

The 2019 Post-Wayfair World and the Additional Shoes We May See Drop in 2020



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Following the Court's decision in *Wayfair*,²⁶ the process promptly commenced for how states would pursue this new revenue opportunity. Despite some efforts at uniformity, states predominantly acted on

their own, and their disparate approaches on thresholds, timing, and a host of other issues have created a compliance challenge.

One idea that quickly gained traction was the imposition of this new collection/remittance obligation on those deemed to be "marketplace facilitators." Instead of processing registrations, returns, and payments for numerous remote marketplace sellers, chasing noncompliant remote sellers, and potentially auditing many of them, this new approach was designed to make the "facilitators" do the state's work — one-stop shopping for the states. And in 2019 we saw a proliferation throughout the country of states individually deciding to impose obligations on marketplace facilitators through legislation, administrative actions, and in a few instances, court cases.²⁷

Unfortunately, as with the disparate state approaches to *Wayfair*, we saw disparate approaches to imposing these obligations as well. For example, while many states took a narrower view in defining a "marketplace" and a "facilitator," several states took an extremely broad approach. There wasn't much appetite to wait for reasoned, model legislation. This "ready, fire, aim" race to create new tax collectors created significant inconsistencies from state to state, as well as uncertainty as to how these rules will be

interpreted, thereby creating risk and undoubtedly future litigation.

Looking back, a "facilitator" was not a generally recognized term of art in sales tax parlance before *Wayfair*. However, with this year's flurry of action, it is now — although it is subject to many different definitions. This term has taken on a life of its own, not only with its general use with "marketplace," but in some cases, with "accommodations" and "car sharing." On the heels of the creation of this new world order in 2018-2019, here is a list of potential, additional shoes that may drop in 2020.

Continued Changes to the Wayfair/ Marketplace Playing Rules

States are likely not done tinkering with these new collection tools. States may revisit what they initially adopted in light of the continuous identification of issues, efforts at a "model approach," and the development of what appears to be "best practices." That could be a positive, if it improves and clarifies rules for compliance and creates more uniformity, but of course, it could also include changes that are detrimental to businesses. In any event, this ongoing evolution will require continuous monitoring, adapting, and cost.

Less Friendly Enforcement and Start of Remote Seller and Facilitator Audits

Many states initially took a "friendly" approach to coaxing remote sellers to voluntarily register, and at least one state, Indiana, worked with some of the larger platform "facilitators" on Indiana's facilitator legislation. But in time, that spirit of cooperation will undoubtedly change with perceived noncompliance, disagreements, and audits. One Indiana Department of Revenue representative (who will remain unnamed) likes to quote Patrick Swayze from the movie, *Road House*: "Be nice until it's time not to be nice." The "not nice" time is approaching throughout the states, and that could commence as soon as 2020. And that might include claims against "responsible officers."

²⁶ 585 U.S. __ (2018).

²⁷ *Amazon Services LLC v. South Carolina Department of Rev.*, No. 17-ALJ-17-0238-CC (S.C. Admin. Law Ct., Sept 10, 2019) and *Normand v. Walmart.com USA LLC*, 263 So. 3d 974, 18-211 (La. App. 2018) (appeal pending).

Spotlight on Specific Issues

This marketplace facilitator trend isn't just a shift in the compliance cost to the facilitators; this is a shift in the risk as well. Will facilitators have enough information about the seller, the seller's product or service, or the buyer to know if a transaction is taxable, exempt, or partially taxable? Will the facilitator need to make decisions with the applicable law of a state unclear, such as with cloud computing type transactions? Will the facilitator and the states disagree on where a transaction should be sourced, or will states take inconsistent positions on sourcing? While many laws protect facilitators if the seller gives the facilitator bad information, that protection may not cover several other scenarios. States will want their money and may cast a broad net.

Collecting and Remitting Other Transaction Taxes

Will states increasingly add to the facilitators' obligations by adding a collection/remittance obligation as to other transactional taxes? After all, a seller doesn't want its customers receiving multiple invoices for the same transaction, but the more taxes that are added, the higher the cost of compliance, and the risk, to the facilitator.

More Aggressive Approach to Income Tax Nexus?

Finally, will states attempt to apply an interpretation of *Wayfair* that justifies a more aggressive approach to income tax "economic" nexus? Will states respect the boundaries of P.L. 86-272? In 2019 the Indiana legislature passed a law expanding income tax nexus "to the fullest extent permitted by the Constitution of the United States and federal law," and the Indiana DOR has not yet expressed its view on what it believes that means. Some lucky taxpayer may find out on audit.

We are living in a time of virtual instant access to information, and with states willing to use that information to move quickly and independently to implement change. There is no reason to anticipate this slowing down in 2020, so hold on for the ride.

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