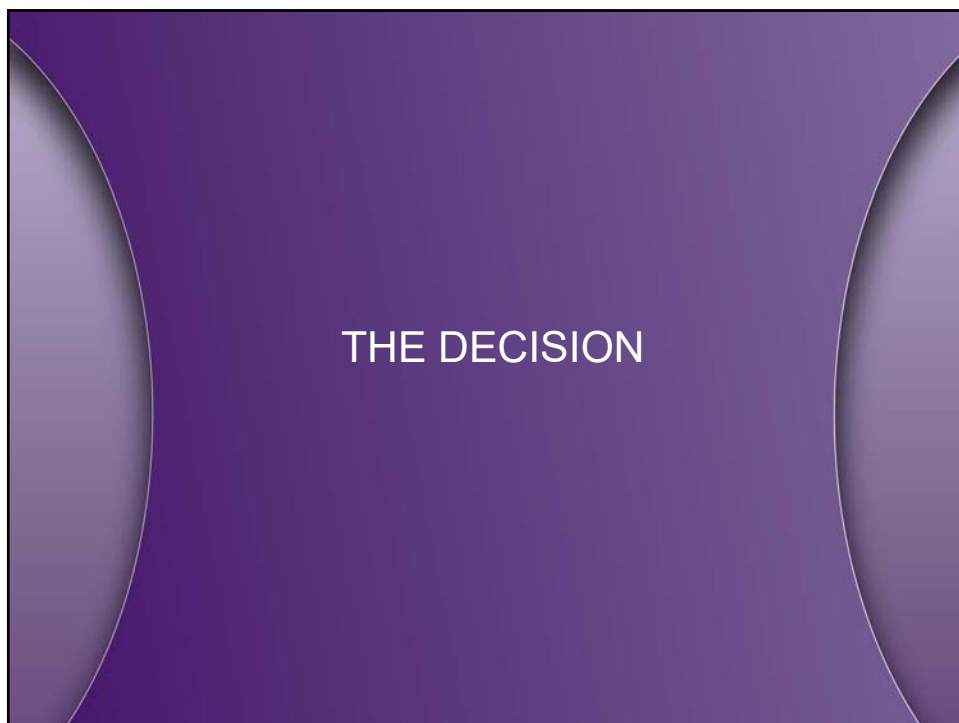




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## THE DECISION

- On June 21, 2018, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair*. The Court ruled in favor of South Dakota and overruled *Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*
- The Court concluded that “the physical presence rule of *Quill* is unsound and incorrect.”
- Although the decision found in favor of South Dakota, it was also remanded to the South Dakota Supreme Court to evaluate if the provision meets the other tests for constitutionality. The case was settled.

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## THE DECISION (CONT.)

- Key Takeaways
  - Physical presence is no longer a requirement but is still relevant
  - An economic threshold is what the states are using - \$100,000 in sales or 200 sales transactions being the most common
  - Are seeing a trend to eliminate the transaction threshold
- This applies not just to online sellers but individuals who sell anything, including digital goods and software.

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# ECONOMIC NEXUS: STATES' REACTIONS

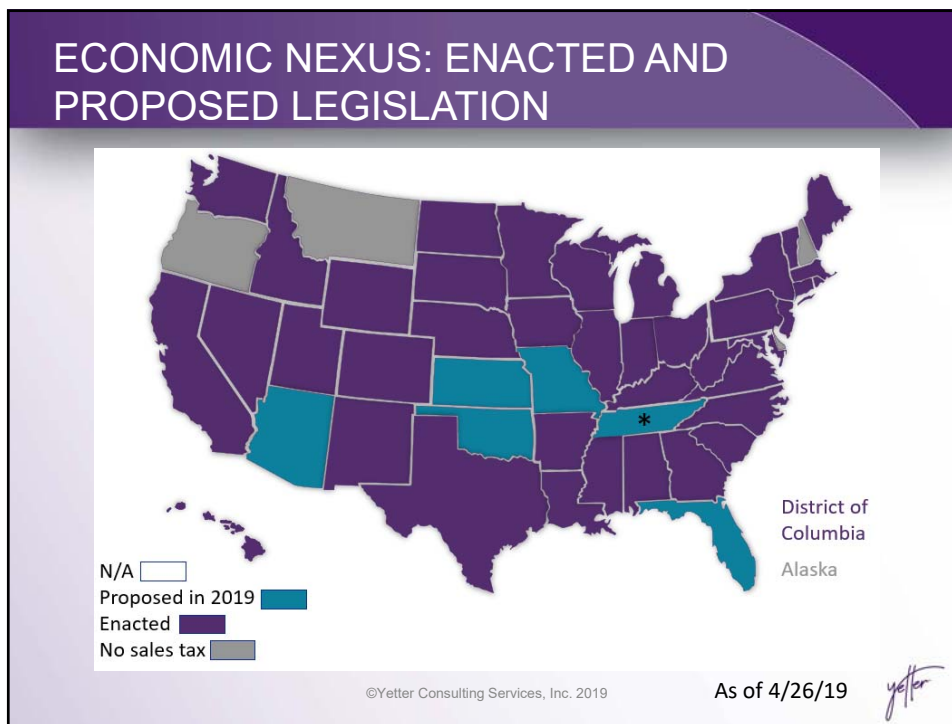
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## CONSIDERATIONS

