

Wayfair and Sales Tax: What Do I Really Need to Know?



Diane Yetter

President, YETTER Tax & Sales Tax Institute

March 19, 2019



Learning Objectives

- Understand how the South Dakota v. Wayfair decision affects you
- Get updated on Economic and Marketplace Nexus activity across the states
- Learn about significant recent activity across the states regarding remote seller nexus
- Discover tax amnesty opportunities for remote sellers
- Understand what you need to do to determine if you need to register to collect and remit sales tax

Wayfair's Impact on FBA Sellers

Wayfair's Impact on FBA Sellers

- Key Takeaways
 - Physical presence is no longer a requirement but is still relevant
 - Economic threshold applies with norm - \$100,000 in sales/200 sales transactions
- What Wayfair Doesn't Impact:
 - Any physical presence in a state (employee, inventory, delivery, rentals, etc)
 - FBA sellers with inventory in a state – there's no threshold and this activity created nexus since date of inventory in a state
 - FBA sellers with inventory in a state also have income tax nexus

Wayfair's Impact on FBA Sellers (cont.)

In the wake of the Wayfair decision, some states have subpoenaed Amazon to provide the state Department of Revenue with lists of third party sellers who have inventory in-state.

- California
- Connecticut
- Massachusetts
- New York
- North Carolina
- Rhode Island
- South Carolina
- Wisconsin

Wayfair's Impact on FBA Sellers (cont)



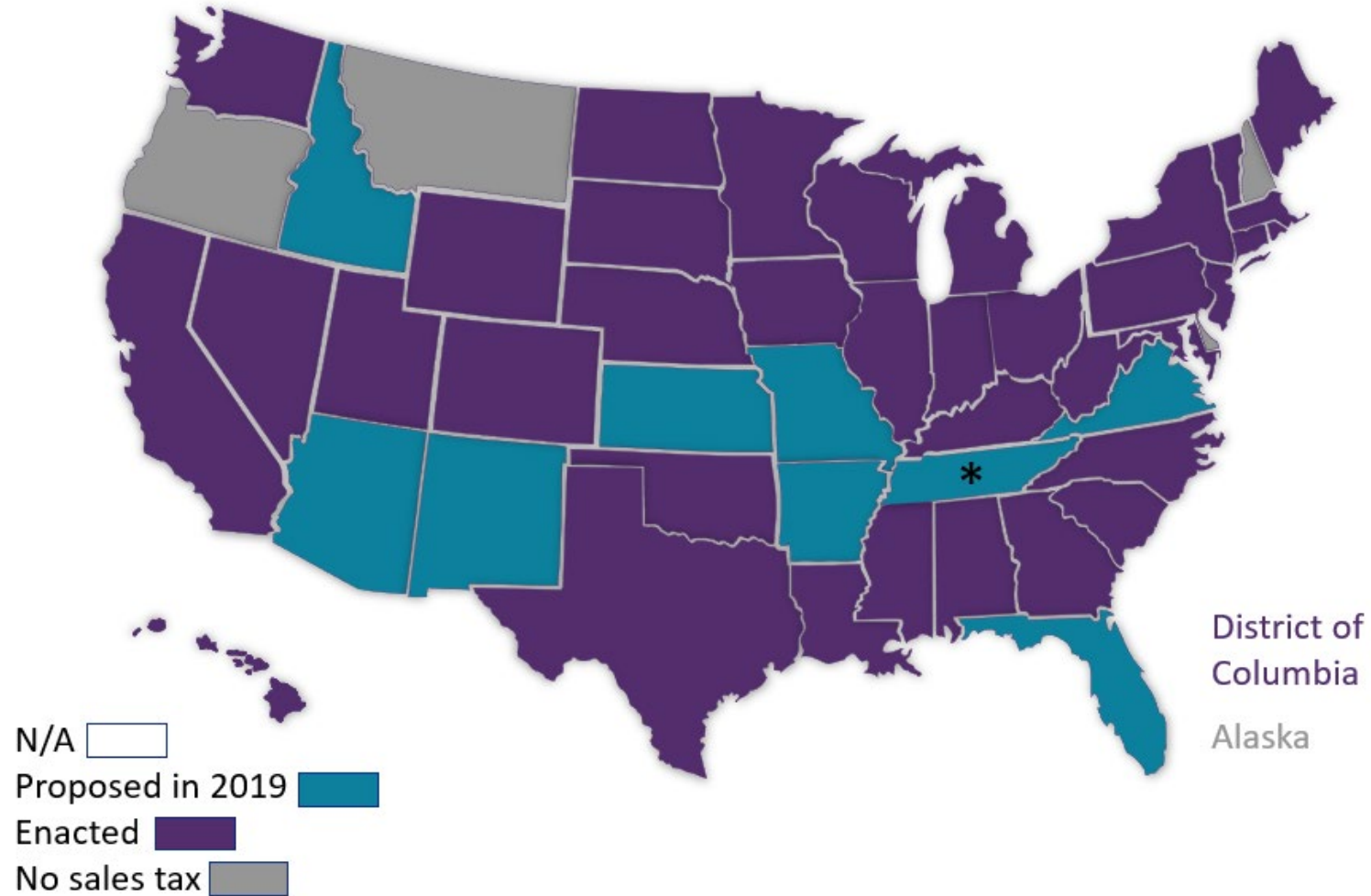
- States are using public information
 - Top 1000 internet sellers
 - Purchased Data
 - Web searching
 - Data Analytics

