

# How the Wayfair Decision is Transforming Nationwide Nexus Rules

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# Summary of Topics

## Section 1

*Wayfair*  
Analysis and  
Fallout

## Section 2

Compliance  
Discussion  
and  
Suggestions

## Section 3

New  
Marketplace  
Provider  
Rules

## Section 4

Impact of  
*Wayfair* on  
Other Taxes

# Section 1

## *Wayfair Analysis and Fallout*

# Types of Taxes



Income



Gross Receipts / Franchise



Sales

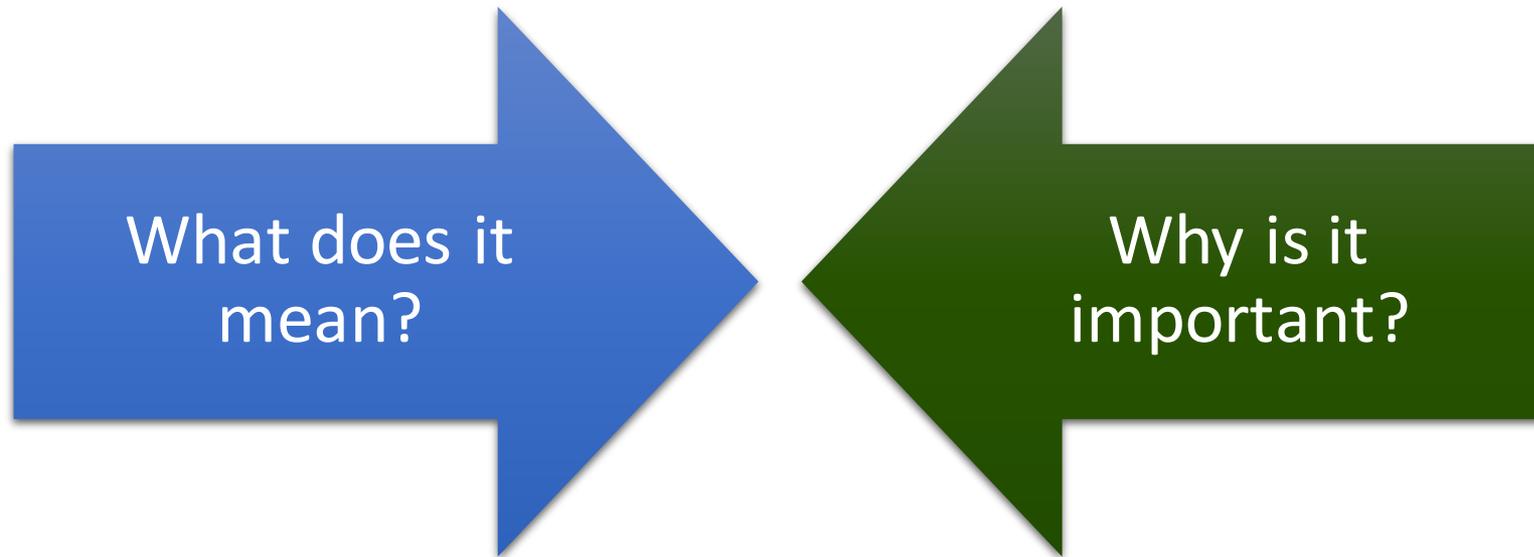


Others



# Nexus

## *The All-Important Term*



## Nexus: Changing Standards

- For many years, Supreme Court jurisprudence recognized a physical presence standard for sales and use tax nexus purposes.
- This led states to seek creative ways to find physical presence (the “Amazon tax;” affiliate nexus, etc.)
- In *South Dakota v. Wayfair (2018)*, the Supreme Court permitted the possibility that economic presence could create sales and use tax nexus.
  - South Dakota Law:
  - \$100K in sales of goods or services to SD or;
  - 200 or more separate transactions.

## Nexus: Why the Change in Wayfair?

- In 1992, *when the last nexus case was decided*, less than 2% of Americans had Internet access – today, 89% of Americans have Internet.
- In 1992, mail-order sales in the US totaled \$180 billion.
- In 2017, **e-commerce retail sales alone were about \$453.5 billion!**
- Since the Dept of Commerce first began tracking e-commerce sales, those sales have increased tenfold from 0.8% to 8.9% of total retail sales in the US – percentage is expected to continue increasing.

## *Nexus: Why the Change in Wayfair?*

- In 1992, it was estimated that the states were losing between \$694 million-\$3 billion annually in sales tax revenues as a result of the physical presence rule. It was more recently estimated that the physical presence standard caused the states to lose between \$8-\$33 billion every year.
- *Wayfair*: “the Court could not have envisioned a world where the world’s largest retailer would be a remote seller.”
- The sheer numbers and statistics show how the Internet has changed the dynamics of the national economy – those numbers will continue increasing, while states continue to lose revenue.

