

CA, NY, TX, AND WASHINGTON, D.C. ENACT ECONOMIC NEXUS THRESHOLDS FOR SALES USE TAX, IN RESPONSE TO WAYFAIR DECISION

CALIFORNIA

In December of 2018, the California Department of Tax and Fee Administration issued Special Notice L-565. Effective April 1, 2019, out-of-state retailers are required to collect and remit California use tax from their California customers, if the out-of-state retailer meets California's economic nexus thresholds.

California adopted South Dakota's thresholds. So, a retailer located outside of California is required to register and to collect California use tax if, during the preceding or current calendar year, the retailer's sales into California exceed \$100,000, OR the retailer made sales into California in 200 separate transactions. California made clear that it would not be enforcing its new rule retroactively. Instead, California will begin enforcing its economic nexus thresholds on April 1, 2019.

NEW YORK

New York is usually one of the more aggressive states when it comes to finding ways to create nexus. For example, so-called "click-through nexus" originated with a New York ruling in 2008. So, it is no surprise that New York was one of the first states to create an economic nexus standard for sales and use tax purposes. In fact, as far back as 1989, New York promulgated an economic nexus regulation (20 NYCRR 526.10) that implemented New York's definition of "vendor" for sales tax purposes in Tax Law section 1101(b)(8)(iv). Even though New York's rule has been on the books for years, it was never enforced. Until now.

On January 15, 2019, New York issued Important Notice N-19-1, "Notice Regarding Sales Tax Registration Requirement for Businesses with No Physical Presence in New York State." In the Notice, the Department of Taxation and Finance indicated that due to the U.S. Supreme Court's ruling in Wayfair, "certain existing provisions in the New York State Tax Law that define a sales tax vendor immediately became effective."

New York's definition of a sales tax vendor includes remote sellers that, in the immediately preceding four sales tax quarters, have more than \$300,000 in sales of tangible personal property delivered into the state, AND has conducted more than 100 sales of tangible personal property delivered into the state.

Unfortunately, New York has not provided clear guidance on when it intends to begin enforcement of its economic nexus rules. "Immediately" could mean several things. It could be June 21, 2018 (date of Wayfair decision), January 15, 2019 (date of Notice), or even back to 1989 (date of enactment). Although possible, New York's attempt to enforce its economic nexus rule retroactively to periods before the U.S. Supreme Court's Wayfair decision could be met with many legal challenges.

SUMMARY

California, New York, Texas, and Washington D.C. have recently adopted economic nexus thresholds for sales and use tax collection purposes. California and D.C. adopted South Dakota's thresholds, which were the subject of the U.S. Supreme Court's decision in *South Dakota v. Wayfair*, decided on June 21, 2018. Texas promulgated a rule requiring remote sellers to collect sales tax, unless the remote seller meets Texas's safe harbor exemption. And, most recently, New York indicated that it would begin enforcing a rule that has been on its books since 1989.

TEXAS

On December 14, 2018, the Texas Comptroller issued amended regulations specifying that sellers who are “engaged in business” in Texas are subject to tax, unless they meet the safe harbor for remote sellers, which is found under 34 Tex. Admin. Code section 3.286(b)(2). The Texas safe harbor provision applies to a remote seller whose total Texas revenue in the preceding twelve calendar months is less than \$500,000. Texas has specified that total Texas revenue means gross revenue, which includes taxable, nontaxable, and exempt sales.

Once a remote seller exceeds the safe harbor exemption, it must obtain a permit and begin collecting tax on the first day of the fourth month after the month in which the remote seller exceeds \$500,000. Although effective on January 1, 2019, Texas will not begin enforcing its new rule until October 1, 2019.

WASHINGTON D.C.

Washington D.C. also followed in South Dakota’s footsteps. If in the previous calendar year or in the current calendar year, a remote seller has more than \$100,000 of gross receipts from retail sales delivered into D.C., OR has more than 200 separate retail sales delivered into D.C., then it is required to collect sales tax. D.C.’s new legislation is effective January 1, 2019.

The legislation also included a provision for marketplace facilitators. They are now required to collect and remit sales tax on all sales made through their marketplace. This provision of the legislation is effective April 1, 2019.

INSIGHTS

- The thresholds discussed in this article only apply to remote sellers that do not have physical presence in that state. If the seller had physical presence in a state before exceeding that state’s economic nexus rule, the seller may still have nexus for sales tax purposes. In that scenario, the seller should perform an exposure analysis and consider mitigation strategies, such as voluntary disclosure agreements or amnesty programs.
- Stay tuned for further guidance related to New York’s enforcement date.
- Sellers should be aware of the differences when applying rules among the various states. For example, New York’s rule requires the remote seller to have \$300,000 of sales and 100 transactions, while California’s rule is easier to meet because it only requires \$100,000 of sales or 200 transactions. Texas does not have a transactional limit, but has a higher sales threshold of \$500,000.
- Taxpayers affected by the sales/use tax economic nexus developments addressed in this Alert, as well as by the 34 other states that have enacted or adopted similar provisions, should consult with their financial statement auditor and tax advisor to evaluate and determine the potential financial statement implications under ASC 450, including impact on reserves and accruals.

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