

Marketplace: Caveat Emptor No More

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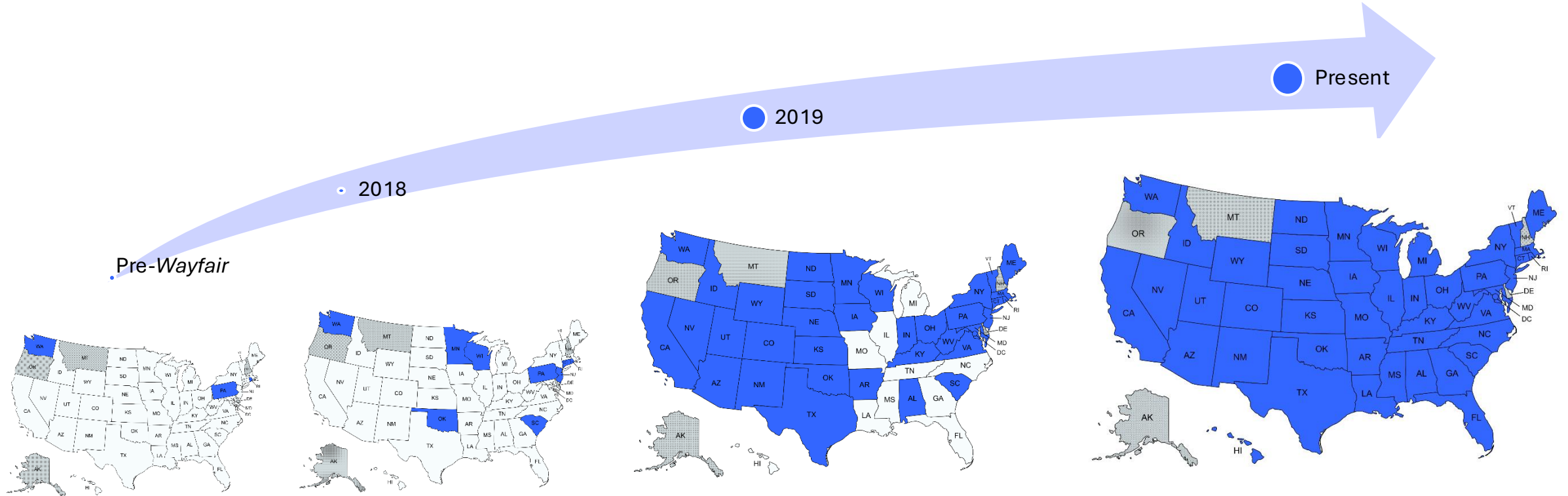
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Agenda

- Marketplace facilitator history and common features
- A closer look: Nuances in applying marketplace tax regimes
- Recent legislation/regulatory changes, issues, and controversy

Wayfair – 6 Years Later



Wayfair – 6 Years Later

- June 21, 2024 marked the 6th anniversary of *South Dakota vs. Wayfair*.
- The case was the catalyst for states and local transaction tax economic nexus adoption.
- Every state that imposes a state-wide sales tax/transaction tax has adopted economic nexus for remote sellers and marketplace facilitator collection requirements
- E-commerce retail sales continue to increase at a greater rate than brick-and-mortar retail sales*

(See US Census Bureau News release, 8/19/2024)

Enforcement Dates

Date	States	Date	States
Pre-Wayfair	RI (8/17/2017) WA (1/1/2018) PA (3/1/2018)	July 1, 2019	AR, IN, KY, NM, VA, WV, WY
July 1, 2018	OK	September 1, 2019	OH
October 1, 2018	MN	October 1, 2019	AZ, CA, CO, KS, MA, MD, ME, ND, NV, TX, UT
November 1, 2018	NJ, SC	January 1, 2020	HI, IL, MI
December 1, 2018	CT, WI	February 1, 2020	NC
January 1, 2019	AL, IA	April 1, 2020	GA
March 1, 2019	SD	July 1, 2020	LA, MS
April 1, 2019	DC, NE	October 1, 2020	TN
June 1, 2019	ID, NY, VT (6/4/19)	July 1, 2021	FL, KS
		January 1, 2023	MO

Common Features

- Statutory Triggers for Sales/Use Tax Collection Requirement
 - Define marketplace facilitators
 - Sales thresholds (e.g., \$100,000 or 200 transactions)
 - Measured in gross or taxable sales
 - Over specified time period (e.g., current and/or prior year, rolling 12 mos.)

What is a Marketplace?

- Marketplace Facilitator example –
 - A person that facilitates the retail sale of tangible personal property or digital property by listing or advertising the tangible personal property for sale at retail and either directly or indirectly through agreements or arrangements with third parties, collects the payment from the purchaser, and transmits the payment to the person selling the property.

What is a Marketplace?

- Common Elements:
 - List/advertise other sellers' offerings
 - Process orders
 - Collect payment
 - Transmit payment to the seller
 - And receive consideration in exchange

What is a Marketplace?