# Nexus: The Wayfair Checklist

- The Court provided a checklist of factors present in South Dakota's law that strongly suggested why it would be constitutional under the new standard:
  - Safe harbor: Exclude "those who transact only limited business" in the state. (South Dakota's is \$100,000 in sales or 200 transactions.)
  - No retroactive collection.
  - Single state-level administration of all sales taxes in the state.
  - Uniform definitions of products and services (South Dakota is a full member of Streamlined Sales and Use Tax Agreement (SSUTA)).
  - Simplified tax rate structure. (South Dakota requires the same tax base between state and local sales tax, has only three sales tax rates, and limited exemptions from the tax.)
  - Software: access to sales tax administration software provided by the state.
  - Immunity: sellers who use the software are not liable for errors derived from relying on it.
- Would other state laws satisfy these requirements? Some almost certainly would not!

# States Jump on the Bandwagon!

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Alabama	10/1/2018	\$250,000 in-state sales and seller conducts one of the listed activities
Arizona	10/1/2019	\$200,000 in-state sales for 2019, \$150,000 for 2020, and \$100,000 for 2021 and thereafter
Arkansas	7/1/2019	\$100,000 in-state sales or 200 transactions
California	4/1/2019	\$500,000 in-state sales
Colorado	6/1/2019	\$100,000 in-state sales
Connecticut	12/1/2018 7/1/2019 for \$100K	\$250,000 in-state sales and 200 transactions until 6/30/2019 \$100,000 in-state sales and 200 transactions as of 7/1/2019
District of Columbia	1/1/2019	\$100,000 in-state sales or 200 transactions
Florida	Proposed	\$100,000 in-state sales or 200 transactions
Georgia	1/1/2019 1/1/2020 for \$100K	\$250,000 in-state sales or 200 transactions until 12/31/2019 \$100,000 in-state sales and 200 transactions as of 1/1/2020
Hawaii	7/1/2018	\$100,000 in-state sales or 200 transactions
Idaho	7/1/2018 for referrals 6/1/2019 for \$100k	\$10,000 in-state sales (result of referrals) OR \$100,000 in-state sales
Illinois	10/1/2018	\$100,000 in-state sales or 200 transactions
Indiana	10/1/2018	\$100,000 in-state sales or 200 transactions
Iowa	1/1/2019 7/1/2019 for just \$100K	\$100,000 in-state sales or 200 transactions until 6/30/2019 \$100,000 in-state sales as of 7/1/2019
Kansas	10/1/2019	No threshold but proposed \$100,000 in-state sales
Kentucky	10/1/2018	\$100,000 in-state sales or 200 transactions
Louisiana	7/1/2019 Enforced: no later than 7/1/2020	\$100,000 in-state sales or 200 transactions

# States Jump on the Bandwagon!

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Maine	7/1/2018	\$100,000 in-state sales or 200 transactions
Maryland	10/1/2018	\$100,000 in-state sales or 200 transactions
Massachusetts	10/1/2017 10/1/2019 for \$100K	\$500,000 in-state sales and 100 transactions until 9/30/2019 \$100,000 in-state sales as of 10/1/2019
Michigan	10/1/2018	\$100,000 in-state sales or 200 transactions
Minnesota	10/1/2018 10/1/2019 for \$100K	10 or more retail sales totaling more than \$100,000 or 100 transactions until 9/30/2019 \$100,000 in-state sales or 200 transactions as of 10/1/2019
Mississippi	9/1/2018	\$250,000 in-state sales
Missouri	Proposed	\$100,000 in-state sales or 200 transactions
Nebraska	1/1/2019	\$100,000 in-state sales or 200 transactions
Nevada	10/1/2018	\$100,000 in-state sales or 200 transactions
New Jersey	11/1/2018	\$100,000 in-state sales or 200 transactions
New Mexico	7/1/2019	\$100,000 in-state sales
New York	6/21/2018	\$500,000 in-state sales and 100 transactions
North Carolina	11/1/2018	\$100,000 in-state sales or 200 transactions
North Dakota	10/1/2018 1/1/2019 for \$100K	\$100,000 in-state sales or 200 transactions until 12/31/2018 \$100,000 in-state sales as of 1/1/2019
Ohio	1/1/2018 8/1/2019 for \$100K	\$500,000 in-state sales and uses in-state software to promote sales, or \$500,000 in-state sales and enters into an agreement to provide content distribution to enhance delivery until 7/31/2019 \$100,000 in-state sales or 200 transactions as of 8/1/2019

# States Jump on the Bandwagon!

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Oklahoma	7/1/2018 11/1/2019 for \$100K	\$10,000 in-state sales (register or report) until 10/31/2019 \$100,000 in-state sales (register and collect) can no longer provide notice and report as of 11/1/2019
Pennsylvania	4/1/2018 for \$10k 7/1/2019 for \$100k	\$10,000 in-state sales (register or report) until 6/30/2019 \$100,000 in-state sales (register and collect) can no longer provide notice and report as 7/1/2019
Rhode Island	8/17/2017	\$100,000 in-state sales or 200 transactions and can no longer provide notice and report as of 7/1/2019
South Carolina	11/1/2018	\$100,000 in-state sales
South Dakota	11/1/2018	\$100,000 in-state sales or 200 transactions
Tennessee	7/1/2019	\$500,000 in-state sales
Texas	1/1/2019 Enforced: 10/1/2019	\$500,000 in-state sales
Utah	1/1/2019	\$100,000 in-state sales or 200 transactions
Vermont	7/1/2018	\$100,000 in-state sales or 200 transactions
Virginia	7/1/2019	\$100,000 in-state sales or 200 transactions
Washington	10/1/2018 3/14/2019 for \$100K	\$100,000 in-state sales or 200 transactions until 3/13/2019 \$100,000 in-state sales as of 3/14/2019
West Virginia	1/1/2019	\$100,000 in-state sales or 200 transactions
Wisconsin	10/1/2018	\$100,000 in-state sales or 200 transactions
Wyoming	2/1/2019	\$100,000 in-state sales or 200 transactions