- **Physical Presence**
  - If there is physical presence, the minimum threshold is not relevant
  - Nexus starts date physical presence commences
- **Threshold Test** – is \$100,000/200 transactions the minimum threshold?
  - Note that states that have reporting requirements vs. registering provisions – such as Oklahoma, Pennsylvania and Washington – have had a much lower threshold that predates the decision
- **Effective Date**
  - No state has attempted economic nexus retroactive before the Wayfair decision
  - New York has issued comments that will enforce starting 6/21/18

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## STATES WITH ECONOMIC NEXUS

- 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

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## STATES WITH ECONOMIC NEXUS

- Threshold for all states is \$100,000 gross sales OR 200 transactions in current or prior year unless noted
- Effective July 1, 2017
  - Tennessee – \$500,000 case dropped replace with proposed \$100,000 OR 200 threshold, effective Jan 1, 2020
- Effective August 17, 2017
  - Rhode Island – Notice and Reporting provisions
- Effective June 21, 2018
  - New York - \$300,000 and 100 transactions (announced mid January)
- Effective July 1, 2018
  - Hawaii
  - Maine
  - Vermont

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## STATES WITH ECONOMIC NEXUS

- Effective September 1, 2018
  - Mississippi – \$250,000
- Effective October 1, 2018
  - Alabama - \$250,000
  - Illinois
  - Indiana
  - Kentucky
  - Maryland
  - Michigan
  - Minnesota – \$100,000 AND 10 sales or 100 transactions
  - North Dakota – 200 transaction count dropped, effective for tax years beginning after 12/31/18
  - Washington – 200 transaction count dropped, effective March 14, 2019
  - Wisconsin

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## STATES WITH ECONOMIC NEXUS

- Effective November 1, 2018
  - Nevada
  - New Jersey
  - North Carolina
  - South Carolina - \$100,000
  - South Dakota
- Effective December 1, 2018
  - Connecticut - \$250,000 AND 200 transactions
  - Colorado but can delay until June 1, 2019, notice & reporting still required until collect. Colorado adopted permanent regulations effective April 14, 2019 that drop the 200 transaction count.

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## STATES WITH ECONOMIC NEXUS

- Effective January 1, 2019
  - D.C.
  - Georgia – \$250,000 or 200 transactions, proposed legislation to reduce to \$100,000 with option to comply with notice
  - Iowa – plus cookie
  - Nebraska – enforcing 1/1/19 - permanent legislation enacted, effective April 1, 2019
  - Utah
  - West Virginia
- Effective February 1, 2019
  - Wyoming
- Effective April 1, 2019
  - California – originally \$100,000 or 200 transactions. Threshold changed to \$500,000 only, per legislation signed on April 25, 2019.

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## STATES WITH ECONOMIC NEXUS

- Effective June 1, 2019
  - Colorado – grace period ends
  - Idaho - \$100,000
- Effective July 1, 2019
  - Arkansas
  - New Mexico - \$100,000
  - Pennsylvania – \$100,000 but no transactions and required not optional to notice
  - Virginia
- Effective October 1, 2019
  - Texas – \$500,000

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## STATES WITH ECONOMIC NEXUS OR REPORTING

- Threshold for all states is \$10,000 sales or comply with notice and reporting rules
  - Oklahoma – 7/1/18 (proposed mandatory at \$100K; eliminate option at \$10K)
  - Pennsylvania – 4/1/18 TTP and 4/1/19 digital goods (mandatory collect at \$100,000; notice or collect between \$10K and \$100K)
  - Washington – 1/1/18 sales tax (eliminated 3/14/19)
  - Washington – 7/1/17 B&O tax (2018 threshold \$285,000 gross sales)
    - Effective 1/1/20, B&O nexus is only based on \$100,000 sales

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## STATES WITH ECONOMIC COOKIE NEXUS

- Threshold for all states is \$500,000 sales or CDN or instate software/cookies
  - Massachusetts – \$500,000 AND 100 transactions
    - 10/1/17 litigation but enforcement not stayed
  - Ohio - 1/1/18