Economic Nexus

Economic Nexus

- Typical Attributes
 - Does not require physical presence
 - Correlates with a set level of sales or gross receipts activity

Economic Nexus: Enacted and Proposed Legislation



States with Economic Nexus - Thresholds



- Most states' threshold is \$100,000 or 200 transactions
- Most states are using TOTAL GROSS sales not TAXABLE sales
- Most states with economic and marketplace still calculate threshold including marketplace sales reported by the marketplace

States with Economic Nexus - Thresholds (cont.)

- Exceptions
 - Alabama - \$250,000
 - California – proposal to increase to \$500,000
 - Connecticut - \$250,000 AND 200 transactions
 - Georgia - \$250,000 or 200 transactions (proposal to reduce to \$100,000 or 200)
 - Massachusetts - \$500,000 and 100 transactions plus cookie
 - Minnesota - \$100,000 and 10 sales or 100 transactions
 - Mississippi - \$250,000
 - New York - \$300,000 and 100 transactions

States with Economic Nexus - Thresholds (cont.)

- Exceptions (cont.)
 - Oklahoma - \$10,000 (under notice reporting)
 - Ohio - \$500,000 plus cookie
 - Pennsylvania - \$100,000 (also \$10,000 notice reporting)
 - South Carolina - \$100,000
 - Tennessee - \$500,000 (proposal to reduce to \$100,000 or 200)
 - Texas - \$500,000
 - Washington – proposed legislation to eliminate transaction count test

States with Economic Nexus – When to Begin Collecting

- When does the seller need to begin collecting?
- For most states, it is the next transaction once you cross the threshold.
- Exceptions:
 - Illinois - The retailer shall determine on a quarterly basis whether they meet the criteria for the preceding 12-month period
 - Minnesota - On the first taxable retail sale into Minnesota that occurs no later than 60 days after you exceed the Small Seller Exception
 - Nevada - Must register by the first day of the calendar month that begins at least 30 calendar days after they hit the threshold.

States with Economic Nexus – When to Begin Collecting (cont.)

- Exceptions (cont.):
 - North Carolina - 60 days after you meet the threshold
 - North Dakota - 60 days after you meet the threshold
 - Oklahoma - On or before July 1, 2018, and on or before June 1 of each calendar year thereafter, beginning June 1, 2019
 - Pennsylvania - On or before June 1 of each calendar year for \$10,000 threshold

States with Economic Nexus – When to Begin Collecting (cont.)