## *New York Provisions*

Tax Law §§1101(b)(8)(i)(E) and 1101(b)(8)(iv)

Notice N-19-1

A Taxpayer with NO physical presence is presumed to be soliciting business if it has:

THRESHOLD:

- \$500,000 in-state sales of tangible personal property
  - AND**
  - 100 transactions, for immediately preceding four quarters ending February, May, August and November
- Exception – demonstrates to satisfaction of Commissioner that it cannot reasonably be expected to have \$500,000 OR 100 transactions in the next four quarters ending February, May, August and November.
  - The \$500,000 threshold was raised from \$300,000 with the passage of Senate Bill S6615 and applies retroactively

But the devil is in the details and several questions arise regarding how New York, and the other states, will apply these economic presence laws.

# What's the Measurement Period?

<u>State</u>	<u>The Measurement Period</u>
Alabama	Previous calendar year
Arizona	Previous or current calendar year
Arkansas	Previous or current calendar year
California	Previous or current calendar year
Colorado	Previous or current calendar year
Connecticut	The twelve-month period ended on the September thirtieth immediately preceding the monthly or quarterly period with respect to which such person's liability for tax
District of Columbia	Previous or current calendar year
Florida	Proposed: Previous calendar year
Georgia	Previous or current calendar year
Hawaii	Current or immediately preceding calendar year
Idaho	Immediately preceding 12 months
Illinois	Determined on a quarterly basis, ending on the last day of March, June, September, and December, whether either threshold was met in the preceding 12-month period.
Indiana	Previous or current calendar year
Iowa	Immediately preceding or current calendar year
Kansas	N/A
Kentucky	Previous or current calendar year
Louisiana	Previous or current calendar year
Maine	Previous or current calendar year
Maryland	Previous or current calendar year

# What's the Measurement Period?

<u>State</u>	<u>The Measurement Period</u>
Massachusetts	<p>100K: For the period beginning October 1, 2019 through December 31, 2019, the preceding 12 months, October 1, 2018 to September 30, 2019. For 2020 onward, the preceding calendar year but if the remote retailer passed \$100,000 in sales after November 1 of the prior year, the requirement is for the period beginning as of the first day of the first month beginning two months after the month in which the \$100,000 threshold is exceeded.</p> <p>Cookie: After 2018, the preceding calendar year. For the period beginning October 1, 2017 through December 31, 2017, during the preceding 12 months, October 1, 2016 to September 30, 2017.</p>
Michigan	Previous calendar year
Minnesota	Prior 12 month period, calculated as of August 2017
Mississippi	Prior 12 month period
Missouri	<p>SB 50 – previous or current calendar year</p> <p>HB 701: Preceding calendar year</p> <p>SB 805 – any 12 month period, following the close of the quarter</p>
Nebraska	Previous or current calendar year
Nevada	Previous or current calendar year
New Jersey	Current or prior calendar year
New Mexico	Previous calendar year
New York	Immediately preceding four sales tax quarters - The sales tax quarters are: March 1 through May 31, June 1 through August 31, September 1 through November 30, and December 1 through February 28/29

# What's the Measurement Period?

<u>State</u>	<u>The Measurement Period</u>
North Carolina	Previous or current calendar year
North Dakota	Previous or current calendar year
Ohio	Previous or current calendar year
Oklahoma	Preceding calendar year
Pennsylvania	Preceding calendar year
Rhode Island	Preceding calendar year
South Carolina	Prior or current calendar year
South Dakota	Prior or current calendar year
Tennessee	Prior 12 month period
Texas	Preceding 12 calendar months. Initial period will be 7/1/2018 -6/30/2019
Utah	Prior or current calendar year
Vermont	Any 12-month period preceding the monthly period with respect to which that person's liability for tax under this chapter is determined
Virginia	Prior or current calendar year
Washington	Prior or current calendar year
West Virginia	Prior or current calendar year.
Wisconsin	Previous or current calendar year
Wyoming	Prior or current calendar year

