Wayfair case can seem overwhelming for many businesses, but the best approach is to be proactive and address it now rather than later. The **BMSS SALT Services Group** is available to help you and your business and to provide you peace of mind. Please contact Karen Poist for additional information or questions by calling (833) CPA-BMSS.



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STATE SALES & USE TAX ECONOMIC NEXUS STATUTES

Several states have enacted economic nexus statutes for sales/use taxes. See below for thresholds, legal effective dates, and administrative enforcement dates for each state. States not listed have not yet adopted economic nexus or have not yet announced thresholds or effective/enforcement dates.

Alabama

Economic Nexus Threshold: \$250,000 AL sales for previous calendar year, AND at least one other activity enumerated under Alabama law

Legal Effective Date: 1/1/2016

Administrative Enforcement Date: 10/1/2018

California

Economic Nexus Threshold: If during the preceding or current calendar year, the retailer's sales for delivery into California exceed \$100,000 or the retailer makes sales for delivery into California in 200 or more separate transactions.

Legal Effective Date: 04/1/2019

Administrative Enforcement Date: 4/1/2019

Colorado

Economic Nexus Threshold: \$100,000 in gross revenue from the sale of tangible personal property or services delivered into CO, or 200 or more separate transactions of such sales, in the previous or current calendar year.

Legal Effective Date: 12/1/2018

Administrative Enforcement Date: 12/1/2018

Connecticut

Economic Nexus Threshold: \$250,000 in annual gross receipts AND 200 retail sales during the 12-mo period ended on Sept. 30th immediately preceding the monthly or quarterly period with respect to which such person's liability for tax is determined

Legal Effective Date: 12/1/2018

Administrative Enforcement Date: 12/1/2018

Georgia

Economic Nexus Threshold: \$250,000 in GA sales in current or prior calendar year delivered electronically or physically to GA, OR 200 separate sales transactions in current or prior calendar year delivered electronically or physically to GA

Legal Effective Date: 1/1/2019

Administrative Enforcement Date: 1/1/2019

Hawaii

Economic Nexus Threshold: In the current, or immediately preceding calendar year, \$100,000 gross income or gross proceeds from the sale of TPP delivered in HI, services used or consumed in HI, or intangible property used in HI; OR 200 separate transactions from such sales

Legal Effective Date: 7/1/2018 (applies to tax years beginning after 12/31/2017)

Administrative Enforcement Date: 7/1/2018

Illinois

Economic Nexus Threshold: \$100,000 in cumulative gross receipts from sales to TPP or services to purchasers in IL, OR 200 separate transactions for the sale of TPP or services to purchasers in IL (in prior 4 quarters)

Legal Effective Date: 10/1/2018

Administrative Enforcement Date: 10/1/2018

Indiana

Economic Nexus Threshold: \$100,000 in IN sales in current or prior calendar year delivered electronically or physically to IN, OR 200 separate sales transactions in current or prior calendar year delivered electronically or physically to IN

Legal Effective Date: 7/1/2017

Administrative Enforcement Date: 10/1/2018

Iowa

Economic Nexus Threshold: Gross revenue from IA sales of \$100,000 for an immediately preceding calendar year or current calendar year, OR makes IA sales in 200 separate transactions for an immediately preceding calendar year or current calendar year

Legal Effective Date: 1/1/2019

Administrative Enforcement Date: 1/1/2019

Kentucky

Economic Nexus Threshold: \$100,000 in KY sales in current or prior calendar year delivered electronically or physically to KY, OR 200 separate sales transactions in current or prior calendar year delivered electronically or physically to KY

Legal Effective Date: 7/1/2018

Administrative Enforcement Date: 7/1/2018

Louisiana

Economic Nexus Threshold: If during the previous or current calendar year, either: \$100,000 from sales of TPP, products transferred electronically, or services; OR 200 separate transactions

Legal Effective Date: 6/21/2018

Administrative Enforcement Date: 1/1/2019

Maine

Economic Nexus Threshold: \$100,000 in ME sales in current or prior calendar year, OR 200 separate sales transactions in current or prior calendar year

Legal Effective Date: 10/1/2017

Administrative Enforcement Date: 7/1/2018

Maryland

Economic Nexus Threshold: Vendors with more than \$100,000 of gross revenue from the sale of tangible personal property or taxable services delivered into MD, or 200 or more separate transactions of such sales must register and collect sales tax.

