



December 2018

Supreme Court Decision Affects Dealers' Sales and Use Tax Responsibilities

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The sales and use tax landscape is rapidly changing in the wake of the U.S. Supreme Court's 2018 decision in *South Dakota v. Wayfair, Inc.* The decision overturned the longstanding bright-line rule from *Quill Corp. v. North Dakota*, which required that a taxpayer have some physical presence in a state in order for that state to be able to impose a filing and collection responsibility for sales and use taxes.

The *Wayfair* decision removed the requirement for physical presence after upholding the South Dakota statute in question, which provides for the following:

- Prospective application. The effective date of the South Dakota law was tied to a decision by the highest court validating the constitutionality of the statute.
- Small-business threshold. The law applies to out-of-state sellers that have more than \$100,000 in sales or 200 transactions per year delivered into the state.
- Streamlined Sales Tax Project. South Dakota is a member of the SSTP, which has simplified rules consistent with the other members. It also has state-funded compliance software with audit protection.

Businesses historically have relied on the bright-line physical presence standard for protection against the burden of compliance and sales tax liability. Similar to South Dakota, many states now have passed economic nexus sales and use tax statutes (measuring nexus based on the number of transactions or gross revenue from sales rather than physical presence). (See the exhibit, which identifies the states that have economic nexus laws as well as the effective dates and registration/filing thresholds. The remaining states that impose sales and use tax and do not have economic nexus laws are expected to address the issue in upcoming legislative sessions.)

Therefore, businesses now must more carefully monitor sales activity to determine filing requirements and potentially register in additional states as a proactive measure.



**Exhibit: States with economic sales tax nexus legislation
(as of November 2018)**

Jurisdiction	Threshold	Likely effective date
Alabama	\$250,000 annual sales	Jan. 1, 2019, for third-party marketplace facilitators; Oct. 1, 2018, for all others
Colorado	\$100,000 annual sales OR 200 transactions	Dec. 1, 2018
Connecticut	\$250,000 annual sales AND 200 transactions	Dec. 1, 2018
Georgia	\$100,000 annual sales OR 200 transactions	Jan. 1, 2019
Hawaii	\$100,000 annual sales OR 200 transactions	July 1, 2018
Illinois	\$100,000 annual sales OR 200 transactions	Oct. 1, 2018
Indiana	\$100,000 annual sales OR 200 transactions	Oct. 1, 2018
Iowa	\$100,000 annual sales OR 200 transactions	Jan. 1, 2019
Kentucky	\$100,000 annual sales OR 200 transactions	Oct. 1, 2018
Louisiana	\$100,000 annual sales OR 200 transactions	Jan. 1, 2019
Maine	\$100,000 annual sales OR 200 transactions	July 1, 2018
Maryland	100,000 annual sales OR 200 transactions	Oct. 1, 2018
Massachusetts	\$500,000 annual sales AND 100 transactions	Oct. 1, 2017
Michigan	\$100,000 annual sales OR 200 transactions	Oct. 1, 2018
Minnesota	\$100,000 annual sales from 10 different orders OR 100 transactions	Oct. 1, 2018
Mississippi	\$250,000 annual sales	Sept. 1, 2018
Nebraska	\$100,000 annual sales OR 200 transactions	Jan. 1, 2019
Nevada	\$100,000 annual sales OR 200 transactions	Oct. 1, 2018
New Jersey	\$100,000 annual sales OR 200 transactions	Nov. 1, 2018
North Carolina	\$100,000 annual sales OR 200 transactions	Nov. 1, 2018
North Dakota	\$100,000 annual sales OR 200 transactions	Oct. 1, 2018
New Jersey	\$100,000 annual sales OR 200 transactions	Oct. 1, 2018
Oklahoma	\$10,000 annual sales	July 1, 2018
Pennsylvania	\$10,000 annual sales	March 1, 2018
Rhode Island	\$100,000 annual sales OR 200 transactions	Aug. 17, 2017
South Carolina	\$100,000 annual sales	Nov. 1, 2018
South Dakota	\$100,000 annual sales OR 200 transactions	Nov. 1, 2018
Utah	\$100,000 annual sales OR 200 transactions	Jan. 1, 2019
Vermont	\$100,000 annual sales OR 200 transactions	July 1, 2018
Washington	\$100,000 annual sales OR 200 transactions	Oct. 1, 2018
West Virginia	\$100,000 annual sales OR 200 transactions	Jan. 1, 2019
Wisconsin	\$100,000 annual sales OR 200 transactions	Oct. 1, 2018
Wyoming	\$100,000 annual sales OR 200 transactions	July 1, 2017