# How Do You Measure Sales?

<u>State</u>	<u>Sales Measured</u>	<u>Transactions Measured</u>
Alabama	Retail sales of tangible personal property, including taxable and non-taxable sales, but excluding wholesale sales, sales for resale, and sales made through a marketplace facilitator that is collecting tax on behalf of the seller.	N/A
Arizona	Gross proceeds of sales or gross income, including gross receipts from the sale of tangible personal property or service, or both, excluding sales made through a marketplace facilitator.	N/A
Arkansas	Sale of tangible personal property, taxable services, a digital code, or specified digital products for delivery into Arkansas, excluding tax exempt goods and services and sales made through a marketplace facilitator.	Not defined, but excluding sales made through a marketplace facilitator.
California	Sales of tangible personal property in the state or for delivery in the state, including by sales by affiliates/subsidiaries and nontaxable sales such as sale for resale, as well as sales made through a marketplace facilitator.	N/A
Colorado	Sales of tangible personal property, commodities or services in the state, excluding sales made through a marketplace facilitator.	N/A
Connecticut	Sales price from retail sales of tangible personal property and taxable services, including sales made through a marketplace facilitator	Not defined, but including sales made through a marketplace facilitator
District of Columbia	Gross receipts from retail sales of tangible personal property, taxable services and digital goods, including sales made through a marketplace facilitator.	The sale in any quantity or quantities of any tangible personal property or servi
Florida	Proposed: Retail sales of tangible personal property.	Not defined
Georgia	Gross revenue from retail sales of tangible personal products delivered into the state electronically or physically, excluding sales for resale.	Not defined
Hawaii	Gross income or gross proceeds from sale of tangible personal property in the state, services used or consumed in the State, or intangible property used in the State.  If a marketplace seller and the marketplace facilitator have economic nexus, then it is the gross income or gross proceeds from: sales of tangible personal property made directly into the State (not through a marketplace facilitator); sales of tangible personal property made through any marketplace facilitator if the marketplace seller sends the property into the State, either directly to the purchaser or to a marketplace facilitator for resale; and sales of intangible property and services that were made into the State, regardless of whether the sale was made through a marketplace facilitator, if the intangible property or services are ultimately used or consumed in the State.	Not defined

# How Do You Measure Sales?

<u>State</u>	<u>Sales Measured</u>	<u>Transactions Measured</u>
Idaho	\$10,000 -Total sales to Idaho buyers through referral agreements.  \$100,000 - Cumulative gross receipts from sales of tangible personal property delivered into Idaho.	N/A
Illinois	Sales of tangible personal property in the state, including exempt sales, but excluding sales for resale, occasional sales, sales not subject to Retailers' Occupation Tax, and sales of tangible personal property that is required to be registered with an agency of the state that are made from locations outside Illinois to Illinois purchasers. As of 1/1/2021 it will not include sales made through a marketplace facilitator.	Transactions that are documented on separate invoices, regardless of the manner in which the tangible personal property is delivered to the purchaser. As of 1/1/2021 it will not include sales made through a marketplace facilitator.
Indiana	Gross revenue from any combination of: the sale of tangible personal property delivered into Indiana; a product transferred electronically into Indiana; or a service delivered in Indiana. Except where the marketplace facilitator has not met the thresholds, the sales of the seller made through the marketplace are not counted toward the seller.	Not defined but where the marketplace facilitator has not met the thresholds, the transactions of the seller made through the marketplace are counted toward the seller.
Iowa	All retail sales of tangible personal property, services, or specified digital products sold into Iowa or for delivery into Iowa, including taxable and exempt sales and sales made by a remote seller by any means, including sales made through a marketplace.	N/A
Kansas	N/A	N/A
Kentucky	Gross receipts derived from the sale of tangible personal property or digital property delivered or transferred electronically to a purchaser in the state, including sales made through a marketplace facilitator.	Not defined, but including sales made through a marketplace facilitator.
Louisiana	Gross revenue of sales of tangible personal property, products transferred electronically, or services delivered into the state, including exempt sales.	Not defined
Maine	Gross revenue from sales of tangible personal property or taxable services delivered in or into the state, including sales exempt from tax.	Each invoice generated from a Maine sale is considered a separate transaction.
Maryland	Gross revenue from the sale of tangible personal property or taxable services delivered in the state, including tax-exempt transactions and Maryland tax-exempt revenue, e.g. sales for resale, sales to tax exempt entities, and sales of exempt items, as well as sales made through a marketplace facilitator.	Not defined, but including sales made through a marketplace facilitator.

# How Do You Measure Sales?

<u>State</u>	<u>Sales Measured</u>	<u>Transactions Measured</u>
Massachusetts	Cookie: Transactions completed over the Internet and made sales resulting in a delivery into Massachusetts. 100k or 200: Gross revenue from all sales of tangible personal property or services delivered into the state, including sales exempt from tax, but excluding sales made through a marketplace facilitator.	Not defined, but including sales made through a marketplace facilitator.
Michigan	Sales of tangible personal products or services, including taxable and non-taxable and exempt, as well as sales made through a marketplace facilitator.	N/A
Minnesota	Retail taxable and non-taxable sales of tangible personal property and services, including exempt sales and sales made through any marketplace, the seller's own website, and through other sources, but excluding sales for resale.	Not defined, but including sales made through a marketplace facilitator
Mississippi	Sales into the state, including wholesales and those taxable under sales and use statutes.	A retail sale is one sales transaction. One sale into the state may contain 10 items for one customer but that transaction counts as one retail sale.
Missouri	SB 50 - gross revenue from delivery of tangible personal property into the state HB 701 - gross receipts from the sale of tangible personal property SB 805 - cumulative gross receipts from the vendor's sales of tangible personal property to purchasers for the purpose of storage, use, or consumption in this state	N/A
Nebraska	Total retail sales of property, excluding sales from resale, sublease, or subrent, but including sales made through a marketplace facilitator	Not defined
Nevada	Gross revenue from retail sale of tangible personal property.	Not defined
New Jersey	Gross revenue from sales of tangible personal property, specified digital products, or taxable services, including nontaxable retail sales and sales made through a marketplace facilitator, but excluding sales for resale.	Not defined, but including sales made through a marketplace facilitator.
New Mexico	Taxable gross receipts from sales, leases and licenses of tangible personal property, sales of licenses and sales of services and licenses for use of real property sourced to the state.	N/A
New York	The amount received for all sales of tangible personal property delivered into New York, whether taxable or exempt, without any deductions for expenses, and including sales made through a marketplace facilitator.	Each invoice, sales slip, contract, or other memorandum of sale issued for the sale of tangible personal property delivered into New York State, whether taxable or exempt, including sales for resale and sales made through a marketplace facilitator.