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## STATES WITH ECONOMIC NEXUS – EFFECTIVE DATE UNKNOWN

- States with effective dates unknown:
  - Louisiana – last meeting on February 14, 2019
    - Pending creating of Remote Seller Collection Authority with centralized collection of actual rates of sale destination

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## STATES WITH ECONOMIC NEXUS – PROPOSED

- Proposed legislation
  - Arizona
  - Florida
  - Georgia – two bills – First lowers threshold from \$250,000 to \$100,000; Second is economic nexus for rental car industry
  - Kansas – \$100,000 only; Vetoed by Governor and returned to Senate on March 25, 2019
  - Missouri
  - Oklahoma - \$100,000 only, would also eliminate notice requirements
  - Tennessee – lowers threshold to \$100,000 OR 200

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## EFFECTIVE DATE – STATES WITHOUT ECONOMIC LEGISLATION

- New Hampshire
  - Senate passed bill on February 21 that would prohibit New Hampshire remote sellers from disclosing private customer information to foreign taxing authorities in connection with the collection of certain sales and use taxes

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## KEY ITEMS TO KNOW FOR ECONOMIC NEXUS

- Washington enacted legislation (S.B. 5581) on March 14, 2019 that drops the 200 transaction count from its economic nexus threshold, effective March 14, 2019 as well as click-thru nexus. Also, effective 1/1/20 B&O nexus is only based on \$100,000 sales.
- California State Treasurer Fiona Ma is pursuing Amazon to collect sales tax on all orders into the state instead of third-party sellers.
- Louisiana has enacted economic nexus provisions, but the effective date is TBD with 30 days notice.
- Colorado's economic nexus provisions (with a grace period through May 31, 2019) requires affected out-of-state retailers to register to collect and remit sales tax and not retailer's use tax.

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## FEDERAL RESPONSE TO *SOUTH DAKOTA V. WAYFAIR*

- Stop Taxing Our Potential (STOP) Act of 2019 (S. 128) re-introduced on January 5, 2019
  - Would establish physical presence requirement
  - Would take effect August 1, 2019
- Protecting Businesses from Burdensome Compliance Cost Act of 2019 (H.R. 379) re-introduced on January 9, 2019
  - Would limit the authority of a state to require remote sellers to collect taxes owed by purchasers located in the state
  - Would take effect January 1, 2020

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## FEDERAL RESPONSE TO *SOUTH DAKOTA V. WAYFAIR*

- Online Sales Simplicity and Small Business Relief Act of 2019
  - Limit states ability to impose a sales tax collection duty on remote sellers to sales after January 1, 2019
  - Small seller threshold of \$10M
  - Require states to join an interstate compact similar to SST

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MARKETPLACE NEXUS

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## MARKETPLACE NEXUS CONSIDERATIONS

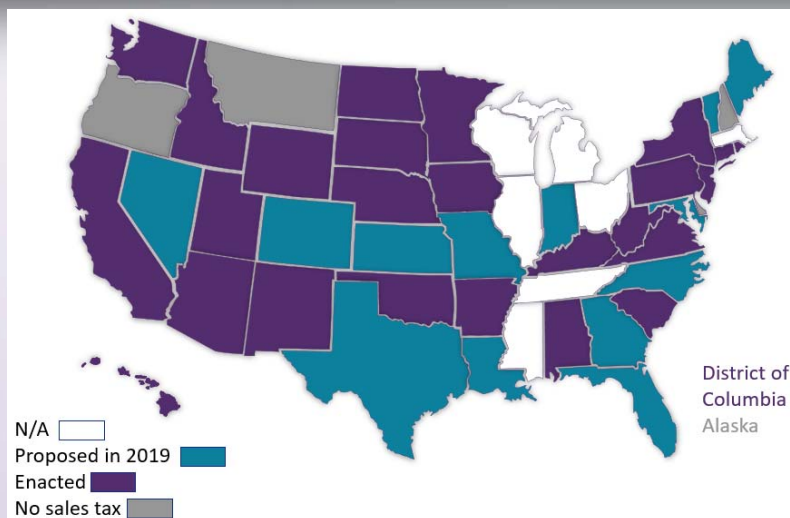
- Requires online marketplace facilitator to collect tax on behalf of sellers operating through their systems
- Typical requirements include that the marketplace facilitator collects revenue from the customer and manages multiple activities related to the selling process
- Key provisions relation to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

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## MARKETPLACE NEXUS: ENACTED AND PROPOSED LEGISLATION



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As of 4/26/19

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**DETERMINING WHETHER YOU NEED TO COLLECT SALES TAX – NEXT STEPS**

- Gather your data (\$ amount of sales, # of sales into a state)
- 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
- Make sure you have some sort of calculation system and compliance process

