Blog Post

Removing Transaction Thresholds – Where does Wayfair go from here?

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Last year, the U.S. Supreme Court ruled in *South Dakota v. Wayfair* that economic nexus is constitutional for sales tax purposes. South Dakota's economic nexus statute at issue in the case included an economic threshold of at least $100,000 of sales or 200 separate transactions into the state in the prior calendar year. The decision overruled prior decisions by the Supreme Court, including the landmark holding in *Quill Corp. v. North Dakota*. In the 1992 *Quill* decision, the Court affirmed a bright-line physical presence rule limiting the imposition of sales and use taxes on remote sellers. The *Wayfair* ruling created a snowball effect with approximately 40 states jumping on the bandwagon of "economic nexus." Nearly all of these states enacted laws that mirrored South Dakota's $100,000/200 separate transaction threshold model.

In recent months, however, states are shifting away from this dual threshold approach to a singular monetary threshold, often $100,000. These states include California, Colorado, North Dakota, and South Carolina.[1] Many commenters have applauded this shift as it is a move to protect small businesses. For example, a company that sells a product for $5 and makes 300 separate sales into a particular state is nowhere near the $100,000 monetary threshold set by that state. The flipside of this recent development is a potentially slippery

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slope where the monetary threshold is reduced over time to the detriment of small businesses.

Regardless, these types of changes should make us question "What next?" We've seen a growing number of states, approximately 21, enact marketplace facilitator nexus rules that place the burden of compliance solely on a marketplace facilitator. Further, many of these rules indicate that a marketplace facilitator is the only entity that would be audited by a particular jurisdiction for compliance purposes.

States are also beginning to move away from notice and reporting requirements. Notice and reporting requirements were implemented in several states after the 2015 U.S. Supreme Court decision in *Direct Marketing Association v. Brohl* which indicated that a taxing jurisdiction could require an out-of-state seller with no nexus to the state to notify any in-state customers of the state's tax requirement and report tax-related customer information to the state. Many notice and reporting requirements and penalties were extremely severe and many businesses chose to register and begin to collect and remit tax in these states, rather than implement a notice and reporting system. While this decision did not allow economic nexus, many believe it was the first step in implementing economic nexus provisions. Washington initially implemented these notice and reporting rules but recently repealed these requirements. Interestingly, the state included a provision indicating that if the federal government were to pass a law in the future that prohibited the state from collecting tax from remote-sellers, the state would revert back to their notice and reporting rules. Similarly, Pennsylvania removed the notice and reporting alternative in their rules for remote sellers and marketplace facilitators for those entities that exceed the economic nexus monetary threshold. We may soon see other states following this trend.

As more and more states and other taxing jurisdictions implement economic nexus rules and further iterations thereof, this area of the law continues to be a hotbed of activity with no end in sight. It is important to remain diligent to understand the current rules affecting your business.

[1] Notably, on April 25, 2019, California increased their threshold to $500,000 while removing the transactional threshold for sales and use tax economic nexus purposes.