# How Do You Measure Sales?

<u>State</u>	<u>Sales Measured</u>	<u>Transactions Measured</u>
North Carolina	Total of the sales price of all sales of tangible personal property, digital property, and services sourced to NC including taxable sales, sales for resale, exempt sales, nontaxable sales, and marketplace-facilitated sales.	Not defined but including sales made through a marketplace facilitator.
North Dakota	Gross sales of tangible personal property and other taxable items delivered in the state.	N/A
Ohio	Gross receipts from the sale of tangible personal property for storage, use, or consumption in this state or from providing services the benefit of which is realized in this state.	Not defined
Oklahoma	Aggregate sales of tangible personal property, excluding sales made through a marketplace facilitator where the marketplace facilitator collects the tax.	N/A
Pennsylvania	All sales, leases and deliveries of tangible personal property, and sales of services, excluding sales made through a marketplace facilitator who collects tax on its behalf.	N/A
Rhode Island	Gross revenue from the sale of tangible personal property, prewritten computer software delivered electronically or by load and leave, vendor-hosted prewritten computer software, and/or taxable services.	Not defined
South Carolina	Total gross revenue from all sales of tangible personal property delivered into South Carolina, including all taxable retail sales, exempt retail sales, and wholesale sales of tangible personal property; the total gross revenue from all sales of products transferred electronically and services delivered into South Carolina, whether or not the transfer of such product is subject to the South Carolina sales and use tax, including sales made through a marketplace facilitator	N/A
South Dakota	Gross revenue from the sale, rental or lease of tangible personal property, any product transferred electronically, or services delivered into the state.	Not defined
Tennessee	Gross retail sales of products and services, including taxable and exempt sales, but excluding sales for resale.	N/A
Texas	Gross revenue from the sale of tangible personal property and services for storage, use, or other consumption in this state, including taxable, nontaxable, sales for resale and exempt sales, but excluding sales through a marketplace facilitator if it collected the tax.	N/A
Utah	Gross revenue from the sale of tangible personal property, any product transferred electronically, or services for storage, use, or consumption in the state	Not defined

# How Do You Measure Sales?

<u>State</u>	<u>Sales Measured</u>	<u>Transactions Measured</u>
Vermont	All sales of tangible personal property products transferred electronically into the state including taxable and nontaxable sales and sales made through a marketplace facilitator.	A sale transaction that is documented on a unique invoice, regardless of the manner in which the tangible personal property is delivered to the purchaser, and includes sales made through a marketplace facilitator
Virginia	Gross revenue from retail sales of taxable tangible personal property or taxable services in the state, excluding sales made through a marketplace facilitator, but sales made by commonly controlled persons shall be aggregated.	Not defined but excludes sales made through a marketplace facilitator
Washington	Cumulative gross receipts of all gross income sourced to the state, including exempt sales and sales made through a marketplace facilitator.	N/A
West Virginia	Gross revenue from sale or lease of tangible personal property, custom software or a taxable service, including both taxable and non-taxable transactions.	Total transactions with West Virginia destinations regardless of whether the transaction is subject to or exempt from sales and use tax.
Wisconsin	Gross sales including taxable and nontaxable sales of tangible personal property and services, including sales made through a marketplace facilitator	Each invoice is considered a "separate sale transaction", and includes taxable and nontaxable sales, and those made through a marketplace facilitator. An invoice that has multiple products is considered one separate sale transaction. For leases and licenses, each required periodic payment is a separate sale transaction. A deposit made in advance of a sale is not a sale transaction.
Wyoming	Gross sales, which includes the total revenue in Wyoming including taxable, exempt and wholesale sales,	Each invoice is a transaction. If the sale involves a yearly subscription and the purchaser is able to make payments over time, this is one transaction.



## *Is Physical Presence Dead?*

- NO!!!!
- Economic presence only enters the analysis when the vendor has no physical presence in a state.
- For example, if a business has a salesperson who regularly enters state X, that business will have nexus in state X even if its sales are below state X's thresholds (e.g., sales into the state amount to only \$30K)

# Wayfair Updates

- Now that most states have some kind of threshold, small online sellers have been pressuring Congress to adopt uniform tax measures
- On March 3, the House Small Business Subcommittee on Economic Growth, Tax and Capital Access held a hearing regarding the issue
- Representatives from small online companies testified to the complexities and compliance costs
  - One rep. testified that the company spent \$200,000 to collect a little under \$84,000 in sales tax across 32 states.
- No current plan for federal intervention