The *Wayfair* decision presents several issues for retail auto and recreational vehicle dealers who may exceed the gross revenue thresholds and may be required to establish economic nexus based on a single transaction or a small number of transactions. These dealers also may make smaller sales transactions (lower dollar but higher volume) for parts they ship to out-of-state customers, requiring dealers to monitor the transactional amounts sold into destination states. It often is difficult to predict when such transactions – specifically vehicle sales – may arise, and dealers may be resistant to registering in every state where they have met the legal standard of economic nexus.

Tax specialists can help dealerships review their motor vehicle and parts export sales in order to mitigate liability in case of audit. Please note that the determination of nexus and filing responsibility is independent of determining the taxability of the transactions, and triggering nexus results in all transactions (vehicles and parts) potentially being subject to a tax collection responsibility.

Additionally, most states likely will not distinguish between taxable retail sales and wholesale sales for the purposes of measuring gross revenue or transactional activity in determining whether economic nexus is established. The *Wayfair* case has different impacts for vehicle and parts sales.

Sales of vehicles

Dealers periodically sell vehicles either to individual customers or to other dealerships that are domiciled out of state. These sales transactions can be structured as follows:

- **Drive-away:** The nonresident customer will take possession of the vehicle at the dealership and drive to the out-of-state destination.
- **Dealer-arranged transportation:** The dealer hires a common carrier to deliver the vehicle to the out-of-state destination as requested by the customer. The customer generally pays the dealer for the transportation charges.
- **Customer-arranged transportation:** The customer hires a common carrier to transport the vehicle to the destination state.

Drive-away

Some concern exists that drive-away sales could be included in states that have adopted dollar sales or transactional thresholds as a condition for measuring economic nexus. States likely would be legally hard-pressed to include drive-away sales in their measurements because there is no delivery by the seller into the destination state. However, this issue will continue to be monitored.

Dealer-arranged transportation

States likely will include dealer-arranged transportation sales as qualifying for the purposes of measuring economic nexus. The dealer arranges the transportation service for the customer as part of the sale, which is the general definition of an export sale.

Customer-arranged transportation

For purposes of measuring sales revenues under the economic nexus laws, vehicle sales to nonresident customers that directly arrange and pay for the transportation of their purchase(s) likely will be included by most but potentially not all taxing jurisdictions. While most states consider these transactions as export sales for the purposes of determining taxability, some states take the position that these sales should be sourced to the seller's home state because the transportation service provider is acting as the agent of the customer and taking possession of the property in the home state. Similarly, some states might exclude such sales from the measurement thresholds for establishing economic nexus.

Parts sales

Interstate parts sales also present challenges post-*Wayfair*. For wholesale parts sales, selling dealers should request a resale certificate from purchasers in destination states. Additionally, dealers should implement procedures to monitor the total sales revenue of parts and vehicles and the total number of sales transactions by state to determine if they have exceeded the sales or transaction thresholds to establish nexus. If a dealership determines that its export sales trigger the economic nexus provisions, the dealership should determine if registering for sales and use tax in that particular state is worth the compliance costs based on the amount of taxable parts sales and then should either register and collect tax or establish audit reserves.

Contact a tax specialist with any questions regarding the effect of the *Wayfair* decision on retail automobile dealers.





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This article was originally published by Chicago Automobile Trade Association.

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RD-19003-024A