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## 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

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## MONITORING NEXUS

- Sales threshold calculation
  - Most states are silent or indicate collection required upon reaching threshold
  - Evaluation Period Exceptions
    - IL – quarterly evaluation for prior 4 quarters
    - MN – on the 1<sup>st</sup> taxable retail sale into MN that occurs no later than 60 days after you exceed Small Seller Exception
    - NV – by the first day of the calendar month that begins at least 30 calendar days after they hit the threshold
    - NC – within 60 days of meeting threshold
    - ND – within 60 days of meeting threshold
    - OK – on or before July 1, 2018, and on or before June 1 of each calendar year thereafter, beginning June 1, 2019
    - PA – on or before June 1 of each calendar year for \$10,000 threshold
    - SC – by the first day of the second calendar month after economic nexus is established
    - TN – first day of the third month following the month in which the dealer met the threshold
    - TX – first day of the fourth month after the month in which the seller exceeded the safe harbor threshold
    - WA – 1<sup>st</sup> day of calendar month that is at least 30 days from the date that it met the required gross receipts

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## EVALUATING NEXUS

- Sales threshold calculation
  - Gross Sales – General Rule and includes all sales
  - Retail Sales – Excludes sales for resale (AL, DC, GA, IL, KY, NV, NJ, WA)
  - Taxable Sales – Only includes taxable sales (MN, ND, NM (excluding sales on marketplace if provider collects and remits), OK, PA (10K notice), RI, UT)
- Home Rule local taxes
  - AL – Simplified Seller Use Tax Program (SSUT) simple 8% flat rate for entire state
  - CO – Required to collect state administered SALES tax (but not home rule unless have specific physical nexus)
  - LA – Remote Seller Collection Authority pending centralized collection of actual destination rates
- Sales tax nexus no longer impediment to business operations

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## TAXABILITY

- Taxability becomes much more important to determine
- Product classification
- Tax Type evaluation (sales vs seller's use)
- Tax Engine Needs

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## TAXABILITY

- Invoicing standards
  - Bundling
  - Ancillary Charges
  - Delivery Point
- Exemption Documentation
  - Required for all states
  - Impact on drop shipments
- You may have nexus in a state, but if what you sell isn't taxable, then need to evaluate collection costs vs. business risk

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## REGISTRATION CONSIDERATIONS

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## REGISTRATION CONSIDERATIONS

- When to Register
  - Effective Date implications
  - Amnesty considerations

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## REGISTRATION CONSIDERATIONS

- Streamlined Sales Tax Project (SSTP) Registration Considerations
  - Volunteer Filer
    - No fixed place of business for more than 30 days
    - Less than \$50k or less than 25% total property or payroll
    - No previously collecting tax
    - Not required to collect as a statutory requirement
    - Any seller that meets above and who became legally obligation to register due to enactment of federal legislation
  - Simplified Registration Process
  - Can exclude states if no requirement to register
  - CSP use
  - Amnesty benefits: TN would be prospective
  - Potential registration platform for non-SST states
  - Contract with states likely to be renegotiated

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## AMNESTY OPPORTUNITIES

- California
  - VDA limited to 3 year look back with potential 50% interest abatement under MAP
  - Pending Governor request to halt collection efforts against FBA sellers
- Indiana
  - May 2, 2018 – June 30, 2019
  - Amnesty inclusion period: Taxes due after January 1, 2017
  - Applies to sales, use and income taxes
  - Amnesty benefits: Waiver of all taxes prior to 2017, waiver of penalties and interest
- Illinois
  - Special arrangements are available

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## AMNESTY OPPORTUNITIES (CONT.)

- Kansas
  - Special arrangements are available
- Maryland
  - Special arrangements are available
- Ohio
  - For non inventory economic nexus only; sales tax waive Jan to June 2018 if pay CAT tax for 3 years if exceed threshold of \$500,000

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## AMNESTY OPPORTUNITIES (CONT.)

- Tennessee
  - Streamlined Sales Tax Amnesty available until 12 months after becoming full member of SST
  - Amnesty inclusion period: All periods prior to date of amnesty application
  - Applies to Business Sales and Seller's Use Tax under SSTP Program if register under SSTP.
  - Amnesty benefits: Waiver of all tax, penalty and interest.
- Texas
  - Special arrangements are available

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## AMNESTY OPPORTUNITIES (CONT.)

- 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

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## REMOTE SELLER RESOURCES

- Visit <https://www.salestaxinstitute.com/interactiv-conference>
- Nexus Whitepaper
- Remote Seller Nexus Chart
- Remote Seller Resources
- Presentation slide deck

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