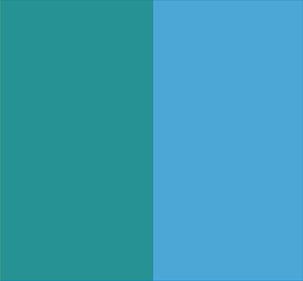
## Section 2

# *Compliance Discussion and Suggestions*



## *Relevant Compliance Questions*

- Start by analyzing your business operations and infrastructure:
  - Where does the business have physical presence?
  - Where does the business's revenue come from (create a revenue report by state/jurisdiction)?
  - Create a list of states/jurisdictions where the business either has physical presence or where revenue exceeds the applicable threshold.
  - Are the business's sales subject to tax in each state on the list?
  - How many states will the business be required to file in (where does it have taxable sales)?
  - What are the applicable filing frequencies/rules?
  - How many platforms is the business utilizing; i.e. Ebay, Amazon, Website, Brick & Mortar?
  - Can the business's system integrate into a third-party software platform?
  - How much assistance does the business need on a monthly basis?
  - Does the business want its sales tax payable accounts reconciled?



## *Response to Wayfair?*

- What's a small business to do?
- Case study: \$40M Office Supply Co.
  - Collect in home state and nowhere else?
  - Collect in all states?
  - Collect in big states?
  - Wait it out?
- Case Study: \$100M Software Co
  - 50-state tax matrix!
  - Start date?
  - Tussling with states.....

## Wayfair Workarounds?

- The B&H “Payboo” Concept
  - When customers use the store issued “Payboo” card for B&H purchases that are made in their SuperStore or shipped to eligible states, B&H charges the customers sales tax, but then it instantly pays the customer back the sales tax in the form of a reward.





## *Special Industry Issues*

- State Sourcing Rules: Where is the “Sale”?
  - “Destination”-based sourcing is the norm.
  - For sales of tangible personal property, the place where the *delivery of possession* occurs controls where the transaction is taxed.
  - Contractual terms (where title and/or risk of loss pass, F.O.B. point, etc.) generally *do not* control.
  - When shipping is involved, relinquishing property to a carrier for shipment out-of-state is generally deemed a delivery out-of-state—regardless of who (vendor or customer) arranges shipping.



## *Special Industry Issues*

- Streamlined Sales and Use Tax Agreement (SSUTA) Sourcing Rule
  - For sales of tangible personal property:
    - If product received at seller's business location: Sale occurs at business location.
    - If product is not received at seller's business location: Sale occurs where "receipt by the purchaser (or the purchaser's done...) occurs, including the location indicated by instructions for delivery...known to the seller."
  - What if an out-of-state purchaser hires a carrier to pick-up the product?
    - Per SSUTA interpretation: receipt/delivery is still out-of-state for sourcing purposes.

## Special Industry Issues

- *New York's Sourcing Rules:*
  - The sales tax is a “**destination tax**”, meaning that “the point of delivery or point at which possession is transferred by the vendor to the purchaser or the purchaser’s designee controls both the incidence and the tax rate.” (20 NYCRR § 525.2[a][3])
  - Where title passes is irrelevant. (See 20 NYCRR § 526.7[e][2]).
  - Rulings on Shipping: If the *vendor* arranges and pays for shipping out of state via interstate carrier (“contract” or “common”), delivery is out of state. **BUT**, if the *customer* arranges for shipping, the place of delivery depends on whether the customer hired a “common” or “contract” carrier. If a “contract” carrier, delivery is deemed to occur in “NY” – to the customer’s “agent or designee.” (See *Chizek & Co. LLC*, TSB-A-08(53)S).



## *Special Industry Issues*

- COMPARE: California's Rule
  - Exempt out-of-state sale includes “sale of tangible personal property which, pursuant to the contract of sale, is required to be shipped and is shipped to a point outside this state by the retailer by means of: (a) facilities operated by the retailer, or (b) delivery by the retailer to a carrier, customs broker or forwarding agent, whether hired by the purchaser or not, for shipment to such out-of-state point.”
  - Definition of “Carrier” includes both common and contract carriers.

## Special Industry Issues

- **Wayfair and the Art Industry**

- *Wayfair* thresholds. A single sale can trigger nexus and filing obligations in a state.
- Sourcing of Sales
  - NY galleries/art dealers already grappled with the “contract” carrier issue, pre-*Wayfair*.
  - Audits, and even criminal charges based on NY enforcement of sourcing rules.
  - NY’s position: all art shippers are “contract carriers”.
  - Problem scenario: CA purchaser buys Picasso from NYC gallery and arranges art-shipper to pick up in NYC for CA delivery
    - NY position: Sale occurred in NY (delivered to purchaser’s “agent” in NY).
    - CA position: Sale occurred in CA (delivered when carrier delivers in CA).
  - Can both states assert tax on the sale? Constitutionally, yes.



