

Interstate Sellers: Are You Ready for Sales Tax after Wayfair?

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In July, we wrote to tell you about the results of a June 2018 Supreme Court decision that will impact interstate sales for years to come. In the Wayfair case, the Supreme Court ruled that a state can require any seller to charge sales tax regardless of any physical presence in that state by the seller, as long as the seller has a defined economic presence in the state.

In the case, Wayfair, Overstock, and Newegg had all contested the 2016 South Dakota (SD) law that set an economic presence threshold for out-of-state (remote) sellers above which sellers were required to charge, collect, and remit SD sales tax on sales of taxable goods shipped or delivered to SD addresses. The SD law states that a seller has SD economic presence if in the previous or current calendar year, the seller shipped or delivered in excess of \$100,000 of taxable goods and services into the state, or shipped or delivered taxable goods into the state in 200 or more separate transactions. The rule also applies to electronic deliveries of taxable intangible goods. The Supreme Court generally upheld the SD law. As a result, many states have enacted similar laws to require remote sellers to collect their sales tax. Details can be found at the end of this article.

Where have we been? Under the pre-Wayfair rules, businesses must collect applicable sales tax for any taxable sales shipped or delivered to customer locations only within your home state or any state where you have some kind of physical presence, owned or leased, including office, warehouse, inventory storage, factory, employees, consignments, service facility (directly or through authorized agents), and locations that you or your personnel visit with frequency and regularity. This includes sales transacted over the internet.

Sales tax is always imposed based upon the state in the “ship to” address. In some cases, a state allows the local municipalities to assess and collect local taxes. For sales within Illinois, local sales taxes are based upon the “ship from” address, or where the sales are completed. No Illinois local sales tax applies to sales from outside Illinois.

If a sale is exempt, you must collect the applicable exemption certificate from your exempt customer, regardless of the type of exemption—sales for resale, or sales to certified exempt charities and government agencies. For any and all of the exemption certificates you collect, you must keep them up-to-date—many of these exemptions expire and must be periodically renewed. You should obtain updated certificates at least every three years.

It is important to remember that if your business is required to collect sales tax, but does not do so, the state can and will hold the seller responsible for payment of the sales taxes not properly collected. In addition, many states will hold the owners and/or officers and other responsible parties liable for sales taxes not collected and paid by the business.

What do we do now? To determine if your business has any potential sales tax exposure in other states, you should do the following ASAP:

1. Any business that sells anything that is physically or electronically shipped or delivered outside of its home state should review its sales activity based upon the state where the products are delivered. Such a review should be based upon the delivery or “ship to” address, not the billing address. Include all sales (tangible and intangible) and property and services (whether delivered physically or electronically, taxable or exempt, retail or wholesale).

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2. If 12-month sales in the current or preceding calendar year to ANY state exceed \$100,000 or 200 separate transactions, the lowest safe-harbor state activity threshold, you should review the tax rules of that state to determine whether you must now collect that state's sales tax for sales shipped or delivered to that state.
3. If any or all of your sales are for resale, be sure to require that all of your customers provide you with their resale exemption certificates for every state where you deliver the goods.
4. If any of your sales are to charitable organizations or governmental agencies, be sure to require your exempt customer to provide their exemption certificate applicable to the specific state locations receiving your goods. DO NOT accept a charitable organization's federal non-for-profit income tax exemption letter—this is not a sales tax exemption. Not every not-for-profit is sales tax exempt. Not every state has the same standard for sales tax exemptions for charitable organizations. California is perhaps the most restrictive on this issue.

If your home state exempts manufacturing equipment and/or related replacement parts, please note that many states do not consider these to be exempt. You must require the specific state applicable exemption certificate from your customer before you exempt the sale.

The Aftermath. In anticipation of the Supreme Court holding in favor of SD, many states have enacted or are currently considering similar legislation.

- Some states have imposed special reporting on sellers, requiring them to print notices on websites and invoices indicating that even though the seller is not required to register and collect "State X" sales tax, the out-of-state buyer is still obligated to self-assess and pay "State X" use tax. Some of these states also require sellers to provide an annual summary notice to these customers, and also provide a list of such customers to the state where the goods were delivered.
- Some states have enacted legislation identical or similar to the SD law.
 - Effective dates vary, some in 2018, others in 2019.
 - Threshold amounts vary widely both by amount and by definition.
 - As of this writing, twenty-four states and DC adopted the SD threshold of \$100,000 sales or 200 transactions shipped or delivered to that state.
 - South Carolina adopted the sales threshold of \$100,000, but without a transaction count.
 - Connecticut adopted a threshold of \$250,000 sales or 200 transactions. Alabama and Mississippi also adopted the \$250,000 sales threshold, but without a transaction count.
 - New York had previously included in their definition of vendors required to collect NY sales tax any vendors exceeding \$300,000 of gross receipts from sales of tangible personal property made in the state **and** making more than 100 sales of property delivered into the state in the preceding four sales quarters.
 - Massachusetts set a threshold of \$500,000 sales **and** 100 transactions. Ohio, Tennessee, and Texas also adopted the \$500,000 threshold, but without a transaction count.
 - Eight states have not yet adopted any kind of SD-like safe-harbor threshold. Therefore, you must review your activity in such states relative to the sales tax requirements published by those states.
- Some states have adopted both special reporting requirements and enacted new legislation with safe harbor thresholds. For example, Oklahoma, Pennsylvania, and Washington have established variations on a requirement that when selling more than \$10,000 during the preceding 12-month period or calendar year, the seller must collect and remit the sales tax, or comply with their detailed notice and reporting requirements. In Washington, once the seller exceeds the higher economic presence threshold of \$267,000 sales shipped to Washington, the seller must begin collecting and remitting the sales tax. Other states have similar notice and reporting requirements for sellers below the collection threshold.

- Fifteen states, including Alabama and Minnesota, require “marketplace facilitators” over their respective sales threshold amounts to collect sales tax on behalf of their third-party sellers. For example, such a rule would require Amazon to collect sales tax on sales made by retailers using its platform to sell into such a state.
- The various sales thresholds described above all sound similar when reading, but a seller must beware how each state has defined these transaction levels:
 - Some states have set their limits based on sales of **taxable** tangible personal property or retail sales of property shipped to their state, while other states have established their limits based upon **all sales** of property delivered in their state.
 - Some states define taxable transactions to include sales of **intangible** property, which include downloads of music, software, e-books, and other forms of electronically delivered product.
 - Some states tax services, so sales of services rendered for the benefit of customers located in such states count toward their sales thresholds.

Note that the comments noted above are all based on the reporting of the various state laws as of this writing, and are subject to change as states change their laws and regulations.

If you have any questions, or you think your business might have exposure for collection of sales tax in other states, please call us at 847.982.0333 and we can assist with your review and discuss your options.

Joe Roznai, CPA, CGMA, Partner, is the leader of our state and local tax practice, as well as our international tax team. He has more than 30 years of federal, state and local tax planning, consulting and compliance experience, working with entrepreneurial businesses across a wide range of industries, including manufacturers, distributors, real estate, retail, leasing companies, retailers, service providers, and auto dealers. He has expertise in corporate reorganizations, multi-state income, franchise, personal property and sales and use taxes, international reporting, and related appeals.