- MTC whitepaper found a 27-15 state split in favor of “narrow” marketplace definitions over “broad” definitions
- “The narrow definition requires that the marketplace or forum list the marketplace seller’s item on the marketplace and, directly or indirectly, take the customer’s payment and transmit payment to the marketplace seller.”
- “The broad definition contains two lists of different activities. If the business performs at least one activity in each of those lists, the business can fall within the definition..”
 - “With the broad definition, a business may not have access to the details of the sales transaction, and may not handle the customer’s payment, yet could still fall within the definition.”

Example of “Broad Definition” (California)

A marketplace facilitator only needs to have ONE factor from Column A and ONE factor from Column B

Column A

1. Transmitting or otherwise communicating the offer or acceptance between the buyer and seller.
2. Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together in a marketplace.
3. Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller.
4. Software development or research and development activities related to any of the activities described in Column B, if such activities are directly related to a marketplace operated by the person or a related person.

Column B

Provides with respect to the marketplace seller's products:

1. Payment processing services.
2. Fulfillment or storage services.
3. Listing products for sale.
4. Setting prices.
5. Branding sales as those of the marketplace facilitator.
6. Order taking.
7. Providing customer service or accepting or assisting with returns or exchanges.

A Closer Look

Nuances in applying marketplace tax regimes

Growing Application Beyond “Traditional” E-Commerce

- Services and digital products (including software access) are part of a growing list of transaction types subject to tax.
- B2B transactions may qualify for an exemption, but there is a lot of complexity around how to document this.
- Application to local delivery networks brings uncertainty and potential for multiple taxation.

Who is the Responsible Party?

- Liability and audit exposure for sales and use tax remittance errors may not always be clear.
- States vary on whether marketplace sellers must also register or may elect to collect taxes on their marketplace sales

Who is the Responsible Party?

- California audit manual guidance highlights the complexity in determining who is the responsible party when the correct amount of tax is not collected.

“Documentation, such as emails, letters, agreements, contracts, etc., between the marketplace facilitator and the unrelated marketplace seller should be examined to determine if the marketplace facilitator made a reasonable effort to obtain accurate and complete information from the marketplace seller regarding its retail sales(s) and if the marketplace seller provided incorrect or incomplete information to the marketplace facilitator regarding the sales(s), such as the marketplace seller misrepresented the item(s) sold.”

Tips for Marketplace Sellers and Facilitators

- Understand your individual and shared responsibilities in each state
- Ensure marketplace agreements provide for the information you will need and/or need to provide to the other party
- Keep your own records as though you will be audited without any help or information from the other party

Carve-outs and Shifting Responsibilities

- Various exclusions of specific industries, such as certain local delivery networks in California and Florida.
- Availability of waivers allowing marketplace sellers, rather than facilitators, to collect and remit tax, as in Minnesota and Ohio.
- Marketplace information collection requirements, as in Colorado and Illinois.

Requirements Extend to New Taxes and Fees

- Marketplace facilitator requirements implicate other transaction tax types besides sales and use taxes.
 - Environmental taxes/fees
 - Local taxes
 - Special industry taxes (e.g., hotel occupancy taxes)
- Beginning January 1, 2022 in California, marketplace facilitators are required to collect:
 - Covered electronic waste recycling (eWaste) fee
 - California battery fee
 - Lumber products assessment
 - California tire fee

Recent Changes

New law, regulations, issues and controversies

States Move Away from Transaction Thresholds

- The US Supreme Court in *Wayfair* found sufficient nexus based on the thresholds in South Dakota's law; however, it reserved judgment on "whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act"
- South Dakota has since led the way in removing number of transactions from economic nexus thresholds:
 - South Dakota . . . effective July 1, 2023
 - Louisiana . . . effective August 1, 2023.
 - Indiana . . . effective January 1, 2024.
 - North Carolina . . . effective July 1, 2024

Example of Transaction Repeal (North Carolina)

- NC repealed 200-transaction threshold for remote sellers and marketplace facilitators (Session Law 2024-28, effective upon enactment on July 1, 2024)
- Now, only \$100,000 gross sales threshold, requiring sales and use tax collection if—
 - The retailer makes gross sales in excess of \$100,000 from remote sales sourced to this state, including sales as a marketplace seller, for the previous or the current calendar year.
 - The retailer is a marketplace facilitator that makes gross sales in excess of \$100,000, including all marketplace-facilitated sales for all marketplace sellers, from sales sourced to this state for the previous or the current calendar year.
- Sellers registered prior to July 1, 2024 may cancel registration if--
 - Did not meet \$100,000 gross sales threshold in 2023 or 2024 (at time of cancellation); and
 - Not otherwise engaged in business in the state.
- [Session Law 2024-28; Directive SD-24-1, North Carolina Department of Revenue \(7/1/24\)](#)

NC Expands Admin. Authority

- Gave Secretary discretion to say who or what is subject to MPF rules
 - S.B. 174 (enacted April 3, 2023)
 - “When the Secretary finds it necessary for the efficient administration of this Article to regard any sales representatives, solicitors, representatives, consignees, peddlers, or truckers as agents of the dealers, distributors, consignors, supervisors, employers, or persons under whom they operate or from whom they obtain the items sold by them regardless of whether they are making sales on their own behalf or on behalf of these dealers, distributors, consignors, supervisors, employers, or persons, the Secretary may so regard them and may regard the dealers, distributors, consignors, supervisors, employers, or persons as "marketplace facilitators" for the purpose of this Article and may treat the sales they make as “marketplace-facilitated sales” and the sellers as “marketplace sellers.”