# Special Industry Issues

## ● **Wayfair and the Wine Industry**

- Alcoholic beverage retailers have been grappling, even pre-*Wayfair*, with strict state restrictions on the ability to ship alcohol directly to consumers.
- Current work-arounds:
  - “Customer is solely responsible for shipping” (vendor may assist as agent in arranging carrier).
  - “All sales are transacted in [vendor state] and title and risk of loss pass to you in [vendor state].”
- *Wayfair* registration/collection obligations versus direct-shipping law compliance:
  - Sales tax sourcing based on delivery of possession, not contractual terms or title passage.
  - Registering and collecting taxes a state raises red flag for alcoholic beverage law enforcement.
- Solution?
  - Structuring a true “delivery” event in NY prior to any shipping arrangements
    - Simplifies multistate registration obligations under *Wayfair*: All sales “delivered” and taxable in NY.
    - Reduces risk of other state’s claim for tax on same sale.



- Special Covid-19 Nexus Issues

- Will nexus be created by work-at-home employees?

- States who have spoken have all said no

- District of Columbia
- Indiana
- Georgia
- Maryland
- Massachusetts
- Minnesota
- Mississippi
- New Jersey
- North Dakota
- Pennsylvania

- Follow this here:

<https://www.hodgsonruss.com/assets/htmldocuments/Telecommuting%20Issues%20chart%202%205.11.20.pdf>

# Section 3

## *New Marketplace Provider Rules*



## *Marketplace Provider Rules*

- Sales made on “platforms” like Amazon or eBay.
- Who has nexus?
  - Amazon clearly now does
  - What about other sellers on platform?
- New Marketplace Provider rules to switch up “tax collector”
  - Provider has to collect tax if seller does not

# State-by-State Marketplace Facilitator

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Alabama	Yes	1/1/2019	\$250,000 in-state sales (register or report)
Arizona	Yes	10/1/2019	\$100,000 in-state sales
Arkansas	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
California	Yes	10/1/2019	\$500,000 in state sales
Colorado	Yes	10/1/2019	\$100,000 in-state sales
Connecticut	Yes	12/1/2018	\$250,000 in-state sales
District of Columbia	Yes	4/1/2019	\$100,000 in-state sales or 200 transactions
Florida	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Georgia	Yes	4/1/2020	\$100,000 in-state sales
Hawaii	Yes	1/1/2020	\$100,000 in-state sales or 200 transactions
Idaho	Yes	6/1/2019	\$100,000 in-state sales
Illinois	Yes	1/1/2020	\$100,000 in-state sales or 200 transactions
Indiana	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Iowa	Yes	1/1/2019 7/1/2019 for \$100K	\$100,000 in-state sales or 200 transaction until 6/30/2019 \$100,000 in-state sales as of 7/1/2019
Kansas	Proposed	TBD	\$100,000 in-state sales
Kentucky	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Louisiana	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Maine	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions

# State-by-State Marketplace Facilitator

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Maryland	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions
Massachusetts	Yes	10/1/2017 10/1/2019 for \$100K	\$500,000 in-state sales and 100 transactions until 9/30/2019 \$100,000 in-state sales as of 10/1/2019
Michigan	Yes	1/1/2020	\$100,000 in-state sales or 200 transactions
Minnesota	Yes	10/1/2018	\$100,000 in-state sales or 200 transactions
Mississippi	Proposed	TBD	\$250,000 in-state sales
Missouri	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Nebraska	Yes	4/1/2019	\$100,000 in-state sales or 200 transactions
Nevada	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions
New Jersey	Yes	11/1/2018	None specifically, but \$100,000 in-state sales or 200 transactions generally applicable
New Mexico	Yes	7/1/2019	\$100,00 in-state sales
New York	Yes	6/1/2019	\$500,000 in-state sales or 100 transactions
North Carolina	Yes	2/1/2020	\$100,000 in-state sales or 200 transactions
North Dakota	Yes	10/1/2019	\$100,000 in-state sales

# State-by-State Marketplace Facilitator

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Ohio	Yes	8/1/2019	\$100,000 in-state sales or 200 transactions
Oklahoma	Yes	7/1/2018	\$10,000 in-state sales (register or report)
Pennsylvania	Yes	4/1/2018 for \$10k 7/1/2019 for \$100k	\$10,000 in-state sales (register or report) until 6/30/2019 \$100,000 in-state sales (register and collect) can no longer provide notice and report as 7/1/2019
Rhode Island	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
South Carolina	Yes	11/1/2018 (date being challenged) 4/26/2019 (by statute)	\$100,000 in-state sales
South Dakota	Yes	3/1/2019	\$100,000 in-state sales or 200 transactions
Tennessee	Yes	10/1/2020	\$500,000 in-state sales
Texas	Yes	10/1/2019	\$500,000 in-state sales
Utah	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions
Vermont	Yes	6/4/2019	\$100,000 in-state sales or 200 transactions
Virginia	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Washington	Yes	10/1/2018 3/14/2019 for \$100K	\$100,000 in-state sales or 200 transactions until 3/13/2019 \$100,000 in-state sales as of 3/14/2019
West Virginia	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Wisconsin	Yes	10/1/2018	\$100,000 in-state sales or 200 transactions
Wyoming	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions

# Section 4

## *Impact of Wayfair on Other Taxes*

## Income Tax Nexus

- Economic Nexus was a Thing long before Wayfair!
  - *Geoffrey, Inc.* (Supr. Ct. S.C. 1993)
    - *Quill* applies only to sales and use tax
    - Concludes that “minimal connection” and “substantial nexus” standards can be met without physical presence
- Many states jumped on the economic nexus bandwagon, at least for Geoffrey-type cases
- But not so much on the Wayfair Thresholds