Legal Effective Date: 10/1/2018

Administrative Enforcement Date: 10/01/2018

Massachusetts

Economic Nexus Threshold: Out-of-state internet vendors that have certain software or hardware in MA and who make sales of TPP or services in MA in excess of \$500,000; AND who make such sales for delivery in MA in at least 100 transactions in the preceding calendar year have nexus in MA (i.e., "cookie" nexus)

Legal Effective Date: 10/1/2017

Administrative Enforcement Date: 10/1/2017

Michigan

Economic Nexus Threshold: Gross revenue from MI sales of \$100,000 for the previous calendar year OR enters into 200 or more separate transactions for the previous calendar year in the state.

Legal Effective Date: 10/1/2018

Administrative Enforcement Date: 10/1/2018

Minnesota

Economic Nexus Threshold: 10 or more retail sales totaling \$100,000 from outside MN to destinations within MN for a period of 12 consecutive months, or 100 or more retail sales from outside MN to destinations within MN for a period of 12 consecutive months; AND engages in any of the activities that demonstrate the regular or systematic solicitation of sales under Minnesota law

Legal Effective Date: 6/21/2018

Administrative Enforcement Date: 10/1/2018

Mississippi

Economic Nexus Threshold: \$250,000 in MS sales for prior 12 months AND remote seller must engage in other MS activities such as advertising, direct mail marketing, e-mailing, texts, telephone solicitation, etc.

Legal Effective Date: 12/1/2017

Administrative Enforcement Date: 9/1/2018

Nebraska

Economic Nexus Threshold: Gross revenue from Nebraska sales of more than \$100,000 OR 200 or more separate transactions for the previous or current calendar year in the state.

Legal Effective Date: 1/1/2019

Administrative Enforcement Date: 1/1/2019

Nevada

Economic Nexus Threshold: As broadly as permitted under the US Constitution (to be approved by NV's Legislative Commission - gross revenue of retail sales into NV in the prior or current year is greater than \$100,000 or the business conducts 200 or more retail sales into the state).

Legal Effective Date: 6/16/11

Administrative Enforcement Date: 10/1/2018

New Jersey

Economic Nexus Threshold: Seller's gross revenue from delivery of TPP, specified digital product, or services into NJ in the calendar year exceeds \$100,000, OR 200 separate transactions.

Legal Effective Date: 11/1/2018

Administrative Enforcement Date: 11/1/2018

New York

Economic Nexus Threshold: In the immediately preceding four quarters, the cumulative total of gross receipts from sales of tangible personal property delivered into NY exceeds \$300,000, and more than 100 sales of property delivered into NY.

Legal Effective Date: 1/1/2009

Administrative Enforcement Date: 01/01/2019

North Carolina

Economic Nexus Threshold: Gross revenue from NC sales in excess of \$100,000 sourced to NC, OR 200 or more separate transactions sourced to NC in the previous or current calendar year.

Legal Effective Date: 11/1/18

Administrative Enforcement Date: 11/1/18

North Dakota

Economic Nexus Threshold: \$100,000 in ND sales in current or prior calendar year, OR 200 separate sales transactions in current or prior calendar year

Legal Effective Date: 6/21/2018

Administrative Enforcement Date: 10/1/2018

Ohio

Economic Nexus Threshold: Use in-state software to sell or lease TPP or services in excess of \$500,000 in the current or prior calendar year, or enter into an agreement with a person to provide a content distribution network and make sales in excess of \$500,000 in current or prior calendar year

Legal Effective Date: 1/1/2018

Administrative Enforcement Date: 1/1/2018

Oklahoma

Economic Nexus Threshold: "Remote seller," "marketplace facilitator" or "referrer has \$10,000 in OK sales in prior 12-month period

Legal Effective Date: 4/10/2018 (election to register and collect or comply with use tax notice and reporting must be made by 7/1/2018)

Administrative Enforcement Date: 7/1/2018

Pennsylvania

Economic Nexus Threshold: \$10,000 of sales of TPP delivered to PA in prior 12 months. Effective July 1, 2019, remote sellers and marketplace facilitators will be required to collect and remit tax if their total Pennsylvania gross sales exceed \$100,000 in the preceding 12 calendar months. A remote seller's gross sales include their direct sales and sales made through a facilitator that does not collect sales tax on its behalf. A marketplace facilitator's gross sales include both facilitated and direct sales. Note that if the \$100,000 threshold is not met, and the seller made \$10,000 or more in taxable sales in the previous 12 months, the seller must still elect to either (1) collect tax or (2) provide notice to buyers and report to the state