- Exceptions (cont.):
 - South Carolina - The first day of the second calendar month after economic nexus is established
 - Tennessee - The first day of the third month following the month in which the dealer met the threshold
 - Texas - The first day of the fourth month after the month in which the seller exceeded the safe harbor threshold
 - Washington - The first day of the month that starts at least 30 days after you meet the threshold

States with Economic Nexus – Measurement Date

- What is the period for assessing the threshold?
- For most states, it is the previous or current calendar year.
- Exceptions:
 - Alabama – previous calendar year
 - Connecticut – the 12-month period ending on September 30 immediately preceding the monthly or quarterly period with respect to which such person’s liability for tax under this chapter is determined
 - Illinois - preceding 12-month period
 - Massachusetts - For each calendar year beginning with 2018, if during the preceding calendar year.

States with Economic Nexus – Measurement Date (cont.)

- Exceptions:
 - Michigan – previous calendar year
 - Minnesota - The 12-month period ending on the last day of the most recently completed calendar quarter
 - Mississippi - Prior twelve month period
 - Nebraska – current calendar year
 - New York - immediately preceding four sales tax quarters
 - Oklahoma - immediately preceding twelve-calendar-month period
 - Pennsylvania - in the previous 12-month period; Previous calendar year for 7/1/19 legislation

States with Economic Nexus – Measurement Date (cont.)

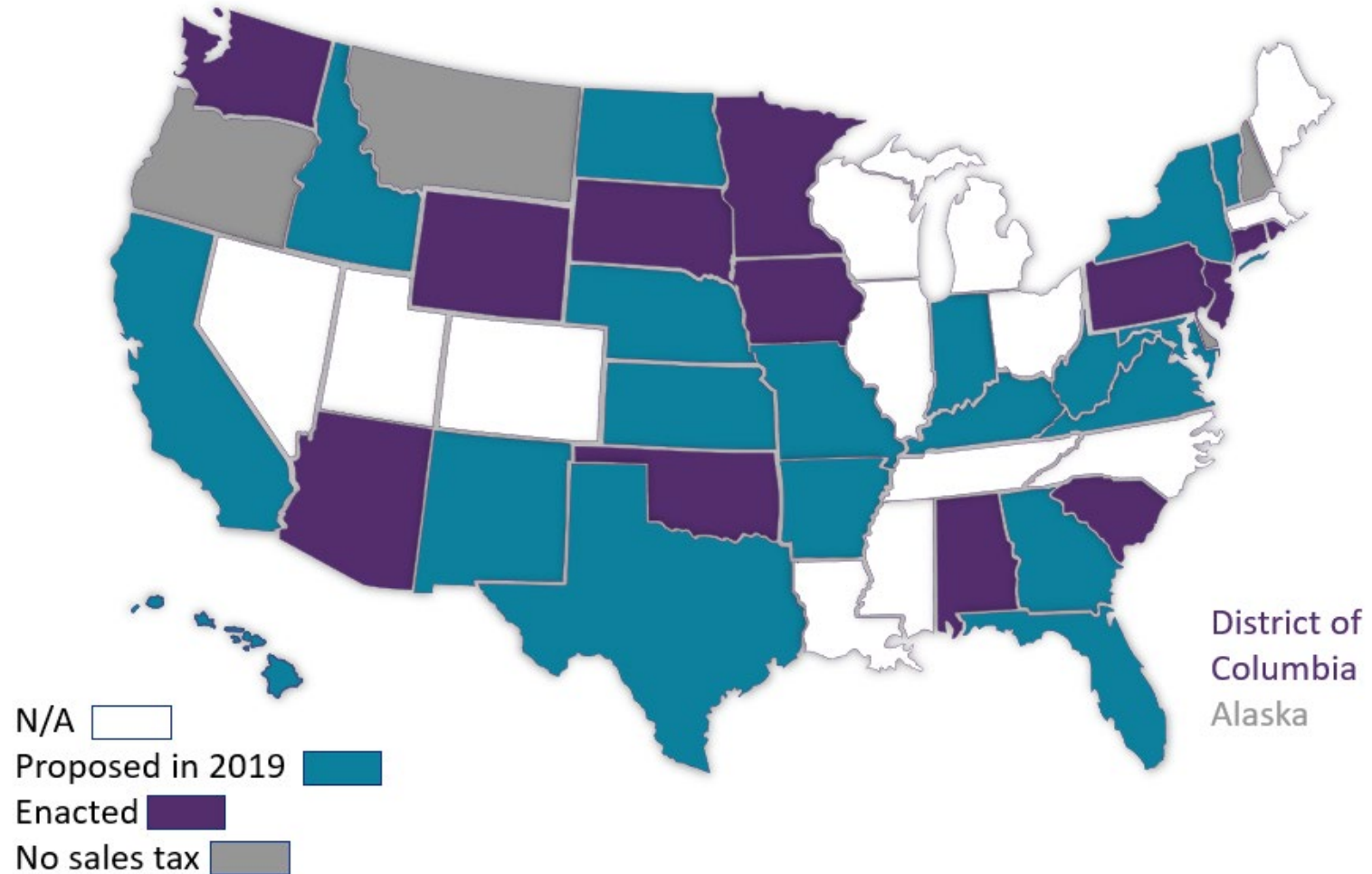
- Exceptions:
 - Rhode Island - in the immediately preceding calendar year
 - Tennessee - During the previous 12-month period
 - Vermont - any 12-month period preceding the monthly period at issue
 - West Virginia - Calendar year 2018. Vendor responsibility will be determined annually each year thereafter.
- If you no longer meet the threshold, what do you do?
 - Generally will be able to cancel your registration or put it into inactive status