California Finalizes MPF Rules

- Regulation 1684.5, Marketplace Sales (final adoption Aug. 30, 2023)
- “Facilitating” is when “the person agrees to do anything directly or indirectly...that makes it possible or easier for the marketplace seller to sell its products through the marketplace.”
 - These activities include “listing products for sale, communicating the offer or acceptance between the buyer and seller, taking orders for merchandise, or providing payment processing or fulfillment services.

California Finalizes MPF Rules

- “Listing products for sale” includes
 - “providing the means for another person to create or post a written, verbal, pictorial, graphic, or similar means of announcement of tangible personal property for sale in a marketplace, including, but not limited to, an advertisement that contains an announcement of tangible personal property for sale.”
- “Payment processing services” includes
 - providing a "virtual credit or debit card terminal, integrating payment processing with an online shopping cart at checkout, or otherwise directly or indirectly authorizing or providing the means for payment processing in any manner.”

California Finalizes MPF Rules

- Handling payments or providing fulfillment services are not required to trigger a sales and use tax collection obligation
- BUT “facilitating” does not include –
 - A website provider posting a seller’s advertising that only “refers purchasers to the seller by telephone, mail, email, website address, internet link, or other similar means to complete the sale, and [the website provider] does not participate further in the sale.”

Colorado Eases Home Rule Compliance Headaches

- S.B. 23 (enacted 4/19/24) lets vendors rely on state's GIS database
- S.B. 24 (enacted 4/19/24) prohibits local variation on reporting requirements for marketplace facilitators and accommodation intermediaries

Colorado Eases Home Rule Compliance Headaches

- S.B. 25 (enacted 5/1/24) clarifies state administration of local sales and use tax
 - Requires home rule jurisdictions to
 - (1) provide the Department written notice within 45 days of the effective date of imposing new tax or making changes to existing sales or use tax,
 - (2) establish a dispute resolution process for taxes erroneously paid to the state or the wrong jurisdiction, and
 - (3) designate a liaison to coordinate tax collection.
 - Permits home rule jurisdictions to grant retailers a percentage to cover collection and remittance expenses.

Illinois Updates Sourcing Rules

- S.B. 3362 (enacted 8/9/24) addresses sourcing of sales into the state.
- Effective January 1, 2025, a retailer maintaining a place of business within the state that makes retail sales of tangible personal property (TPP) to Illinois customers from a location outside the state is engaged in the occupation of selling at retail in the state for purposes of the retailers occupation tax.
- Such retailers are liable for retailers occupation tax, sourced at the location to which the TPP is shipped, delivered, or taken possession of by the purchaser.

Texas Taxes Fees Paid to Marketplace Providers

- Asserted imposition of sales tax on marketplace provider fees charged to sellers as a “data processing service”
- Prior legislative proposals would have clarified the imposition of sales tax on such services.
- Proposed changes to data processing services rule would make explicit that certain marketplace provider services would be taxable if falling under the “data processing” definition
- Proposed application of a bundling rule

Washington Denies Online Auctioneer's MPF Claim

- Determination No. 22-0027
 - Found a company that sells digital advertising space through an online exchange via auction software is not a marketplace facilitator, and therefore its payments to publishers are a cost of doing business that cannot be deducted from its gross income for B&O tax purposes.
 - The out-of-state taxpayer is a private for-profit corporation that auctions third-party publishers' advertising space to buyers through an exchange. Following an audit, the DOR determined that the company deducted the sales amounts from online auctions from its gross income and only reported income equal to commissions earned. The department disallowed the deductions, adjusted the company's gross income, and issued an assessment.

Washington Denies Online Auctioneer's MPF Claim

- Determination No. 22-0027 (continued)
 - The taxpayer appealed, arguing that it was a marketplace facilitator under Wash. Rev. Code section 82.08.010(15)(a), and therefore under Wash. Rev. Code section 82.08.0531(1), only its commissions from retail sales are subject to the service and other activities B&O tax.
 - The review officer disagreed, writing that “although Taxpayer calls its business an exchange, Taxpayer’s business operates like an advertising agency because it provides ‘advertising services’” as defined by Wash. Rev. Code section 82.04.192(3)(b)(xiii).