Legal Effective Date: 4/1/2018 (delayed until 7/1/2019 for remote sellers of digital products)

Administrative Enforcement Date: 4/1/2018, 7/1/2019

Rhode Island

Economic Nexus Threshold: \$100,000 in RI sales in the prior calendar year, OR 200 separate sales transactions in the prior calendar year

Legal Effective Date: 8/17/2017

Administrative Enforcement Date: 8/17/2017

South Carolina

Economic Nexus Threshold: \$100,000 in gross revenue from the sale of tangible personal property, products transferred electronically, and services delivered into South Carolina in the previous or current calendar year.

Legal Effective Date: 11/1/2018

Administrative Enforcement Date: 11/1/2018

South Dakota

Economic Nexus Threshold: \$100,000 in SD sales in current or prior calendar year, OR 200 separate sales transactions in current or prior calendar year

Legal Effective Date: 11/1/2018

Administrative Enforcement Date: 11/1/2018

Tennessee

Economic Nexus Threshold: Remote seller engaged in regular and systematic solicitation in TN and sales in prior 12 months exceeded \$500,000

Legal Effective Date: 1/1/2017 (remote seller must register by 3/1/2017 and begin collecting 7/1/2017)

Administrative Enforcement Date: Enforcement stayed during pendency of in-state litigation.

Texas

Economic Nexus Threshold: If during the preceding 12 calendar months, a remote seller's annual gross revenue, including taxable, nontaxable and tax-exempt sales of tangible personal property and services for storage, use or other consumption in the state exceed Texas's economic nexus threshold of \$500,000 will be required to collect and remit sales tax.

Legal Effective Date: 1/1/2019

Administrative Enforcement Date: 10/1/2019

Utah

Economic Nexus Threshold: In the previous or current calendar year, \$100,000 in gross revenue into UT from the sale of TPP, any product transferred electronically, or services; OR 200 or more separate transactions of such sales

Legal Effective Date: 1/1/2019

Administrative Enforcement Date: 1/1/2019

Vermont

Economic Nexus Threshold: During any 12-month period remote seller has \$100,000 of VT sales, OR 200 separate sales transactions in VT and engages in regular, systematic, or seasonal solicitation

Legal Effective Date: 7/1/2018

Administrative Enforcement Date: 7/1/2018

Washington

Economic Nexus Threshold: In the current or previous year, more than \$100,000 in annual gross retail sales to Washington consumers OR, more than 200 annual transactions with Washington consumers.

Legal Effective Date: 1/1/2018

Administrative Enforcement Date: 10/1/2018

Washington D.C.

Economic Nexus Threshold: If during the preceding or current calendar year, the seller's annual gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered in the District of Columbia exceeds \$100,000 or the seller sold tangible personal property, any product transferred electronically, or services for delivery in the District of Columbia in 200 or more separate transactions in a 12-month period.

Legal Effective Date: 1/1/2019

Administrative Enforcement Date: 4/1/2019

West Virginia

Economic Nexus Threshold: Vendors who deliver more than \$100,000 of goods or services into West Virginia or engages in 200 or more separate transactions for the delivery of goods and services into West Virginia, during calendar year 2018.

Legal Effective Date: 1/1/2019

Administrative Enforcement Date: 1/1/2019

Wisconsin

Economic Nexus Threshold: \$100,000 in WI annual sales, OR 200 separate annual sales transactions

Legal Effective Date: Since at least 4/18/2018

Administrative Enforcement Date: 10/1/2018

Wyoming

Economic Nexus Threshold: \$100,000 in WY sales in current or prior calendar year, OR 200 separate sales transactions in current or prior calendar year

Legal Effective Date: 7/1/2017

Administrative Enforcement Date: 2/1/2019

This information is current as of February 8, 2019.

*This chart assumes the remote seller will collect/remit sales tax, rather than elect to comply with notice/reporting requirements, if that is an option.

**Legal effective date is the date the statute or regulation indicates the remote seller rules are effective.

***Some states are seeking to apply economic nexus only for periods on/after the Wayfair decision.

****Guidance relied upon may include informal announcements by the state or a state representative.