Marketplace Nexus

Marketplace Nexus

- Requires online marketplace facilitator to collect tax on behalf of sellers operating through their systems
- Typical requirements include that the marketplace facilitator collects revenue from the customer and manages multiple activities related to the selling process
- Key provisions relation to collection of sales revenue from customer
- If marketplace doesn't collect, seller is still responsible
- Most states include marketplace sales in threshold calculation

Marketplace Nexus: Enacted and Proposed Legislation



States with Marketplace Nexus

- Effective August 17, 2017
 - Rhode Island
- Effective January 1, 2018
 - Washington
 - Amazon & Etsy timely collecting; eBay collecting eff. 1/1/19; Walmart collecting eff. 2/6/18
- Effective April 1, 2018
 - Pennsylvania – April 1, 2018 for sales of TPP (\$10,000 threshold – option to collect or notice), July 1, 2019 mandatory collection (\$100,000 threshold)
 - Amazon & Etsy timely collecting; eBay collecting eff 7/1/19

States with Marketplace Nexus (cont.)

- Effective July 1, 2018
 - Oklahoma – April 10, 2018 election
 - Amazon timely collecting; Etsy collecting eff. 8/1/18; eBay collecting eff. 7/1/19;
- Effective October 1, 2018
 - Minnesota
 - Amazon & Etsy timely collecting; Walmart collecting eff. 10/2/18; eBay collecting eff. 1/1/19;
- Effective November 1, 2018
 - New Jersey
 - Amazon timely collecting; Etsy collecting eff. 4/1/19; eBay collecting eff. 5/1/19;
 - South Carolina – Amazon has challenged the marketplace legislation.
 - Etsy collecting eff. 2/1/19

States with Marketplace Nexus (cont.)

- Effective December 1, 2018
 - Connecticut
 - Amazon collecting; Etsy collecting eff. 2/1/19; eBay collecting eff. 4/1/19;
- Effective January 1, 2019
 - Alabama
 - Amazon collecting; eBay collecting eff. 7/1/19; Etsy collecting eff. 7/1/19
 - Iowa
 - Amazon collecting; eBay collecting eff. 2/1/19; Etsy collecting eff. 2/1/19
- Effective March 1, 2019
 - South Dakota
 - Amazon and Etsy collecting

States with Marketplace Nexus (cont.)