- A lot of states have statutes that broadly asserted nexus over companies who were “doing business” in the state, or “deriving income from sources” in the state, and do not include any dollar thresholds.
- Before Wayfair, a bunch of states didn’t enforce these laws.
- Since Wayfair, a few states changed their laws to specifically adopt a "broad" economic nexus standard, or published a notice of their intent to enforce their pre-existing "broad" economic nexus standards in light of Wayfair. These states include:
  - Indiana
  - Kentucky
  - Minnesota
  - Utah
  - Virginia
  - Wisconsin



## Income Tax Economic Nexus

- States are also beginning to enact factor presence nexus or Wayfair-like dollar thresholds
- Factor presence nexus applied by MTC:
  - Property of \$50,000, or
  - Payroll of \$50,000, or
  - Sales of \$500,000, or
  - 25% of total property, total payroll, or sales

# State-by-State Income Tax Economic Nexus

<u>State</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Alabama	1/1/2015	MTC Factors
California	1/1/2011	MTC Factors (adjusted for inflation)
Colorado	1/1/2010	MTC Factors
Connecticut	1/1/2010	\$500,000 in annual gross receipts
Hawaii	12/31/2019	\$100,000 in gross receipts or at least 200 transactions
Massachusetts	1/1/2019	Presumption that the state corporate excise tax applies if in state sales exceed \$500,000 annually
Michigan	1/1/2012	\$350,000 in annual gross receipts
New York	1/1/2015	\$1,000,000 in annual gross receipts
Ohio (CAT)	1/1/2005	\$500,000 in annual gross receipts
Oregon	1/1/2020	\$750,000 in annual gross receipts
Pennsylvania	12/31/2019	\$500,000 threshold as a rebuttable presumption
Tennessee	1/1/2106	MTC Factors
Texas (franchise tax)	1/1/2020	\$500,000 in annual gross receipts
Washington (B&O)	6/1/10 - Service and other activities 9/1/15 - Wholesaling 7/1/17 - Retailing	\$250,000 in annual gross receipts (2010-2012) \$267,000 in annual gross receipts (2013-2016) \$285,000 in annual gross receipts (2017-2019) \$100,000 in annual gross receipts (2020-)

## *Ohio Commercial Activity Tax (CAT) Economic Nexus*

- A seller has sufficient contact with Ohio to trigger CAT if it has \$500,000 of taxable gross receipts that are situated to Ohio during the calendar year
- This tax was challenged in Crutchfield Corp. v. Testa, but the Ohio Supreme Court upheld the standard
- It was then challenged in Greenscapes Home and Garden Products Inc. v. Testa, the Tenth District Court of Appeals again upheld the standard finding that
  - The Taxpayer knew that products were destined for Ohio
  - The destination based sourcing regime is consistent with other states' rules and would not result in double taxation
  - The brightline dollar threshold is consistent with the commerce clause
  - The tax did not violate the due process clause

## *Public Law (P.L.) 86-272*

- In order to minimize the potential income tax burden of operating in numerous states, the federal government passed Public Law 86-272
  - This law can prevent a state from taxing businesses that operate within the state so long as the business satisfied certain strict requirements.





## *Public Law (P.L.) 86-272*

- Public Law 86-272 prevents states from imposing income taxes on businesses whose only activities in the state are restricted to the “mere solicitation” of sales of tangible personal property.
- So the law only applies to Net income taxes of sales of tangible personal property
- Sales of services and digital products are typically not covered
- But the rule is unaffected by *Wayfair*



## MTC Guidance

- An MTC committee approved draft guidance last month on how states can interpret P.L. 86-272
- The draft guidance would protect from state tax under P.L. 86-272:
  - Solely maintaining a website that sells products online. But interaction with a company's website would exceed protections.
  - Placing cookies on a computer to remember items in a shopping cart. But using cookies for other information-gathering purposes would not be protected.
- The draft guidance wouldn't protect regular telecommuting unless the employee's activities constitute solicitation of orders of tangible personal property, and states that states have the discretion to apply the act to foreign commerce.



## *Public Law (P.L.) 86-272*

- Traps with P.L. 86-272
  - A. Business can still be subject to minimum taxes or alternative base taxes
    - Ohio Commercial Activities Tax
    - Oregon Commercial Activities Tax
    - Texas Franchise Tax
    - Tennessee Franchise Tax
    - Washington Business & Occupations Tax
    - Kentucky Limited Liability Entity Tax
    - Alabama's "business privilege tax" (min. \$100, max. \$15,000)
    - California \$800 fixed minimum tax



## *Public Law (P.L.) 86-272*

- Traps with P.L. 86-272
  - A. Business can still be subject to minimum taxes or alternative base taxes (con't)
    - Vermont imposes a gross receipts tax on C-corporations
    - Georgia imposes an annual net-worth tax (\$10-\$5,000)
    - Massachusetts imposes an excise base tax
    - New Hampshire imposes a business enterprise tax.
    - New Jersey fixed dollar minimum (\$500 to \$2000)
    - Nevada Commerce Tax
    - North Carolina's "franchise tax"



## Questions and Comments?

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# Q&A

# Conclusion



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