- Effective April 1, 2019
 - District of Columbia
 - Etsy collecting (others haven't announced yet)
 - Pennsylvania – for digital goods (\$10,000 threshold – option to collect or notice)
- Effective July 1, 2019
 - Wyoming
- Additional state effective dates
 - Arizona – Ruling issued September 20, 2016 but not enforced

Amnesty Opportunities

Amnesty Opportunities

- California
 - VDA limited to 3 year look back with potential 50% interest abatement under MAP
 - Letter from Treasurer to Governor
- Indiana
 - May 2, 2018 – June 30, 2019
 - Amnesty inclusion period: Taxes due after January 1, 2017
 - Applies to sales, use and income taxes for online sellers with inventory in 3rd party warehouses
 - Amnesty benefits: Waiver of all taxes prior to 2017, waiver of penalties and interest
- Illinois
 - Special arrangements are available

Amnesty Opportunities

- Ohio
 - For non inventory; sales tax waive Jan to June 2018 if pay CAT tax for 3 years if exceed threshold
- Texas
 - Special arrangements are available
- Washington
 - VDA will limit lookback to 3 years instead of 7 years
 - For any sales subject to Notice Reporting can waive \$20,000 penalty
 - For sales tax that should have been collected starting Oct 1, pay 50% of tax due
 - Impact on legislative change on notice and threshold

Next Steps

Determining Whether You Need to Collect Sales Tax – Next Steps

- Gather your data (\$ amount of sales, # of sales into a state and inventory locations with dates)
- Figure out where you have collection responsibility
- Compare it against the state legislation
- Determine the taxability of what you're selling
- Register in the state(s) if needed or request VDA
- Make sure you have some sort of calculation system and compliance process

Responding Timely if the State Contacts You

- If a state contacts you, it is important to respond timely.
- They frequently give you a limited amount of time to respond.
- Not contacted by the state => voluntary disclosure
- Contacted by the state => no voluntary disclosure & no limited look-back

Other Legislation

Notice & Reporting Requirements



- States may require sellers to notify customers of use tax obligation which could require invoice notification, annual “1099” type of notification and submission of customer data to state
- Penalties can be significant for non compliance
- Can register in lieu of complying

New Hampshire In State Seller Protection



- In response to the Wayfair decision, New Hampshire has introduced legislation (S.B. 242) that aims to protect in-state retailers from sales and use tax collection by other states.
 - Any state seeking to impose collection obligations on New Hampshire sellers would need to register with the state's Department of Justice.
 - The bill would hamper efforts by other states to collect customer information with the intent to assess tax liability on New Hampshire businesses.
 - The bill was unanimously approved by the New Hampshire Senate on February 21, 2019.
 - It will next be taken up by the New Hampshire House of Representatives.

Proposed Federal Legislation

- Protecting Businesses from Burdensome Compliance Cost Act of 2018/2019
 - Prohibits collection or reporting if no physical nexus before date of act
 - After act allowed if:
 - State has enacted a statute
 - Uniform rate imposed by the state
 - Single location reporting within a state
 - No individual purchaser reporting
 - Effective date would be January 1, 2020

Resources



- For remote seller resources and to download the Sales Tax Institute's "Nexus After Wayfair – What You Need to Know" white paper, visit: www.salestaxinstitute.com/prosper2019

Questions?

Questions/Comments

Diane L. Yetter

YETTER Tax & Sales Tax Institute

910 W. Van Buren, Suite 100-321

Chicago, IL 60607

diane@yettertax.com

(312) 701-1800 x2



@YetterTax, @SalesTaxInst



Yettertax, Salestaxinstitute



/company/sales-tax-institute



/salestaxinstitute